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Preface

Defence & Security Procurement 2017
First edition

Getting the Deal Through is delighted to publish the first edition of Defence & Security Procurement, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Mark J Nackman of Jenner & Block LLP, the contributing editor, for his assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

London
February 2017
Defence and security procurement spending was an estimated US$1,676 billion in 2015. The figure was up about 1 per cent from the previous year and was the first increase since 2011, and that was with modest declines in North American and Western Europe. One need only scan the headlines to understand why. With tensions rising between NATO and Russia and between the Pacific states and China, asymmetrical terrorist threats continuing to be very active in North Africa and the Middle East as well as Western Europe and North America, new countries continuing to push to enter the ranks of the nuclear powers, and the proliferation of both state-sponsored and ideologically driven advanced persistent threats in cyberspace, nations are attempting to keep pace with these ever-increasing threats. The recent decline in oil prices has also had a significant impact, simultaneously weakening economies depending on oil sales while creating further destabilisation.

The values of some of these defence procurements are also staggering: US$50 billion for submarines in Australia, US$10 billion for armoured vehicles in Saudi Arabia, US$17.6 billion for additional United States nuclear attack submarines, US$2.3 billion for attack helicopters in the United Kingdom and a potential US$25 billion deal for new fighter jets in India. Nor does it appear that this trend will abate in the near future. In NATO, for example, presently only the United States, United Kingdom and Estonia expend at least 2 per cent of their GDP on defence, as all 28 NATO members are supposed to be doing by 2024 – so spending will only continue to increase. In 2015, the 15 countries spending the highest totals on defence and security were: Australia, Brazil, China, France, Germany, India, Israel, Italy, Japan, Russia, Saudi Arabia, South Korea, the United Arab Emirates, the United Kingdom and the United States, representing US$1,350 billion total or just over 80 per cent of the total global defence and security economy.

For many nations, defence and security spending is one of the largest portions of government procurement expenditures. In many countries the rules for defence and security procurements are different from the rest of the government procurement system, sometimes dramatically so. These types of procurements go right to the heart of a nation’s ability to defend its people and maintain its sovereignty. In addition, these procurements can frequently be controversial, both for the country making the procurement and the country providing the defence and security items and services – and, unfortunately, the defence and security sector does not have a shortage of incidents of corruption.

Other phenomena common in international defence and security procurements are collaborative procurements. Countries with common enemies or defence concerns often collaborate in the procurement of major systems, such as the F-35 Joint Strike Fighter, which is driving significant international cooperation among some of the biggest defence and security consumers and defence contractors in the world. These types of procurements bring international politics and diplomacy directly into the procurement process, and are among the most complex deals in the world. Another common practice in the defence and security procurement world is for larger countries to provide aid money such as United States Foreign Military Financing to smaller countries, or for the more sophisticated defence consumers to assist or even run the procurement process for the smaller country, as seen in the United States Foreign Military Sales programme.

The procurement systems in each of the countries in this book are very different. Conducting due diligence can be difficult and expensive; where do you start and who can you trust? As defence budgets shrink or stagnate in one market, a very common practice is to look internationally in an attempt to make up for the lack of domestic growth. However, this is problematic from the start because international expansion is being pursued as a short-term solution to an immediate problem, and not as a long-term strategic objective. Contractors frequently miscalculate how long international procurements take, the logistics and expenses involved and how much advanced work and planning must be done. This frequently causes them to include estimates and projections in their financial models that fail to adequately account for risk and the potential for significant delays that are part of international defence procurements. This can then lead to desperation and poor decisions.

Defence and security contractors therefore need an initial reference to understand the basics of what it will take to complete a deal for a defence and security procurement in various jurisdictions. To this end, we present the inaugural edition of Getting the Deal Through – Defence and Security Procurement.
Legal framework

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

In Australia, defence and security procurement is undertaken by the federal government through the Department of Defence (Defence). Like other federal government agencies, Defence is subject to the Public Governance, Performance and Accountability Act 2013 (PGPA Act), which establishes a framework for expenditure of public resources. Requirements for procurement are contained in the Commonwealth Procurement Rules (CPRs) issued under the PGPA Act. The central principle of the CPRs is value for money, and this is supported by further obligations to encourage competitive markets, ensure non-discriminatory purchasing practices and accountability for purchasing decisions, and to use efficient, effective, ethical and transparent procurement processes. The CPRs contain rules in two divisions: Division 1 applies to all procurements regardless of value, while Division 2 applies additional rules to procurements valued at or above the relevant procurement threshold (unless an exception applies). The Division 2 rules require a higher level of transparency (eg, stronger requirements to conduct open tenders and to follow certain rules in conducting the procurement). With respect to Defence, the procurement thresholds are as follows:

- other than for procurements of construction services, A$80,000; and
- for procurement of construction services, A$7.5 million.

The CPRs are supported by a range of related policies, including those addressing indigenous economic development, workplace gender equality and the maximisation of Australian industry participation in major projects. As the largest procurement agency in the federal government, Defence has established its own overarching procurement management framework, including the Defence Procurement Policy Manual (DPPM) and a series of policies and programmes for particular procurement matters including intellectual property, cost principles and risk. It has also developed its own suite of contracts, the Australian Standard for Defence Contracting (ASDEFCON) templates, for use across the range of its procurement projects.

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

Defence and security procurements are identified as those acquisitions made by Defence for the purpose of supporting the Australian Defence Force. Such acquisitions range from simple, low-value goods and services to complex military hardware. Defence procurement is subject to the same legislative regime as other federal government procurements, with several exceptions. Division 2 of the CPRs does not apply to procurements undertaken by the Defence Intelligence Organisation, the Australian Signals Directorate or the Defence Imagery and Geospatial Organisation, nor to procurements that have been determined as necessary for the protection of ‘essential security interests’ in accordance with Rule 2.6 of the CPRs. These include goods that fall within certain US Federal Supply Codes and the procurement of specified services, including those relating to design and installation of military systems and equipment, operation of federal government-owned facilities, and the support of military forces overseas. Defence procurements are also exempt from several free trade agreements. For example, certain Defence procurements are excluded from Chapter 15 of the Australian-US Free Trade Agreement, the objective of which is to provide non-discriminatory access to the procurement framework of each country.

3: How are defence and security procurements typically conducted?

All Defence procurements must comply with the mandatory rules contained in Division 1 to the CPRs, while procurements at or above the relevant threshold must comply with the Division 2 rules unless an exemption applies. Pursuant to the CPRs, procurements at or above the relevant threshold must use an ‘open tender’ process, which involves publishing an open approach to market and inviting submissions from tenderers through a request for proposal. However, the DPPM provides that where a procurement is low risk and below the relevant threshold, it should generally be conducted on a limited tender basis. This involves a single potential supplier (or several potential suppliers) being invited to submit a response in lieu of the open tender process. Defence may also utilise a limited tender for a procurement at or above the relevant threshold where it is exempt from Division 2 under Appendix A of the CPRs or because it has been designated as an ‘essential security interest’, or because it meets the specified conditions for limited tender under Rule 10.3 of the CPRs.

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

While defence spending and the efficacy of Defence’s procurement practices are subject to considerable political debate, there are no significant proposals pending to change the defence and security procurement process at this time.

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

The procurement rules do not differ for the procurement of information technology. The ASDEFCON Strategic Materiel suite of contracts are usually used by Defence as the base documents for procuring complex and high-risk IT supplies.

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

Australia is not currently a member of the World Trade Organization (WTO) Agreement on Government Procurement. However, it made an accession offer to the WTO Committee on Government Procurement in 2015 and a revised offer in September 2016. To a limited extent, Defence relies on national security or similar exceptions contained in free trade agreements to procure supplies on a sole sourcing basis.
Disputes and risk allocation

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

Defence’s dispute resolution process encourages the parties to negotiate a resolution to the dispute before commencing litigation, although this does not prevent a party from seeking urgent interlocutory relief. The ASDEFCON template used for strategic materiel procurement contains clauses reflecting this objective. If negotiation fails to resolve the dispute, the parties may agree to use an alternative dispute resolution process (such as mediation or arbitration). If the parties do not agree to an alternative dispute resolution process or such process does not achieve the required outcome, either party may commence legal proceedings.

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

As noted above, alternative dispute resolution (eg, arbitration, expert determination or mediation) is preferred as a means of resolving disputes between Defence and a contractor. There are few recorded court cases of contractual disputes with Defence, indicating that confidential alternative dispute resolution is largely relied on to resolve Defence contractual disputes.

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?

Pursuant to a delegation issued under the PGPA Act, the Finance Minister has delegated to Defence the power to indemnify a contractor within stated rules. Finance Minister approval is needed to give an indemnity to a contractor, with or without consideration. The Finance Minister has delegated to Defence the power to indemnify a contractor under the contract. A supplier seeking to cap its liability may be required by Defence to provide a risk assessment to support the indemnity.

Additionally, an official can only grant an indemnity to a contractor if the official is satisfied that the likelihood of the event occurring is remote (ie, it has a less than 5 per cent chance of occurring), and that the most probable expenditure if the event occurred is not significant (ie, it would be less than A$30 million). The indemnity cannot apply to certain costs (eg, no indemnity can be given for civil or criminal penalties of the indemnified party). Defence acknowledges in its procurement policy that it is not necessary where a contractor is exposed to risks over which it has no control, or which would otherwise make the contract uneconomical for the contractor, for Defence to grant an indemnity on behalf of Defence. In practice, Defence will only provide an indemnity to a contractor in exceptional circumstances and after rigorous risk assessment.

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?

Defence has a stated preference for a contractor’s liability to be determined according to principles of Australia’s common law. However, Defence is able to limit liability to achieve a value for money outcome. Defence has developed its own guide to capping liability for this purpose. Like other federal government agencies, Defence will not usually accept any limitation on a contractor’s liability in respect of personal injury or death, third-party property damage, breach of IP rights, confidentiality, privacy or security obligations, fraud or dishonesty, unlawful or illegal acts, or indemnities provided by the contractor under the contract. A supplier seeking to cap its liability may be required by Defence to provide a risk assessment to support the requested cap. There are no general statutory or regulatory limits to the contractor’s liability to recover against the government for breach of contract. Relevantly, there are some statutory rights for the government to use copyright material (and material protected by some other intellectual property rights) without the rights owner’s consent subject to using them for permitted government purposes and paying compensation determined by statutory rules. Such rights could have the effect of limiting a contractor’s ability to recover from the government for breach of licence rights in a contract.

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 no material risk of non-payment of any amount that the federal government is required to pay under contract. The Defence budgeting process provides for commitments under existing contracts and planned procurements. On occasion, Defence may wish to make commencement of a contract subject to budget appropriation of funds. This may occur, for example, where Defence enters into a supply contract which has budget funds allocated, but the associated support contract is to start in a later year and may not yet have had funds allocated.

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

In complex or high-value procurements, Defence will usually require that a contractor provide a deed of substitution and indemnity from a parent company (or other entity), which allows Defence to request substitution of the contractor for the guarantor if specified events occur. Defence may also consider accepting a conventional parent guarantee, or an unconditional bond to pay on demand issued by a creditworthy financial institution (known colloquially as a ‘bank guarantee’).

Defence procurement law fundamentals

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 DPPM provides that where an ASDEFCON template exists for a particular type of procurement, that template should be used for a new procurement of that type and should only be amended in accordance with relevant policy. The ASDEFCON contract templates for complex procurements contain mostly ‘core’ clauses that are intended to be retained. Such core clauses include the right of Defence to terminate for convenience, limitations on the contractor’s liability and the indemnification of Defence by the contractor. While there is no express doctrine requiring certain clauses to be ‘read into’ the contract regardless of their express inclusion, certain terms may be implied into a contract pursuant to general principles of Australian contract law if permitted by the contract terms (eg, an implied obligation to act in good faith).

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

The DPPM provides for a range of potential cost allocation options depending on the complexity of the project and the level of risk to both Defence and the contractor. For example, the parties may agree for the contractor to be paid a fixed fee regardless of the costs actually incurred, subject to certain variations detailed in the contract. Alternatively, Defence may permit variations in the cost of labour and materials. Defence may also agree fixed or variable labour rates and overheads where the amount of labour required under a contract is uncertain. Cost-sharing arrangements may be adopted in high-risk projects where the contract costs cannot be accurately determined.

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

The disclosures a contractor is required to make regarding its costs and pricing will depend on the fee structures chosen. For example, if a contract is for a fixed price and was formed following a competitive procurement process, a contractor is not typically required to provide a cost breakdown. However, cost details are often required for variations and supplies priced by reference to cost inputs. If a contractor requires an advance payment to meet upfront costs (eg, to pay manufacturers for raw materials), the contractor may need to provide Defence invoices and orders relating to the advance payment.

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

The Auditor-General may access Defence contractors’ and subcontractors’ records and premises to conduct performance audits. In addition,
Getting the Deal Through – Defence & Security Procurement 2017

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the Australian National Audit Office conducts an annual review of major Defence acquisitions. The review, which is published in a major projects report, includes information relating to the cost, schedule and the progress towards delivery of required capability of individual projects as at 30 June each year.

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

Defence has an intellectual property (IP) policy aligned with the federal government policy. Defence policy is to maintain a flexible approach in considering options for ownership, management, and use of IP. Defence is required to conduct a risk assessment to determine whether it will own any IP developed under the contract. Defence will generally require the contractor to provide Defence with a licence to use the contractor’s pre-existing IP for broadly defined ‘defence purposes’. If Defence sees a security risk in allowing the contractor to commercialise created IP, Defence is more likely to wish to own created IP and limit the contractor’s right of use.

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?

While programmes have been developed for the benefit of certain contractors, they are not typically amenable to use by foreign defence and security contractors.

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

In Australia, a joint venture describes an arrangement in which two or more parties enter into an agreement to pursue common objectives while remaining separate legal entities. Joint venture arrangements may be either unincorporated or incorporated. There is no legislation directly regulating arrangements of either type. Under an unincorporated joint venture, the respective rights and obligations of the participants are essentially determined by contract. The rights and duties of the participants are usually set out in detailed joint venture documents and may be interpreted and supplemented by reference to general contract law. A joint venture will often be conducted by a separate entity owned by the joint venture participants. In this case, the participants normally enter into shareholder agreements and Australian corporations laws apply to many aspects of their relationship. While Defence permits the submission of procurement bids by joint ventures, it will usually seek to enter into a contract with a single legal entity. Defence may sometimes contract with multiple parties as part of a public-private partnership or similar structure, although it will usually insist the multiple parties owe their obligations to Defence on a joint and several basis.

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) grants a right of access to a document held by Defence (potentially including previous contracts). This extends to documents held by a party providing services (though not goods) to Defence under contract. If a document falls under one of the FOI Act’s nine exemptions (including documents affecting national security, defence or international relations), Defence may refuse to release it, or can redact the exempt sections. Documents falling under one of the FOI Act’s eight conditional exemptions must be released, unless it would be contrary to the public interest to do so. In practice, FOI requests to access Defence contracts are often partially or fully rejected relying on an exemption but this result cannot be guaranteed. In addition, the Australian Geospatial Intelligence Organisation, the Australian Signals Directorate and the Defence Intelligence Organisation are excluded from the operation of the FOI Act. The CPRs also require federal government agencies to make available via the AusTender website contracts for goods or services valued at or over A$20 million. This requirement is subject to the relevant FOI Act exemptions. A log of decisions by Defence on giving access to documents under FOI Act requests can be viewed on the Defence website.

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 supply chain management and anti-counterfeit parts for defence and security procurement. The requirements for a procurement may require bidders to submit details on how they address those sorts of issues.

International trade rules

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

The Defence and Strategic Goods List (DSGL) published under the Customs Act 1901 identifies military and dual-use items regulated under Australia’s export controls. Australia implements export controls on export of controlled items in tangible form. Under the Customs (Prohibited Exports) Regulation 1958, it is prohibited to export controlled items from Australia without a permit. A recent development is that, since April 2016, under the Defence Trade Controls Act 2012, intangible transfer of export controlled items (called DSGL technology) by a person within Australia to another person outside Australia is also regulated as part of export controls. Intangible transfer can occur for example by a person emailing DSGL technology from a place within Australia to another person outside Australia. Intangible transfer can also occur by a person within Australia providing another person outside Australia with the means to access DSGL technology situated in Australia (eg, a password to access DSGL technology on an Australian server). Unlike some jurisdictions, Australia does not apply export control rules to transfers of controlled items to foreign nationals within Australia. There are limited situations where no permit is required or where an alternate easier to administer permit may be available.

Defence Export Controls within the Department of Defence is responsible for issuing permits and giving guidance on export controls.

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

Foreign contractors regularly successfully bid directly on Australian defence and security procurements. They also regularly bid using an Australian subsidiary or as part of a joint venture. A foreign contractor may directly bid on an Australian government defence and security procurement other than where the government relies on a trade agreement provision entitling the government to place limits on bidders or do selective sourcing. Australia has agreed in the government procurement chapter of several free trade agreements to treat foreign suppliers no less favourably than the procuring entity accords to domestic suppliers for covered procurements. Defence procurement above a monetary threshold is usually a covered procurement. However, the free trade agreements contain some carve outs from this requirement for procurement of supplies for identified essential security defence needs. Most free trade agreements where Australia is a party also switch off the government procurement chapter obligations for any form of preference to benefit small-to-medium enterprises. Australian domestic and foreign bidders for defence and security procurement are required to participate in the Australian Industry Capability (AIC). The AIC requirements applicable for a procurement are set out in the procurement terms. Requirements are generally more extensive if the procurement is estimated to be over A$20 million or for supplies relevant to the priority areas where the government wishes to develop Australian defence capability. The AIC programme commitments bidders offer in their bids form part of the procurement assessment criteria and the contractual obligations of the successful bidder. While not a domestic preference, a foreign contractor may also face some practical challenges in meeting the criteria for an Australian defence and security procurement if the project requires substantial access to security classified information.

24 Are certain treaty partners treated more favourably?

There are measures benefiting trade in defence articles with United States suppliers. The governments of Australia and the United States have agreed the Defence Trade Cooperation Treaty. A measure facilitated by the treaty is that United States suppliers can apply to be members of the Australian Community. A member has been vetted as
meeting certain security requirements. As a result, the member should find that trade in controlled items is streamlined and subject to fewer licensing requirements. Given their traditionally close defence relationship, the Australian and United States governments have also established protocols for transfer of defence-related material and working on joint defence projects that can benefit participating suppliers.

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

The Australian federal government implements the United Nations Security Council sanctions and applies its own autonomous sanctions. The government does not tend to apply boycotts or embargoes in trading with a jurisdiction. Instead, the government prohibits without a permit direct or indirect trade with designated persons and entities and industry-sector targeted trade in certain goods and services connected with a sanctioned jurisdiction. When sector sanctions are applied against a jurisdiction, the sanctioned supplies usually include exporting arms and related material to or providing services concerning arms and related material benefitting the jurisdiction. The Department of Foreign Affairs and Trade (DFAT) administers Australian sanctions but consults with Defence Export Controls on arms and related materiel matters. DFAT generally treats all items listed on the DSGL as falling within the meaning of arms and related materiel. Sanctions change with changes to the political climate. At the time of writing, Australian sanctions apply for the Central African Republic, Crimea and Sevastopol, Democratic People's Republic of Korea (North Korea), Democratic Republic of the Congo, Eritrea, Former Yugoslavia, Guinea-Bissau, Iran, Iraq, ISIL (Da'esh) and Al-Qaida, Lebanon, Libya, Myanmar, Russia, Somalia, South Sudan, Sudan, Syria, the Talibain, Ukraine, Yemen and Zimbabwe.

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 procurement regime.

Ethics and anti-corruption

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

Former federal government employees are not usually prevented from taking up appointment in the private sector or vice versa. The former government employees are under ongoing duties of confidentiality to protect government information (disclosure of information protected under legislation can be subject to a fine or imprisonment). The former government employees may also agree specific commitments with their former employer to address conflict of interest concerns. Defence has a policy addressing post separation employment giving guidance to the departing government employee and their new employer. It is not uncommon for a former Defence employee to agree for a period not to be involved in specified projects for their new employer where the employee was involved in that project while employed by Defence. The new employer might also be asked to make corresponding commitments. Typically, the period is one year. Government procurement terms usually state that compiling a bid with the improper assistance of a former government employee is a breach of the procurement terms and can lead to exclusion from the procurement.

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

The federal Criminal Code contains offences for bribing a public official and for accepting a bribe. There are separate offences for bribing domestic (Commonwealth public official) 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 his or her 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’ includes an officer or employee of a contracted service provider for a ‘Commonwealth contract’ and who provides services for the purposes (whether direct or indirect) of the Commonwealth contract. As part of their employment terms, Australian government officials are also subject to obligations to avoid conflicts of interest and comply with relevant policies. There are government policies addressing the limited extent to which government officials may accept gifts and hospitality and disclosure requirements. Defence has a detailed policy on gifts and hospitality.

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

There is no legislation regulating lobbying. The federal Department of the Prime Minister and Cabinet administers a lobbying policy. The policy includes a requirement for persons conducting lobbying activities on behalf of a third-party client to register themselves and their clients on the publicly available lobbyist register. Government officials should not meet with a person who fails to meet a requirement to register on the lobbyist register. There are listed exceptions to ‘lobbying activities’ and ‘lobbyist’. Relevantly, a person does not engage in lobbying activities when they make communications to the government about a tender.

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

As long as it does not breach secret commission laws, there is no prohibition on the use in Australian government procurement of agents or representatives that earn a commission. However, the procurement terms may require disclosure of use of such agents or representatives and any commissions paid. Such a disclosure requirement is contained in some of the Defence template procurement terms. Secret commission laws could be relevant, for example, if the agent was acting for both the bidder and the customer and this fact was not properly disclosed or otherwise dealt with.

Aviation

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

Aircraft used by Defence for a military purpose will usually be procured specifically for that purpose and will not be an aircraft converted from a civil use (and vice versa). Defence occasionally provides old military aircraft for a foreign government military use and the aircraft would go through a refurbishment process to be suitable for the new owner’s use. If Defence was to make military use aircraft available for disposal or converted to civilian use, the aircraft would go through a decommissioning process to have weapons and sensitive information removed. The Directorate of Military Disposals is responsible for the disposal of major Defence equipment and capability platforms.

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

Manufacture of unmanned aircraft systems or drones is permitted in Australia. Trade in these items is regulated if the components or technology used in the items is subject to export controls. Use of unmanned aircraft systems or drones is heavily regulated (including testing that might occur as part of the manufacturing process).

Miscellaneous

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

The domestic labour and employment rules applying to foreign defence contractors will depend on various factors including whether the foreign contractor is incorporated in Australia, the nature of the work to be performed under the contract and whether the foreign contractor’s employees are performing work in Australia. A foreign contractor may need to consider federal as well as state or territory labour and employment laws. Employees of incorporated entities (whether Australian or
foreign entities) that carry on trade or commerce in Australia, and who are working in Australia, are covered by the federal system of employment laws. The applicable employment laws differ for employees under industrial awards, collective workplace or enterprise agreements and employees under other non-regulated employment contracts. Federal, state or territory work health and safety laws will apply to work performed in Australia. It will be an important matter for Defence that a contractor agrees to comply with the federal Work Health and Safety Act 2011 (WHS Act) or equivalent state or territory legislation for work to be performed in Australia. Defence contracts may also require contractors to comply with certain laws even if the laws may not regulate a foreign contractor. For example, even if work is done outside Australia, Defence may contractually require the contractor to agree to comply with the WHS Act with respect to any contractor worksite that Defence personnel may visit. Defence contractors may also need to consider the application of Australian federal, state and territory discrimination legislation particularly if employment of foreign nationals from certain jurisdictions may be problematic (eg, if security clearances are needed to perform the contract). Defence contractors may need to obtain exemptions from discrimination laws in order to exclude certain foreign nationals from hiring pools.

34 Are there any specific rules that contractors, foreign or domestic, are bound by in defence contracts?
Several specific rules have been noted in the above responses. Other specific rules applying to working with Defence are usually imposed via contract. For example, contractors for defence contracts are usually contractually required to comply with a range of Defence policies such as policies regulating conduct on Defence premises.

35 Do contractors avail themselves of these rules when they perform work exclusively outside of the jurisdiction?
As explained above, it is usually Defence and not a contractor who seeks to apply Australian laws and Defence policies when work is performed exclusively outside of Australia.

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?
Contractor personnel will need to provide personal information when they apply for a security clearance to access protected information. The level of personal information required will depend on the level of security clearance sought. Key personnel named for contracts will often need to provide resumes on their expertise. Identity details are also usually needed if a person is visiting defence premises. Criminal convictions or similar certifications for employees are not usually sought unless Defence has assessed this is necessary for the procurement requirement (eg, for a person to be in a role of trust or handling monies for Defence). It may be a requirement in a tender that a bidder disclose any relevant criminal convictions imposed on it, its related entities and directors and officers.

37 What registration or licensing requirements exist to operate in the defence and security sector in the jurisdiction?
There is no registration or licensing requirement to be eligible to do business with Defence. Security clearances or other vetting may be needed to access certain programmes or procurements run by Defence.

38 What environmental statutes or regulations must contractors comply with?
The applicable environmental statutes and regulations depend on the types of supplies. The contractor may be directly regulated by these laws or contractually required to comply with these laws because Defence is regulated. For example, the Environment Protection and Biodiversity Conservation Act 1999 imposes requirements on all Australian Government entities, including Defence, regarding management of their activities. Other laws called out as important by Defence include the Ozone Protection and Synthetic Greenhouse Gas Management Act 1989, which gives effect to Australia's international obligations under the Montreal Protocol and establishes measures to protect the ozone layer and to minimise emissions of synthetic greenhouse gases. Defence also encourages contractors to follow the Australian Packaging Covenant in dealing with packaging waste. Environmental planning laws may need to be considered for certain land uses.

39 Must companies meet environmental targets? What are these initiatives and what agency determines compliance?
There is no specific environmental target set by Defence for companies to meet. There is substantial guidance issued by Defence on how it may take into account environmental protection, waste management and energy efficiency in procurement. If Defence had a specific environmental objective or requirement for a project, it would usually be set out in the procurement criteria.

40 Do ‘green’ solutions have an advantage in procurements?
Defence is required under federal government policy to consider energy efficiency in purchasing decisions. As noted above, Defence gives considerable guidance on what may be relevant. Procurement terms may identify when environmental considerations form part of the tender evaluation criteria.
Germany

Wolfram Krohn and Tobias Schneider
Dentons Europe LLP

Legal framework

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

The basic procurement rules for defence and security articles above the EU thresholds are set forth in Part IV of the German Act Against Restraints for Competition (GWB). Details of procedure are provided by the Public Procurement Regulation for Contracts in the Fields of Defence and Security and, in the case of construction works, section 3 of the Procurement Rules for Public Works (VOB/A). These rules implement EU Directive 2009/81/EC into German law. Procurement in the area of defence and security outside the specific scope of these rules (see question 2) is governed by the general procurement rules of the GWB, the Public Procurement Regulation and, in the case of works, section 2 of the VOB/A.

The award of contracts in the fields of defence and security below the EU thresholds is governed by federal or state budgetary law, the Procurement Rules for Goods and Services and, in the case of construction works, section 1 of the VOB/A. In the case of state procurement, state procurement laws or regulations may also be applicable.

Procurement of armaments within the framework of the European Defence Agency (EDA) is subject to the EDA procurement rules, in particular Council Decision (EU) 2016/1353.

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

Defence and security procurements are defined in line with the definition in Directive 2009/81/EC as procurements 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 for any and all elements of its life cycle; and
- works and services specifically for military purposes or sensitive works and sensitive services.

‘Military equipment’ is defined as equipment specifically designed or adapted for military purposes and intended for use as arms, munitions or war material; ‘sensitive’ equipment, works or services are defined as equipment, works and services for security purposes, involving requiring or containing classified information as defined in the German Act on Security Clearance Checks.

Defence and security procurements meeting the above requirements are subject to a special procurement regime (see question 1). Although the regime is similar to the general public procurement rules in terms of structure and basic principles, it differs from these rules in various aspects. For example, under the special regime:

- the contracting authority may choose freely between a restricted and a negotiated procedure, while an open procedure is not available;
- bidders may be excluded from public procurement procedures for lack of reliability and reasons of national security (besides the standard reasons of exclusion or lack of ability);
- specific rules regarding the protection of classified information and the security of information apply (for details, see questions 34 and 56); and
- specific rules regarding the security of supply may apply.

3. How are defence and security procurements typically conducted?

German military procurement is based on three pillars. The first is the procurement process defined by the German armed forces’ (Bundeswehr’s) Customer Product Management process (amended 2012), an internal framework directive for capability-oriented requirement identification, cost-efficient and timely procurement of operational products and services, and their efficient use. Industry is involved in all phases of the process within the limits set by public procurement law. The second pillar is the Bundeswehr Procurement, used for the procurement of standard and military goods and services for military operations, including weapon system spare parts and procurement through international channels. The third pillar is the procurement of complex services, such as maintenance of land-based weapon systems, non-military IT and telecom services, fleet management and clothing, through separate legal entities, some of which are organised as public-private partnerships. Central military procurement is typically carried out by the Federal Office for Bundeswehr Equipment IT and In-Service Support and the Federal Office for Bundeswehr Infrastructure, Environmental Protection and Services.

Non-military security procurement for federal entities is carried out mostly by the Procurement Agency of the Federal Ministry of the Interior, in particular for federal police, customs and the federal administration in general. At the state level, security procurement is typically carried out through procurement offices or the requesting agency.

The standard procedures for defence and security procurements are the restricted procedure and the negotiated procedure with publication of a contract notice. In both cases, the contracting authority will publish a call for competition by way of an EU tender notice. In a restricted procedure, the contracting authority invites a limited number of candidates who have sought to participate to submit bids. These bids are not subject to further negotiation. In a negotiated procedure, the contracting authority also invites a limited number of candidates to submit offers which are then subject to negotiation.

A negotiated procedure without publication of a contract notice is only admissible under exceptional circumstances. The contracting authority may choose such a procedure when:

- no tenders or no suitable tenders have been submitted in a restricted procedure or a negotiated procedure with prior publication of a contract notice;
- for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular supplier;
- the time limits for a restricted or negotiated procedure with publication of a contract notice are incompatible with the urgency resulting from a crisis; and
- insofar as is strictly necessary when, for reasons of extreme urgency brought about by events that were unforeseeable by the contracting authority and are not attributable to the contracting entity, the time limits for a restricted or negotiated procedure with publication of a contract notice cannot be complied with.
Military and civilian security procurement falling under the national security exemption from EU or GPA procurement law or for the purpose of intelligence activities is usually carried out without a public call for competition. These contracts are awarded by way of restricted negotiated procedures in accordance with the specific security requirements for the goods and services in question.

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

No.

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

There are no specific procurement rules for IT products. At the contract level, however, public purchasers typically use standardised contract templates known as ‘EVB-IT’ contracts. These standard templates are specifically tailored for the purchase of IT goods and services. They usually contain clauses seeking to ensure that the contractor is not subject to foreign laws requiring it to disclose confidential information obtained in the course of the tender process or contract performance to foreign governments or security agencies (a ‘no-spy clause’). In addition, there are usually contract terms designed to ensure that IT products do not contain any undisclosed access points (‘backdoors’) that would allow access by unauthorised third parties, such as foreign governments or security agencies, to the system or software.

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

Germany is bound by EU and GPA procurement rules. Following the implementation of EU Directive 2009/81/EC on contracts in the fields of defence and security into German law (see question 1), German contracting authorities generally apply these rules to military and non-military security procurement. However, in a significant number of cases, in particular in the field of armament procurement, the national security exemption and the exemption for armament pursuant to article 346 TFEU are still used. In light of strict court review, and due to a change of political climate, the use of these exemptions is declining. For example, in 2015 the German military started the procurement of four newly developed battleships (MKS 180s) using an EU-wide negotiated procedure with publication of a contract notice.

Disputes and risk allocation

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

The standard contract terms of the German military and other German security agencies do not contain arbitration clauses. Disputes between the government and defence contractors are therefore generally resolved in civil court.

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

For smaller contracts, the German military will usually not deviate from its standard terms. Thus, alternative dispute resolution may only be agreed on an ad hoc basis. For high-volume contracts, on the other hand, the military may agree to arbitration clauses on a case-by-case basis, depending on the circumstances. In subcontractor contracts, arbitration clauses are more common, if compatible with security requirements. For international contracts, the ICC, UNCITRAL, LCIA and Swiss arbitration rules are widely accepted.

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 German law, the government – in common with any private principal – has to indemnify the contractor for damages arising from a breach of contract by the government, provided that damages are reasonably foreseeable caused by the breach. On the other hand, the contractor has to indemnify the government for such damages arising from a breach by the contractor.

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 is free to negotiate and accept a limitation of liability of the contractor. There are no statutory or regulatory limits to the contractor’s potential recovery against the government.

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?

Under German law, public contracting authorities – in common with any private principal – are bound by their contracts regardless of whether adequate funds are available. Furthermore, under German law neither the federal state nor the regional states can go bankrupt. A contractor may take legal action against the government for default and enforce a judgment against the government at any time. Thus, there is no legal risk of non-payment.

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

Generally, a contractor only has to provide a parent guarantee if the contractor itself does not meet the minimum requirements of financial and economic standing set by the government for the particular contract. This will often be the case with newly formed companies or, in particular, special purpose vehicles. In many cases, the government will also accept a limited bank guarantee as security instead of a parent guarantee.

Defence procurement law fundamentals

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 procurement clauses that must be included in, or that will be read into, a defence contract as a matter of law, except for certain requirements relating to the protection of classified information as well as certain price control rules described below. However, under German law, contracts are construed in accordance with the provisions of the German Civil Code, including, inter alia, the principle of good faith, which might take precedence over the actual wording of the contract. Moreover, the German military typically uses a set of standardised terms and conditions that are generally non-negotiable. Contracts involving access to classified information at levels ‘confidential’ or higher must contain clauses obliging the contractor to observe the applicable rules and procedures for the protection of such information, including a requirement to pass this obligation on to any subcontractor.

Public contracts are in all cases subject to the price control rules of Pricing Regulation No. 10/53. This regulation contains binding rules on the pricing of public contracts, in particular in the case of cost-plus contracts. Any price in excess of the maximum price allowed by the regulation will, by law, be cut to the maximum price. However, any price cut based on the regulation requires a formal pricing audit resulting in an official finding of an excess price.

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

Contracts awarded on the basis of competitive procedures usually provide for fixed prices or a mix of fixed and variable price elements. In some cases, contracts may also contain cost-pricing elements. Contracts awarded without a competitive procedure more often provide for cost-based fixed prices or cost-plus prices. The actual allocation of costs between the contractor and the government in these cases depends on the individual agreement.

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

Contracting authorities may require tenderers to explain their pricing in the procurement procedure to verify that prices are adequate. In
competitive tendering procedures, tenderers are, however, not obliged to fully disclose all details of their cost and pricing calculation. On the other hand, in non-competitive procurement procedures, particularly for cost-based contracts, the government may require the tenderer to disclose details of its costs and pricing. Moreover, in the case of cost-based contracts, contractors must disclose all relevant cost and pricing information, including their method of cost allocation, in the event of a formal pricing audit pursuant to Pricing Regulation No. 30/53 (see question 14). Such audit may be conducted by the pricing control authority at the request of the contracting authority before, during or after contract performance.

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

Procurement by the military is subject to audits by the Ministry of Defence. Non-military procurement is subject to audits by the supervisory authority, usually the Ministry of the Interior. Procurement at the ministerial level is subject to internal audits by the ministry itself. In all cases, procurement is subject to audit by the Federal Court of Auditors or the relevant state court of auditors.

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

The allocation of intellectual property rights created during performance of the contract is determined by the individual contract and may therefore differ from case to case. The standard terms of the German military for industrial research contracts and for development contracts provide that the military is entitled to the ownership of intellectual property rights arising from inventions made by soldiers or other employees of the military. On the other hand, the contractor is entitled to intellectual property rights based on inventions made by its employees.

Under the standard terms for industrial research contracts, the German military is granted a non-exclusive right of use regarding all domestic or foreign intellectual property rights, constructions, procedures and documents created during the performance of the contract.

If the purpose of the contract is the development of a specific good or procedure, the military is also granted the right to reproduce the product or to alter and apply the procedure for purposes of national defence, for the protection of the civil population and for the riot police of the federal states.

Under the standard terms for industrial development contracts the military is granted a non-exclusive, irrevocable right to use all technical information or IP rights, including patents, which are created in performance of the contract.

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

No.

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

**Limited liability company (GmbH)**

This is the most common form of commercial legal entity. Formation of a GmbH requires a notarised shareholders’ agreement. The notary must verify the identity of the shareholders by valid identification papers at the time of notarising the agreement. The minimum share capital of a GmbH is €25,000. The company must be registered in the commercial register. Registration requires confirmation by the managing director that the share capital to be contributed by the shareholders is at the disposal of the company (usually accompanied by a bank statement as proof). Moreover, a list of shareholders signed by the managing director has to be filed with the application for registration.

**Civil code partnership**

This is a simple partnership based on the provisions of the German Civil Code and the simplest form of company under German law. It is an easy and practical vehicle for temporary joint ventures, in particular for joint tendering or as an interim step towards the formation of a permanent joint venture structure. There are no formal requirements for its formation, and no capital is required. There is also no need for registration.

**Limited commercial partnership**

This is a partnership between two or more partners intending to operate a trading business, including a joint venture. It requires one fully liable general partner (which may be a limited liability company), as well as one or more limited partners whose liability is limited to their individual capital contributions. No formal rules exist for the formation and no minimum capital is required. A limited commercial partnership does, however, require registration in the commercial register.

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

Government contracts are usually not published or disclosed to third parties. However, pursuant to the freedom of information acts of the federal and the regional states, everyone (including foreign nationals) has a right of access to official information held by public bodies. This is generally considered to extend to records on past public procurement procedures, including previous contracts. Access is denied in a number of cases, including where disclosure may adversely affect international relations, military and other security interests or public safety and to protect classified information, other official secrets or trade secrets, including third-party confidential information and intellectual property rights. In many cases, the disclosure of previous government contracts will be barred by one of these exemptions.

**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 defence and security related contracts, with two exceptions noted below. Generally, suppliers are considered eligible for public contracts if they meet the requirements of professional suitability, financial and economic standing and technical or professional ability set up by the contracting authority for the contract in question, and if they are not debarred from public contracting for one of the reasons provided by EU general procurement law (such as certain criminal convictions, gross professional misconduct and non-payment of taxes and social security contributions). In the case of defence and security procurement, a tenderer may also be excluded if it is judged to lack the reliability needed to protect public security interests. For contracts involving access to classified information at the level 'confidential' or higher, contractors must fulfil certain security requirements (see questions 34 and 36).

There are no specific requirements regarding supply chain management. However, the standard terms and conditions of the German military include specific commitments by the contractor to ensure the security of supply in the event of a crisis (if applied to the particular contract). Moreover, the contracting authority may, on a case-by-case basis, impose requirements it deems reasonable to secure the supply of security. In addition, while the contractor may, in principle, freely choose its subcontractors, the contracting authority may reject subcontractors on the basis of the same criteria that apply to the prime contractor. The contracting authority may also require the contractor to subcontract up to 30 per cent of the contract value to third parties and to apply competitive tendering procedures when selecting subcontractors.

There are no specific rules regarding anti-counterfeit parts for defence and security procurements.

**International trade rules**

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

Germany has strict export control regulations and procedures for military equipment and dual-use products. The manufacture, trade, brokering and transport of weapons of war are subject to a government licence pursuant to the War Weapons Control Act. This applies in particular to any export. The export of military equipment and dual-use products is also subject to licence requirements under the Foreign Trade and Payments Act and the Foreign Trade and Payments
Ordinance (AWV). The goods covered are listed the Export Control List (Annex 1 of the AWV).

The licence under the War Weapons Control Act is issued by the Ministry of Economic Affairs, upon consultation with the Ministry of Defence and the Foreign Office. The decision is a political one taken on a case-by-case basis. No licence is necessary for the supply of weapons to the German military, federal police, customs administration or other law enforcement authorities. Export licences for military equipment and – if applicable – dual-use products are issued by the Federal Office for Economic Affairs and Export Control (BAFA).

Export licences for military equipment are granted on the basis of the Political Principles of the Government of the Federal Republic of Germany for the Export of War Weapons and Other Military Equipment of 19 January 2000 (Political Principles) and the EU Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (EU Council Common Position). In some respects, the German government applies stricter criteria than those imposed by the EU Council Common Position. Licences for the export of dual-use products are granted by BAFA on the basis of EU Dual-Use Regulation No. 428/2009 (as amended).

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

German public procurement rules, including in the fields of defence and security, are based on competition, equal treatment and non-discrimination. Hence, German public procurement law prohibits any discrimination against bidders on the grounds of their nationality. This applies to all contractors from EU, EEA and GPA member states. There are no restrictions on foreign contractors bidding on a procurement directly.

### 24 Are certain treaty partners treated more favourably?

German public procurement law is based on EU law and the GPA, which prohibit any discrimination on the grounds of nationality. However, this applies only to contractors from the EU, European Free Trade Association and member states of the GPA. That said, there are no rules providing for more favourable treatment of contractors from any particular country.

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

Germany adheres to the boycotts, embargoes and other trade sanctions put in place by the UN or the EU regarding defence and security articles.

Weapon embargoes involve the prohibition or restrictions on the delivery of weapons, ammunition and other military equipment within the meaning of Part I section A of the national Export Control List, and of paramilitary equipment, as well as the provision of related technical assistance.

Country-related weapon embargoes in Germany as of 1 August 2016:
- Armenia;
- Azerbaijan;
- Belarus (including equipment used for internal repression);
- Central African Republic;
- China;
- Congo;
- Ivory Coast;
- Eritrea;
- Iran (including equipment used for internal repression);
- Iraq;
- North Korea;
- Lebanon;
- Liberia;
- Libya (including equipment used for internal repression);
- Myanmar (including equipment used for internal repression);
- Russia;
- Somalia;
- South Sudan;
- Sudan;
- Syria (including equipment used for internal repression);
- Yemen; and
- Zimbabwe (including equipment used for internal repression).

In addition, there are person-related weapon embargoes. These relate to listed entities, for example Al-Qaeda, entities in Afghanistan and others.

There are also embargoes on the export (and sometimes also the import) of certain dual-use goods as listed in the respective embargo regulations. This currently applies, for example, to Iran, North Korea, Russia and Syria.

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

The concept of offsets is incompatible with the EU principle of non-discrimination on the grounds of nationality. Offsets are therefore generally considered illegal under European and German defence procurement rules. While this appears to be common ground regarding contractors from the EU or the European Free Trade Association, the situation regarding suppliers from third countries is less clear. That said, offsets do not form part of the German defence procurement regime or general practice even with regard to contractors from third countries.

### Ethics and anti-corruption

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

Current and former members of the federal government must notify the government of intended activities in the private sector if they may give rise to a conflict with the public interest. The notification duty expires 18 months after leaving government. In the event that there is interference with public interests, the government may prohibit the activity for 12 months, which may be extended to 18 months. The government decides about the prohibition based on a recommendation by an advisory board. At state level, although the introduction of cooling-off periods is being discussed, only one state (Schleswig-Holstein) has enacted legislation to date.

German civil service law – at federal and state level – requires retired civil servants to notify the government if they intend to enter into any activity related to their service responsibilities in the five years before retirement. The government may prohibit the activity if official interests are adversely affected. The notification duty expires after five years. No such obligations apply to the proposed principal or new employer.

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

Corruption is punishable under the German Criminal Code. Corruption includes bribery of German and EU public officials and German soldiers (sections 333 and 334), of members of parliament (section 108e) and commercial bribery (section 299). In severe cases it also covers bribery of other foreign officials (section 335a). Companies may be subject to fines if their employees commit corruption offences on their behalf.

Companies whose employees have been found guilty of corruption on their behalf are debarred from public contracting for a period of up to five years. In the case of other improper behaviour intended to unduly influence the outcome of a procurement procedure, a contractor may be debarred for up to three years. Eligibility for public contracts may be restored if the contractor has taken appropriate remedial measures to ensure future compliance.

Some regional states operate registers of contractors that have been found guilty of corrupt practices. In these states, state government entities must consult the register to check whether a prospective contractor is listed. There is no federal register yet, but discussions are ongoing as to setting one up.

There are no statutory provisions on value-limits of gifts or invitations to meals, travel or lodging for government officials or business partners. Unless government or company internal guidelines provide otherwise, social etiquette is usually the appropriate benchmark. However, most government entities have issued strict internal guidelines on accepting gifts or other benefits. In particular, law enforcement authorities such as the police or customs do not allow their personnel to...
accept any benefits at all in the discharge of their duties. Other government authorities are also quite restrictive on accepting gifts.

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

Lobbyists and commercial agents are not generally required to register with any government entity (in addition to general business registration requirements). However, a contracting authority may require commercial agents to register for specific procurements.

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

Generally, there are no legal limitations on the use of agents or representatives.

The German military has adopted general terms requiring the approval of intermediaries. Approval will only be granted if it is commercially appropriate to use a broker. This is not the case if the contractor can be expected to deal with the procuring department directly. The use of general commercial agents who have due authority to contract on the contractor’s behalf and are instructed to negotiate for the contractor in particular areas of business not specifically related to military or public contracting is usually deemed appropriate. Commissions are only accepted if the military has approved the agent, the contractor discloses the commission and the amount is fair and reasonable. Commissions are also acceptable if the contract is awarded in an open or restricted (i.e., non-negotiated) procedure.

Aviation

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

Military aircraft may be converted to civil use if the military gives up its control and all certificates and permits generally required for civil aircraft are obtained. The use of a civil aircraft for military purposes requires that the aircraft is under control of the military, and approval by the inspection and approval office of the German military.

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

The aviation laws and regulations regarding the inspection, approval and operation of aircraft generally also apply to unmanned aircraft systems (UAS), subject to certain exemptions and special provisions. Whether or not a permit is required, as well as the type of permit, depends on:

- the classification of the UAS as model airplane (for sports or recreation) or other UAS; and
- its weight.

Some German security authorities are entitled to adopt their own regulations with regard to UAS. The German military has adopted an administrative rule classifying UAS into three categories. Inspection and approval requirements depend on the classification of the UAS in question. The legal rules on the civil use of UAS are currently under consideration; amendments are expected in the first half of 2017.

Miscellaneous

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

Foreign defence contractors must observe German labour and employment rules to the extent that they run permanent operations in Germany or post employees to Germany in the course of the contract performance. Applicable rules for permanent operations include general labour law provisions on hiring and laying off the workforce, minimum wages as provided by the Minimum Wage Act and working conditions similar to those applying to permanent operations. Infringements of applicable labour and employment laws, in particular of the Minimum Wage Act, the Act on the Posting of Workers and state minimum wage provisions, may lead to debarment from public contracting. Compliance with these laws is therefore particularly relevant for foreign contractors.

Update and trends

Following the full implementation of EU Directive 2009/81/EC on public procurement in the fields of defence and security in Germany, both military procurement and non-military security procurement are increasingly based on competitive procedures. As a result, the German defence and security market has become far more accessible for foreign contractors than in the past. The trend towards more competitive procurement is still ongoing, in particular in the areas of defence technology and security-related IT. This creates ample business opportunities for new entrants, not only from the EU but also from overseas.

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

There are no specific legal rules for defence contractors. However, in all cases where contracts involve access to classified information, contractors must observe all applicable rules for the protection of such information. If a contract involves access to information classified as ‘confidential’ or higher, contractors need security clearance by the Federal Ministry of Economic Affairs or the relevant state authority. This requires enrolment in the Ministry of Economic Affairs’ programme for the protection of classified information. Moreover, personal security clearances are required for the owners, managing directors and relevant employees of the contractor (see question 36). Foreign security clearances from most EU and NATO member states are accepted under certain circumstances or on a case-by-case basis. For contracts involving information classified as ‘Restricted’, simpler procedures apply.

The standard terms and conditions of the German military for defence contracts contain a number of specific provisions relating, inter alia, to commitments by the contractor to ensure the security of supplies in the event of a crisis if applied to the particular contract, pricing control (see question 15) and certain limitations regarding the use of agents and other intermediaries (see question 30).

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

Foreign defence contractors performing work exclusively outside of Germany are typically bound by the above rules by virtue of the procurement laws and regulations and the standard terms and conditions of the German military. This applies, in particular, to security clearance requirements and pricing control. On the other hand, contractors performing work outside of Germany are not subject to German labour and employment rules.

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?

Contractors must generally certify that their directors, officers and responsible employees have not have been convicted of certain criminal offences, including corruption and money laundering. This may involve individual certifications by the directors, officers or employees in question, or excerpts from the national judicial records on the relevant individuals.

For contracts involving access to classified information of the level ‘confidential’ or higher, personal security clearances are required for the owners, managing directors and relevant employees of the contractor (see question 34). This involves personal security checks on these
individuals in accordance with the Act on Security Clearance Checks. The same applies to personnel working in particularly sensitive military areas.

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

There are no general registration or licensing requirements to operate in the defence and security sector. However, the production, acquisition, shipment and transfer of possession of weapons of war require a licence from the Federal Ministry of Economic Affairs pursuant to the War Weapons Control Act (for details, see question 22). The production, import, maintenance and trade of certain arms and ammunition not subject to that act require a prior permit in accordance with the German Arms Act. Further requirements apply if the contractor is to be granted access to classified information or to particularly sensitive military areas (see questions 34 and 36).

38 What environmental statutes or regulations must contractors comply with?

There are no specific environmental statutes or regulations for defence and security contractors on the federal level. A number of states, however, require government contractors to observe certain sustainability standards such as the International Labour Organization core labour standards. In some states, contracting authorities are required by law to include environmental criteria, such as energy efficiency or emissions, into the technical specifications or the award criteria.

When defining environmental requirements and criteria, contracting authorities may refer not only to laws, regulations and administrative rules but also to eco-labels, provided the labels meet certain standards of transparency, accessibility and non-discrimination.

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

Contractors are, as a general rule, not required to meet any environmental standards beyond those set by general environmental law. However, contracting authorities may include environmental criteria relating to the subject matter of the contract, such as energy efficiency or emissions, into the technical specifications or the award criteria. Moreover, in the case of works and services, contracting authorities may require the contractor to apply adequate environmental management standards. In this case, the contracting authority may also require certificates of compliance by independent bodies on the basis of the European Eco-Management and Audit Scheme. However, in defence and security procurements, reference to environmental management standards is not common.

40 Do ‘green’ solutions have an advantage in procurements?

To the extent that a contracting authority includes environmental criteria in its specifications or award criteria, or requires the contractor to apply specific environmental management standards, any contractor who complies with the requirements has a clear advantage. On the other hand, if the terms and conditions of the particular tender or contract do not provide for any specific environmental aspects, ‘green’ solutions would not be evaluated more favourably than standard solutions.
India

Sunil Seth and Vasanth Rajasekaran
Seth Dua & Associates

Legal framework

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

The acquisition of weapons and equipment is a complex process governed by procedures prescribed in various manuals, namely:
- the Defence Procurement Procedure (DPP) 2016;
- the Defence Procurement Manual (DPM) 2010;
- Financial Regulations and numerous policy letters;
- office memorandums and instructions issued by the Ministry of Defence (MoD); and
- various directorates and branches of the armed forces.

The DPP specifically deals with capital acquisitions and the DPM governs procedures covering revenue procurements. Apart from the DPP and the DPM, government organisations such as the Defence Research and Development Organisation (DRDO), Ordnance Factory Board and Defence Public Sector Undertakings follow their own procurement procedure. To promote indigenous production and house critical technologies, the strategic partnership model is expected to be incorporated in the DPP, allowing the Indian private players to play the strategic partner role for critical Indian defence programmes. Such strategic partnership also aims to foster indigenous production in accordance with the government’s vision under the Make In India programme.

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

Yes, defence and security procurements are treated differently from civil procurements. The procurement of defence and security articles is identified in terms of long-term (15 years), medium-term (five years) and short-term (two years) perspectives, keeping in view operational exigencies and the availability of monetary resources. The planning process would be under the overall guidance of the Defence Acquisition Council; its decisions, as approved by the Defence Minister of India (Raksha Mantri), flow down for implementation by the Defence Procurement Board.

3. How are defence and security procurements typically conducted?

Defence procurements are typically conducted through a competitive two-stage bidding process (ie, a financial and technical bid) and as per the guidelines contained in the DPP. The first stage incorporates a selection of eligible and prospective bidders and is termed as the Request for Qualification or Expression of Interest. The second stage, which involves the financial evaluation of bidders, is referred to as a financial bid only successful technical bid.

The commonly adopted mechanism for the selection of the bidder in bid documents includes selection of the lowest bidder (the L1 method), typically adopted for the selection of the successful bidder, inter se technically qualified bidders, in respect of lump sum and rate contracts.

Another procurement procedure includes intergovernmental agreements executed between friendly countries. Such procurements do not necessarily require to follow the standard procurement procedure (DPP) and the standard contract document and are based on mutually agreed provisions between the governments of both countries.

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

The most recent reform in relation to defence and security procurement process in India has been the introduction of DPP 2016.

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

The procurement of IT is governed by general procurement rules, in other words, the General Financial Rules, and the guidelines of the Central Vigilance Commission, which apply to all civil procurements. Besides the general rules, each ministry or agency sets its own procurement guidelines, which complement the general rules.

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

India is not a member state to the Government Procurement Agreement (GPA), hence the rules and regulations as contained in the GPA are not applicable to defence procurements made by the Indian government.

Disputes and risk allocation

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

The Standard Contract Document provided under the DPP (proposed to be executed between the government and the defence contractor) stipulates a step by step dispute resolution procedure for resolving any disputes among the parties. The procedure may include amicable settlement as a first step to resolve the dispute, followed by mediation as the next step. Upon failure of both these steps, the parties may invoke the arbitration clause and initiate arbitration proceedings to resolve the dispute.

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

As a standard practice, all contracts executed between the government and the contractor or between the prime contractor and subcontractor exclusively set out an alternative dispute resolution procedure, hence it is used extensively by the contracting parties to resolve the dispute and to avoid directly approaching the court.

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?

As per the Standard Contract Document prescribed in the DPP, the Indian government has no obligation to indemnify the contractor. The draft RFP attached to the DPP stipulates that the original equipment manufacturer (OEM) is required to indemnify and protect, at its own cost, the production agency in respect of cost, claims, legal claims and liabilities arising from a third-party claim with regard to the existence
of any patent or intellectual and industrial property right of any such parties in India or from other countries.

10 Can the government agree to limit the contractor’s liability under the contract? Are there limits to the contractor’s potential recovery against the government for breach?
The Standard Contract Document, as contained in the DPP, does not contain a limitation of liability clause.

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?
No. However, if a contractor faces a situation wherein payment has been outstanding or there is a denial of payment by the government, then in such a scenario the contractor can resort to resolving the dispute by way of the dispute settlement procedure enumerated in the contract.

12 Under what circumstances must a contractor provide a parent guarantee?
Generally, a contractor is not required to provide a parent guarantee while bidding for tenders or at the time of entering the contract with the procurer. However, at various stages of the procurement process (ie, at the time of submitting the bids, before signing of the contract, etc) the contractor may have an obligation to furnish a bank guarantee (eg, performance bank guarantee, advance bank guarantee, Integrity Pact bank guarantee) as per the requirements set out in the RFP issued by the procurer.

In certain cases (eg, for Indian vendors under the ‘make’ category), Indian vendors and contractors who are a fully owned subsidiary of a particular company can furnish a parent company guarantee to take into account the strengths of the parent company for evaluation purposes.

Defence procurement law fundamentals

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 DPP contains a standard contract document, which acts as a guideline for the government as well as the bidder or contractor for making acquisitions in a transparent manner. The contractor or bidder is generally required to accept these standard clauses regarding the hiring of agents, penalty for use of undue influence, use of an Integrity Pact, access to books of accounts, arbitration and clauses related to law, which would be incorporated in the contract.

In case of any deviations from the standard clauses mentioned in the standard contract document, the same require prior approval from the Defence Minister of India.

14 How are costs allocated between the contractor and government within a contract?
Allocation of cost between the contractor and the government largely depends on the nature and scope of the contract and differs on case-by-case basis. The cost allocation is generally done as per the terms enumerated in the contract. Further, as per the clause contained in the standard contract document, all taxes, duties, levies and charges that are to be paid for the delivery of goods shall be paid by the parties under the present contract in their respective countries.

15 What disclosures must the contractor make regarding its cost and pricing?
There are no specific disclosures required as per the model RFP attached to the DPP 2016 in relation to contractors’ cost and pricing.

16 How are audits of defence and security procurements conducted in this jurisdiction?
The MoD has the right to conduct an audit of all certifications and costs relevant to indigenous content at all or any stages (tiers) of manufacturing, production or assembly, starting from the main contractor downwards.

Audits can be conducted by the Ministry itself through the Controller General of Defence Accounts or by an agency, institution or officer nominated by the Ministry, as may be decided by the Ministry.

17 Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?
Generally, the MoD only retains a licence for production in the intellectual property being transferred by the OEM as per the provisions of the contract in the ‘buy and make’ category of procurement.

Licence for production is the most preferred category by the government. In such licences, the government is empowered to export the licensed product without any restrictions.

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?
Foreign contractors can set up special economic zones for all manufacturing activities in the defence sector, subject to permissible limits of foreign direct investment as notified by the central government in such sector and other applicable laws.

Also, aside from the above, each state in India offers additional incentives for industrial projects. Such incentives include subsidised land costs, relaxation in stamp duty exemption on sale and lease of land, power tariff incentives, concessional rates of interest on loans, investment subsidies and tax incentives, etc.

19 Describe the process for forming legal entities, including joint ventures, in this jurisdiction.
An interested foreign entity can operate in India through incorporating a company under the provisions of the Companies Act 2013, which regulates incorporation of a company, manner of conducting the affairs of a company, responsibilities of its directors and dissolution of a company.

Further as per the current Foreign Direct Investment Policy (FDI), foreign investment has been allowed up to 100 per cent subject to FDI up to 49 per cent being permitted in defence manufacturing under the automatic route. FDI above 49 per cent is permitted under the approval route, on case-by-case basis, wherever the investment is likely to result in access to modern technology. Therefore, foreign companies can form joint ventures with an Indian company and hold up to 49 per cent equity through the automatic route as per the extant FDI.

The defence industry is also subject to industrial licences under the Industries (Development and Regulation) Act 1951 and manufacturing of small arms ammunition under the Arms Act 1959.

20 Are there statutes or regulations enabling access to copies of government records? How does it work? Can one obtain versions of previous contracts?
No. Owing to the nature of contracts, security and interest involved, the records are not available for the public.

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 and regulations in relation to eligible suppliers and supply chain management. However, all eligible suppliers are required to follow the conditions set out in the DPP. As per the bidders’ and contractors’ commitment, the bidder has to confirm and declare to the procurer that it is the original manufacturer, integrator or authorised government-sponsored export entity of the defence products.

Further, in relation to the counterfeit parts, the DPP enumerates provisions in relation to pre-despatch inspection (PDI), wherein the procurer representatives carry out PDI of the equipment in order to check their compliance with specifications in accordance with acceptance test procedures as finalised during contract negotiation. The Director General of Quality Assurance, Director General of Aeronautical Quality Assurance and Director General of Naval Armament Inspectorate have to be informed at least 45 days before the scheduled date of the PDI regarding the quality of the products to be procured by the MoD.
International trade rules

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

In India, the import and export of defence products and goods is governed by the Foreign Trade (Development and Regulation) Act of 1992 and India’s Export Import Policy.

The Department of Defence Production (DDP) generally issues a no objection certificate (NOC) as per the provisions of the standard operating procedure (SOP) for export of items given in the list of military stores issued by the DDP. However, there are certain defence items that are not included in this list. These are primarily dual-use items and are listed in the Special Chemicals, Organisms, Materials, Equipment and Technologies list (SCOMET) of the Directorate General of Foreign Trade (DGFT).

While undertaking export of defence items, all the exporters must first refer to the list of military stores issued by DDP and then the SCOMET list of the DGFT.

The items proposed to be exported by the exporter, which are listed in the list of military stores issued by the DDP, are freely exportable subject to issuance of the NOC from the DDP and the Ministry of Defence as per the provisions of the SOP.

The items of export that are listed in the SCOMET list of the DGFT would require issuance of an NOC as per the rules and procedures of DGFT and as such, depending on the specifications and specific end uses, may require an export licence from the DGFT and other clearances from relevant governmental authorities.

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

The DPP 2016 encourages indigenous manufacturing of defence equipment, and therefore a new category of capital procurement – Buy Indian-IDDM (Indigenously Designed, Developed and Manufactured) – has been introduced to encourage indigenous design, development and manufacturing of defence equipment. As per the DPP, preference is given to ‘Buy (Indian-IDDM)’, ‘Buy (Indian)’ and ‘Buy and Make (Indian)’ over the ‘Buy (Global)’ categories of capital acquisition.

Under the Buy (Global) category, procurement can be made directly on a multi or single foreign contractor basis, subject to adherence to the provisions of the DPP.

24 Are certain treaty partners treated more favourably?

No. All vendors and contractors are treated equally and are subject to the guidelines issued by the Indian government in relation to the nature of procurement.

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

Generally, the Indian government implements the sanctions imposed by the United Nations through its Gazette Notifications. At present, India has economic sanctions in place targeting Iraq, Somalia and North Korea.

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

Yes, the provisions of the Defence Offset Policy as contained in the DPP 2016 are applicable to all capital acquisitions falling in the category of Buy (Global); namely, outright purchase from a foreign or Indian vendor or procurements under the Buy and Make category of procurements where the estimated cost of the acquisition proposal is 2000 crores or more.

The policy states that 30 per cent of the estimated cost of the acquisition in Buy (Global) category acquisitions and 30 per cent of the foreign exchange component in Buy and Make category procurements will be the required value of the offset obligations.

These offset conditions generally form a part of the RFP and subsequently of the main contract. A separate offset contract is also executed simultaneously with the main contract.

The offset obligations are required to be discharged within the period of the main contract. However, this is subject to extension beyond the period of the main procurement contract by a maximum period of two years.

Ethics and anti-corruption

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

The Central Civil Services (Pension) Rules 1972 (CCS Rules), prescribed by the Indian Armed Forces, stipulate restrictions for officers employed by the Forces to accept commercial employment within a period of two years from the date of retirement in the case of the Indian Navy and the Indian Air Force and one year from retirement in the case of an officer of the Indian Army. If the retired officer wishes to accept commercial employment with a private organisation within such restricted period, he or she is required to obtain prior written permission from the competent authority.

Similarly, if any government official or personnel employed with the DRDO wishes to accept commercial employment with a private organisation within a year of his or her retirement, he or she is required to seek permission from the Indian government by filing an application as prescribed under the CCS Rules.

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

The bidder or contractor is required to sign and submit an Integrity Pact as per the guidelines enumerated in the DPP. The DPP contains various standard clauses in relation to penalties for the use of undue influence and demands further commitments from bidders or contractors in relation to giving or offering bribes or inducements and giving directly or indirectly any gift, consideration, reward, commission, fees brokerage or inducement to any person in service of the government.

If the bidder or contractor is found in violation of the Integrity Pact, this may lead to:
- debarment of the bidder for an appropriate period of time;
- denial or loss of contract;
- forfeiture of the bid security and performance bond; or
- liability for damages to the MoD and the competing bidder.

Some of the anti-corruption laws prevalent in India are as follows:
- the Prevention of Corruption Act 1988;
- the Indian Penal Code 1860;
- the Prevention of Money Laundering Act 2002; and
- the Official Secrets Act 1923.

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

As per the new DPP guidelines, the vendor or contractor is required to disclose the full details of any such person, party, firm or institution engaged by them for the marketing of their equipment in India. This will be conducted either on a country-specific basis or as a part of a global or regional arrangement at the time of submission of bids, and within two weeks of engagement of an agent at any subsequent stage of procurement.

These details should include the scope of work and responsibilities that have been entrusted with the said party in India. If there is non-involvement by any such party then the same shall also be communicated in the offers or bids submitted specifically.

Further, on demand, the vendor or contractor shall provide necessary input, inspection of the relevant financial documents, and information including a copy of the contract or contracts and details of payment terms between the contractor and the agent engaged by him or her.

As per the DPP, the MoD reserves the right to inform the vendor at any stage that the agent so engaged is not acceptable, whereupon it would be incumbent on the vendor either to interact with the Ministry directly or engage another agent. The decision of the MoD on rejection of the agent shall be final and be effective immediately.

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

As per the DPP guidelines, the contract with the agent shall not be a conditional contract wherein payment made or penalty levied is based, directly or indirectly, on success or failure of the award of the contract to the bidder or contractor.
Further, all payments made to the agent 12 months prior to the tender submission are required to be disclosed at the time of tender submission. Thereafter, an annual report of payments should be submitted during the procurement process or upon demand of the MoD.

**Aviation**

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

As per the provisions of the Aircraft Act and Aircraft Rules, the Directorate General of Civil Aviation is the authority empowered to register aircraft and to grant certificate of registration in India. The process of conversion would be guided by internal circulars and office memorandums issued from time to time by the concerned ministries in this regard. After such grant of conversion of aircraft, the register of aircraft maintained by the Directorate General of Civil Aviation would be appropriately amended to effect such change.

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

At present, India does not have any specific legislation or rules that enumerate the manufacturing and trading aspect of unmanned aircraft systems or drones in India. Currently, only the government is permitted to use drones for military purposes. However, the Director General of Civil Aviation (the apex aviation regulator in India) has recently introduced draft guidelines for the operation of a civil unmanned aircraft system.

### Miscellaneous

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

In a situation where the defence contractor is operating in India and has deployed their personnel in India, then the existing labour and employment rules and statues shall be applicable on such personnel and the defence contractor shall have to abide by the same.

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

All foreign and domestic bidders or contractors interested in bidding for defence procurement made by the Indian government are bound to follow the terms and guidelines as specified and contained in the DPP issued by the MoD. Also, the bidders or contractors are required to abide by the terms and conditions as contained in the RFP and the standard clauses as enumerated in the Standard Contract Document. Also, the contractors are required to sign a pre-contract Integrity Pact with the procurer. The Integrity Pact is a binding agreement between the government department and bidders for specific contracts in which the government promises that it will not accept bribes during the procurement process and bidders promise that they will not offer bribes.

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

Yes.

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

Yes. As per the DPP guidelines, the latest certificate of incorporation by the Registrar of Companies, the latest Memorandum of Association and Articles of Association of the Company, details of the Directors, Managing Director and Manager of the Company and the complete address of the registered office of the company are required to be submitted to the government entity.

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

Generally an industrial licence (IL) under the Industries (Development and Regulation) Act 1951 is required for manufacturing defence equipment. However, not all defence items require an IL and the same is subject to a list issued and revised by the Department of Defence Production of the MoD.

An IL is required to manufacture arms and ammunition and allied items of defence equipment, parts and accessories. The licence is granted under Rule 15(2) of the Registration and Licensing of Industrial Undertaking Rules 1952. The applicant must be an Indian company or partnership and has to apply to the DIPP. The IL will be considered and given subject to approval from Ministry of Commerce and Industry, in consultation with the Ministry of Defence and Ministry of Home Affairs, state government and other members of the licensing committee.

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

If the manufacturing setup is established within the territorial jurisdiction of India, then the concerned vendor or contractor shall be required to comply with the necessary statues and environmental regulations existing and prevalent in India. The manufacturer is also required to obtain requisite environmental clearances and prior consent from the concerned state pollution control board before establishing their setup.

Some of the statues or legislations are as follows:

- the Environment Protection Act 1986;
- the Water (Prevention and Control of Pollution) Act 1974;
- the Air (Prevention and Control of Pollution) Act 1981;
- the Hazardous Wastes (Management, Handling and Trans-boundary Movement) Rules 2008;
- the Manufacture, Storage and Import of Hazardous Chemicals Rules 1989;
- the Indian Forest Act 1927;
- the Forest (Conservation) Act 1980;
- the National Environment Tribunal Act 1995; and

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**Seth Dua & Associates**

Sunil Seth  
Vasanth Rajasekaran  
6th Floor, 601 DLF South Court 
Saket  
New Delhi 110017  
India  

Sunil.seth@sethdua.com  
vasanth.rajasekaran@sethdua.com  

Tel: +91 11 41644400  
Fax: +91 11 41644500  
www.sethdua.com
Must companies meet environmental targets? What are these initiatives and what agency determines compliance?
Not applicable.

Do ‘green’ solutions have an advantage in procurements?
No.
Italy

Anna Masutti
LS LexJus Sinacta – Avvocati e Commercialisti

Legal framework

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

The Italian Public Contract Code (Legislative Decree No. 50/2016) is the principal legal reference concerning public procurements, which are specifically regulated by articles 159 and 160. However, the provisions of the above-mentioned Code also apply to procurement of defence and security, except those that fall within the scope of Decree No. 208 of 15 November 2011 (article 1, paragraph 6a of the 2016 Italian Public Contract Code). Defence and security procurements were at first governed predominantly by general rules enunciated in the Italian Public Contract Code of 2006 (Decree No. 163, 04/12/2006). The Code provided fundamental rules concerning public procurements, with particular attention to defence and security requirements. Regarding this field, specific reference has been made to a separate regulation that must be implemented in the area of defence and security. In fact, in 2012 the legal framework was enforced with the transposition of Directive 2009/81/EC into the Italian legal system through Decree No. 208 of 15 November 2011, which entered into force on 15 January 2012.

There is currently a trend towards complex and expensive systems, and consortiums and agencies have been developed as a result of such systems. Therefore, the acquisition process is no longer fully supervised and controlled by the Italian nation – various defence goods are dealt with by NATO, the Organisation for Joint Armament Cooperation and consortiums and agencies have been developed as a result of such systems. The national legal framework does not provide for different or additional procurement rules for defence and security procurements conducted in accordance with EU guidelines, public procurements are identified as contracts for financial interest concluded in writing between one or more contractors, suppliers or service providers. More specifically, defence and security procurement contracts present, as the principal object, elements related to sensitive work, equipment and services for security purposes, or even military equipment that is specifically designed or adapted for military purposes and that is intended to be used as arms, munitions or war material. Further, in order to follow the general regulations concerning procurement when dealing with the acquisition of defence and security assets, there should be specific assumptions regarding those regulations, which must be in accordance with the Treaty of Rome (1957). Whether defence and security procurement is treated differently from civil procurement depends on the suitability of the field in question, and defence and security procurement are generally treated differently because they require the application of particular protection measures.

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

In accordance with EU guidelines, public procurements are identified as contracts for financial interest concluded in writing between one or more contractors, suppliers or service providers. More specifically, defence and security procurement contracts present, as the principal object, elements related to sensitive work, equipment and services for security purposes, or even military equipment that is specifically designed or adapted for military purposes and that is intended to be used as arms, munitions or war material. Further, in order to follow the general regulations concerning procurement when dealing with the acquisition of defence and security assets, there should be specific assumptions regarding those regulations, which must be in accordance with the Treaty of Rome (1957). Whether defence and security procurement is treated differently from civil procurement depends on the suitability of the field in question, and defence and security procurement are generally treated differently because they require the application of particular protection measures.

3 How are defence and security procurements typically conducted?

Defence and security procurements are typically conducted following the rules (which are also taken into account by the national Public Contract Code of 2016) provided by Legislative Decree No. 208 of 15 November 2011. Furthermore, management of defence and security aspects follows the Directories of the Ministry of Defence, which acts under the applicable law. The Directorate of Works and State Property handles public works (in accordance with the principle of transparency of administrative measures), as the activities concern procurement award and contract executions. Moreover, the institution realises and performs projects related to the construction and maintenance of national or NATO civil constructions, and also coordinates structural interventions.

Concerning the rules of conduct of defence and security procurement, the recent legal framework is also in accordance with TFUE article 346. This article provides a derogation to the European Community principle of public evidence for the awarding of public procurements of defence and security goods. The Decree establishes that, in order to identify the economic operators who can present the offer for the procurement of a contract, the contracting authority can use the restricted procedure or the negotiated procedure with the publication of a contract notice. Eventually, in the case of particularly complex contracts, the contracting authorities can proceed with the competitive dialogue. In other predetermined cases, the contracting authorities can use the above-mentioned negotiated procedure without publishing the contract notice. Recourse to these particular procedures is subject to the peculiarity of the contract.

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

In Italy, there is currently no particular legal updating process concerning defence and security procurement. A significant proposal concerning a change of the defence and security procurement process might arise from European and international levels. Nevertheless, potential changes in the sector might also come from the integration of the European defence market, which was made by the transporta-
tion of Directive 2009/81/EC, into the Italian legal system by Decree No. 208 of 15 November 2011. The implementation of the Directive, which aims to fix certain structural issues, relies on procurements in defence and security in order to harmonise the legislation of member states. However, if the European Nations Departments of Defence were unified, the acquisition process could be managed by simply using European Directives.

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

The national legal framework does not provide for different or additional procurement rules for information technology and non-IT goods and services. The main distinction is provided in relation to defence and security matters as a whole. Particular rules and provisions concerning information technology goods and services, or non-IT goods and services, can be included in the procurement contract clauses section, which must be in accordance with the competent national legislation.

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

As mentioned above, the Italian regulations concerning procurement of defence and security are compliant with the European principles established in that field. The ongoing development of the war industry in the European context, as well as the view of a European
Community integration process, takes into consideration the necessity to adapt national legislation concerning procurement of defence and security to European guidelines. In fact, recent Italian legislation and regulation enforcement, such as the implementation of Directive 2009/81/EC, is also due to the implementation of Community directives. However, defence and security procurements are excluded from the scope of GPA application. This means that member states retain the right to decide whether the contract authorities can allow a third-party economic operator to participate in the awarding of a defence and security procurement.

Disputes and risk allocation

7 How are disputes between the government and defence contractor resolved? Disputes between the government and defence contractors are dealt with according to the general regulations concerning settlements between contract authorities and economic operators. Part VI of the Italian Public Contract Code of 2016 defines the forms of dispute resolution in a unitary way (article 204 et seq of the Code). This kind of approach is frequently subjected to legislative interventions and amendments, however, the means of dispute resolution provided for in the Code consist of the typical judicial remedy and of alternative means. A typical judicial remedy is provided for in article 204 of the Code, which, in turn, refers to article 120 of the Code of Administrative Procedure. If alternative means are required, they are provided for in Chapter II of the Code, which establishes three other modalities in order to solve disputes:

• the friendly agreement procedure (article 205);
• settlement by compromise (article 208); and
• arbitration procedure (disposed by article 209 of the Code).

However, the states usually conclude bilateral agreements in order to deal with particular sets of problems.

8 To what extent is alternative dispute resolution used to resolve conflicts? What is typical for this jurisdiction? Alternative dispute resolution is the instrument that is most frequently used to solve conflicts in public procurement, as well as in the defence and security field. In fact, the friendly agreement procedure, arbitration procedure and settlement by compromise are characterised by their procedural rapidity. Moreover, these alternative dispute resolutions can also be less expensive than the judicial remedy (article 204 of the Italian Public Contract Code of 2016) or the pre-litigation procedure established by the National Anti-Corruption Authority (ANAC). For a jurisdiction related to defence and security procurement, the arbitration procedure is typically used by economic operators for the above-mentioned reasons; in fact, these procedures speed up procedure time and reduce costs.

9 What limits exist on the government’s ability to indemnify the contractor in this jurisdiction and must the contractor indemnify the government in a defence procurement? The government administration’s liability obligation is not limited by specific elements. The administrative court has the competence to define the value of the contractor’s compensation and the relative government obligations in accordance with the rules concerning administrative proceedings provided by Law No. 241 of 1990.

If an economic operator fails to comply with his or her obligations, as established in the defence procurement contract, the contractor authority may request him or her to provide reasons. These reasons should be presented in 20 days, and when the administration evaluates the extent of the default it can decide to keep the guarantee deposit or to apply the penalties given by the procurement framework.

10 Can the government agree to limit the contractor’s liability under the contract? Are there limits to the contractor’s potential recovery against the government for breach? There are no particular limits. When the government takes part in a public contract procurement it is subject to contract obligations. This means that contract parties are in an equal position concerning liability and any other contract element.

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 the field of defence and security procurement, there is no particular risk of non-payment by the government or of failure to ensure adequate funds to meet contractual obligations. This kind of field deals with services that are particularly sensitive and, for this reason, in Italy every public procurement process can start only if an ‘economic hedge’ is assured. In other words, the contract may only be concluded if financial security is provided for the specific established amount. This condition also applies to long-term activities and for NATO agencies. All this means that an accurate and adequate evaluation of economic and financial conditions must be conducted before the Defence Administration decides to issue a call for tender concerning defence and security works. Furthermore, there should be reference to the European Defence Agency. The Agency presents projects concerning activity and research developments in the defence and security scope to member states. Even if reference is made to the Agency, or to other agencies or programme offices, the other cautions given above should still be adopted.

12 Under what circumstances must a contractor provide a parent guarantee? Each contract requires a bank guarantee, a provision of guarantee or another form of guarantee for an amount equal to 10 per cent of the contract. Such guarantees are required as an assurance for the procurement contract and, more specifically, as a guarantee for the part that corresponds to the company profit. This part of the profit is reduced by 50 per cent when the economic operator shows that he or she has adopted certificated quality systems in accordance with European standards (eg, ISO 9000, AQAP, etc).

Defence procurement law fundamentals

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? In the Italian legal framework, there are no specific clauses regarding procurement of defence and security, except those regarding aspects of defence. Concerning the clauses that have to be included in a defence procurement contract, as with other contract types it is important that the first clause provides for the contract object, which in this specific and highly sensitive case concerns activities or services finalised for defence and security purposes. This clause should be added to the other clauses concerning the economic operator’s obligations, the value of the contract, terms and modality of the execution, checks and inspections, the duration, the unilateral termination of the contract, compensations and payments procedures.

However, two more clauses deserve particular attention. The first clause regards the traceability of financial flows. Such clause is governed by the regulation framework composed by articles 3 and 6 of Law No. 136/2010 and article 6 of Law No. 217/2010. Other operative indications were provided in Dermination No. 4 7/07/2010 by the Authority of the Supervision of Public Contracts for Works, now replaced by the ANAC, which defines guidelines concerning the traceability of financial flows. These provisions aim to hinder organised crime and infiltration in public procurements and also to control transparent public administration financial flows ex post. The second important clause is the social clause, which has raised an ongoing debate concerning workers’ protection, foreseen in article 50 of the Italian Public Contract Code. The purpose of the social clause is to ensure and guarantee the safeguard and protection of workers during the defence procurement contract execution.

14 How are costs allocated between the contractor and government within a contract? Costs regarding the defence procurement contract are allocated between the contractor and the government. Costs concerning the contractual documentation shall be carried by the economic operator (in accordance with Law No. 790 27/12/1975). However, all expenditure related to contract notice (see article 66 co. 7-bis of Legislative Decree No. 165/2006) shall be reimbursed by the government as a contract party to the economic operator within a 60-day period from the award.
15 What disclosures must the contractor make regarding its cost and pricing?
A disclosure should be inserted that provides indications concerning the contract value. These indications remain approximately in relation to the effective necessity of the contract authority and the contract performers, and also in relation to the eventual decreases caused by intricate budgetary manoeuvres that could not be known in advance.

16 How are audits of defence and security procurements conducted in this jurisdiction?
For audits of defence and security procurements, the Italian legal framework presents specific rules provided for in Legislative Decree No. 22/2013. A first control done by the contract authority administration concerns the actual existence of general requirements and the professional competence of economic operators. The administration verifies that economic operators are qualified to perform public work, and verifies the technical, professional, economic and financial capacities of services provided. These types of audits allow the contract authority to ascertain if the defence and security purposes can be reached by the economic operators. Furthermore, the defence procurement contract contains a clause concerning controls and inspections: this clause envisages that the economic operator will undertake to comply with all of the contractor authority’s controls or inspections in order to verify the positive contract performance.

Concerning economic audits, generally every procurement contract is a ‘fixed-price contract’. Only when the contract provides for assets acquisition specifically made for defence and security, and when the acquisition period exceeds a certain number of years, may some formulae concerning the escalation of prices be adopted (prices and formulae are negotiated before the contract signature).

17 Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?
For contracts regulated by the Public Contract Code (except for pre-commercial procurements), during the performance of a defence procurement contract, the contract authority holds all commercial exploitation rights resulting from the research, including intellectual property rights. The contract authority also provides for the protection costs. However, the European Commission aims to incentivise economic research so that economic operators own rights to intellectual property.

Typically, licences are given for patents, trademarks and copyrights in order to protect intellectual property rights.

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 Italy, there are no specific economic zones or special programmes that are reserved for foreign economic operators. Given that the Italian legal framework concerning defence and security procurement is mostly based on European orientations, this has made the treatment concerning economic zones or other special programmes in this jurisdiction commonly utilised by foreign defence and security contractors for financial or other procurement-related benefits.

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19 Describe the process for forming legal entities, including joint ventures, in this jurisdiction.
Italian company law presents two main types of incorporated entities: the company limited by shares, or public limited company (SPA); and, the company limited by quotas, or limited liability company (SRL).

The SPA-forming process starts with a notary who identifies the necessary steps by referring to the requirements of the Civil Code. After the reform of Italian Company Law, an SPA can also be formed with a single partner (member) that will have unlimited liability for company obligations, unless proper information has not been provided to the company register or if there has been a breach of duty with regard to the rules on contributions. The recognition of a company’s legal personality with regard to formal registration in a special company registry is the last phase of the forming process. This registration confirms the company’s legal existence to third parties.

The SRL-forming process starts with the deed of incorporation that has to be in the form of a public act and that must comply with the requirements provided for in article 2461 of the Italian Civil Code. An SRL can also be formed with a single partner or become a single partner company at any time. Again, the single partner will have unlimited liability for the company obligations, unless proper information has not been provided to the company register or if there has been a breach of duty with regard to the rules on contributions.

For joint ventures, there is no express regulation of such contracts under Italian law. However, parties have the discretion to form contractual or corporate joint ventures in accordance with the principle of contractual freedom given in article 1322 of the Italian Civil Code. A joint venture agreement must be registered with the Italian Revenue Agency, and this is required for both corporate and contractual joint ventures. It does not require a public notary except in cases when a corporate joint venture is incorporated and when parties agree to transfer rights for which the involvement of a public notary is mandatory.

Moreover, no formal requirements are needed in order to validate the constitution of the joint venture. Nevertheless, the anti-trust law may apply when parties decide to establish a fully functional corporate joint venture, and in this case a notification is required. Furthermore, companies should form a Temporary Grouping of Companies in order to realise joint venture projects.

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 general goal is to provide everyone who has a legitimate interest with the possibility of access to the copies and documents related to the procedure. In the Italian Public Contract Code, access to procedure documentation is governed by article 13. The ‘right of access’ ensures the principle of transparency of administrative proceedings. This is one of the most important principles provided by the national legislation.

An exception to this principle concerns cases characterised by the presence of technical or commercial data that should be protected, such as defence procurement contracts whose performance could require special security measures. Moreover, when the protection of certain technical data secrecy is needed, the judge may prevent certain parties from accessing required documentations during the offer stage, as stated in pre-litigation opinion No. 6 issued by the ANAC, dated 6/02/2013.

In fact, in various defence contract procurements, a clause concerning the military secret could be inserted and this means that information related to the contract should be barred from being obtained afterwards.

21 What are the rules regarding eligible suppliers and supply chain management and anti-counterfeit parts for defence and security procurements?
The rules governing eligible suppliers and supply chain management are provided for in article 42 of the Public Contract Code. This issue also falls within the competence of the ANAC. The legal framework establishes an official list of suppliers, instituted by the law and geared by the administration. In addition, counterfeit of supplies could include intellectual property and material elements. Anti-counterfeit is governed by national rules such as articles 472 et seq of the Italian Penal Code, and by article 127 of Legislative Decree No. 30/2005.

International trade rules

22 What export controls limit international trade in defence and security articles? Who administers them?
The limitation of international trade in defence and security is due to intense and strict controls. Export is subject to various layers of national control performed by different authorities, such as the Foreign Ministry, the Defence Ministry, the Ministry of the Interior, the Ministry of Economy and Finance and also by the customs authority. The Italian legal framework also presents a regulation concerning the export and import process for defence and security assets: Law No. 185/1990 regards conditions governing goods transfer related to the defence field. Moreover, other elements, such as the slow decision-making
process in issues concerning defence and security in the international or European market, create limitations to international trade in this field.

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

Domestic rules that apply to defence and security procurements contracts are:
- Regulation No. 49 of 13/03/2013, which governs Defence Ministry activities related to defence and security works, services and supplies; and
- Legislative Decree No. 208 of 15/11/2015, which provides defence and security contracts procurements and which implements Directive 2009/81/EC.

Such rules also apply to foreign companies that have commercial relations with Italy. A foreign contractor can bid directly for a procurement and there is no limit to negotiating or subscribing a procurement contract under Italian law. For such economic operators, article 47 of Legislative Decree No. 126/2006 provides that the conditions to participate are the same as those established for Italian economic operators (there must be a prior condition of reciprocity).

24 Are certain treaty partners treated more favourably?

According to the general principles governing administrative proceedings such as transparency, neutrality and non-discrimination, a potential treaty partner shall not be treated more favourably.

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

Existing trade sanctions between jurisdictions are those provided by international trade and commercial law. Sanctions are mainly divided into two categories: diplomatic sanctions (measures of withdrawal of diplomatic relations with the state concerned) and the recall of diplomatic representatives of the state. Other sanctions are arms embargoes, restrictions on the admission of ‘state concerned’ persons (listed in specific lists), the freezing of assets and economic sanctions.

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 defence and security procurement regime and are administrated by the Secretary-General or by the National Manager of Armaments delegated by Ministry of Defence, by the Directors of the General Secretariat of National Defence and the National Industry of Defence. Italy also adopted its own coordination policy concerning offsets in defence and security procurement. However, this policy was modified in order to be compliant with European orientations. The 2002 and 2012 Directives made the trade offsets slightly more flexible and understandable. The first Directive sets out a clear and detailed list of the involved figures and their functions, and also establishes the methodical procedure that parties should follow. In fact, the 2002 Directive concerns the binding side agreements and provides for continuous coordination between the Direction and General Secretariat of National Defence, both in the pre-contractual and contractual stages. The 2012 Directive only refers to the competent Direction, subject to negotiations.

Ethics and anti-corruption

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

Public appointments are generally incompatible with positions dealing in private sectors, especially where such private sector is overseen by the public. The management of public functions and collaborations with the private sector should be maintained separately in order to guarantee the exclusive pursuit of the public interest without negative interference caused by private interests.

The legal framework permits former government employees to take up appointments in the private sector on the condition that they will renounce their public function with a set deadline of 15 days after the proposal.

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

Even defence and security procurement fields are subject to bribery, at both the internal and international levels. The ANAC, in accordance with anti-bribery regulations, plays a central role in combating this negative aspect: it monitors the contract qualification system and the modality used to perform the contract, and the traceability of financial flows (as given in Determination No. 47/07/2010). Economic operators are required to commit themselves to transparency standards during the execution of activities related to defence and security procurements, given that a lack of transparency constitutes a development of the ‘dirty market’ in which corruption is typically present.

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

To register as a lobbyist or commercial agents, a person must be resident in Italy, or have Italian nationality, or even be a national of a member state. Commercial agents are entitled to exercise their civil rights, and must have reached the age of majority. Concerning professional requirements, the applicant should present a secondary school diploma or a degree in economic and juridical subjects, or a certificate confirming successful attendance of a professional course recognised by the region. Moreover, the applicant should have experience as a sales employee and must have worked for a company for at least two years.

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

According to article 1748 of the Italian Civil Code, commercial agents or representatives have the right to earn a commission, determined as percentage on all transactions concluded after commercial agent intervention and the counting criteria are established by the parties. There are no limitations if earnings are issued in accordance with the competent regulation.

Aviation

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

Usually, there is a distinction between military use aircraft and civil-use aircraft. Military aircraft belong in a special category because of their military end-use (article 745 of the Navigation Code). However, there may be circumstances under which civil aircraft could be used as military aircraft. This conversion can only be carried out with the approval of the Italian General Directorate of Air Armaments, which is the competent authority.

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

The principal restriction on manufacture and trade of unmanned aircraft systems or drones concerns the competence of the Ministry of Defence. The creation of unmanned aircraft systems or drones has
military and public defence purposes and is governed by the Decree of 16 May 2016.

The use of drones is regulated by Legislative Decree No. 7 of 18 February 2015, which disposes requirements concerning drone pilotage, requirement for use, prompt intervention use and operation procedures. These rules have also been compared to the civil drone regulations given by the Italian Civil Aviation Authority. The regulation framework concerning military aircraft is provided in the Second Part of the Navigation Code. For example, article 691-bis establishes that certain military aeronautics activities are allowed by specific agreements concluded with the Italian Civil Aviation Authority.

**Miscellaneous**

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

Domestic labour and employment rules apply to foreign defence contractors who execute contract activities in Italy. The same legal framework concerning work law applies to Italian defence and security contractors. Moreover, specific clauses related to domestic labour and employment rules, such as the application of social protection of workers, are provided for foreign defence contractors. Such social protection ensures that rules concerning the security, assistance and assistance of workers shall be respected.

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

The specific rules by which contractors are bound under defence security contracts are those that show the objectives of the activity, which means that contract obligations bind economic operators during the execution of the contract proceedings. Moreover, other specific rules that bind contractors may be provided by clauses inserted in defence contract procurement, such as the military secrecy clause.

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

When contractors perform work exclusively outside the country, the applicable rules shall be those agreed between the state where the contract has been constituted and the state where the activity shall be performed, as well as potential specific rules that could bind the contractor.

**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?**

In general, the company should provide assurances to the government with regard to personnel who will be employed in specific public work. The personnel, and therefore also the company, may be called upon to give assurances regarding security aspects that need be resolved. Other requirements that are needed in order to contract with a government entity include personal aspects such as nationality, date of birth and permanent address. If the director, officer or employee attends to a task in an institution related to the defence and security sector, he or she must prove possession of all the professional requirements, present adequate certificates and also show that he or she is not related up to the fourth degree of kinship to the institution responsible or the institution directors.

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

Given the various collaborations and tasks that could be proposed by the defence and security sector, it is not possible to define in one list the registrations or licensing requests of the defence administration. The more specific the task, the more licensing and requirements are prescribed. Generally, in order to operate in the defence and security sector, the applicant is required to be in possession of a degree or a master’s degree in engineering, law or political sciences.

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

Environmental protection during the execution of a public procurement contract is an important issue that contractors must take into account. The Italian legal framework concerning public procurements includes defence and security procurements, provides for specific obligations concerning the protection of the environment. Legislative Decree No. 165/2006 provides for the possibility of recourse to green public procurement. Decree No. 207 of the President of the Republic dated 2010 provides for the legitimacy of non-economic criteria where there is a request for environmental protection (articles 2 and 64 of the aforementioned Decree).

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

Environmental targets should be met by companies during the performance of the procurement contract. In fact, the national regulations concerning public procurement require certain forms of conduct in accordance with the necessity for environmental protection. For these reasons, in order to promote environmental criteria, which must be respected during the contract implementation, special measures are given (also in accordance to European orientations) in an action plan regarding environmental sustainability or the use of eco-labels.

**40 Do ‘green’ solutions have an advantage in procurements?**

Green public procurements have an advantage in procurement, given that environmental sustainability is taken into account during the process of economic operator selection. Green public procurement provides potential contractors with an incentive to present tenders that also consider environmental character and protection. By way of confirmation, even the ANAC has activated a service addressed to contract authorities by which it can constantly monitor green public procurements.
Japan

Kohei Masuda, Ryuichi Nozaki, Yuri Suzuki and Yuko Nihonmatsu
Atsumi & Sakai

Legal framework

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

Procurement by the Ministry of Defence is governed by a complex set of laws and regulations including the Public Accounting Act, stipulated at a country level, as well as official directives and circular notices stipulated independently by the Ministry of Defence. These laws, regulations, official directives, etc, are to undergo review in light of changes in social circumstances and the environment affecting defence and security procurement and other factors. In particular, on 1 October 2015, following the establishment of the Acquisition, Technology and Logistics Agency (ATLA), amendments were made to a large number of related rules and regulations. The main laws and regulations governing the procurement of defence and security articles are listed below.

Laws and regulations:
- Public Accounting Act;
- Act on Prevention of Delay in Payment under Government Contracts;
- Act on the Responsibility of Government Employees Who Execute the Budget;
- Cabinet Order on Budgets, the Settlement of Accounts, and Accounting;
- Temporary Special Provisions of Cabinet Order on Budgets, the Settlement of Accounts, and Accounting; and
- Rules on Administrative Handling of Contracts.

Official directives:
- Official Directive regarding the Implementation of Procurement of Equipment and Services;
- Official Directive regarding Supervision and Inspection of Procurement Items;
- Official Directive regarding Calculating Basis for Target Price of Procurement Items; and
- Detailed Regulations on Administrative Handling of Contracts under jurisdiction of the Ministry of Defence.

Official Directives of the ATLA:
- Official Directives regarding Contract Administration at the ATLA;
- Official Directive regarding Supervision and Inspections of Procurement Items procured by Central Procurement;
- Official Directive regarding the Administration of Target Price Calculation by the ATLA; and
- Official Directive regarding Cost Audit Administration by the ATLA.

Notices, circular notices, etc, of the ATLA:
- Outline of Contract Administration Handling;
- Administration Outline for Administration of Target Price Calculation by the ATLA;
- Administration Outline for Official Directive regarding Cost Audit Administration by ATLA; and
- Implementation Outline of System Investigation and Import Investigations, etc, for Central Procurement.

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

The procurement of defence and security articles is, for the most part, the responsibility of the ATLA. This agency is subject to official directives, circular notices, etc, stipulated independently by the Ministry of Defence or the ATLA, as outlined above. In this sense, procurement by the agency is treated separately from civil procurements.

3 How are defence and security procurements typically conducted?

According to The Guidance for Bid and Contract (ATLA Public Notice No. 1 of 1 October 2015), the procedures for defence and security articles procurement can be summarised as follows.

- As a rule, in order to become a procurement counterparty, one must apply for bid participation eligibility screening and go through the screening process. If eligible, the applicant’s name is recorded in the register of qualified bidders, and notice is sent to the applicant with the results of the eligibility screening.
- Public notice is made in the case of a general competitive bidding, and notice is sent to the counterparty in the case of a designated competitive bidding or discretionary contract.
- The counterparty pays a bid deposit to the Chief Secretary Treasurer of the ATLA (revenue), unless exempted from deposit by public notice or regular notice.
- The bid participant or government counterparty negotiating a discretionary contract submits a bid document or an estimate. There is also an electronic bidding and bid-opening system (central procurement).
- The process of determining the successful bidder can be summarised as follows:
  - As a rule, the bidder who offers the lowest tendered price equal to or lower than the target price (the target price or the target price plus the sum of the consumption tax rate and the local consumption tax rate, expressed as a percentage) will be the successful bidder;
  - however, if the bid is conducted by the comprehensive evaluation method, the bidder must indicate its price, performance, capability, technology, etc, in its application, and the successful bidder will be the bidder whose tendered price is within the target price and whose performance, capability, technologies, etc, relating to the bid (Performance) meets all the minimum requests and requirements critically required for the Performance specified in the publication or public notice of such bid (including the bid instructions related thereto) and that receives the highest score according to the Method of Comprehensive Evaluation; and
  - when the successful bidder is determined, or when negotiation results in agreement in the case of a discretionary contract, the counterparty submits a contract in accordance with the prescribed procedures, and pays the contract deposit (unless exempted). The contract is deemed concluded when the certifying officer certifies the contract and thereafter an officer in charge of ‘acts to assume debts’ signs and seals the contract together with the counterparty.
4 Are there significant proposals pending to change the defence and security procurement process?

At time of writing, no legislative bills have been submitted to the Diet nor any issues opened for public comments.

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

The Ministry of Defence has established information security management standards by importing international standards commonly used by private companies inside and outside Japan. The Ministry requires companies that build information systems to implement measures pursuant to such standards, and also constantly reviews measures by monitoring international standards and social trends.

In particular, the Ministry of Defence contractually requires the counterparty company to implement the following measures, with the implementation of such measures ensured via voluntary audits by the company itself and audits conducted by the Ministry of Defence:

- Implementation of information security management system for procurement consisting of three stages: Basic Policy ('securing information security of procurement of equipment and services'), Standards, and (Audit) Implementation Outline pursuant to international standards regarding information security management;
- Companies that build information systems for the Ministry of Defence are required to establish an information security management system similar to the above; and
- There are audits by the Ministry of Defence pursuant to the (Audit) Implementation Outline to confirm that the information security management system built by the relevant company is in compliance with the Basic Policy and Standards implemented by the Ministry of Defence, and that the information security measures taken in accordance with the Implementation Outline prepared by the company are conducted properly.

In addition, considering the importance of information security, the Ministry of Defence also applies information security measures equivalent to those detailed above to the supply of certain equipment other than information systems.

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

The Ministry of Defence is a procurement agent subject to the GPA, and procurement of defence and security articles is conducted in accordance with the GPA. Further, government procurement is regulated by economic partnership agreements with the following countries, and thus procurement must be conducted in accordance with the following:

- the Japan–Singapore Economic Partnership Agreement;
- the Japan–Mexico Economic Partnership Agreement;
- the Japan–Chile Economic Partnership Agreement;
- the Japan–Philippines Economic Partnership Agreement;
- the Japan–Peru Economic Partnership Agreement; and
- the Japan–Australia Economic Partnership Agreement.

Disputes and risk allocation

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

In addition to regular litigation proceedings, complaints regarding government procurement can be resolved at the Office for Government Procurement Challenge System established by the Cabinet Office (CHANS: www5.cao.go.jp/access/japan/chans_main_j.html).

There are no special dispute resolution procedures applicable only to defence and security contractors.

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

Litigation is the typical method used to resolve conflicts, and out-of-court dispute resolution is rarely used. Since 1996, there have been no cases filed with CHANS against the Ministry of Defence.

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

Indemnity by the government is conducted in accordance with article 29, paragraph 3 of the Constitution.

On the other hand, as a rule, the government is not allowed to enter into guarantee agreements with respect to liabilities owed by companies or other juristic persons (article 3 of the Act on Limitation of Government Financial Assistance to Juridical Persons). However, in a court precedent, a loss indemnity agreement by a local government was deemed null and void as being in breach of article 3 of the Act on Limitation of Government Financial Assistance to Juridical Persons.

The liability of a contractor under a defence and security articles procurement agreement is provided in the contract it enters into with the government, and thus depends on the individual case. However, the government would rarely claim indemnity from a contractor unless required in the Civil Code (defect liabilities, etc).

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

There are no laws or regulations that restrict the government from limiting the liability of a defence and security articles contractor under the contract, or restrict the defence and security articles contractor from recovering loss or damages from the government due to breach of contract. Limitations, if any, are subject to the terms and conditions of each contract.

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

When the government enters into a procurement contract, normally it must conduct an ‘act to assume national treasury debts’ (article 15 of the Fiscal Act), and as the necessary budget is secured by such act, there is basically no risk of non-payment.

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

A parent guaranty would be necessary if a parent guarantee is clearly required under the bid terms. A parent guarantee may be required when procurement is conducted through a special purpose company, for example.

Defence procurement law fundamentals

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

When the government determines the successful bidder in a tender or the counterparty to a discretionary contract, the contract officer, among others, must prepare a written contract that includes the particulars of the purpose of the contract, contract price, performance period and contract guarantee and other necessary matters (article 29, paragraph 1 of the Public Accounting Act; article 100 of the Cabinet Order on Budgets, the Settlement of Accounts, and Accounting). For the Ministry of Defence, a contract must be prepared for ‘each successful bid, etc’ and a contract must be prepared for all defence and security articles, without exception.

Further, a contract will not become final and binding until signed and sealed by both the contract officer and the counterparty, and the preparation of a written contract by such signing and sealing is one of the requirements for the conclusion of contracts.

There are no particular clauses that would be read into a contract without actually being included therein.

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

The General Terms and Conditions published by the Ministry of Defence (www.mod.go.jp/igo/procurement/pdf/kokoro_e_bessi2.pdf) do not refer to contract expenses. It is considered normal for each party to bear its own expenses.
15 What disclosures must the contractor make regarding its cost and pricing?

The contractor must submit a bid form or an estimate sheet to the Ministry of Defence.

The contractor has no legal obligation to disclose any information, but when the government enters into certain contracts specified by cabinet order or statute that cause expenditures to be incurred by the national government, the government must publish information concerning the contract price, among other things.

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

In order to improve the fairness and transparency of defence and security procurements, the Ministry of Defence takes measures to ensure the appropriateness of contracts and to enhance checks and balances.

First, as part of an effort throughout the government to ‘ensure appropriateness of public procurement’, the Ministry of Defence has been expanding the use of a ‘comprehensive evaluation bid method’ and streamlining its bidding procedures. In addition, in response to a number of cases in 2012 of overcharging and manipulation of product test results by contractors, the Ministry of Defence has been steadily working on measures to prevent recurrence of these problems, such as enhanced system inspections, reviewing penalties and ensuring the effectiveness of supervision and inspections, and otherwise putting more effort into prevention of misconduct, improvement of fairness and transparency and ensuring contracts are appropriate.

Further, with the aim of strengthening checks and balances, the ATLA has established an Audit and Evaluation Division to carry out internal audits, as well as conducting multilayered checks on the ATLA from both inside and outside through audits by the Inspector General’s Office of Legal Compliance and deliberations at the Defence Procurement Council, whose members are outside intellectuals. Further, it is also making efforts towards raising compliance awareness by enhancing its education division and providing thorough education on legal compliance to its personnel.

In the case of defence and security procurement, the supplier’s records of costs are inspected in relation to the production cost of products, the contract price or the cost of goods related to contracts concerning import goods, etc (‘Special clause regarding securement of reliability of documents and implementation of system inspection’, ‘Special clause on securement of reliability of documents related to contracts concerning import goods, etc and implementation of import procurement inspections’) (www.mod.go.jp/j/procurement/kadaiyakujian/), and whenever needed, cost audits are conducted to confirm that the price of each item’s cost and consumption quantity is appropriate.

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

Under the special terms published by the Ministry of Defence, any copyright works created during the performance of a contract are required to be transferred and a ‘certificate of transfer of copyright’ and ‘certificate of non-exercise of author’s moral right’ to be submitted together with the work product.

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

No.

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

The process for forming legal entities is described below:

1. Advance preparations:
   - determine basic matters (such as organisational form, stated capital, business descriptions and succession of assets); and
   - check whether there is any other company of the same trade name at the same location of head office at the legal affairs bureau.

2. Preparation of articles of incorporation:
   - determine the purposes, trade name, location of the head office, minimum amount of contributed assets, name or organisational name and address of the incorporator (matters required to be stated in the original articles of incorporation) and other matters.
   - Notarisation of articles of incorporation by notary public.
   - Contribution:
     - the incorporator pays the money to be contributed in full or tender all property other than monies with respect to the shares issued at incorporation without delay after subscribing for such shares issued at incorporation.
   - Appointment of officers at incorporation:
     - the incorporator appoints directors at incorporation without delay after the completion of capital contribution;
     - in the case of a company with company auditors, company auditors are appointed; and
     - appointment of officers at incorporation is determined by a majority of the voting rights of the incorporators.
   - Examination by directors at incorporation:
     - directors at incorporation examine whether the capital contribution has been completed and whether any incorporation procedures are in breach of any laws and regulations or the articles of incorporation.
   - Appointment of directors at incorporation:
     - in the case of a company with a board of directors, a representative director at incorporation is appointed (as decided by a majority of the directors at incorporation).
   - Registration of incorporation:
     - registration of incorporation must be made within two weeks from the later of the date of termination of examination by the directors at incorporation and the date designated by the incorporator.
   - Notification to the relevant government agencies:
     - tax office, prefectural tax office, municipal government (tax or national pension), labour standards office (employment insurance, workers’ accident compensation insurance), pension office (health insurance, employee pension), etc.

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

In accordance with the Act on Access to Information Held by the Administration, any person may request the head of an administrative organ to disclose administrative documents, and the head of such administrative organ who receives such request for disclosure must disclose such administrative documents except in the following cases:

- Information concerning an individual (excluding information concerning the business of an individual who operates the said business), where it is possible to identify a specific individual from a name, date of birth or other description contained in the information concerned (including cases where it is possible to identify a specific individual through comparing the said information with other information.), or when it is not possible to identify a specific individual, but disclosure of the said information is likely to cause harm to the rights and interests of an individual. This is provided however, that the following information shall be excluded:
  - information that is made public, or information that is scheduled to be made public, pursuant to the provisions of laws and regulations or by custom;
  - information that is found necessary to be disclosed in order to protect a person’s life, health, livelihood or property; and
  - if the said individual is a public officer; officers and employees of the incorporated administrative agencies; local public officers; and officers and employees of the local incorporated administrative agencies. And when the said information pertains to the performance of his or her duties, the portion of the said information pertaining to the job of the said public officer, etc, and the substance of the said performance of duties.

- Information concerning a juridical person or other entities (excluding the state, incorporated administrative agencies, local public entities and local incorporated administrative agencies, hereinafter referred to as a ‘juridical person’), or information concerning the business of an individual who operates the said business,
which corresponds to the following, provided that information that is found necessary to be disclosed in order to protect a person's life, health, livelihood, or property shall be excluded:

- information that, when disclosed, is likely to cause harm to the rights, competitive position or other legitimate interests of the said juridical persons or of the said individual;
- information customarily not disclosed by the juridical person or the individual, which has been voluntarily provided in response to a request by an administrative organ on the condition of non-disclosure, or information for which it is found reasonable to set such a condition in light of the nature of the information or the circumstances at the time.
- Information for which there are reasonable grounds for the head of an administrative organ to find that disclosure is likely to cause harm to national security, cause damage to the relationship of mutual trust with another country or an international organisation, or cause a disadvantage in negotiations with another country or an international organisation.
- Information for which there are reasonable grounds for the head of an administrative organ to find that disclosure is likely to cause impediments to prevention, suppression or investigation of crimes, the maintenance of prosecutions, the execution of punishment, and other matters concerning maintenance of public safety and public order.
- Information concerning deliberations, examinations or consultations internally conducted by or mutually conducted between state organs, incorporated administrative agencies, local public entities and local incorporated administrative agencies, where disclosure is likely to cause unjust harm to the open exchange of opinions or the neutrality of decision-making, cause unjust confusion among citizens, or bring unjust advantages or disadvantages to specific individuals.
- Information concerning the affairs or business conducted by a state organ, an incorporated administrative agency, a local public entity or a local incorporated administrative agency, where disclosure is likely to have the following risks or is likely to hinder the proper execution of the said affairs or business due to the nature of the said affairs or business:
  - risk of making it difficult to accurately understand facts concerning affairs pertaining to audits, inspections, supervision, examinations, imposition or collection of tax, or facilitating wrongful acts regarding such affairs, or making it difficult to discover such acts;
  - risk of causing unjust damage to the property benefit of the state, an incorporated administrative agency, local public entities or a local incorporated administrative agency concerning affairs pertaining to contracts, negotiations or administrative objections and litigations;
  - risk of causing unjust hindrance to the fair and efficient execution of affairs pertaining to research and study;
  - risk of causing hindrance to the maintenance of impartial and smooth personnel practices in the affairs pertaining to personnel management; and
  - risk of causing damage to the legitimate interests arising from corporate management with regard to the business of an enterprise managed by the state or a local public entity, an incorporated administrative agency, or a local incorporated administrative agency.

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

As a condition of participating in competitive bidding (other than for construction work) any person who meets the following conditions may not participate in competitive bidding:

- any person who falls under the descriptions of articles 70 and 71 of the Cabinet Order on Budgets, the Settlement of Accounts, and Accounting (article 70 of the foregoing Cabinet Order);
- if a sales, lease, contracting, or other contract is put out to tender pursuant to article 29-3, paragraph (1) of the Public Accounting Act (hereinafter referred to as an ‘open tender’), the contract officer may not permit a person who falls under any of the following items to participate, unless there are special grounds for doing so, for example:
  - a person who is incapable of concluding the relevant contract;
  - a person who received an order of commencement of bankruptcy proceedings and has not had the person's rights restored;
  - a person who falls under any of the items of article 32, paragraph (1) of the Act on Prevention of Unjust Acts by Organised Crime Group Members (Act No. 77 of 1991) (article 17 of the foregoing Cabinet Order);
- if a contract officer determines that a person who wishes to participate in an open tender falls under any of the following items, the contract officer may prevent the person from participating in open tenders for a period of not more than three years. The same applies to the proxies, managers and employers of such a person:
  - if the person has intentionally carried out construction, manufacturing or any other service in a careless manner or acted fraudulently with regard to the quality or volume of an object in the course of performing a contract;
  - if the person has obstructed the fair implementation of a tender or has hindered a fair price from being reached or colluded with others to obtain an unlawful profit;
  - if the person has obstructed the successful bidder from entering into a contract or obstructed a party to a contract from performing the contract;
  - if the person has obstructed an official from performing the official’s duties in a supervision or inspection;
  - if, without a justifiable reason, the person has not performed a contract;
  - if, under a contract, the price is to be fixed after the signing of the contract, and the person has intentionally claimed an excessive amount as such price based on false facts;
  - if the person has employed a proxy, manager or other employee who is not eligible to participate in an open tender pursuant to this paragraph (not including this item) in the conclusion or performance of a contract; and
- Any person who currently faces a de-nomination under the 'Outline of de-nomination, etc. concerning procurement of defence and security articles, etc. and services'.

There are no specific rules regarding supply chain management and anti-counterfeit parts relating to defence and security procurements.

International trade rules

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

With regard to export controls that limit international trade in defence and security articles, the Foreign Exchange and Foreign Trade Act stipulates certain provisions relating to security trade controls, which are enforced by the Ministry of Economy, Trade and Industry.

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

There is no mechanism for applying domestic preferences to defence and security procurements. For the acquisition of defence and security articles, a number of acquisition methods are currently adopted, including domestic development, international co-development or production, domestic production under licence, utilisation of civilian goods, import, etc. The appropriate method is selected depending on the characteristics of the particular defence and security articles in question. As noted in 'Updates and trends', the Acquisition Strategy Plan published by ATLA on 31 August 2016 adopts a policy of domestic development, production and maintenance for certain items.

The Guidance for Bid and Contract (ATLA Public Notice No. 1 of 1 October 2015) contains provisions pursuant to which foreign business operators may apply for screening of eligibility for participation in tender, which indicates that it is possible for foreign companies to directly participate in procurement tender. However, in the case of procurement from a foreign company, this is usually done by a Japanese trading company on their behalf.
24 Are certain treaty partners treated more favourably? There are no treaty partners that are treated more favourably.

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

Export
There are export controls that require the permission or approval of the Minister of Economy, Trade and Industry.

Defence and security articles that require permission include export of 'weapons, articles related to weapons of mass destruction, articles related to conventional weapons and articles that are likely to be used for development, etc. of weapons of mass destruction or conventional weapons'. 'Articles related to weapons of mass destruction' refers to articles related to nuclear, chemical weapons, biological weapons and missiles, and 'articles related to conventional weapons' refers to state of the art materials processing, electronics, computers, communication devices, sensor or laser, navigation equipment, marine related equipment and propulsion devices.

Those subject to approval include all exports of articles bound for North Korea as the place of destination.

Import
Primary import controls applicable to defence and security articles include restriction on specified regions under which approval is required for import from specified countries of origin or places of shipment. Pursuant to this restriction, approval of the Minister of the Economy, Trade and Industry is required for import of weapons of which the country of origin or place of shipment is Eritrea, and Type I Designated Substances defined in the Act on the Prohibition of Chemical Weapons and the Regulations of Specific Chemicals (Chemical Weapons Control Act) of which the counties of origin or the places of shipment are specified countries or regions. Further, in terms of current economic sanctions, the approval of the Minister of the Economy, Trade and Industry is required for the importation of any articles for which the country of origin or the place of shipment is North Korea, and the importation of weapons for which the country of origin or the place of shipment is Liberia, and effectively prohibited as a result.

Articles that require approval regardless of the country of origin or the place of shipment include:
- explosives;
- military aircraft, engines for military aircraft, tanks and other armed vehicles and components thereof; warships; military armaments, guns and other firearms, other weapons, bombs, swords, spears and other similar weapons, and components of the foregoing items; and
- specified substances under the Chemical Weapons Control Act.

26 Are defence trade offsets part of this country’s defence and security procurement regime? How are they administered? There are no trade offsets at the moment, although the Ministry of Defence is considering their introduction.

Ethics and anti-corruption

27 When and how may former government employees take up appointments in the private sector and vice versa? There are no restrictions preventing former public officers from taking up appointments in the private sector, or vice versa. However, the following is a summary of appointments that are prohibited as a rule:
- a public officer currently in office, engaging in communications with an 'interested enterprise' (including enterprises defined by law), who has executed, offered or is obviously intending to offer to execute a contract for defence and security articles (excluding those where the total amount of the contract is less than ¥20 million) for the purpose of assuming a position in such enterprise or its subsidiary corporation (in summary, a corporation directly or indirectly holding a majority of voting rights);
- a public officer engaging in communications with an enterprise (not limited to the 'interested enterprises') for the purpose of having another public officer or former public officer assume a position in such enterprise or its subsidiary corporation; and
- a former public officer who currently holds a position in the enterprise demanding or requesting performance or non-performance of acts in the course of his or her duties in relation to a contract for such enterprise, or in relation to administrative measures against such enterprise (the scope of prohibited acts differs depending on the position the public officer had at the time of office) to the division within the government agency where said public officer had held a position while he or she served as a public officer. The prohibition period after departure from public office is unlimited with respect to the execution of contracts and administrative measures that said former public officer himself or herself handled, and is two years with respect to other cases.

Getting a position at an enterprise immediately after leaving public office will lead to suspicion of a breach of the foregoing restrictions on communications. In practice, there is a cooling-off period of at least three months before assuming a position in the private sector after leaving office as public officer.

The above-mentioned restrictions also apply to public officers with fixed terms of office, and public officers hired on a public-private personnel exchange.

Further, in order to ensure transparency, public officers or former public officers must file notices with certain prescribed persons including the Minister of Defence in cases where:
(i) they promise, while in office, to assume a position in an enterprise after leaving office; and
(ii) after having held a managerial position in public office, they assume a position in an enterprise within two years after retirement (except where a notice in relation to item (i) has already been filed).

Certain information, contained in notices filed as above, is also made public.

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

There are no special restrictions related to bribery that specifically target government procurement. Such matters are generally covered under the offence of bribery under the Criminal Code. The main crimes under the Criminal Code regarding bribery and applicable to enterprises are the giving, offering or promising of bribes, as listed below:
- any bribe to a public officer in relation to the performance of his or her official duties;
- any bribe, upon request, to a potential public officer in relation to the performance of official duties for which he or she is expected to be responsible;
- any bribe, upon request from a public officer in relation to the performance of his or her official duties, to a person other than said public officer (who is not required to be a public officer);
- any bribe to a former public officer in relation to said former public officer having conducted an unlawful act or refraining from conducting a reasonable act upon request while in office; or
- any bribe to a public officer as a reward for said public officer arranging or having arranged for another public officer to conduct an unlawful act or refrain from conducting a reasonable act in the course of his or her duties upon request.

In the procurement of defence and security articles, the specifications thereof are generally very specific and there is no market price. In many cases, contracts are executed upon calculating an estimated price using cost accounting with a view to preventing overcharging by contractors. Contractual special clauses are generally required for cost accounting and management for the purpose of preventing overcharging by contractors, and cost audits are conducted. See question 16 for more details.

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

Any enterprise that has violated any of the restrictions or requirements stated above, or otherwise engaged in acts unfairly or in bad
faith, making false statements in tendering documents, performing a contract negligently without due care, or breaching a contract will be de-nominated from procurements for defence and security articles for a certain period (one month to three years depending on the degree of seriousness of the violation, and in the case of refusal to comply with system research, until the same resumes) (www.mod.go.jp/j/procurement/kadaikeikyujin/pdf/20130801_1.pdf). In addition, enterprises that have capital ties or personal relationships with an enterprise that was de-nominated may be barred from participation in open and selective tendering procedures for agreements for similar types of defence and security articles (www.mod.go.jp/j/procurement/chotatsu/naikyoku/tendering_procedures_for_agreements_for_similar_types_of_defence_and_security_articles.html).

Public officers are subject to the National Public Service Ethics Code in order to ensure public trust in the fairness with which public officers execute their duties. Pursuant to this Code:

- the following acts with interested parties (defined in the Code, including enterprises with which a public officer has executed, offered to execute or obviously intends to offer to execute a contract for defence and security articles in relation to which such public officer is involved in administering. Any interested parties to post that a public officer served within the past three years shall continue to be regarded as interested parties for at least three years after the transfer. In addition, where any interested party of a public officer contacts another public officer, such interested party will also be regarded as an interested party of the other public officer depending on the expectation of influence asserted by such interested party) and as such prohibited as a rule from:
  - receiving a gift of money, goods or real estate;
  - borrowing money;
  - receiving services free of charge;
  - receiving assignment of private equity;
  - receiving entertainment and paid dining;
  - going on a trip, playing golf and other entertainment (such as mahjong) together (including in the case of splitting the bill);
  - demanding any interested party have a third party conduct any of the above; and
- it is not prohibited to dine together if the public officer pays his or her own costs, but where the cost of their respective payments exceeds ¥10,000, notice needs to be filed with the Ethics Supervisory Officer, except in certain specific cases such as buffet parties.

Any public officer who has violated the foregoing is subject to disciplinary action. There are no provisions on sanctions that would be directly applicable on the interested party side.

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

There are none.

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

No.

Aviation

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

In August 2010, the Ministry of Defence finalised guidelines for the design of a system for conversion to civil use, and in 2011 put in place a system for companies wishing to conduct conversion to civil use. Up to now, technical documents for conversion to civil use of F7 engines loaded onto US-2 rescue flying-boats and P-3 fixed-wing patrol aircraft have been disclosed and published upon request from commercial enterprises, and the possibility of conversion to civil use of defence and security articles other than aircraft will be reviewed based on the intentions of the defence industry. The Ministry of Defence rarely procures aircraft configured for civilian use for conversion to military use, preferring instead to purchase equipment that has already been converted for military use.

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

Under the Aircraft Manufacturing Industry Act, airplanes and rotorcraft with a structure that people cannot board and with a gross weight of 150 kilograms or over are included in the definition of ‘aircraft’ subject to restrictions on the method of manufacturing and repair. Below are the primary restrictions:

- the manufacturing or repair (including modification) of aircraft is subject to a licensing system. Permission of the Minister of Economy, Trade and Industry is required for each plant;
- manufacturing or repair must be conducted by permitted business operators in a manner approved by the Minister of Economy, Trade and Industry, which must also be confirmed by an aircraft inspector; and
- permitted business operators may, as a rule, only deliver a manufactured or repaired aircraft to others along with a manufacturing confirmation document prepared by an aircraft inspector.

On 10 December 2015, the Ministry of Economy, Trade and Industry announced it would request manufacturers, importers and sellers of unmanned aircraft to make voluntary efforts to ascertain the owner of unmanned aircraft.

Miscellaneous

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

Labour and employment rules are domestic laws and as such do not apply unless a contractor has an office and employs employees in Japan. If an enterprise has an office and employs employees in Japan, it must pay Japanese labour insurance and employee pension insurance.

Having the proper labour insurance and employee pension insurance policies in place and not being delinquent in payment of premiums will generally be a requirement for qualification to participate in open and selective tendering procedures.

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

No.

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

Not applicable.

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

One trigger for disqualification from bidding is being a ‘juridical person or other organisation in which a designated organised crime group member serves as an officer thereof’ (see question 21). As a result, enterprise bidders are required to submit a pledge at the time of bidding, declaring that none of their ‘officers, etc’ belongs to an organised crime group.

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

There are no registrations or licensing requirements.

38 What environmental statutes or regulations must contractors comply with?

Green Purchasing Act

The Green Purchasing Act came into force in 2001. In the procurement process, the national government must endeavour to select ‘eco-friendly goods’ with low environmental impact (in particular recyclable resources; products that have low environmental impact based on the ability to reuse or recycle or through the use of raw materials or parts with low environmental impact; and services that have low environmental impact). In response to this, the Ministry of the Environment has established a basic policy applicable to all governmental agencies in respect of a wide variety of procurement items. The Ministry of Defence has also set its own corresponding procurement goals (www.mod.go.jp/j/procurement/chotatsu/buppin/kankyo2016.html).
Update and trends

The ATLA was established on 1 October 2015 as an extra-ministerial bureau of the Ministry of Defence. It is an outpost agency of the headquarters of defence and security facilities of the Ministry of Defence, and administers procurement. Individual procurement is conducted by land, sea and air defence forces respectively, but the cost management and project management is now centralised at the Acquisition, Technology and Logistics Agency.

On 31 August 2016, the ATLA published a strategic acquisition plan (www.mod.go.jp/atla/pinpup/pinpup280831.pdf) listing the 12 items below as defence and security articles requiring focused project management.

<table>
<thead>
<tr>
<th>Items</th>
<th>Acquisition policy</th>
<th>Life cycle cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>SM-3 Block IIA</td>
<td>Japan-US joint development.</td>
<td>¥172.1 billion</td>
</tr>
<tr>
<td>Standard Missile (SM) Block IIA</td>
<td>Japan will be in charge of production of components for which Japan was in charge of development.</td>
<td></td>
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<tr>
<td></td>
<td>To review a system that enables maintenance assembly within Japan.</td>
<td></td>
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<td></td>
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<td>2028</td>
</tr>
<tr>
<td>Mid-SAM (modified)</td>
<td>Domestic development.</td>
<td>¥415.3 billion</td>
</tr>
<tr>
<td>Type 03 Medium-Range Surface-to-Air Missile</td>
<td>To focus on maintenance and improvement of domestic production and technical platform.</td>
<td></td>
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<tr>
<td></td>
<td>(modified)</td>
<td>2048</td>
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<td></td>
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<tr>
<td>Global Hawk (unmanned surveillance aircraft)</td>
<td>Acquisition by way of import of foreign products (foreign military sales: FMS).</td>
<td>¥216.9 billion</td>
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<td></td>
<td>To strengthen the maintenance and development system.</td>
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<td>2038</td>
</tr>
<tr>
<td>Assault Amphibious Vehicle 7</td>
<td>To have 52 vehicles in place by 2018.</td>
<td>¥94.9 billion</td>
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<td></td>
<td>Procurement by way of general import.</td>
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<td></td>
<td>To implement renovation to conform to the Japanese specifications.</td>
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<td>2038</td>
</tr>
<tr>
<td>New destroyer with enhanced multi-mission capability, downsized and requiring fewer crew members</td>
<td>To take advantage of multiple domestic construction foundations.</td>
<td>TBA</td>
</tr>
<tr>
<td></td>
<td>To implement appropriate form management in order to secure the functions necessary while also reducing the size of the hull and reducing the crew requirements for the new destroyer.</td>
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<tr>
<td>JGSDF UH-X</td>
<td>To implement in parallel with the development of civil aircraft jointly implemented by a domestic enterprise and an overseas joint venture enterprise.</td>
<td>¥399.3 billion</td>
</tr>
<tr>
<td>UH-X helicopter for Ground Self-Defence Force</td>
<td>Development of the portion dedicated to the Ministry of Defence.</td>
<td></td>
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<td></td>
<td>To manufacture production models at a domestic manufacturing base.</td>
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<td>2058</td>
</tr>
<tr>
<td>Osprey (tiltrotor aircraft)</td>
<td>Acquisition by way of FMS.</td>
<td>¥708.9 billion</td>
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<td></td>
<td>Renovation to conform to JGSDF specifications.</td>
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<td>2058</td>
</tr>
<tr>
<td>SH-60K helicopter with enhanced capability</td>
<td>Domestic development, manufacturing of airframes.</td>
<td>¥3,002 billion</td>
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<tr>
<td></td>
<td>For research and development of defence and security articles, on board, utilising domestic technical platforms in particular.</td>
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<td></td>
<td>For logistical support, to secure, in particular, a base in Japan.</td>
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<td>2058</td>
</tr>
<tr>
<td>P-1 (maritime patrol aircraft)</td>
<td>Domestic manufacturing of airframes.</td>
<td>¥2,218.2 billion</td>
</tr>
<tr>
<td></td>
<td>For research and development of defence and security articles, on board, utilising domestic technical platforms in particular.</td>
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<td></td>
<td>For logistical support, to secure, in particular, a base in Japan.</td>
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<td>2048</td>
</tr>
<tr>
<td>C-2 (transport aircraft)</td>
<td>Acquisition by way of development.</td>
<td>¥1,932.6 billion</td>
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<td></td>
<td>To manufacture airframes by domestic manufacturing companies, and to procure engines by way of general import.</td>
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<td>2048</td>
</tr>
<tr>
<td>F-35A</td>
<td>Acquisition of airframes after a domestic enterprise participates in manufacturing (excluding four acquired in 2012.</td>
<td>¥2,218.7 billion</td>
</tr>
<tr>
<td></td>
<td>Acquisition by way of FMS.</td>
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<td>2048</td>
</tr>
<tr>
<td>Next generation fighter replacing F-2 (under consideration)</td>
<td>Including a possibility of international joint development, to promote a strategic review including empirical research.</td>
<td>TBA</td>
</tr>
<tr>
<td></td>
<td>To implement review of the purpose of taking necessary measures such as decision on development by 2018.</td>
<td></td>
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<tr>
<td></td>
<td>To seek the best choices for Japan in respect of the choice of method of acquisition (domestic development, international joint development, import or domestic production under licence).</td>
<td>TBA</td>
</tr>
</tbody>
</table>

Green Contract Act


Moving forward further than the Green Purchasing Act, the Green Contract Act requires the national government to endeavour to promote procurement contracts with serious consideration for the reduction of greenhouse gas emissions, etc. In response thereto, the Cabinet has established a basic policy that covers six types of contracts:
• the purchase of electricity;
• the purchase and lease of automobiles;
• the procurement of vessels;
• the design of governmental building renovations that include a guaranteed reduction in the cost of electricity and fuel, etc, by operation of governmental buildings that is greater than the renovation cost;
• other building designs; and
• industry waste disposal.

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

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

As mentioned in question 38, for the six types of contracts covered by the Green Contract Act, requirements for specific fuel consumption and other environmental performance may be provided in the specifications for bidding. In such cases, enterprises must submit bids that meet such requirements. Evaluation will be conducted by the ATLA, which is the agency managing procurement.

40 Do ‘green’ solutions have an advantage in procurements?

Nothing other than that which is specified in question 38.
Korea

Wonil Kim, Sang-Hyun Ahn, Jin Kee Jung and Sung Duk Kim
Yoon & Yang LLC

Legal framework

1 What statutes or regulations govern procurement of defence and security articles?
The primary legislation governing defence and security procurements in Korea is the Defense Acquisition Program Act (DAP Act). The statute is further implemented by the Enforcement Decree and Enforcement Rules thereof. For matters not stipulated in the DAP Act, the Act on Contracts to Which the State is a Party (ACSP) generally applies along with the Enforcement Decree and Enforcement Rules thereof.

The Defense Acquisition Program Administration (DAPA), an executive agency of the Ministry of National Defence (MND), has detailed administrative rules, such as the Defense Acquisition Program Management Regulation (DAPMR), the Overseas Procurement Eligibility Criteria, the Weapon System Proposal Evaluation Criteria, and the Guidelines for Weapon System Procurement Program Proposal and Model Selection.

2 How are defence and security procurements identified as such and are they treated differently from civil procurements?
Among the articles owned and controlled by the government, the items managed by the MND and its agencies, the joint chiefs of staff or the army, navy and air force are defined as defence articles. Defence articles are divided into:
- weapon systems (ie, all weapons to exert combat power, including guided missiles, aircraft and naval ships, along with equipment, parts, facilities, software and other items necessary to operate such weapons); and
- support systems (ie, equipment, parts, facilities, software and items other than those of weapon systems).

In principle, defence articles are procured by the DAPA. However, under the DAP Act, if it is efficient for the army, navy or air force to directly procure defence articles (eg, items with an annual procurement amount of less than 30 million won), such procurements can be carried out by each armed force. If the manufacturing and supply characteristics of a defence article are the same as those of a commercial product, and the item meets certain requirements (eg, value of more than 50 million won), the procurement of such item may be delegated to the Public Procurement Service, an executive agency under the Ministry of Strategy and Finance.

3 How are defence and security procurements typically conducted?
Defence and security procurements are generally conducted to improve defence capacities or to manage military forces. Procurements for the improvement of defence capacity involve purchase, new development, performance improvement and R&D of weapons, coupled with installation of accompanying facilities, to improve military capacities. Procurements for the effective management of military forces relate to the normal operations of the army, navy and air force.

Procurements for the improvement of defence capacities are carried out through the following procedures:
- requests from each armed force;
- decision of the joint chiefs of staff; and
- prior research;
- establishment of project strategy;
- adjustment to reflect the Mid-Term National Defense Plan;
- budgeting;
- bidding announcement; and
- contract conclusion.

On the other hand, procurements for the management of military forces are conducted by the DAPA upon the request for specific items made by each armed force in compliance with the Procurement Planning Guidelines issued by the MND.

4 Are there significant proposals pending to change the defence and security procurement process?
Significant proposals pending in the National Assembly that might affect the defence and security procurement process, include the following:
- The establishment of a National Defence Industry Development Institute has been proposed, to support the development of defence science and technology by promoting cooperation and exchange between defence technology and technology for the private sector.
- An amendment bill proposes that private companies should be allowed to make extensive use of test evaluation facilities and information from the Agency for Defence Development.
- It has been proposed that defence contractor designation should be cancelled if the defence contractor fails to ensure sufficient supply or to provide quality assurance due to a low localisation rate.
- An amendment bill has proposed that non-defence companies should also be eligible for loans from the Defense Industry Promotion Fund if they research and develop weapon systems.

5 Are there different or additional procurement rules for information technology versus non-IT goods and services?
As software that supports and operates a weapon system is inseparable from the main equipment (or hardware), it is generally required to be integrated into the main equipment (embedded software) or as a separate item (supporting software) through the procedures as discussed in question 3.

As heightened security and interoperability are required for IT goods and services compared with non-IT goods and services, a more rigorous process applies when verifying the reliability of procurements of IT goods and services.

6 Are most defence and security procurements conducted in accordance with the Agreement on Government Procurement (GPA) or other treaty-based procurement rules, or does this jurisdiction commonly use the national security exemption to procure them?
Korea is a party to the Government Procurement Agreement (GPA) within the framework of the World Trade Organization. However, the GPA does not apply when it is necessary to protect significant national security interests in connection with defence procurements. As a general principle, defence articles manufactured domestically have preference over those manufactured overseas. Only those articles that are not domestically available can be purchased overseas by the government.
Korea has also entered into free trade agreements with ASEAN, Australia, Canada, Chile, China, Colombia, EFTA, the EU, India, New Zealand, Peru, Singapore, Turkey, the United States and Vietnam. Government procurement provisions included in those free trade agreements also carve out an exception, which applies where necessary to safeguard significant security interests in connection with defence procurements.

Disputes and risk allocation

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

Disputes between the government and a defence contractor over bidding or contract-related issues involved in defence and security procurements, such as bidding procedures, bidding outcomes or delay penalties, are settled through civil litigation.

In addition, in the case of defence and security procurements of more than a certain amount (7 billion won for a construction contract; 150 million won for a commodity contract; and 150 million won for a service contract), disputes between the government and a defence contractor may also be settled through the appeal process under the ACSF or through the mediation process by the State Contract Dispute Mediation Committee. A defence contractor may directly file a lawsuit in court without exhausting dispute resolution processes outside the court system. Alternative dispute resolution processes are not frequently used in practice.

On the other hand, if a defence contractor has committed unfair bidding, misstatement of cost or breach of contract, the government (ie, the DAPA in the case of a contract administered by the DAPA, and the MND in the case of a contract administered by the national defence authorities) may restrict the defence contractor’s eligibility to participate in bidding for a certain period of time. Disputes over such restrictions are resolved by administrative appeal or administrative litigation.

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

The DAPA resolves disputes related to procurements of weapon systems through litigation or arbitration. In the case of domestic procurements, the parties generally stipulate in their contract to resolve disputes through litigation. In the case of overseas procurements, it is common to resolve disputes through arbitration. However, in some cases, disputes related to overseas procurements may also be stipulated to be resolved through litigation in Korea.

The arbitration clause included in the DAPA’s general terms and conditions stipulates that disputes shall be finally settled by arbitration conducted in Seoul, Korea in accordance with the Commercial Arbitration Rules of the Korean Commercial Arbitration Board. The arbitration clause may be modified depending on negotiations between the DAPA and the contractor.

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

There is no particular limitation on the scope of the government’s liability toward a defence contractor. Accordingly, where the government breaches the defence procurement contract, it shall be responsible for damages caused to the contractor in the same way as ordinary contracts – provided that a special clause about damages of delayed payment is included in the defence procurement contract to stipulate that the damages shall be calculated by multiplying the number of days of delay by the average lending rate of financial institutions for the given month.

On the other hand, if the contractor fails to perform the contract, they shall be liable to the government in accordance with general legal principles, unless otherwise specifically provided in the contract.

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

As a general principle, government contracts must be entered into in compliance with all relevant laws and regulations, and contracting officers generally have very little discretion in executing contracts. In other words, contracting officers are restricted from arbitrarily limiting the contractor’s liability under the contract.

On the other hand, the DAPA’s general terms and conditions for overseas procurements partially mitigate the liability of the contractor by limiting the total amount of delay penalty to 10 per cent of the contract price. In addition, depending on negotiations with the contractor, the government may further agree to limit the scope of product liability claims as suggested by the contractor.

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

There is little risk that the Korean government may fail to perform payment obligations under procurement contracts. A weapon system is not procured without first securing a budget and the Korean government is responsible for executing payment obligations under government procurement contracts from the single national treasury, even if they are signed by an individual government agency such as the DAPA. The Korean government maintains a sound level of reserves to perform such payment obligations.

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

A parent guarantee is not required in a government procurement contract. The contractor is directly required to pay a performance bond to cover the risk of potential damages at each stage of the conclusion and performance of the contract. In particular, in the case of overseas procurements, the government demands a performance bond of at least 10 per cent of the contract value within 30 days after opening a letter of credit or within a period specified in the contract. The performance bond must be paid in cash or by an irrevocable standby letter of credit. If the contractor fails to pay the performance bond within a specified period without justifiable grounds, the DAPA reviews and determines whether the contract must be terminated. Bond deposits are attributable to the Treasury when the contractor does not fulfill its contractual obligations.

Defence procurement law fundamentals

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?

A contracting officer is statutorily required to ensure that a procurement contract expressly states the purpose of the contract, contract price, contract period, performance bond, risks and delay penalty. A contracting officer is also required to execute a procurement contract by signing it. The DAPA or a contracting officer executes a procurement contract using the general terms and conditions, and the contract form, as prescribed by administrative rules in advance.

In addition, the DAPA’s general terms and conditions for overseas procurements stipulate that the contract is governed by the laws of Korea in terms of its formation, validity and performance and that the provisions of the contract shall not be interpreted against the ACSF.

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

Cost allocation varies depending on negotiations between the parties, but as a common practice, the contractor is responsible for the cost of contract execution. The DAPA’s general terms and conditions provide that the contractor shall:

- bear administrative costs, bank charges, and other related expenses (such as postal charges) incurred while fulfilling contractual obligations;
- obtain the government approval required for export of contract articles at its own risk and expense; and
- deliver contract articles at its own risk and expense.

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

In general, in the case of a weapon system procurement contract, in its proposal request the DAPA requires data on the total price, sub-system price, part prices and cost factors, contract price conversion, detailed
How are audits of defence and security procurements conducted in this jurisdiction?

The Board of Audit and Inspection has a special audit department, which frequently or periodically conducts audits of the DAPA and each armed force concerning defence and security procurements. In addition, the DAPA’s special inspector general for defence acquisition examines each stage of the procurement projects. The auditor’s office or ombudsmans of the DAPA, established pursuant to the DAP Act, also conduct inspections and audits of misconducts or complaints related to defence and security procurements.

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

In the case of a weapon system procurement contract, in principle, the seller retains the intellectual property rights in the same manner as contracts for the purchase of general goods. However, technology may be transferred to the government through a defence offset agreement. In such cases, the relevant technology, equipment and tools must be provided to the government free of charge, and the government retains the ownership or licence of the technology, equipment and tools.

On the other hand, licensing agreements may be concluded with respect to intellectual property rights. Terms of such agreements vary from case to case. In some cases, the government retains the right to improve technical data and software provided by the contractor within the scope of the purpose of the contract.

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

The Korean government has designated a free trade zone or a free economic zone, and grants benefits such as tax reduction and financial support to foreign-invested enterprises residing in such zones. However, very few foreign defence contractors have moved into free trade zones or free economic zones in Korea.

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

There are five types of company recognised by Korean laws: partnership companies, limited partnership companies, limited liability companies, stock companies and limited companies. Most of the companies established in Korea are corporations. There are two ways of incorporation: promotion and subscription. In either way, the promoter who intends to incorporate a company prepares the company’s articles of incorporation. The promoter may acquire the entire shares by paying the full par value (incorporation by promotion), or acquire part of the shares, allowed other shareholders to subscribe the remaining shares (incorporation by subscription). Thereafter, the shareholders’ general meeting and the board meeting are held, incorporation of the company is registered and registration tax and other taxes are paid. The incorporation process is complete once the company is registered with the local tax office.

In the case of incorporation of a company by a foreigner, foreign investment notification is required before the registration of incorporation and the company needs to be registered as a foreign-invested enterprise after the registration of incorporation. Other than that, the procedures of establishing a company by a foreigner are identical to those by a Korean citizen. The notification applies when a foreign investor and a domestic investor form a joint venture.

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

Documents related to government contracts are archived or disclosed as prescribed under the Public Records Management Act and the ACSP.

The DAPA prepares records of all progress and actions taken in each defence procurement project from the time of filing the request to the end of the project, and maintains and uses such records by inputting them, with the exception of confidential documents, into the integrated project management information system. Such records, which include all documents relating to the contract, negotiations between the DAPA and the contractor and selection of the model, are kept permanently.

Through the Defense E-Procurement System, the DAPA discloses such records as prescribed by the ACSP, including records of bidding announcements, bidding progress and results of successful bidder decisions. The contractor can view or obtain copies of records of its own contract through the Defense E-Procurement System, but cannot access other companies’ contracts (past or current).

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

The DAPA requires the companies that intend to participate in the bidding for procurements to register as procurement contractors in compliance with registration requirements (eg, registration in the Defense E-Procurement System, business licence, etc) under the Guidelines on Procurement Contractor Registration Information Management. The DAPA also manages suppliers and supply chains through an integrated management system.

In general, the government screens for counterfeiters by identifying the original manufacturer’s certification documents at the stage of delivery inspection or, if in doubt, confirming the documents related to the import and export in cooperation with the Korea Customs Service.

In the case of domestic contracts, an integrated test report management system has been implemented to prevent tampering with test reports, while requiring the contractor to check the authenticity of the test report on the quality of the parts supplied by the sub-contractor.

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

The DAPA is the agency responsible for administering the export of defence and security articles. In order to export defence and security articles, the exporter must file a report with the DAPA as a defence article exporter or agent, and obtain approval of each export transaction from the DAPA.

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

In defence and security procurements, the DAPA has an obligation to apply domestic preferences to defence and security articles manufactured domestically. Procurement of foreign articles is only allowed in exceptional cases where domestic articles are not available. Accordingly, if there are domestic defence articles with the same performance and price as foreign articles, the DAPA must purchase domestic articles over foreign ones. However, procurement of certain defence articles with low relevance to the national security interests can be carried out through international bidding, and foreign contractors can bid directly on such procurements.

Are certain treaty partners treated more favourably?

In principle, the Korean government does not treat any country more favourably in the purchase of defence and security articles from foreign contractors. The government has concluded treaties to cooperate with various countries concerning the defence industry. It is not bound by any treaty to apply preference to weapons of a specific country.

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

According to the resolution of the United Nations Security Council, the Korean government does not engage in any defence transactions with North Korea concerning the defence industry or other related industries. It also bans the export of weapons to countries subject to arms embargo under international treaties, or countries threatening international peace and security such as those assisting in international trade.
26 Are defence trade offsets part of this country’s defence and security procurement regime? How are they administered?

The Korean government promotes defence trade offsets when purchasing defence articles of more than US$10 million from overseas. However, defence trade offsets may not be used in certain circumstances. For example, they are not used:

- when the government purchases repair parts, key parts for use in R&D for the development of core weapon systems in Korea or basic raw materials such as oil; and
- when the government procures defence articles through a contract with a foreign government.

Defence trade offsets must:

- secure the technology necessary for defence improvement projects;
- secure logistics support capability for weapon systems to be procured;
- allow the Korean government to participate in the development and production of weapon systems;
- enable the Korean government to facilitate the export of domestic defence articles to foreign countries; or
- secure maintenance of the weapon systems of the contracting partner.

It must also meet at least a certain percentage of the main contract amount. (Offset Program Guidelines can be found at www.dapa.go.kr/mbshome/mbs/dapa_eng/index.jsp)

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

The Public Service Ethics Act restricts former government employees from taking up appointment in the private sector under certain circumstances. For example, the president, prime minister, cabinet members, members of the National Assembly, head of each local government, public officials of Grade 4 or higher, and officers over colonel or civil employees equivalent thereto may not take up employment, for three years following the termination of their public services, with a commercial private company of a certain size or above that is closely related to the work of the organisation or department to which they have belonged for five years.

In contrast, there is no specific regulation that restricts persons in the private sector from taking up appointments in the government.

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

The Criminal Code, together with the Act on the Aggravated Punishment of Specific Crimes and the Act on the Aggravated Punishment of Specific Economic Crimes, punishes corruption of public officials, including:

- the act of abusing their position or authority or violating laws for benefits of themselves or any third party in connection with their duties;
- the act of causing damages to public institutions in using public budgets, or in acquiring, managing or disposing of public property, or in concluding and performing a contract to which a public institution is a party, in violation of laws and regulations; and
- the act of forcing, recommending, suggesting or inducing the execution or concealment of any of the aforementioned acts.

In addition, any person who offers, or promises to offer, or indicates willingness to offer, bribery to foreign officials in connection with their duties for the purpose of obtaining improper profits in international business transactions will be punished by imprisonment or fines under the Act on Combating Bribery of Foreign Officials in International Business Transactions.

Furthermore, the Improper Solicitation and Graft Act (commonly called the Kim Young-ran Act), which was enacted in 2016, punishes public officials who demand, accept or promise to accept anything of value of 1 million won (per single occasion) or 3 million won (per year), regardless of whether it is connected with their duties.

As another measure to prevent corruption, defence contractors are required to submit integrity pledges and then fully comply with them. Defence contractors, companies or research institutions that breach integrity pledges may be restricted in their eligibility to participate in bidding for up to two years.

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

Except for lawyers, no one is allowed to lobby the government, public institutions or public officials on behalf of others for commercial purposes. The act of lobbying is interpreted as a lawyer’s job, and there is no separate lobbyist registration system.

However, a defence trade agent (ie, a person who intends to act as an intermediary or agent for a foreign company in the process of concluding and performing a contract between the foreign company and the DAPA) must be registered with the DAPA in advance.

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

As a general rule, a foreign contractor is required to deal directly with the DAPA rather than through a defence trade agent in the procurement of more than US$2 million. However, when a foreign company inevitably needs to use a defence trade agent, it is commonly allowed to use one as long as there is no special issue.

As discussed above, a defence trade agent must register with the DAPA in advance. Acting as a defence trade agent without registration will lead to punishment.

Those who have been sentenced to imprisonment without forced labour, and where five years have not passed from the date when the execution of sentence was completed (or deemed to be completed), are not eligible to register as defence trade agents. For registration as a defence trade agent, a registration application must be filed with the DAPA accompanied by:

- resumes of the representative and officers;
- employment information such as numbers and names of total employees and employees related to the defence industry;
- an integrity pledge; and
- a security pledge.

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

In connection with defence procurement programmes, the Korean government is pursuing not only the enhancement of military capability but also the promotion of defence science and technology as well as the overall development of the defence industry and other related industries. Accordingly, the government encourages the spin on, spin off and dual use of civilian–military combined technologies by strengthening R&D through technical cooperation between the military and civilian sectors, and expanding civilian–military mutual technology transfer through the standardisation of specifications.

The government may apply preference to the purchase of defence articles developed by civilian–military technical cooperation projects, and the procurement contract may proceed on a negotiated contract basis instead of competitive bidding. In the case of transferring defence technology to the private sector, the head of the central administrative
agency concerned classifies technologies as military and non-military, prepares a list of technologies that can be mutually transferred, chooses technology transfer projects and makes relevant technologies available to the private sector.

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

The Aviation Act governs the safe navigation of aircraft in accordance with the standards and methods adopted by the Convention on International Civil Aviation and Annexes thereto. The unmanned aircraft system is regulated as a type of aviation.

The manufacture and sale of unmanned aircraft are not prohibited or restricted, but the design, manufacture and maintenance of their physical frames are regulated through the certification or airworthiness that applies to aircraft in general. If the weight of the aircraft (excluding that of the fuel) is in the range of 12kg to 150kg, pilot certificate, owner notification and display of the notification number will be required. Aircraft with a weight of less than 12kg will not be subject to such requirements.

Unmanned aircraft or unmanned rotating wing aircraft of less than 25kg, and unmanned airships with a weight of less than 12kg (excluding that of the fuel) and a length of less than 7 meters are allowed to fly at altitudes less than the minimum flight altitude (150 metres) in an area that is not a controlled zone or non-fly zone without further permission. Even so, it is prohibited to fly such aircraft in densely populated areas. Military unmanned aircrafts are required to obtain airworthiness certification conducted by the DAPA or the armed forces under the Military Aircraft Airworthiness Certification Act.

Miscellaneous

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

The parties to the employment agreement may choose the governing law of the agreement. However, despite the parties’ choice of governing law, the employee shall not be deprived of the rights and protections that the employee is entitled to under mandatory laws of the country where the employee routinely provides services. For instance, a Korean employee will be entitled to the rights and protections under Korean labour laws, even if the governing law of the employment agreement is determined to be the laws of a foreign jurisdiction that may not recognise the same rights and protections as provided by Korean labour laws.

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

The DAP Act prescribes domestic procurement procedures and overseas procurement procedures. The details are further expanded upon in the DAPMR. The DAPA has established standardised special terms and conditions to be used in the case of domestic procurements. Unless there is a special reason, domestic procurement contracts are generally entered into using such terms and conditions. The DAPA has also established general terms and conditions for foreign procurements, and negotiates with foreign contractors based on such terms and conditions.

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

Procurement contracts between the Korean government and a foreign contractor must comply with the provisions concerning conclusion of procurement contracts under the DAP Act, the ACS and other relevant legislation. These laws will apply even where the contractor performs work exclusively outside of Korea.

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?

In order to participate directly in the procurement bidding, the contractor must register as an overseas source in the Defense E-Procurement System. For the registration, a registration application, notarised security pledge and business registration certificate must be submitted. In the case of the registration of a domestic branch or domestic defence trade agent of a foreign company, they must submit a domestic business registration certificate, corporate registry, security measurement results, integrity pledge and an agency agreement signed by the foreign company. Personal information of directors, officers or employees of the contractor is not required, and there is no particular qualification that they are required to satisfy. However, when a civilian (regardless of their nationality) needs to enter the DAPA or a military unit in connection with the execution of a defence procurement contract for more than one month, he or she may be required to provide personal information for a background check.

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

To register as an overseas source, a foreign company must apply for registration in the Defense E-Procurement System. The application includes a notarised security pledge, business licence or business registration certification in the foreign jurisdiction, manufacturer’s certificate or supplier’s certificate to confirm the type of industry, and employment certificate of the signatory of the procurement contract. Upon the submission of all those required documents, the registration certificate will be issued to the foreign company, and will become eligible to participate in procurement bidding in Korea.

On the other hand, for a Korean branch or defence trade agent of a foreign company to participate in procurement bidding, they must:

• register in the Korean Comprehensive E-Procurement System their eligibility to particulate in competitive bidding;
• register with the Defense E-Procurement System;
• obtain security qualification from the Defense Security Command; and
• submit a document proving the relationship between the foreign company and its domestic branch or domestic defence trade agent.
38 What environmental statutes or regulations must contractors comply with?

Contractors operating within the territory of Korea must comply with obligations as prescribed by environmental laws and regulations of Korea in connection with their business activities, regardless of whether they are domestic or foreign entities. Korean environmental laws include the Framework Act on Environmental Policy, the Natural Environment Conservation Act, the Environmental Health Act, the Clean Air Conservation Act, the Soil Environment Conservation Act, the Marine Environment Management Act, the Occupational Safety and Health Act, the Chemicals Control Act, the Nuclear Safety Act, the Water Quality and Aquatic Ecosystem Conservation Act, the Malodour Prevention Act, the Environmental Impact Assessment Act and the Environmental Dispute Adjustment Act.

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

Companies exporting products to Korea or operating within the territory of Korea must comply with environmental standards as prescribed by the Korean government, and may be subject to criminal penalties if they fail to comply with the standards. Environmental standards are established mostly by the Ministry of Environment (ME) in accordance with the aforementioned environmental laws. The ME has the authority to investigate whether a company has complied with environmental standards, and may file a criminal complaint with the prosecutor based on the results of the investigation.

The Ministry of Oceans and Fisheries has the authority to investigate and deal with pollution of the marine environment.

In addition, in the case of regulations on hazardous substances that affect not only the environment but also the working environment of employees, the Ministry of Employment and Labour determines risk standards.

40 Do ‘green’ solutions have an advantage in procurements?

The Act on the Promotion of Purchase of Green Products provides that the national government, government entities, local governments and public institutions must purchase products with greenhouse gas reduction technology, efficient energy utilisation technology, clean energy technology, and technology to minimise pollutant emission as long as such products are available. In addition, the Environmental Technology and Industry Support Act requires the ME to certify eco-friendly products or to get them certified by the Minister of Trade, Industry and Energy as products that conserve resources or promote recycling so that the government may purchase such products. Furthermore, in the case of domestic procurements, the eligibility to participate in bidding can be further restricted based on whether the defence article to be procured has been certified by an environment friendly product or environment technology by the ME.
Norway

Christian Bendiksen and Alexander Mollan
Brækhus Advokatfirma DA

Legal framework

1 What statutes or regulations govern procurement of defence and security articles?
The following acts and regulations govern the procurement of defence and security articles within Norway:
- Public Procurement Act No. 75 of 17 June 2016; and
- Regulation No. 974 of 12 August 2016 on Public Procurement (RPP).

The above constitute the general legislation on civil public procurement. They apply to procurement by the armed forces or the Ministry of Defence unless the category of procurement is exempt under the Regulation on Defence and Security Procurement or article 123 of the European Economic Area (EEA) Agreement.

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

Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 (DAR)
Parts I and II of DAR apply to all defence-related procurement. Part III applies to defence procurement under the Public Procurement Act and Regulation. Part IV applies to procurement under FOSA. Part V applies to procurement that is entirely exempt from the procurement regulations under EEA article 123.

These regulations are internal instructions for the Ministry of Defence and its agencies (see DAR section 1-2). They do not provide any rights to third parties and a breach of the rules thus cannot be relied on in court by a dissatisfied contractor.

Regulation No. 753 of 1 July 2001 on Classified Procurement
This regulation applies where the procurement procedure requires a security classification.

2 How are defence and security procurements identified as such and are they treated differently from civil procurements?
Section 1-3 paragraph 1 of FOSA defines defence and security procurements in accordance with article 2 of EU Directive 2009/81/EC.

The procedures vary according to the nature of the goods and services to be procured. If the goods are not classified, ordinary civil procurement law applies. Where the goods or services are highly sensitive and the requirements or specifications are classified, the entire procurement procedure may be exempt from ordinary procurement rules under EEA article 123. In that case, only DAR Part V applies, and the Ministry of Defence will also generally require offset agreements.

3 How are defence and security procurements typically conducted?
DAR section 7-3 requires the procuring authority to assess the nature of the procurement, and to assess which set of regulations applies.

All defence procurement must be based on a formal market study, which forms the basis for a needs assessment with realistic requirements for material and services (DAR section 7-1, cf 6-1). As a main rule, all contracts are subject to competitive bidding and published on Doffin, the Norwegian national notification database for public procurement.

The procuring authority may select the procuring procedure, with due care shown to the need for competition and national security interests. Outside the RPP and FOSA, there is no requirement for prior publication of a contract notice. Depending on certain circumstances related to EEA threshold values and the type of procurement, the procuring authority may choose to conduct the procurement without competition through single-source procurement, to engage in selective bidding, competitive dialogue or a negotiated procedure with or without prior publication of a contract notice.

Use of competitive dialogue or a negotiating procedure without prior publication of a contract notice is contingent on the fulfilment of the conditions in FOSA sections 5-2 or 5-3 respectively.

The procuring authority will evaluate offers, and then decide whether to accept an offer. Normally, the procuring authority imposes a grace period between the decision and the contract-signing to allow for any complaints concerning the procurement from competing contractors (see FOSA Chapter 14).

4 Are there significant proposals pending to change the defence and security procurement process?
No.

5 Are there different or additional procurement rules for information technology versus non-IT goods and services?
No, but certain forms of command and control systems and components technology, including software, may be liable for offset purchases as Norway prioritises such technology under offset obligations in EEA article 123.

6 Are most defence and security procurements conducted in accordance with the Agreement on Government Procurement (GPA) or other treaty-based procurement rules, or does this jurisdiction commonly use the national security exemption to procure them?
Both the EU and Norway are members of the World Trade Organization, and are consequently parties to the Agreement on Government Procurement (GPA). Directive 2009/81/EC does not govern arms trade with third countries – this continues to be governed by the GPA.

Norway does use a national security exemption on occasion (see EEA article 123). For further clarification, see question 23.

Disputes and risk allocation

7 How are disputes between the government and defence contractor resolved?
DAR section 9-10 prescribes that the procuring authority requires contracts in the defence and security sector to dictate that the ordinary courts shall settle any dispute, with Oslo District Court as the governing venue. See question 8 on dispute resolution under the armed forces standard procurement contract.
8 To what extent is alternative dispute resolution used to resolve conflicts? What is typical for this jurisdiction?

Generally, disputes are resolved through negotiation, and if this is unsuccessful, through the Oslo District Court (see Armed Forces of Norway Form 5052 – General Purchase Conditions section 13). These conditions are used in small and medium-sized contracts, whereas larger contracts may require supplementary or alternative contracts and terms. Normally, larger contracts are based on the same contract principles and conditions that are used in Form 5052.

Arbitration is rarely used in Norwegian defence contracts.

Although the relationship between a prime contractor and a subcontractor is usually considered an internal matter, the procuring authority may, in certain circumstances such as classified information disclosure, require that the contractor include clauses on conflict resolution equivalent or similar to those as stipulated in DAR.

DAR section 9-10 allows for deviations, such as accepting another country’s jurisdiction or laws, if the contract involves international aspects and the deviation is necessary due to the nature of the negotiations and the safeguarding of Norwegian interests. Whether or not to deviate is a matter of a case-by-case assessment and, in general, a foreign contractor ought not to rely on a requirement to apply national laws when negotiating with the Norwegian government.

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

The procuring authority is entitled to compensation for direct losses caused by delay or defect (see Armed Forces of Norway Form 5052 sections 6.6 and 7.7). The contractor will also be liable for indirect losses caused by his or her negligence. In larger contracts, the procuring authority may accept a limit on the contractor’s liability for direct or indirect losses.

Form 5052 section 10.1 provides that the procuring authority must indemnify the contractor from any claim due to the use of drawings, specifications or licences provided by the procuring authority. The contractor must, in turn, indemnify the procuring authority from any claim due to patent infringement or other immaterial rights related to the completion of the agreement.

In accordance with Armed Forces of Norway Form 5053 – General Terms for Cost Control, the following costs are considered unallowable should they incur in any contract:

- penalties;
- fines and compensatory damages; or
- costs and legal fees for legal action, or preparation of such.

Furthermore, the standard procurement contract states that, in the event of default, the Armed Forces shall pay interest in accordance with Act No. 100 of 17 December 1976 Relating to Interest on Overdue Payments etc (see Armed Forces of Norway Form 5052 section 5.2). As such, the maximum interest rate is currently set at 8 per cent.

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

If the procurement is time-sensitive or otherwise warrants it, the procuring authority must contractually require the contractor to pay liquidated damages upon failure to meet any deadlines (DAR section 26-4). Liquidated damages shall incur at 1,000th of the contract price per working day, related to the part of the delivery that is unusable due to the delay. Normally, the maximum liability shall be set at 10 per cent of the price for the same part.

The procuring authority may also exempt the contractor from liquidated damages or accept an extension of time in the implementation and execution of the procurement. If the waiver exceeds 500,000 Norwegian krone, the procuring authority must request prior approval from the Ministry of Defence (see DAR sections 5-5 and 5-9).

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

The Norwegian government budgets future procurements through a long-term strategy plan. The plan undergoes an update on an annual basis and is valid for a seven-year period. The current plan is available at:


The risk of non-payment for contractual obligations, excluding contract disputes, is non-existent as the procuring authority evaluates budgetary limits before entering into a contract.

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

The contractor must have financial strength that is proportionate with the financial risks entailed by the contract in question. If the procuring entity has doubts concerning the contractor’s financial ability, it may request adequate security of performance of the contract. The procuring authority calculates the need for security based on the perceived consequences for the defence sector, should the contractor incur financial problems.

In accordance with DAR section 18-6 paragraph 6, or section 36-2, such security could be in the form of a guarantee from a bank, financial institution or insurance company, or a parent guarantee. In the case of parent guarantees, the guarantee must be issued by the highest legal entity in the corporate group and reflect the contractor’s obligations under the contract.

In larger contracts, the use of a performance guarantee is usually the norm and the guarantee used is often that of a parent guarantee.

The main rule in Norwegian defence procurement is payment upon delivery or the achievement of milestones. Under certain circumstances, the procuring authority may pay the contractor prior to fulfilment. In such situations, the contractor shall provide a surety for payments due before delivery (see DAR section 23-7). The surety shall cover the full amount of any outstanding payment.

Defence procurement law fundamentals

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

The procuring authority must include a number of clauses in the contract, for example, clauses on termination, damages, transparency, warranties, etc. The exact wording and depth of such clauses fall under the discretion of the procuring authority.

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

The allocation of costs between the contractor and the government is dependent on the choice of the contract (see DAR section 26-9 paragraph 1). The procuring authority may use the following contract types concerning aspects of the delivery and costs:

- cost contracts: the contractor is only obliged to deliver the goods or services if they receive payment of the relevant costs under the contract (see DAR section 19-2 paragraph 2b); or
- price contracts: the contractor is obliged to deliver the goods or services at an agreed price, regardless of the actual costs incurred (see DAR section 19-2 paragraph 2a).

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

The procuring authority will list the contractor’s completion of the Armed Forces of Norway Form 5351 – Specification of Pricing Proposal as a qualification criterion where a cost analysis is required. For further information, see question 16.

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

Normally, the procuring authority shall request the right to review the contractor’s accounting, in order to monitor their performance under the contract (see DAR section 27-2 paragraph 1). Additionally, the procuring authority shall contractually require the contractor to supply specific information in a number of circumstances; for instance, where cost controls are required, where there is suspicion of economic irregularities or where the contractor is foreign. The procuring authority may also demand that the contractor include contract
clauses with subcontractors belonging to the same company group as the contractor, or in whom the contractor has a controlling interest, or vice versa, allowing the procuring authority equivalent rights to information and to audit (see DAR section 27-4).

If the procurement has uncertain price calculations, or if the procuring authority conducts the procurement without competition, the procuring authority shall perform a cost control of the contractor’s offer regardless of contract type, both before work commencement and during the fulfilment of the contract.

Additionally, cost control on accrued expenses and costs is required regardless of competition for all cost contracts (incidental, fixed or no compensation for general business risks, or cost sharing) as well as price contracts with limited risk compensation or incentive.

Lastly, the procuring authority shall perform cost control on procurement from a foreign sole contractor.

The procuring authority conducts the cost control in accordance with Armed Forces of Norway Form 5055 – General Terms for Cost Control.

Upon confirming the correctness of its costs in Armed Forces of Norway Form 5055 – Specification on Pricing Proposal, the contractor shall give the procuring authority the right to audit the costs in accordance with Form 5055.

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

DAR section 24-3 obliges the procuring authority to consider the legal opportunity, wholly or partly, to acquire the intellectual property rights covered by the contract, including any right of use.

The main rule, in accordance with DAR section 24-4, is that the procuring authority shall acquire a non-exclusive licence to the intellectual property rights, if this meets the needs of the armed forces and constitutes the most economically advantageous option. A non-exclusive licence shall include interface documentation and the rights of usage.

Under DAR section 24-5, the procuring authority shall acquire the intellectual property rights or an exclusive licence if this is considered necessary or appears to be the most economically advantageous option, or there are significant security considerations. If the procuring authority is unable to acquire a wholly exclusive licence, it shall consider whether to partly acquire the rights, or enter into both exclusive and non-exclusive licence agreements (see DAR section 24-6).

If Norway has financed the research and development of a deliverable, the procuring authority is obliged to enter into a royalty agreement with the contractor, normally requiring 5 per cent of the sale price (see DAR section 24-10).

DAR section 24-7 states that the procuring authority must ensure that a contract concerning intellectual property rights contains provisions concerning, among other things:

- the possibility for the procuring authority to make available documentation related to the intellectual property rights to the entire defence sector within Norway. This possibility shall also extend to other countries’ armed forces should it prove necessary; and
- a clause that in the event that the deliverable is not fully developed, produced, industrialised or commercialised, the defence sector receives the intellectual property rights necessary to recover their costs through a resale. The clause must stipulate that the transferred intellectual property rights may be subject to completion, development, production, industrialisation or commercialisation by another contractor, or resold to cover the defence sector’s share of the costs.

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

Not applicable.

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

Limited liability company

To form a limited liability company, the shareholders must compile and sign the following documentation:

- a memorandum of association;
- articles of association;
- confirmation from a bank, financial institution or auditor that the share capital has been paid. The share capital requirement for a limited liability company is 30,000 Norwegian krone, while public limited liability companies have a requirement of 1 million Norwegian krone; and
- a declaration of acceptance of assignment from an auditor, or minutes of a board meeting if the company has decided against using an auditor.

Following this process, the company registers in the Register of Business Enterprises with the documents enclosed. Registration may be done electronically and takes, in general, no more than one to five business days. Registration must be completed before the company commences commercial activities, and within three months after signing the memorandum of association at the latest.

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

Not applicable.

Partnerships

Norwegian law recognises three forms of partnerships: a general partnership with joint liability, general partnership with several (proportionate) liability and limited partnerships.

To form a partnership, the partners must sign and date a partnership agreement and register the partnership in the Register of Business Enterprises with the agreement enclosed, before the company commercially activates and within six months after signing the partnership agreement. The partnership’s headquarters must be located within Norway, though its partners do not need to be resident there.

Joint venture

It is usual to form a joint venture by establishing a separate company. While several forms of incorporation are available, the parties generally chose a limited liability company.

Another way to establish a joint venture is through a simple cooperation or joint venture agreement between the parties.

Norwegian-registered foreign enterprises (NUFs)

While Norway does not consider a NUF to be a separate legal entity, foreign companies frequently use them due to their practical nature.

When a foreign company wants to register a branch in Norway, said branch can register as an NUF. To form an NUF, or to conduct business within Norway in general, the foreign company must register in the Register of Business Enterprises. The foreign parent company is fully responsible for the activity of its branch due to the lack of recognition of its separate legal status.

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

Anyone seeking access to information from Norwegian ministries is entitled to request any unclassified information, including previous contracts, under the Freedom of Information Act. The responsible ministry receives any requests for information and performs a case-by-case review of whether to approve the request. This review also entails the assessment of whether to approve the request with or without redactions.

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

There are no general rules concerning counterfeit parts, though the contractor must certify that the deliverables conform in all aspects to the contract requirements (see the Armed Forces Form 3557 – Certificate of Conformity).

The procuring authority often requires materiel and deliveries to be accompanied by relevant certificates of quality and specifications, such as Allied Quality Assurance Publications, which also allows the procuring authority to conduct inspections at the contractors’ and subcontractors’ place of production. The procuring authority may also require a certificate of origin to ensure that the deliverable is not from an embargoed country, inter alia.
International trade rules

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

Export of certain defence-related goods, technology and services, or services related to trade or assistance concerning the sale of such deliverables, or the development of another country’s military capability, are conditional on acquiring a licence from the Ministry of Foreign Affairs in accordance with Regulation No. 718 of 19 June 2013 on the Export of Defence-related Products, Dual-use Items, Technology and Services, which only governs the export and import between Norway and other EEA countries.

The export of such products to the EEA is subject to general transfer licences covering specific product categories and recipients, global transfer licences covering specific defence-related product categories (and services) or recipients for a period of three years, and finally, individual transfer licences covering the export of a specific quantity or specific defence-related product to a recipient in one EEA state.

For countries other than those belonging to the EEA, the Ministry of Foreign Affairs distinguishes between the following categories:

- Group 1: the Nordic countries and members of NATO.
- Group 2: countries not belonging to Group 1 who the Ministry of Foreign Affairs have approved as recipients of arms.
- Group 3: countries not belonging to Group 1 or 2 and to whom Norway does not sell weapons or ammunition, but which can receive other goods as listed in Annex 1 of Regulation 2009/428/EC.
- Group 4: countries who are located in an area with war, the threat of war, civil war or general political instability that warrants the deterrence of export of defence-related goods and services or which the UN, EU or Organization for Security and Co-operation in Europe sanctions. As member of the UN, Norway is a state party to the UN Arms Trade Treaty.

For export to Groups 1-3 (above), the Ministry of Foreign Affairs may grant the following licences in accordance with their guidelines:

- Export licence: valid for one year and for a single export of goods.
- Service licence: valid for one year and for a single export of services.
- Technology transfer licence: valid for one year and for a single export of technology.
- Global export licence: valid for a maximum of three years and for one or several exports of one or several defence-related goods to one or several specific recipients outside of the EEA, within NATO or other countries of relations.
- Project licence: valid for one or several exports of defence-related goods, services or technology to one or several collaboration partners and/or subcontractors in conjunction with development projects where a state within Group 1 is the final end user.

For Group 4, an export licence valid for one single export may be granted in certain situations.

As a member state of the EEA, Norway also adheres to the Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, and has transposed its criteria listed in article 2 when assessing whether to grant a licence.

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

Norwegian defence procurement is generally not conducted with domestic preference, and the possibility of making direct bids will vary with each procurement procedure (see questions 1-3).

In accordance with FOSA article 3-2 and DAR’s preamble, all procurement shall as far as possible be based on competition, and the procuring authority shall not discriminate against a contractor due to nationality or local affiliation. DAR section 34-2 allows the procuring authority to conduct the procurement without competition in certain specific circumstances similar to the exemptions from competition under ordinary EEA procurement law.

Furthermore, Norway may deviate from Directive 2009/83/EC where the procurement has essential security interests and falls under EEA article 123, or warrants exception in accordance with the Regulation on Classified Procurement. Exemptions require approval from the Ministry of Defence.

The aforementioned exemptions may, under certain circumstances, result in the procuring authority allowing only Norwegian contractors to submit offers for the request of tender.

24 Are certain treaty partners treated more favourably?

Certain countries enjoy the benefit of bilateral security agreements, which eases the exchange and certification of contractors with regard to classified information related to procurements. Members of the EEA also have the advantage of a common transfer licence arrangement (see questions 22 and 37).

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

Norway enforces mandatory UN and EU arms embargoes and sanctions. Additionally, Norway enforces the embargo on Nagorno-Karabakh (Azerbaijan), through its membership in the Organization for Security and Co-operation in Europe.

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

Offset agreements are required in the procurement of defence and security articles from foreign contractors. This also includes contractors based in Norway if they produce essential parts of the delivery abroad. Exceptions to this rule are procurements that are:

- conducted in accordance with the RPP;
- conducted in accordance with FOSA, where the contractor (and most of its subcontractors) are located within the EEA. However, if the contractor is domiciled in the EEA but one of its subcontractors is not and the value of the subcontract exceeds 50 million Norwegian krone, said subcontractor shall be made party to an offset agreement with the procuring authority; and
- conducted with a contract price below 50 million krone, provided that the licence and other aspects of the delivery does not include future options or additional procurement that may exceed this threshold or the procuring authority expects that the contractor will enter into several contracts below 50 million Norwegian krone over a period of five years.

The procuring authority manages trade offsets by enclosing the provisions contained in the Regulation for Industrial Co-operation related to Defence Acquisitions from Abroad to the request for tender. The foreign contractor compiles a proposal on the offset requirement and delivers it to the Ministry of Defence or Norwegian Defence Materiel Agency. The offset agreement is a precondition for accepting the contractor’s tender. Consequently, the procuring authority conducts negotiations for the procurement contract while the Ministry of Defence or Norwegian Defence Materiel Agency conducts simultaneous negotiations concerning the offset agreement.

Ethics and anti-corruption

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

There is no mandatory waiting period for former government employees wishing to enter the private sector.

However, certain government employees have a duty to inform the Board of Quarantine, which is tasked with deciding whether the employee would have to undergo a waiting period before entering into the private sector or receive a temporary ban on their involvement in specific cases.

DAR section 2-5 prescribes that if the contractor’s personnel have been employed by the Ministry of Defence or in the defence sector within the past two years, or are retired, they are prohibited from being involved in the contact between the contractor and the Norwegian defence. The contractor shall inform the procuring authority if they have hired or otherwise used such personnel (see question 28 and 36 on the use of the Ethical Statement).

Private sector employees face no general restrictions on appointment to positions in the public sector.
28 How is domestic and foreign corruption addressed and what requirements are placed on contractors?

Corruption within Norway is punishable by law and carries a maximum penalty of 10 years in prison (see the Norwegian Penal Code sections 387 and 388).

DAR section 3-2 dictates that in any procurement exceeding the current national threshold value at the time of the publication of the request for tender, the procuring authority must contractually require the contractor to warrant that measures or systems have been effected in order to prevent corruption or the abuse of influence. Such measures or systems may entail internal controls or ethical guidelines.

For procurements exceeding the aforementioned threshold value, DAR section 4-1 requires that the procuring authority issue to the contractor or attach to any request for tender the Ethical Statement for Suppliers to the Royal Norwegian Ministry of Defence with underlying agencies (DAR appendix 3).

The statement obligates the contractor to adhere to the ethical guidelines and not:

- to offer any gift, benefit or advantage to any employee or anyone else who is carrying out work for the MoD or underlying agencies, if the gift, benefit or advantage may be liable to affect their service duties. This rule applies regardless of whether the gift, benefit or advantage is offered directly, or through an intermediary.

Also, see question 36. Failure to comply with these requirements may lead to rejection of the contractor’s current and future offers to the Ministry of Defence or its underlying agencies.

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

Lobbyist or commercial agents are not subject to any general registration requirements, though commercial agents who directly engage or provide assistance in the export of certain defence and security articles require an export licence from the Ministry of Foreign Affairs.

DAR section 7-4 paragraph 2 dictates that the procuring authority shall provide contractors, at the request for tender, with the guidelines on Prudence, Non-Disclosure and Conflict of Interest (DAR appendix 3):

> The name of any lobbyist acting on behalf of the supplier must be reported to the Defence sector. If a supplier fails to act with openness and strict adherence to good business practices and high ethical standards, this may undermine trust in the relationship between the supplier and the Defence sector, and potentially also the rating of the supplier’s bid in the final decision process.

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

As a main rule, Norwegian law does not contain any limitations on the use of agents or representatives that earn a commission on the transaction between the contractor and the procuring authority.

If the contract in question is between the procuring authority and an agent, the procuring authority may require disclosure of the commission or agreement between the agent and the contractor (see DAR section 17-3 paragraph 7).

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

Aviation

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

When converting military aircraft to civilian use, the process is subject to a case-by-case pre-conference review by the Civil Aviation Authority, which reviews the relevant documentation, with applicable procedures for registration of ownership, security and certification from the civil aircraft register to follow.

When a civilian aircraft is considered converted for military use, the armed forces perform a case-by-case assessment of the aircraft’s military use and capabilities, and requirements concerning the aircraft’s safety and airworthiness. Upon acceptance of the conversion, the armed forces notify the Civil Aviation Authority and the aircraft receives the appropriate marking and certification in the military aircraft register.

Deletion of the aircraft’s certification in the civil aircraft register is a prerequisite for certification in the military aircraft register.

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

There are none.

Miscellaneous

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

The Working Environment Act of 17 June 2005 No. 62 and Regulation No. 112 of 8 February 2008 on Wages and Working Conditions in Public Contracts will apply if the contractor is operating or performs work within Norway.

Contractors performing work within Norway on procurements exceeding 100,000 Norwegian krone, excluding VAT, shall provide the contracting authority with a health, safety and environment (HSE) statement warranting that the contractor complies with all legal requirements pertaining to HSE (see FOSA sections 3-13 and 8-18).

See question 35 for further information.

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

See questions 2, 3 and 13 for further information.

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

The procuring authority shall contractually require the contractor to adhere to the national legislation related to wages and working conditions in the country where the contractor carries out work (DAR section 3-1). Furthermore, the contractor shall adhere to the prohibition against child-, forced- and slave labour, discrimination and the right to organise in accordance with the UN Convention on the Rights of the Child and ILO Conventions Nos. 29, 87, 98, 100, 105, 111, 138 and 182.

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

DAR section 4-1 mandates that the procuring authority issue to the contractor the Ethical Statement for Suppliers to the Royal Norwegian Ministry of Defence with underlying agencies. The procuring authority shall issue the statement (DAR appendix 3) to the contractor together with the request for tender or otherwise.

The statement places a duty on the contractor to inform the procuring authority if the contractor, its employees or associates have:

> been convicted by a final judgment of any offence concerning its professional conduct, such as, for example, infringement of existing legislation on the export of defence and/or security equipment [or] criminal acts of participation in a criminal organisation, corruption, fraud, money laundering, financing of terrorism or terrorist activities [or] been guilty of grave professional misconduct, such as, for example, a breach of obligations regarding security of information or security of supply during a previous contract

The contractor may see his or her current and future offers rejected by the Ministry of Defence or its underlying agencies, should he or she fail to comply with the information duties imposed by the statement.

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

The Directorate for Civil Protection and Emergency Planning requires contractors operating within Norway to adhere to the regulations concerning the production, storage and transport of material of a chemical, biological, explosive or otherwise dangerous nature. In that regard, the Directorate may perform inspections and require prior notification, certificates and permissions.
Regulation No. 718 of 19 June 2013 on the Export of Defence-related Products, Dual-use Items, Technology and Services governs the possibility for Norwegian companies to acquire certification to receive defence-related goods from other EEA countries operating under a general transfer licence. Such goods may include materiel used for production.

The certification is subject to a case-by-case review where, among other things, the department factors in the company’s reliability and defence-related experience.

38 What environmental statutes or regulations must contractors comply with?
Contractors transporting or storing deliverables or operating within Norway must comply with the environmental rules in Act No. 6 of 13 March 1981 Concerning Protection against Pollution and Concerning Waste, as well as any requirements imposed in the contract with the procuring authority.

39 Must companies meet environmental targets? What are these initiatives and what agency determines compliance?
The procuring authority may impose environmental targets on contractors through inclusion of environmental requirements in both contracts and framework agreements (see FOSA sections 8-5 and 8-16). If the procuring authority requires documentation that shows the contractors are adhering to certain environmental standards, the procuring authority should refer to the Eco-Management and Audit Scheme or other European or international standards.

40 Do ‘green’ solutions have an advantage in procurements?
Green solutions do not have an outright advantage in procurements as such, but may have an advantage in the sense that the procuring authority is obligated to consider the life-cycle costs and environmental consequences of the procurement when it designs the requirements of the deliverable. As such, environmentally conscious contractors may be better able to meet these requirements depending on the desired deliverable in question.

If possible, the procuring authority should require the contractor to meet certain environmental criteria concerning the deliverables performance or function. Additionally, the procuring authority may give green solutions an advantage in accordance with the applicable rules and regulations.
Poland

Maciej Zalewski and Maciej Szymański
White & Case

Legal framework

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

The procurement of defence and security articles in Poland is based on the following:
- the Polish Public Procurement Law (PPL);
- the Minister of National Defence (MoD) Decision No. 367/MON of 14 September 2015 on the rules and mode of granting contracts at the MoD regarding essential state security interests (Decision 367); and
- other specific rules if enacted by the MoD for a particular procurement.

Other regulations may impose additional rules on the procurement of defence and security articles. This includes offset obligations regulated by the Act on Certain Agreements Concluded in Connection with Contracts Essential for National Security (the Offset Act) (see question 26).

The PPL regulations governing procurements in general, including procurement of defence and security articles, were brought in line with the principles of EU law in the field of military procurements set out by Directive 2009/81/EC of 13 July 2009.

Procurements are subject to the PPL and in particular its Chapter 4a ("Procurement in the area of defence and security") unless a given procurement is exempt from the PPL on the basis of its provisions. The principal exemption refers to article 346 of the Treaty on the Functioning of the European Union (the Treaty), based on which procurement may be exempted if necessary to preserve an essential security interest of the state. If a procurement is exempt, lower level regulations issued internally by the MoD will apply, in particular Decision 367.

Government-to-government procurements of defence and security articles are exempt from both the PPL and Decision 367. There is no uniform framework for negotiating such agreements.

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

Pursuant to the PPL, procurement in the area of defence and security covers the supply of military and sensitive equipment, including any parts, components or sub-assemblies thereof, works, supplies and services directly related thereto. ‘Military equipment’ is defined as ‘special equipment designed and adapted for military purposes and intended to be used as arms, munitions or war material’, while ‘sensitive equipment’ means ‘safety equipment that is associated with the use of confidential information, requires its use or contains confidential information’.

Procurement of ‘military equipment’ and ‘sensitive equipment’ will, by default, be subject to Chapter 4a of the PPL, unless the procurement is exempt from the PPL. The most common exemption is due to the operation of article 346 of the Treaty, pursuant to which a contract concerning the production of, or trade in, arms, munitions or war material may be exempt ‘if this is required for the protection of an essential interest of the state and the award of a contract without observance of the PPL will not adversely affect the conditions of competition in the internal market regarding products that are not intended for specifically military purposes’. In such case, the contracting entity can apply Decision 367.

Both Chapter 4a of the PPL and Decision 367 impose different rules than are applicable to civil procurements based on the standard PPL procedures. In particular, Chapter 4a of the PPL offers:
- a narrower selection of modes of procedure available to contracting entities;
- a wider range of circumstances mandating exclusion of contractors from the proceedings;
- formal requirements related to the protection of classified information;
- a wider scope of rights of the contracting entity concerning subcontractors;
- more flexibility for the contracting entity concerning termination of proceedings, rejection of offers, etc; and
- modified rules concerning advance payments.

Decision 367 goes even further than Chapter 4a of the PPL in narrowing the available modes of procurement, offering only procurement through negotiations with one or several suppliers. Moreover, it does not provide for the ability of the contractors to appeal the decisions of the contracting entity to the specialised National Appeals Chamber. Instead, contractors can only file claims to civil courts of general jurisdiction, which are more time-consuming and more expensive. Therefore, there are far fewer cases filed in court in relation to disputes arising out of defence procurements.

3 How are defence and security procurements typically conducted?

The defence and security procurements are typically performed on behalf of the MoD by the Armament Inspectorate.

More standardised and less sensitive procurements are conducted under Chapter 4a of the PPL, while the proceedings aimed at securing the essential security interests of the state are typically conducted on the basis of Decision 367. Alternatively, such procurements can take the form of international inter-ministerial agreements or even be based on an individual decision of the MoD.

The PPL does not apply to procurements of supplies or services below the threshold of €418,000. In regular circumstances, defence procurements above that value can take the following forms (within the discretion of the contracting entity):
- restricted procedure; or
- negotiated procedure with the publication of a contract notice.

In both of these generally available modes, the proceedings are commenced with a contract notice. In the restricted procedure, contractors submit an application for access to the proceedings and the contracting entity invites a specific number of entities to submit offers, while the number and the selection criteria are specified in the contract notice (preselection). In the negotiated procedure, following the preselection and admission to participate in the proceedings, contractors are invited to submit their initial offers followed by negotiations. Following the negotiations, the requirements can be made more specific or supplemented. Subsequently, contractors are invited to submit their final offers.

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In certain cases, enumerated in the PPL, the contracting entity may also award a contract through a competitive dialogue (not to be confused with the technical dialogue that is a preparatory stage preceding the procurement procedure), negotiated procedure without the publication of a contract notice, a single-source procurement procedure or through an electronic auction.

For procurements exempt from the PPL and conducted on the basis of Decision 367, the procedure can take the shape of negotiations with one or several suppliers. If a closed catalogue of suppliers cannot be ascertained, the MoD publishes a contract notice based on which it creates a list of entities and conducts negotiations.

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

The PPL, including its Chapter 4a, has just undergone significant changes related to implementation of the new EU Directives (Directive 2014/24/EU, Directive 2014/25/EU and Directive 2014/23/EU).

Moreover, on 30 November 2016, the European Commission issued a report on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security and concluded that an amendment of the Directive is not necessary. The Commission decided to limit itself to focusing on the proper implementation of the Directive by providing guidance on the interpretation of specific provisions, in particular concerning exclusions. The Commission also issued a notice providing guidance on government-to-government contracts.

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

There are no different or specific procurement rules regarding information technology. However, the MoD did adopt Decision 349 of 20 September 2011 setting forth certain requirements for technical documentation, including software, supplied by contractors to the MoD. In addition, there are provisions of the Act on Copyright and Related Rights of 4 February 1994 that apply to licence agreements, which are a typical way that the MoD obtains rights to information technology, rather than by transfer of ownership, unless the newly developed IP is financed by the MoD.

The MoD uses both competitive and non-competitive procurement procedures to purchase IT. However, for complex IT systems negotiations are the most appropriate, as they enable broader cooperation between the parties.

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

Polish procurement law is a result of the harmonisation process within the European Union. The GPA and the EU directives, on which the national legislation in this area is to a large extent based, are coordinated, since the EU and the member states of the EU are all members of the World Trade Organization.

The 2014 version of the GPA is in line with the relevant EU directives and is consequently already reflected in the Polish PPL. The national security exemption was introduced in the PPL and is mainly expressed in Decision 367.

Disputes and risk allocation

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

Disputes stemming from proceedings based on the PPL are resolved by the National Appeals Chamber, a state entity (quasi-court) that specialises in such disputes. The PPL contains specific remedies that provide legal protection to contractors if they have or had an interest in being awarded a contract and suffered or may suffer damage as a result of violation of the PPL. Contractors can appeal actions that are incompliant with the PPL performed by the contracting entity in the course of the contract award procedure or the contracting entity’s failure to act while being bound to perform under the PPL. The ruling issued by the National Appeals Chamber may be appealed to the regional court competent for the seat of the contracting entity. The validity of a contract can be questioned based on the relevant provisions of the PPL, as well as on the basis of the general provisions of the Polish Civil Code.

In the procurement proceedings conducted on the basis of exemptions from the PPL, mostly governed by Decision 367, disputes related to the procurement process are resolved by courts of general jurisdiction. At the stage of contract performance, disputes are typically subject to resolution by the court of general jurisdiction competent for the seat of a contracting entity. In practice, only offset contracts (separately described below) can contain an arbitration clause.

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

Mandatory resolution of disputes related to the procurement process under the PPL by the National Appeals Chamber is often considered to be a form of alternative dispute resolution, although the Chamber is a state body formed under the statutory provisions of the PPL. At the stage of contract performance, the parties may confer disputes to arbitration. However, the MoD usually does not agree to include arbitration clauses in contracts.

The manner of resolving disputes between the prime contractor and a subcontractor is entirely within the discretion of the parties and can involve ADR within the boundaries of applicable law.

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 procurement regulations do not modify the general rules of Polish civil law governing contractual liability, pursuant to which (under article 471 of the Polish Civil Code) the contractor bears contractual liability if all of the following elements are in place:

- it fails to perform or improperly performs the contract;
- the contracting entity suffers damage;
- the damage suffered constitutes a normal (typical) consequence of the contractor’s conduct; and
- the failure to perform or improper performance of the obligation results from circumstances within the contractor’s control (is attributable to its fault).

The procurement regulations also do not modify general tort liability. Pursuant to article 435 of the Polish Civil Code, whoever through his or her own fault causes damage to another person is obliged to redress it. In practice, it is very common for the contracting entity to require contractors to show proof of civil liability insurance.

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?

In the absence of a different provision of statutory law or provision in the contract, the redress of damage covers the losses as well as the benefits that could have been obtained but for the action or inaction causing the damage. The amount of compensation may not be in excess of the damage suffered (no punitive damages).

The general rules governing liability (both contractual and in tort) may be modified by a statute or contract. However, contractual modifications are often subject to certain limitations (eg, the tortious liability of the possessor of a mechanical vehicle, liability for the operation of an enterprise by the person running such enterprise or liability for damage caused by intentional fault).

Therefore, as a matter of law contractor liability can be limited. Contracts typically include provisions on the payment of liquidated damages, which may either result in the elimination of further liability by the payment of an amount stipulated in advance in a contract or take the form of a non-liquidating contractual penalty. The latter form of liquidated damages does not eliminate liability in excess of the amount stipulated in the contract and is only possible when a contract explicitly allows damages to be claimed exceeding the amount of the contractually stipulated liquidated damages.

In practice, contractors are obliged to present a performance bond, which eases potential enforcement by the MoD.

There are no specific limits on the contracting entity’s liability towards contractors. In general, contractors can claim recovery in the amount of damage suffered. However, considering that the principal obligation of the contracting entity is limited to payment of the agreed
consideration, the damages would usually encompass such considera-
tion (for performed deliveries or advances due) and applicable interest
(if not contractually indicated, then statutory interest rates apply).

At the stage of procurement proceedings, it is common practice to
require contractors to submit a bid bond, which is returned upon the
selection of an offer or kept by the contracting entity if the contractor
avoids the execution of the contract. If the contracting entity avoids
the execution of the contract, the contractor may either ask for the return
double the amount of the security (ie, return of the bid bond and a
lump sum in the amount of the bid bond) or damages.

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 contracting entity needs to observe not only the procurement reg-
ulations, but also the Act on Public Finances, pursuant to which it can
only undertake obligations that are included in the budget. Moreover,
the MoD conducts most of its major procurements in line with the
multi-year programme Priority Tasks of Technical Modernisation
of the Polish Armed Forces within the Operational Programmes (the
Programme) adopted by the Council of Ministers Resolution No. 164 of
17 September 2013 (amended as of 24 June 2014).

The Programme sets forth the expenditure on the purchase of
equipment within the main operational programmes for the years
2014–2022. While the actual binding funds available for a given year are
only included in the budget act for such year, the Programme allows the
MoD to increase the flexibility in utilising the funds envisaged for the
entire Programme. The Programme assumes that the allocated funds
that are not used in a given budget year will increase the funds for the
Programme in subsequent years, while maintaining the overall value of
the Programme. See ‘Update and trends’ for more information.

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

There is no obligation to provide a parent guarantee. The contracting
entity may require a security of performance of the contract and for
large contracts that is customary. The procurement regulations contain
a list of forms in which security of performance of the contract should
be provided. These include primarily bank guarantees and insurance
 Guarantees (performance bond).

For offset contracts, the submission of a performance bond is
mandatory.

A parent guarantee may sometimes be accepted as ancillary secu-
rity, but not as the principal one.

Defence procurement law fundamentals

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 numerous provisions of the PPL for contracts subject to
the PPL, as well as provisions of the Polish Civil Code (for all contracts)
and other legal acts, that may be applicable and which will apply
regardless of their inclusion in a defence procurement contract. Such
provisions concern liability, warranty, rescission, subcontracting, pay-
ment, technical supervision, etc.

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

There is no allocation of costs. The consideration due to the contractor
is indicated as a fixed price, so any costs that the contractor would like
to have reimbursed would need to be included in the price.

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

In large complex defence procurements contracts that comprise an
entire system, the contractor may be required to fill out a spreadsheet
indicating the elements of the price (often also the life cycle costs) bro-
ken down into elements of the system.

While typically the price is provided merely as a fixed amount, the
Armament Inspectorate often reserves for itself the right to require
more detailed information regarding cost and pricing where only one
valid offer is submitted and the MoD wishes to obtain insight into the
price calculation methodology to verify that the values are, in fact, mar-
ket-based. Thus, the MoD often requests a cost calculation indicating,
ter alia, the costs of materials, cooperation, purchase, warranty, etc.
Additionally, the contractor may be requested to submit a representa-
tion on the mathematical method of calculating the values of individ-
ual cost components, resulting from the company’s accounting policy.

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

Audits of the Armament Inspectorate are conducted on a regular basis
by internal audit and control units. Periodically, an audit is also per-
formed by the Supreme Audit Office, from the perspective of general
compliance with law and in particular with the Act on Public Finances.

At the stage of procurement proceedings, the process is moni-
tored by the MoD’s Office of Anti-corruption Procedures. Also,
representatives of the counter-intelligence service serve on the ten-
der commission.

As far as quality audits of the contractors are concerned, for
foreign contractors from NATO countries the contract typically states
that quality supervision should be performed by a government quality
assurance representative from the contractor’s country in accordance
with the relevant AQAP requirements.

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

Defence procurement contracts mostly oblige the contractors to grant
the contracting entity a licence. The items licenced are predominantly
documents, including technical documents, or complete IT solutions.
Typically, licences under defence procurement contracts are granted
to the contracting entity on a non-exclusive basis. According to the
MoD’s understanding, a non-exclusive licence is one that is not limited
to the contractually stipulated purpose of the licence. Such stipulation
of the exclusive purpose of the licence would restrict its usage in the
manner described in the contract.

Licences typically cover Polish territory and allow the use of the
equipment outside Poland where the Polish Armed Forces may
be deployed.

Moreover, licences usually authorise the contracting entity to grant
further licences (sub-licences), but only to such entities in which the
Polish State Treasury directly or indirectly holds all or a majority of
shares in the share capital, or that are under the supervision of public
authorities, such as the MoD. In order to be allowed under Polish law, a
sub-licencing right has to be expressly stated in the contract.

Typically, the licences required in Polish defence procurements are
irrevocable, granted for an indefinite period of time, and may not be
terminated before the lapse of a specific period of time (eg, 30 years).
In the absence of specific contractual provisions and if a licence is open-
ended, the grantee may terminate the agreement in accordance with
the notice periods established therein, or if no notice periods have been
established, with one year’s notice as of the end of a calendar year.

The MoD seeks to ensure that it can use the rights in a manner
enabling the full benefit of the foreground intellectual property (IP).
Therefore, it is keen to obtain access to all applicable IPs (through own-
ership or a licence), within the widest possible scope, with regard to
the background IP.

For contracts encompassing development work financed by the
MoD, the MoD will typically reserve for itself the ownership of the fore-
ground IP and may agree to grant a reverse licence to the contractor.

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 specific economic zones or programmes dedicated to
defence contractors. However, some defence contractors take advan-
tage of the benefits offered in general by state aid, special economic
zones and other similar programmes.
19 Describe the process for forming legal entities, including joint ventures, in this jurisdiction.

Taking up economic activity in Poland is more straightforward for persons from the EU member states and European Free Trade Association countries (Iceland, Lichtenstein, Norway, and Switzerland). Residents of other countries have limited forms of legal entities that they can adopt in Poland, unless otherwise agreed in a relevant international agreement (eg, an agreement with the United States of America, which eliminates such limitations for US persons).

It is typically not necessary to set up a Polish legal entity to perform deliveries to the MoD.

For persons from the EU and EFTA, the available legal forms include a limited liability company (minimum share capital is 5,000 zloties), a private corporation (minimum share capital is 100,000 zloties) and several forms of partnerships:
- general partnership;
- limited liability partnership;
- limited partnership; and
- limited joint-stock partnership.

The typical formation process includes execution of an agreement (usually in the presence of a notary), registration in court and for tax purposes.

Subject to the limitations related to the origin of a foreign entity mentioned above, business activity may also be conducted in the form of individual business activity, a civil partnership (under a contract) or a branch office of a foreign company.

There are no specific rules on forming joint ventures, which are subject to laws applicable to the chosen legal form (primarily a limited liability company and sometimes a private corporation). Sometimes the parties decide to form a partnership or resign from establishing a separate entity and conduct business based on various types of agreements, for example, cooperation agreements, consortium agreements and agreements on a common understanding.

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

Everyone (including foreign persons) has a right to access public information, namely, any information about public affairs that has not been classified. Polish authorities publish information in bulletins on their websites. Moreover, anyone can make an application to the relevant authorities to demand the disclosure of particular information. The contracting entity may only limit access to information related to the contract award procedure in specific cases, which encompass primarily classified information (at the levels of restricted, confidential, secret and top secret information) and information that is regarded as business secret of the contractor, who is entitled to request that information be classified. Polish authorities publish information in bulletins on their economy (currently the Minister of Economic Development), who issues a list of armaments that require authorisation.

The export control system applicable in Poland is harmonised with the EU regulations (Council Regulation No. 428/2009 of 5 May 2009). Authorisations are necessary (individual, global or national export authorisations) for the trade in strategic goods (including dual-use).

In Poland, authorisations are issued by the minister relevant for the economy (currently the Minister of Economic Development), who issues a list of armaments that require authorisation.

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

Pursuant to the PPL, contracts in the fields of defence and security may be bid for by contractors established in one of the member states of the European Union or the European Economic Area, or a state with which the European Union or Poland entered into an international agreement concerning such contracts (eg, the United States of America and the Republic of Korea). Moreover, the contracting entity may specify additional states. If the Armament Inspectorate has knowledge of contractors from such other states, it will include them in the contract notice (recently this concerned Israeli and Canadian contractors).

Decision 367 does not have limitations similar to those contained in the PPL. There are, however, examples of procurements where the Armament Inspectorate narrowed the scope of eligible entities to Polish contractors, who acted as prime contractors (integrators). In such cases, foreign entities are limited to acting as subcontractors of a Polish entity. It seems that this may become a prevailing tendency in the MoD’s procurement practice.

In defence and security procurements, the contracting entities may influence the organisation and management of the supply chain of the contractor. Under the PPL, despite general permission for contractors to use subcontractors, the rights of the contracting entity include the following:
- the right to request the contractor to subcontract a share of the contract in a non-discriminatory manner (if such subcontractors were not previously selected);
- the right to request the contractor to specify in his or her offer which part or parts of the contract he or she intends to subcontract to fulfill the subcontracting requirement;
- the right to request the contractor to indicate in the offer the share of the contract that will be subcontracted as well as the names of subcontractors (if already selected);
- the right to request the contractor to indicate without delay any change occurring at the level of subcontractors during the execution of the contract; and
- the right to refuse to consent to a subcontract with a third party if that party does not comply with the conditions for participation, both during the procurement procedure and the performance of a contract.

Decision 367 does not provide for a general right to use subcontractors. The contracting entity may allow it, but must require the contractor to indicate the part of the contract that it intends to subcontract. Just like under the PPL, the contracting entity may refuse to consent to a subcontract with a third party.

International trade rules

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

The export control system applicable in Poland is harmonised with the EU regulations (Council Regulation No. 428/2009 of 5 May 2009). Authorisations are necessary (individual, global or national export authorisations) for the trade in strategic goods (including dual-use).

In Poland, authorisations are issued by the minister relevant for the economy (currently the Minister of Economic Development), who issues a list of armaments that require authorisation.

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

In principle, foreign contractors may bid on procurements directly. Neither the PPL nor Decision 367 explicitly indicate that the contracting entity can prefer domestic contractors. Nevertheless, if justified by the essential security interests of the state (ie, in proceedings conducted under Decision 367), the contracting entity may demand from the foreign contractor some forms of industrial cooperation such as offset or the establishment of production or maintenance capacity in Poland, which may offer an advantage to domestic contractors that are not burdened with such obligations (although the obligations may have to be shifted to the foreign sub-suppliers of a domestic contractor).

Moreover, the contracting entity may go so far as to request that the prime contractor be a domestic company (at least indirectly controlled by the Polish State Treasury), again, if it can be demonstrated that it is justified by the essential security interests of the state.

24 Are certain treaty partners treated more favourably?

The PPL, in line with the EU procurement regulations, does not allow discrimination on the basis of nationality with respect to other member states of the European Union or the European Economic Area, or a state with which the European Union or Poland entered into an international agreement concerning such contracts. The less favourable treatment, for example, a prohibition on participating in procurement proceedings, can thus be limited only to other states that do not belong to these groups.
In practice, there may also be mechanisms within the EU that make it easier, whether at the stage of procurement or performance of the contract, to fulfil or demonstrate fulfilment of certain requirements by EU-domiciled contractors.

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


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

The Offset Act, which entered into force on 30 July 2014, is a result of harmonisation with the EU approach to offsets. The general rule recognised by the European Commission is that any type of offset is a restrictive measure that goes against the basic principles of EU law by impeding the free movement of goods and services. Nevertheless, the EU Commission admits that offset requirements can be justified on the basis of article 346 of the Treaty on the Functioning of the European Union, if necessary, for the protection of the essential security interests of the state.

Therefore, offsets in Poland are part of the defence and security procurement regime, but may be required only if both the procurement itself and the related offset are justified by the existence of an essential security interest of the state.

The possible justification for allowing offsets narrows down the scope of admissible offset to direct obligations, namely:
- offset commitments directed towards offset recipients operating in armament production or trade business; and
- ensuring independence from the foreign supplier in order to maintain or establish in Poland production, servicing, maintenance or other capabilities necessary from the point of view of protection of essential security interests of the state.

It is arguable whether offsets can be justified by essential security interests unrelated to the subject of the procurement.

Offsets are not admissible in proceedings subject to the PPL, but only those governed by Decision 367 or otherwise exempt from the PPL (eg, government-to-government). Offsets are negotiated by the MoD and the offset contract is executed by the State Treasury represented by the MoD following an offset offer submitted by a foreign supplier in response to the assumptions for an offset offer drafted by the MoD and constituting part of the terms of reference of the procurement procedure. A supply contract cannot be executed before an offset contract becomes effective, that is, upon the approval of the Council of Ministers (the Cabinet).

Ethics and anti-corruption

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

According to the Act of 21 August 1997 regarding Limitation of Conducting Business by Persons Exercising Public Functions, governmental employees may not hold positions in companies if they took part in the issuance of a decision regarding a company’s rights within one year from the issuance of the decision.

Later, based on the decision of the MoD dated 11 February 2004 on the keeping of the register of military aircraft. The latter contains provisions that suggest that an aircraft cannot be included in both registers at the same time. Specifically, in practice, there may also be mechanisms within the EU that make it easier, whether at the stage of procurement or performance of the contract, to fulfil or demonstrate fulfilment of certain requirements by EU-domiciled contractors.

Moreover, in proceedings conducted under the PPL and Decision 367, a contractor that took part directly in the preparation of procurement proceedings for defence articles is prohibited from working for contractors manufacturing or trading in such defence articles for a period of three years following the end of service. Both of the above limitations are replicated in defence procurement contracts.

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

Both domestic and foreign corruption practices (based on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions) are penalised in Poland. Moreover, contractors sentenced (including persons holding management or supervisory positions) by a final judgment for corruption must be excluded from procurement proceedings.

Also, in proceedings conducted within the framework of Decision 367, the MoD’s Office of Anti-corruption Procedures investigates potential corruption threats.

As far as the contract implementation phase is concerned, Decision 367 mandates the inclusion of a provision in defence contracts stating that, in the event of corruption concerning the subject procurement involving the contractor or its representatives, such contactor is obliged to pay liquidated damages in the amount of 5 per cent of the gross value of the contract.

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

Under Polish law, all lobbyists in Poland must be entered in the register of entities conducting lobbying activities held by the minister relevant for administrative affairs. Applications for the registration need to be filed on a rather simple official form.

Persons performing intermediation services in executing contracts concerning military equipment need to possess the relevant licence in accordance with the Act of 22 June 2001 on Conducting the Business of Manufacture and Sale of Explosives, Weapons, Ammunition and Technology for the Military or Police (the CBMSE).

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

No, there are no such limitations in Poland.

Aviation

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

There are separate registers for military and civil aircraft. The registers are maintained by the MoD and the Minister of Transportation, respectively. The formalities concerning entering aircraft into a register are set forth in the Ordinance of the Minister of Transportation dated 6 June 2013 on the registration of civil aircraft, and Order No. 3/MON of the MoD dated 11 February 2004 on the keeping of the register of military aircraft. The latter contains provisions that suggest that an aircraft cannot be included in both registers at the same time. Specifically, in order to include an aircraft in the military register, the application should be accompanied by confirmation of the aircraft’s deletion from the civil register if the previous owner was not the Polish Armed Forces
What restrictions are there on manufacture and trade of unmanned aircraft systems or drones?  
The manufacturing and trade of UAS or drones for military use requires a licence as per the CBMSE. Unmanned aircraft designated for military use are included in the list attached to the Ordinance of the Council of Ministers dated 3 December 2001 on the types of arms and ammunition and the list of products and technologies designated for military or police use whose manufacturing requires a licence.

Miscellaneous

Which domestic labour and employment rules apply to foreign defence contractors?  
Under Polish labour law, foreign defence contractors may use foreign law to govern their employment relations. However, if the work is to be performed in Poland or by a Polish worker, the employment contract with the foreign contractor cannot be less favourable to the employee than the rules set out in Polish labour law. The rule of favouring the employee is a fundamental principle of Polish labour law, also applicable in employment contracts governed by foreign law if most of the elements of a certain employment relationship are located in Poland. An employer and an employee may only deviate from the standard provided under Polish labour law as long as their contractual relationship is not less beneficial to the employee than it would be if governed solely by the Polish statutory provisions. Otherwise, any deviation will be invalid.

The performance of work in Poland by employees of a foreign contractor may result in tax and insurance-related consequences for the employees and the contractors.

Are there any specific rules that contractors, foreign or domestic, are bound by in defence contracts?  
Typically, the form of a defence contract is provided to the contractor by the contracting entity. The draft contract is usually negotiable only to a limited extent. Most defence contracts refer to several legal acts that constitute mandatory provisions of law in Poland including with respect to foreign suppliers. These may include:
- legislation governing the assessment of conformity of goods;
- legislation governing technical supervision of military equipment;
- the Industrial Property Law dated 30 June 2000; and
- the Act on Copyright and Related Rights of 4 February 1994.

There are also numerous contractual provisions regularly included by the Armament Inspectorate in contracts concerning defence procurements, including clauses pertaining to:
- Polish governing law;
- the right to unilaterally rescind the contract granted to the contracting entity in certain cases;
- subcontracting;
- contractual warranty; and
- licencing.

Do contractors avail themselves of these rules when they perform work exclusively outside of the jurisdiction?  
An individual approach is necessary. Some rules may no longer apply and others may come into play (eg, quality control), while certain rules are mandatory provisions of Polish law applicable regardless of where the work is performed and whether the contract refers to those rules. Others will apply due to the fact that they are invoked in the contract, which is the primary source of obligations for the parties. Thus, contractors cannot necessarily avoid their obligations under a contract simply by selecting a particular place of performance of work connected with the subject of the contract.

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?  
Considering the fact that the sentencing of members of a contractor’s management or supervisory bodies for certain crimes may lead to the contractor’s exclusion from procurement proceedings, the relevant information from the criminal records must be disclosed to the contracting entity. However, only the person’s name, place of residence and criminal record are required.

Pursuant to recent changes of the PPL, in some cases the request for submission of such data may be deferred by the contracting entity until after the selection of the contractor’s offer as the most advantageous. Under Decision 367, the contracting entity is entitled to, but not obliged to, request the relevant documents from the contractor.

Basic details of the contractor’s representatives are necessary for the purpose of the proceedings (eg, admittance to the MoD’s premises for negotiation meetings, etc).

What registration or licensing requirements exist to operate in the defence and security sector in the jurisdiction?  
In accordance with the CBMSE, in order to conduct such business an entity must obtain a licence from the Minister of Internal Affairs. One of the requirements for obtaining a licence is that two members of the management of the entity have to be citizens of Poland, another EU member state, Switzerland or an EEA member country, or another country under specific conditions (permanent stay in Poland, reciprocity, etc).

However, for the purpose of participating in procurement proceedings, it is sufficient if the foreign contractor possesses the necessary licence to perform the activities covering the scope of the contract issued in compliance with the provisions prevailing in its country of residence, as well as potentially a permit to trade in Poland, if applicable (this is typically specified by the contracting entity in the terms of reference of the proceedings).
In addition, an entity wishing to operate in the defence and security sector must possess the necessary military quality control systems (WSK, AQUAP) as well as typically security clearances up to the required level of classified information.

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

Contractors and contracting entities are obliged to comply primarily with EU and Polish legislation, including the Environmental Law of 27 April 2001, and with secondary legislation issued based on that law. The Polish Environmental Law imposes obligations on entities using the environment, including foreign entrepreneurs, as well as the authorities, including the MoD, which, in order to ensure the compliance of its units with the law, adopted the Regulation of 24 March 2016 on compliance with laws on environmental protection in organisational units subordinated to or supervised by the MoD. Consequently, both the PPL and Decision 367 enable the Armament Inspectorate to take environment protection aspects into account when drafting the requirements of procurement proceedings. This can take the form of specific mandatory or premium requirements, which are subsequently assessed based on the legislation related to assessment of compliance.

Specific requirements imposed on contractors in procurement proceedings may refer, for example, to the acceptable level of noise or limits on the emission of substances detrimental to the air or ground, depending on the subject of the procurement.

Military equipment and operations may, however, be subject to specific exemptions or less restrictive treatment. Pursuant to Regulation (EC) No. 216/2008 of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, environmental protection requirements imposed by the Regulation do not apply to the military aircraft. Also, pursuant to the Polish legislation implementing Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), the MoD may exempt certain substances necessary for needs of defence of the state from the application of REACH.

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

Entities operating in Poland may be required to meet environmental targets by way of restricting activities that have a negative impact on the environment (which predominantly impacts production activities). The authorities may require an entity to obtain permits related to use of the environment, impose monitoring obligations, etc. The authorities conducting inspections and issuing permits include, in particular, the Ministry of Environment and local government administration bodies.

40 **Do ‘green’ solutions have an advantage in procurements?**

No, ‘green’ solutions do not have an advantage in procurements. Theoretically, however, the contracting entity may include certain ‘green’ parameters in the procurements, whether as mandatory or premium requirements.
Qatar

Arnaud Depierrefeu*
Simmons & Simmons Middle East LLP

Legal framework

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

Law No. 24 of 2015 Promulgating the Law Governing Tenders and Auctions (the Tender Law) governs the procurement of contracts by government ministries and other public bodies.

However, the armed forces, the police and other military entities are not required to comply with the Tender Law when the tender relates to a matter that is considered confidential in nature (article 2 of the Tender Law).

In practice, all contracts procured by the armed forces and the police will be considered confidential in nature so will not be subject to the Tender Law.

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

As above, the armed forces, police and other military entities are not required to comply with the Tender Law when the contract relates to a matter that is considered confidential in nature.

3 How are defence and security procurements typically conducted?

Defence and security procurement is usually conducted directly by the relevant entity. For example, the army, air force, navy and Ministry of Interior will usually conduct their own procurement exercises.

Where the matter is considered confidential in nature, the procurement process may be restricted to certain preferred bidders or the procurement may be made directly with a single supplier.

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

No. The most recent version of the Tender Law came into force in June 2016, so (as of the time of writing) we are not expecting any further substantial changes.

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

Information technology procurement is not treated differently. If an information technology contract is procured by the armed forces, police or another military entity then, in most cases, it will be considered confidential in nature so the Tender Law will not apply.

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

Qatar is not a signatory to the GPA.

Qatar has entered into bilateral defence treaties with several important defence partners such as the USA or France. However, the provisions of these treaties do not impact the way the defence contracts are procured.

Disputes and risk allocation

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

Due to the confidential nature of the issues involved, arbitration agreements are usually included in contracts between state entities and international defence contractors. The arbitration is usually conducted under the rules of the International Chamber of Commerce, the London Court of International Arbitration or the Qatar International Center for Conciliation and Arbitration. It is important to ensure that state entities are authorised to enter into an arbitration agreement.

Most disputes are resolved before formal arbitration proceedings are commenced.

Contracts will generally be governed by the laws of Qatar, but there are precedents of state entities accepting a foreign law (such as Swiss law) as applicable to a defence contract.

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

As above, most contracts include an arbitration agreement. Other forms of alternative dispute resolution, such as mediation, conciliation and expert determination are relatively unusual in Qatar.

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 term ‘indemnification’ is not specifically recognised under Qatar law, and there are no statutory provisions limiting the state’s ability to indemnify contractors or specifically requiring defence contractors to indemnify the state.

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?

Most contracts in the defence sector include both a total cap on liability (this is often the purchase price or total fee) and an exclusion of indirect and consequential loss and loss of profit.

These limitations and exclusions are generally enforceable but must be carefully drafted because article 170(2) of the Qatar Civil Code (Law No. 22 of 2004) provides that they will be interpreted narrowly (ie, to limit the scope of the exclusion).

On the basis that most significant defence contracts will not be subject to the Tender Law (see questions 1 and 2), there will be no statutory or regulatory limitations on the liability of the state or of the defence contractor.

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?

State entities need to agree a budget with the Ministry of Finance before entering into a contract. Payment delays can occur where that budget is exceeded, for example, because of variations.
12 Under what circumstances must a contractor provide a parent guarantee?
For major contracts, the state will likely insist that a parent company guarantee is provided. A performance bank guarantee (payable on demand) will also be required for almost all contracts.

Defence procurement law fundamentals

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 provisions specifically relating to the procurement of defence contracts, but there are mandatory provisions under Qatar law that will apply to all contracts. These include:
- an obligation to act in good faith (article 172 of the Civil Code);
- article 171(1) of the Civil Code, which provides that the court may reduce a party’s obligations to a reasonable limit where there is an event that:
  - is an exceptional event;
  - could not have been foreseen;
  - renders performance of a party’s obligations onerous;
  - leaves the party with substantial loss; and
- article 266 of the Civil Code, which permits a court to reduce the amount of liquidated damages agreed between the parties where the debtor can show that they are excessive or that the obligation was partially fulfilled.

14 How are costs allocated between the contractor and government within a contract?
Most contracts will be a fixed price, but there is no defined method of procuring defence contracts and the procurement method will depend on the nature of the thing being procured.

15 What disclosures must the contractor make regarding its cost and pricing?
There are no statutory requirements and this will depend on the express provisions of the tender and contract.

16 How are audits of defence and security procurements conducted in this jurisdiction?
It is unclear if there are any audits being conducted on the procurement process conducted by the various state agents. A body called the State Audit Bureau has, in theory, the power to audit procurement processes. However, the law regulating the powers of the State Audit Bureau specifically excludes defence and security matters from its jurisdiction.

17 Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?
Foreground intellectual property (IP) management in Qatar needs to be considered carefully; in particular, there are statutory restrictions on future assignment of copyright that can often be difficult to manage. Qatar does not have a ‘works for hire’ doctrine in its IP legislation and there are prohibitions around the waiver of moral rights (the Qatari Copyright Law articles 10 and 11). The assumption, therefore, is that the individuals who provided the creative input would be the first owners. However, the law regulating the powers of the State Audit Bureau specifically excludes defence and security matters from its jurisdiction.

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 is a separate and distinct regime for establishing companies in the Qatar Financial Centre (QFC), which allows 100 per cent foreign ownership and has been put in place primarily to attract international financial services companies (but also some support functions and since 2014 wider activities outside the financial services sector) to come to Qatar.

The QFC has been established by the government of Qatar and is located in Doha.

The QFC was originally intended to provide an environment solely to attract international and domestic financial services institutions and service providers in support of those institutions to encourage participation in the growing market for financial services in Qatar and elsewhere in the region.

However, the QFC is now willing to accept applications for business registration from other types of service providers that are not associated with the financial services sector, for example, in the fields of engineering-related scientific and technical consulting activities; and project management.

The process for incorporation in the QFC is more user-friendly than in ‘mainland’ Qatar, and after initial meetings are held with the QFC Authority to determine the ‘strategic fit’ of an applicant company, the QFC Authority appoints a representative with whom an applicant can coordinate regarding documents to be prepared and submitted during the process.

19 Describe the process for forming legal entities, including joint ventures, in this jurisdiction.
As far as mainland Qatar is concerned, foreign investors may only invest in Qatar in accordance with the provisions of the Foreign Capital Investment in Economic Activities Law (No. 13 of 2000), as amended (the Foreign Investment Law).

Foreign investors may invest in all parts of the national economy (other than in the case of certain exceptions) with a Qatari partner who must normally own at least 51 per cent of the enterprise.

The Ministry of Economy and Commerce may permit foreign investors to own more than 49 per cent and up to 100 per cent of a company in specified sectors called the ‘Priority Sectors’, namely business consulting; technical services; information technology; cultural, sports and leisure services; distribution services; agriculture; manufacturing; health; tourism; development and exploitation of natural resources; energy and mining.

A completely new Foreign Investment Law may be issued in the near future, replacing the current law. However, we do not have details of the new law or when the new law will take effect. Accordingly, our responses to these queries, at least with reference to any mainland Qatar option, are subject to what may be provided for in this new law.

The incorporation and organisation of companies is governed by the Commercial Companies Law (No. 11 of 2015) (the Commercial Companies Law), which came into effect in August 2015. The Commercial Companies Law regulates the types of company that may be established in Qatar.

The following are required in order to incorporate a company and obtain a commercial registration:
- memorandum and articles of association in Arabic, which conform with the standard form provided by the Ministry of Economy and Commerce and have been approved by the Ministry;
- notarised, authenticated and consularised copies of the foreign company’s certificate of incorporation, memorandum and articles of association and board resolution or power of attorney authorising someone to act on its behalf to establish a company in Qatar;
- letter from a Qatar bank indicating the deposit of the share capital at that bank; and
- Qatar Chamber of Commerce Registration (issued simultaneously with the Commercial Registration certificate, which will confirm Chamber membership).
Once the company has been incorporated and the Commercial Registration issued, the share capital can be released to the company’s directors or the general manager for the purposes of running the company. The following licences must then also be obtained:

- a commercial licence;
- a signage licence; and
- an immigration card.

A foreign company that has a contract with the government of Qatar or a quasi-government entity may be able to register a branch office (as opposed to incorporating a Qatar company) if it has entered into a contract in respect of a ‘government qualified project’. Historically, most defence contractors have established themselves as a branch office, on the basis of a contract with the Qatar Armed Forces or the Ministry of Interior. The following are required in order to register a branch office and obtain a Commercial Registration:

- a letter of support from the Qatar government entity to whom the services will be rendered;
- a copy of the contract with the Qatar government entity;
- authorisation from the Ministry of Economy and Commerce to establish a branch;
- notarised, authenticated and consularised copies of the foreign company’s certificate of incorporation and memorandum and articles of association;
- a notarised, authenticated and consularised power of attorney from the foreign company to the manager of the branch; and
- Qatar Chamber of Commerce Registration (issued simultaneously with the Commercial Registration Certificate, which will confirm Chamber membership).

Once the branch has been approved and the Commercial Registration issued, the following licences must also be obtained:

- a commercial licence;
- a signage licence; and
- an immigration card.

If applicable, the company or branch may also need to be entered in the Importers’ Register or Contractors’ Register.

It is also possible to register a trade representative office (TRO), which may essentially only be used to promote a foreign company in Qatar so as to introduce it to Qatari companies and projects, through marketing and promotions. A TRO may not be engaged in selling or entering into contracts in Qatar. Business must be carried out by the foreign entity (where the contract can be performed substantially outside Qatar) or by a company or branch authorised to do business in Qatar.

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

There is no formal process to access such records.

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

Not applicable.

International trade rules

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

There is no home-grown defence industry in Qatar to date, and therefore no export of locally manufactured weapons. Export control regulations from the defence suppliers’ countries of origin usually contain restrictions on the ability for a state client to re-export equipment to other countries. Each force purchasing foreign equipment will be in charge of managing its export control obligations.

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

The preference is to contract directly with a foreign contractor who will set up a branch office to perform the local part of the contract. However, there are recent examples where the Qatar Armed Forces seem ready to welcome to the incorporation of a subsidiary with a third-party joint venture partner.

24 Are certain treaty partners treated more favourably?

Qatar has signed defence cooperation treaties with a number of countries, the two main partners being the USA and France. In particular, there is a SOFA (Status of Forces Agreement) between the USA and Qatar to serve as a legal basis for the presence of a large US military base in Qatar. However, Qatar tends to diversify its alliances and has recently signed a defence cooperation agreement with Turkey. The existence of such defence treaties tends to signal a strategic relationship. Yet, to the best of our knowledge, the treaties do not grant any more favourable treatment from a commercial or legal perspective when it comes to buying equipment.

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

Qatar has issued the Qatar Israeli Boycott Law No. 13 of 1963. This law is still in effect and has not been formally amended. The effect of the law is that it prohibits any commercial dealings with Israeli citizens or persons directly or indirectly, which would include any such persons exercising any contractual rights under contracts. In addition, sanctions implemented by Qatar from time to time should be assessed, which can affect transfers or payments with relevant countries, or certain entities or individuals within those countries.

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

There is no formal defence offset regime in Qatar, but we have seen some recent examples where delivering some added value locally (beyond maintenance and training) was considered favourably by the Qatar Armed Forces.

Ethics and anti-corruption

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

There are no restrictions relating to former government employees joining the private sector or former private sector employees joining government entities.
28 How is domestic and foreign corruption addressed and what requirements are placed on contractors?

There is no specific law in Qatar governing corruption. However, the Qatar Penal Code (Law No. 11 of 2004) includes provisions relating to the bribery of public officials, which is widely defined to include employees and those working in ministries, other government agencies, authorities and public institutions as well as:

- arbitrators, experts, administrators, liquidators and receivers;
- chairmen and members of the board of directors and all other employees in private institutions and associations, cooperatives and companies if one of the ministries, or other government agency, authority or public institution is a shareholder therein;
- anyone who carries out work relating to public service upon instructions from a public official; and
- chairmen and members of legislative committees and the municipality committees and others who have a public representative type role whether appointed or elected.

Additionally, government entities including ministries and other authorities (with some exceptions) as well as companies in which the government holds a majority shareholding, private institutions for public benefit and pensions funds are subject to the supervision of the State Audit Bureau. Pursuant to Law No. 11 of 2016, the State Audit Bureau has the right to review the accounts of entities subject to its supervision and to prosecute the perpetrators of any financial irregularities.

The provisions of the Qatar Tender Law No. 2.4 of 2015, which apply to all government ministries and other public institutions (with certain exceptions), provide for a contract awarded to a contractor being void in the event that it is proven that the contractor used fraud or manipulation in obtaining or performing the contract or if it is proven that the contractor either directly or indirectly bribed a government official.

There are no provisions relating to foreign corruption. However, Qatar has ratified the United Nations Convention against Corruption as well as the 2010 Arab Convention for Fighting Corruption, which include definitions of foreign public officials (i.e. public officials who may be in Qatar but exercising the function on behalf of a foreign country). However, there are no specific provisions reflected in domestic law.

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

Generally, any person undertaking business activities in Qatar needs to be licensed by the Ministry of Economy and Commerce and various other agencies. In addition, commercial agencies in Qatar fall into two categories. There is a category of registered agents that are governed by the Commercial Agencies Law (Law No. 8 of 2002: Registered Agencies) and unregistered agencies that are governed by the Commercial Code (Law No. 27 of 2006: Unregistered Agencies). Registered agencies must be registered at the Ministry of Economy and Commerce. There may be internal rules and practices within government departments that require that only ‘approved’ intermediaries be used.

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

There are no such limitations in laws. However, internal rules and practices within government departments may impose such limitations.

The general position under Qatar law is that the parties are free to contract and as such there are no restrictions on the amounts to be paid. However, the law governing registered agencies imposes a limit on commission received. Such commission must be restricted to 5 per cent of the value of the goods sold.

Aviation

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

Not applicable.

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

Not applicable.

Miscellaneous

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

Except for Qatar Petroleum (and its related companies), security guards, housemaids and agricultural workers, all private sector contracts of employment are governed by Labour Law No. 14 of 2004. Such contracts must be in Arabic (or bilingual) and approved and registered with the Ministry of Labour and Social Affairs.

In particular, employers outside the QFC should be aware of the requirement to pay an end of service benefit to employees who have been employed for at least 12 months. Such benefit must not be less than three weeks’ salary for every year of employment.

Companies established and regulated under the QFC have their own different employment regulations governing the relationship between the QFC employer and the QFC employees.

In the case of mainland Qatar and the QFC, companies will need to obtain residence and work permits for their expatriate staff.

All expatriate employees must be sponsored by their corporate employer, who is responsible for them while they are in Qatar.

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

There are no specific rules except in terms of procurement process (see question 3).

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

Not applicable.
### Question 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?

There is no such specific requirement prior to entering into a contract. When an employee of a defence contractor wishes to become a resident, he or she should, however, tender a legalised and translated police clearance certificate from his or her country of origin.

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

See question 19.

### Question 38: What environmental statutes or regulations must contractors comply with?

No specific regulations apply. Any industrial activity carried out in Qatar would, however, need to comply with Law No. 30 of 2002 on Environmental Protection.

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

Not applicable.

### Question 40: Do ‘green’ solutions have an advantage in procurements?

Not applicable.

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Sweden

Max Florenius
Advokatfirman Lyxell Florenius KB

Legal framework

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

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

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

The legislation is based on EU directives and is a part of the harmonisation process within the union. The more specific law regarding procurements of defence and security articles is based on Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004. Meanwhile, the general legislation regarding public procurements is based on Directive 2004/18/EC of the European Parliament and of the Council of 31 July 2009. The legislation is quite similar and coherent regarding regulations and structure, but there are some crucial differences. The law concerning defence and security procurements contains regulations concerning security of supply and information security, which are not contained in the general legislation. The specialised law does not contain regulations about competitive bidding and, unlike in the general statute, there are no restrictions regarding when negotiated procurement and selective bidding is considered an acceptable method of procurement. Even so, the general rule is that procurements should be executed through competitive bidding and published in the EU’s Tenders Electronic Daily (TED), an electronic publication in which all procurements within the EU are to be announced. Sweden recognises essential security interests within the areas of underwater warfare and flight, and procurements of items within these areas is excepted from the regulations regarding competitive bidding. Regarding defence and security procurement, regulation concerning subcontractors is far more extensive than it is regarding civil procurement.

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

Defence and security procurements are defined as procurements of the following articles, infrastructural projects and consultant services:

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

The main difference between defence and security procurements and civil procurements is the legislation that is applicable. The two statutes (see question 1) are quite similar and coherent regarding regulations and structure, but there are some crucial differences. The law regarding defence and security procurements contains regulations concerning security of supply and information security, which are not contained in the general legislation. The specialised law does not contain regulations about competitive bidding and, unlike in the general statute, there are no restrictions regarding when negotiated procurement and selective bidding is considered an acceptable method of procurement. Even so, the general rule is that procurements should be executed through competitive bidding and published in the EU’s Tenders Electronic Daily (TED), an electronic publication in which all procurements within the EU are to be announced. Sweden recognises essential security interests within the areas of underwater warfare and flight, and procurements of items within these areas is excepted from the regulations regarding competitive bidding. Regarding defence and security procurement, regulation concerning subcontractors is far more extensive than it is regarding civil procurement.

3 How are defence and security procurements typically conducted?

Within the Swedish armed forces and the Swedish Defence Material Administration (FMV), there is a strategy regarding supply of materiel. The strategy’s main pillars are as follows:

- the needs of the armed forces should guide the supply of materiel;
- the supplying should be cost-effective from a lifespan perspective and strive for an enhanced security of supply;
- the supplying should be guided by clear and mindful choices, taking cost, efficiency and discretion into consideration;
- the supplying should make efficient use of existing materiel, with consideration of market prospects, and should be coordinated with the formation of new military units;
- international cooperation should be the main alternative regarding development, procuring and maintenance, and international cooperation regarding materiel should be maximised;
- the supplying should be conducted in accordance with armed forces’ research and technology development;
- the number of weapon systems should be reduced through an enhanced coordination of the systems;
- enhanced cost efficiency should be strived for through a decrease of the government’s own business in favour of other suppliers; and
- the supplying should be led by supplier management that is authority-integrated.

There are several methods available for the procuring entity, allowing for various different circumstances:

- ‘Selective bidding’ is a procedure where all suppliers are welcome to show an interest in the procurement, but only a selected number of suppliers are invited to bid. The selection of the suppliers must be conducted according to the foundational principles of public procurements.
- ‘Negotiated procurement’ is when the procuring entity invites a selected number of suppliers and negotiates the bids in accordance with the specifications advertised for that specific procurement.
- ‘Negotiated procurement without foregoing advertising’ is accepted under special circumstances, for example:
  - when there has been a failed procurement where no bids were received;
  - procurement of goods of proprietary nature, which can be obtained only from the proprietary source; and
  - when the procurement consists of a supplementary order adherent to a previously conducted procurement.

There is extensive legislation regarding when this alternative procuring method is acceptable without being categorised as an illegal direct-contracting procedure.

- ‘Dialogue of a competitive nature’ is used when procuring highly specialised types of goods and consulting services, where the procurement cannot be conducted through selective bidding or negotiated procurement. If this process is used, information thereof must be concluded in the advertisement of the procurement. The purpose of the dialogue is to identify and decide how the needs of the procuring entity can best be provided for. Suppliers are requested to submit their final bids after the dialogue has concluded.
- ‘Direct contracting’ is most commonly used when the contractual value is below the set monetary limit. The limit for defence and security procurements is currently 993,368 Swedish krona. The monetary limit is not limited to one specific contract, but to all contracts of the same kind procured during one financial year. Direct contracting can also be used if the contractual value exceeds the monetary limit under certain circumstances, provided, however,
The audits are conducted either by the FMV itself or a reputable auditor.

The contractor must account for its costs according to earned value management. For smaller contracts, it is more common to use the regular dispute resolution method. When the FMV adopted procurements from the armed forces a few years ago, it also adopted their tradition: standard dispute resolution managed by the district court of Stockholm.

In the procurement document, a distinction is made between criteria that must be fulfilled and criteria that are non-mandatory. The criteria that must be fulfilled are, for example, a prohibition against child labour.

Swedish contractual legislation contains a fundamental principle of good faith. This principle impregnates all Swedish contractual law. Breach of contract is also always included. The FMV's right to cancel a contract due to anticipated non-performance may not enter into a legally binding procurement contract if adequate funds to meet the contractual obligations are not ensured.

Defence procurement law fundamentals

There are no 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 also more specific clauses that can be read into contracts – for example, a prohibition against child labour.

In the procurement document, a distinction is made between criteria that must be fulfilled and criteria that are non-mandatory. The criteria can concern economic status, technology features, etc.

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

The audits are conducted either by the FMV itself or a reputable accountant firm of the FMV's choice.

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?

'Indemnification' is an Anglo-American legal term with no equivalent in the Swedish jurisdiction. See question 10 regarding limitation of liability.

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?

All procurements conducted by the FMV are based on a pre-decided procurement plan that is approved by the Swedish parliament. The procurement plan consists of specific procurement projects where a budget is set for each project. This means that there are always sufficient funds for the desired procurement. The FMV may not enter into a legally binding procurement contract if adequate funds to meet the contractual obligations are not ensured.

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?

For larger contracts, a parent guarantee is typically required. These types of contracts often require a performance guarantee for the execution of the contract as well. For smaller contracts and smaller suppliers, a bank guarantee from a reputable bank is often sufficient.
17 Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?

In the past, the intellectual property rights have vested in principle with the contactors to whom the FMV have granted certain rights. However, the current trend is that the FMV are requesting more extensive rights over the intellectual property, and therefore these clauses have to be carefully drafted.

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

Not applicable.

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

Limited company

A limited company must:
- establish a memorandum of association and the articles of association;
- subscribe and pay for shares;
- apply for a certificate from a Swedish bank that states that the share-capital has been paid in;
- sign the memorandum of association; and
- register the company at the Swedish Companies Registration Office.

A public limited company requires a share capital of 500,000 Swedish krona and a private limited company requires a share capital of 50,000 Swedish krona.

Trading company

To establish a trading company, there must be an agreement to jointly conduct business. The partnership must be registered at the Swedish Companies Registration Office.

Partnership

A partnership consists of an agreement to jointly conduct business without the intention to establish a limited company or a trading company. The parties can be either individuals or legal persons.

Joint venture

There are three different types of joint ventures that can be established. A contractual joint venture (or non-corporate joint venture) consists of an agreement between two, or more, companies to conduct business through collaboration. (Note that the joint venture agreement can constitute a partnership agreement.) A partnership joint venture is when two, or more, companies decide to form a trading company, and a corporate joint venture is when a new limited company is established between the parties. The two latter forms of joint venture are conducted according to the regulations above.

Licensing

In order to conduct business in the defence and security sector, a licence is required from the Swedish National Authority called Inspectorate of Strategic Products (ISP). Criteria regarding the quantity of non-Swedish ownership can be attached to the licence. The ISP can also require that the president of the company and the members of the board be Swedish citizens and be resident in Sweden. The ISP sets such requirements on a case-by-case basis. The licence can only be granted to a Swedish limited company of a Swedish trading company.

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

The Swedish jurisdiction recognises the principle of public access to public records. The principle gives both Swedish citizens and foreigners the right to apply for copies of government records that are not under secrecy. Applications are handed in to the authority of interest and a confidentiality assessment is conducted. The same rules comply to previous contracts.

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

Every supplier that has the legal right within its own jurisdiction to deliver the article of the procurement in question may be included in the procurement process. Swedish legislation also contains a strict non-discrimination principle and a principle of equal treatment. These principles give foreign suppliers the same rights as Swedish national suppliers to take part in the procurement processes.

Regarding subcontractors, the main rule is that the supplier has the right to choose its own subcontractors, with some restrictions. The procuring entity may require that parts of the contract are undertaken by a subcontractor. There may also be requirements regarding the process in which the subcontractors are chosen. For example, the supplier may be required to observe the principles of non-discrimination and equal treatment. The procuring entity has the ability, under certain circumstances, to dismiss a subcontractor chosen by the supplier.

There is no procurement legislation that specifically regulates anti-counterfeit parts. The most applicable regulation is the one concerning intellectual property. Clauses regarding intellectual property are also featured in the contract.

International trade rules

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

There are regulations regarding manufacturing and supplying defence articles. These regulations can be found in the Military Equipment Act of 2012.

The ISP administers control and compliance of defence material and dual-use products. The ISP has provided the following guidelines regarding export in defence and security articles:

A licence to export defence material, or other cooperation arrangements with someone abroad regarding defence equipment, should be permitted only if such exports or cooperation is:
- considered necessary to meet Swedish defence needs;
- otherwise desirable in terms of security policy; and
- not in conflict with the principles and objectives of Swedish foreign policy.

The ISP also handles targeted sanctions, including trade restrictions. These sanctions may be based on a decision from the UN or the EU to take collective sanction measures. In addition, Sweden also adheres to the 2008 EU Common Position on arms export controls, and is a signatory of the UN Arms Trade Treaty.

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

There are no restrictions in Swedish legislation regarding foreign contractors. On the contrary, the legislation includes a non-discrimination principle and a principle of equal treatment. Every supplier that has the legal right within its own jurisdiction to deliver the article of the procurement in question may not be excluded from the procurement process. However, Sweden have recognised essential security interests within the areas of underwater warfare and flight, and desires to maintain a national industrial capacity within these areas.

24 Are certain treaty partners treated more favourably?

Generally, Sweden is a promoter of free trade, and has approached trade positively and without restrictions regarding the suppliers’ nationality. However, there are rules regarding cooperation within the EU. In the procurement legislation, there are regulations regarding reciprocal acknowledgement for certificates that are issued in another member state of the EU or in another country within the EES. There are also some generally issued permissions to export defence and security articles within the EU, where the exporting entity must not apply for permission from the ISP.

When it comes to buying defence and security articles from the United States, this can be done through Foreign Military Sales acquisition. This method has had a positive reaction from the Swedish government.
In general, Sweden is interested in international cooperation but rarely enters into a developing project without another funding state. In these occasions, naturally, there are some countries that Sweden prefers to cooperate with – Finland, for example.

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

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

**EU weapon embargoes (including equipment used for internal repression)**
- Myanmar (including equipment used for internal repression);
- the Central African Republic;
- North Korea;
- the Democratic Republic of the Congo;
- Eritrea;
- Iran (including equipment used for internal repression);
- Iraq;
- China;
- Lebanon;
- Liberia (partially);
- Libya (including equipment used for internal repression);
- Russia;
- Somalia;
- South Sudan;
- Zimbabwe (including equipment used for internal repression); and
- Belarus (including equipment used for internal repression).

**UN weapon embargoes**
- Afghanistan (listed entities);
- the Central African Republic;
- North Korea;
- the Democratic Republic of the Congo;
- Eritrea;
- Iran;
- Iraq;
- Yemen;
- Lebanon;
- Liberia;
- Libya;
- Somalia; and
- Sudan.

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

The main concern is that trade offset is to be abolished within the EU. Trade offset is not considered to be compatible with the foundational purposes of the Union. Within the EU, there is only one exception from the non-use of trade offset, which is when offset is required to protect the member states’ substantial security. Outside EU and EES trade, offset is still an available option. However, in general, Sweden still does not use offset as a requirement for procuring articles from a supplier outside the EU.

Ethics and anti-corruption

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

There are no regulations regarding mandatory garden leave in the Swedish jurisdiction. A government inquiry is currently looking into the issue of ‘revolving doors’ on a generic basis between the public and private sectors.

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

The legislation provides a non-optional rule that states that if a supplier is found guilty of corruption, the supplier must be excluded from the procurement. If the supplier is a legal person, the supplier is considered guilty of corruption if a representative for the supplier is found so. If there are well-grounded reasons to presume that the supplier is guilty of corruption, the procuring entity may require that the supplier offer evidence in disproof.

The FMV provides an extensive code of ethics concerning bribery for its employees. These consist of guidelines concerning suppliers offering to pay for meals, travel expenses, giving loans, etc. Corruption is considered a crime according to the Swedish Penal Code.

What are the registration requirements for lobbyists or commercial agents?

There are no requirements regarding registration for lobbyists or commercial agents. Concerning licencing from the ISP, agents who only sell to the Swedish government, or to suppliers who have permission to manufacture, are excepted. Agents who also sell to a country other than Sweden need a licence from the ISP.

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

No, there are no such limitations in the Swedish jurisdiction.

Aviation

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

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

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

There are no specific rules concerning unmanned aircraft systems or drones. The ISP issue their licences accordingly to the specific types of articles that can be manufactured or supplied, but there are no specific criteria that must be met concerning unmanned aircraft systems or drones.
Miscellaneous

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

If the suppliers’ employees are working in Sweden, Swedish labour law is to be applied. It is prohibited to use child labour abroad, and thereafter import the manufactured goods to Sweden. If a sufficient amount of working hours are executed, a permanent establishment might be considered established. The necessary conditions regarding this are to be found in the Swedish Income Tax Act. These conditions may vary according to taxation treaties.

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

There are clauses that are included in most of the contracts concerning defence procurements. For example, the FMV may set up extensive environmental requirements for the procurements. Environmental legislation such as the Swedish Environmental Code and the European Community Regulation on chemicals and their safe use (EC) 1907/2006 is followed.

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

This depends on the subject of the contract. For example, the prohibition against child labour applies even if the work is performed outside the Swedish jurisdiction. The choice of applicable law is another example that is still applicable outside Sweden.

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?

There are situations when a supplier, and its representatives, may be required to provide information regarding certain circumstances. Swedish legislation provides a non-optional rule that if a supplier is found guilty of corruption, organised crime, money laundering or terrorism, it is prohibited to use child labour abroad, and thereafter import the manufactured goods to Sweden. If a sufficient amount of working hours are executed, a permanent establishment might be considered established. The necessary conditions regarding this are to be found in the Swedish Income Tax Act. These conditions may vary according to taxation treaties.

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

To be able to manufacture and distribute security and defence articles, a licence is required from the ISP. Criteria regarding the quantity of non-Swedish ownership may be attached to the licence. It is also possible to require that the president of the company and the members of the board be Swedish citizens and be resident in Sweden. The licence can only be granted to a Swedish limited company or a Swedish trade company.

38 What environmental statutes or regulations must contractors comply with?

The Swedish defence sector authorities have jointly developed and decided on the following document: ‘The defence sector’s criteria document – chemical substances, chemical products and articles’. In this document, the suppliers can find the requirements and how they may apply.

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

For some contracts, the FMV requires that the supplier produce a ‘recycling manual’ for the system in question. The aim of this recycling manual is to provide all the information that is needed to dispose of the system in a way that minimises the effect on people’s health and the surrounding environment.

In the implementation of projects and the development of products on behalf of the FMV, environmental legislation such as the Swedish Environmental Code and the European Community Regulation on chemicals and their safe use (EC) 1907/2006 is followed.

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

The industries operating in Sweden play a large role in meeting Swedish environmental targets, and the targets set up by the EU and the UN. There are specific rules and regulations that must be complied with to run a business in Sweden. These rules can be found in the Environmental Code. The legislation consists of both general environmental goals and more specific rules regarding conducting business that possibly has a negative effect on the environment. The authorities conducting controls and making decisions according to the Environmental Code are the government, the county administration, the municipalities, the environmental court and the environmental supreme court.

40 Do ‘green’ solutions have an advantage in procurements?

‘Green’ solutions do not have an advantage in procurements. However, the FMV may set up extensive environmental requirements for the procurement, which the supplier must be able to meet.
Turkey

Şafak Herdem
Herdem Attorneys at Law

Legal framework

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

The Turkish Public Procurement Law (the Law) is the principal document regulating defence procurement in Turkey. Article 3(b) of the Law refers to:

- goods, services and works procurement that the relevant ministry decides are related to defence, security or intelligence, or should be treated confidentially; and
- procurements requiring special security measures during the performance of the contract pursuant to related legislation, or those concerning cases in which the basic interests of the state’s security need to be protected.

Article 3(n) of the Law refers to goods and services procurement through agreements and contracts, allowing guarantees in advance in order to ensure the provision of urgent requirements that are likely to come up in cases involving defence, security and humanitarian aid issues. Such requirements may arise from either international obligations or for national purposes, and exempt the Law in order for defence procurement to be applied in a fast and effective manner.

This provision constitutes the basis of directives for each relevant institution such as the Ministry of National Defence; the Ministry of the Interior, Service Commands, the Undersecretariat of the Ministry of Defence, the Mechanical and Chemical Industry Corporation and the defence procurement programmes through the NATO Support and Procurement Agency and the Foreign Military Sales programme.

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

The Law on Control of Private Industrial Enterprises Producing War Weapons, Equipment, Vehicles and Ammunitions and Explosives (Law No. 5201) and the Defence Industry Security Law (Law No. 5202) are principal documents regulating the Turkish defence industry. They set forth the legal framework for all classified military agreements, information, documentation, projects, purchases, sales, manufacturing, research and development, storage of material or services, and allow facilities to conduct activities related to the defence industry, excluding staff of and facilities belonging to the Turkish Armed Forces.

3. How are defence and security procurements typically conducted?

Law No. 3238 defines the government mechanism of defence and security procurement as it gives the following responsibilities:

- the Defence Industry High Coordination Council: planning and coordination;
- the Defence Industry Executive Committee: decision-making; and
- the Undersecretariat for Defence Industries (SSM) and The Defence Industry Support Fund: execution.

Once the decisions following the planning and coordination of the Defence Industry High Coordination Council are taken, they are implemented by the SSM on the basis of procurement legislation.

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

No.

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

The Turkish government has particular focus on research and development projects in the defence industry. In this regard, article 3(f) of the Turkish Public Procurement Law exempts purchases of goods and services necessary for research and development projects executed and supported by national research and development institutions, and purchases of all kinds of research and development services, excluding those where the authorities covered by this law meet the entire financing and exploit the outputs only in executing their own activities’ from general procurement rules and national research. Development institutions apply their own directives in case of information technology-related projects.

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

Turkish defence procurement legislation covers both national security exemptions and guidelines for treaty-based rules, such as procurement through the NATO Support and Procurement Agency, the Foreign Military Sales programme (US) and the Federal Office of Bundeswehr Equipment, Information Technology and In-Service Support (Germany).

Disputes and risk allocation

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

Disputes are commonly settled with arbitration, depending on the type of contract. In some cases, Turkish authorities prefer to procure the goods from or through state foundation companies such as Aselsan, Havelsan and Roketsan, and those companies are free to choose the settlement of dispute mechanism as some address local courts for dispute resolution.

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

See question 7. Disputes are commonly settled with arbitration. Mediation, conciliation and expert determination are not common in the defence industry.

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?

It depends on the type of contract. In most cases, government authorities ask for a bank guarantee that covers the risks of each phase of the project. All conditions related to bank guarantees are defined in the procurement contract. Contractors are mostly asked to indemnify
the government authorities in case of any breach or paying penalty, depending on the contract type.

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?

This is not common, and no regulatory or statutory limitations are applied in Turkey.

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?

No, defence items should not be procured without a budget allocation.

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

There is no statutory requirement in this regard, however, the government is free to request a parent guarantee if deems it necessary.

Defence procurement law fundamentals

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?

Yes. The procurement clauses are as follows, and should be included in the contracts:

- the name of the project;
- the name and address of the contractor;
- the name or trade name of the contractor;
- the address of the notification;
- the information and responsibilities of the sub-contractor, if any;
- the type of contractor;
- the type and duration of contract;
- the place and conditions of payment;
- whether the advance payment will be made or not;
- the conditions of advance payment if given and the amount of the advance letter of guarantee in case of purchases extending over years, the price difference to be paid if payment is made for contractual matters and the cost of the transportation;
- insurance details;
- the conditions of the support services such as assembly, operation, training, maintenance-repair and spare parts;
- the amount of the performance bond and conditions of the return of the performance bond;
- the duration of the guarantee; and
- conditions of warranties – place of work, delivery and receipt, form and conditions, failure to fulfil obligations or penalties to be imposed in case of delay, coercive reasons and extension periods, mutual obligations in case of reductions, conditions for the inspection and acceptance procedures, conditions for amendment to the contract, conditions for termination of the contract, the language to be taken into consideration for the interpretation of the contract, and the settlement of disputes.

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

This is a contractual issue, and each contract may contain different clauses in this respect.

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

There is no regulation or law that requires contractors to make certain disclosures. Disclosure is only required when non-original documents are submitted during application to a tender, to acknowledge and warrant that the copies are the same as the originals.

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

They are conducted through independent audit companies.

Update and trends

With over 600 modernisation projects, the defence industry is booming in Turkey. Government policies in manufacturing and new offset regulations towards domestic procurement ensure continuous transformation and development. The 2013 vision of the government is to be ranked in the first 10 countries in the defence industry, and to manufacture all ground vehicles, marine vessels and unmanned aerial vehicles domestically.

In consideration of all aforementioned plans and targets, Turkey intends to change supply policies and focus on domestic production in providing for military requirements. Turkey’s defence industry is also becoming more attractive to foreign manufacturers.

The joint venture between Kale and Pratt & Whitney for the establishment of an F-135 engine centre for F-35 fighter jets is important enough to demonstrate foreign interest in the market.

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

This is a contractual issue.

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?

Yes, there are some free zones such as Ezbaş in İzmir and Ostim in Ankara, which are utilised by some defence contractors. Moreover, a new zone – HAB Aerospace Zone (Ankara Aerospace Specialised Industrial Zone) – has been founded to combine subsidiaries and SMEs in a common area, mainly based on advanced technologies and high-value-added products. With a skilled workforce, this zone is being developed to become one of the world’s leading aviation centres.

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

Commonly used company types in Turkey are limited liability companies (LLCs) and joint stock companies (JSCs). LLCs are formed by one or up to 99 individual or legal entities with minimum capital of 10,000 lira cash or in kind. JSCs can be formed by one individual or legal entity with minimum capital of 100,000 lira cash or in kind. To establish such companies, an article of association should be duly signed and registered to the trade registry where the company headquarters would exist. One quarter of the capital should be deposited during the establishment, and the rest can be committed to be paid within two years following the registration date.

Joint ventures are not deemed to have a legal personality in Turkey. Each party of the joint venture is solely responsible for their commitment to a joint venture agreement; however, any type of LLC or JSC can establish a new company for a specific project, also as a joint venture, even if it is an additional company in the form of an LLC or JSC.

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 Defence Industry Security Law defines the ‘classified information, documents and materials’ used in the defence industry. Accordingly, procedures for determination, marking, transfer, storage, modification of security classifications for defence industry information, documents and materials and the training within this context are regulated by taking the approved resolutions of the Multinational Defence Industrial Security Working Group and bilateral cooperation agreements into consideration.

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

The same rules apply to eligible suppliers and supply chain management and anti-counterfeit parts as well, and no distinction or privilege exists in this regard.
International trade rules

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

From a domestic law perspective, the Law on Control of the Private Industrial Enterprises Producing War Weapons, Equipment, Vehicles and Ammunitions and Explosives (Law No. 5201) regulates the trade of defence and security objects in Turkey. In addition, as a party to international treaties such as the Treaty on Non-Proliferation of Nuclear Weapons, the Comprehensive Test Ban Treaty, the Chemical Weapons Convention, the Biological Weapons Convention and the Wassenaar Arrangement, Turkey is subject to the strict regulations of the international arms trade.

In general, the Ministry of National Defence is authorised to administer the international trade of military equipment, arms and ammunition.

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

There is no restriction on foreign contractors making bids. However, the Turkish government mostly prefers local procurement or co-procurement, which may require foreign contractors to transfer certain technologies to local capabilities.

24 Are certain treaty partners treated more favourably?

This is only possible if a treaty requires it to be so.

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

Turkey applies boycotts, embargoes and other trade sanctions if they are a requirement of the treaties and conventions (UN, WTO, etc) to which Turkey is a party. Turkey also applies embargoes and trade sanctions to certain countries.

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

Yes, the offset regime defines three type of categories:
- category A that consists of local production;
- category B that refers to export of product or service; and
- category C that requires technology transfer and investment.

The offset commitment shall not be lower than 70 per cent of the value of the procurement contract, and all processes of an offset programme are administered by the SSM.

Ethics and anti-corruption

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

There are no statistics regarding this issue.

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

Corruption is only combated using the general provisions of the Turkish Penal Code. No specific legislation exists to combat against corruption in the defence industry.

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

No policy or regulation exists for registration.

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

No, such things are not regulated.

Aviation

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

For civil use, Directive SHY-21 of Turkish Civil Aviation Authority regulates the airworthiness and environmental certification of a product, part and device in this regard, and the Directive is in full compliance with European Aviation Safety Agency’s Part 21, the International Civil Aviation Organization’s Annex 8 and the Chicago Convention.

For military use, it is subject to the export control regimes of technology transferring countries and international rules and conventions, as Turkey has not manufactured any local aircraft yet.

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

There is no specific law regulating manufacture of unmanned aircraft systems or drones in Turkey. Therefore, Directive SHT-IHA of the Turkish Civil Aviation Authority regulates the airworthiness and registration of such air vehicles. However, this Directive exempts drones with a take-off mass of less than 4 kilograms, a maximum speed of less than 50 kilometres per hour and a maximum altitude of less than 100 metres. Drones that are more than five years old are not registered in Turkey, and registration requires security clearance of the applicant.

Miscellaneous

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

There is no difference in rules and regulations for foreigners. The Turkish Labor Law applies to everyone working in the country, as Turkish entities or in a workplace.

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

In general, all defence procurement laws apply in the same way to each and every contractor. This excludes incentive regimes, particularly for local manufacturers. Depending on the nature and scope of the
projects some specific rules might be applied in form of contractual clauses. There is no law or regulation that has specific rules binding foreign contractors.

35 Do contractors avail themselves of these rules when they perform work exclusively outside of the jurisdiction?
There are no particular rules for works that are performed exclusively outside of Turkey.

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?
In addition to the requirements defined in the Law on Control of the Private Industrial Enterprises Producing War Weapons, Equipment, Vehicles and Ammunitions and Explosives (Law No. 5201) (see question 37), the Defence Industry Security Law (Law No. 5202) requires personal security clearance for each person and facility security clearance for each facility to receive the classified information, documents and materials from the relevant authority. No information, project or material is allowed to be delivered or disclosed without holding such clearances. Providing personal information constitutes a requirement of such clearances.

37 What registration or licensing requirements exist to operate in the defence and security sector in the jurisdiction?
When offering weapons, ammunition, explosive materials and their spare parts to the local market, a company must get the approval of the Ministry of Defence, which also requires the assent of the General Staff of the Ministry of the Interior. Moreover, companies must also provide information about their founders, capital, investors and managers, which requires in-depth information sharing with the government body in order to be licensed.

38 What environmental statutes or regulations must contractors comply with?
General environmental safety and occupational health regulations also apply in the defence industry, except regarding facilities.

39 Must companies meet environmental targets? What are these initiatives and what agency determines compliance?
There is a policy that requires defence companies to meet any environmental targets.

40 Do ‘green’ solutions have an advantage in procurements?
There is no legislation with special provisions regarding ‘green’ solutions in the defence industry.
United Kingdom

Elizabeth Reid, Simon Phippard, Brian Mulier, Michael Stocks, Lucy England and Victoria Moorcroft
Bird & Bird LLP

Legal framework

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 UK is governed by the Defence and Security Public Contracts Regulations 2011 (DSPCR), which implement the EU Defence and Security Directive (2009/81/EC) into UK law. 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. European and domestic case law is also influential in interpreting the applicable laws.

The Single Source Contract Regulations 2014 (SSCRs) apply when the Ministry of Defence (MoD) awards contracts with a value of over £5 million without any competition. They are intended to ensure value for money is achieved even in the absence of competition.

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 (approximately £100,000) and is for:

- military equipment and directly related goods, services, work and works;
- sensitive equipment (ie, equipment for security purposes involving, requiring or containing classified information), and directly related goods, services, work and works;
- work, works and services for a specifically military purpose; or
- sensitive work or works and sensitive services.

The procurement will be advertised in the Official Journal as a procurement under the DSPCR.

The key difference for procurements carried out under the specific defence rules are the mechanisms put in place to protect sensitive information and to ensure defence and security interests are protected. For example, there are specific provisions that are intended to protect sensitive information throughout the supply chain, to ensure security of supply and to give the courts flexibility to consider defence and security interests when considering remedies.

Where a procurement falls outside the scope of the DSPCR, it will be governed by the usual civil procurement rules.

3. How are defence and security procurements typically conducted?

There are three different procurement procedures under the DSPCR and four different procedures under the normal civil rules. Most procurements involve a pre-qualification process, during which bidders must demonstrate their financial stability and technical capability, including experience in similar contracts. The way that the procurement proceeds depends on whether the authority has chosen a procedure that permits them to discuss the contract with the bidders (competitive procedures with negotiation or the competitive dialogue procedure) or not (restricted procedures and, for civil rules only, the open procedure). It is increasingly common for negotiations on a contract to be limited, with many of the contract terms being identified as non-negotiable.

The evaluation process is undertaken on the basis of transparent award criteria and weightings, which are provided to bidders in advance in the tender documents. Once the winning bidder is selected, there is relatively little scope for further negotiation (although, in practice, some negotiation is common).

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

The European Commission reviewed the 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, and in particular it feels that too many contracts are awarded without any competition.

It seems highly likely that the UK will review and amend the defence procurement regime when it leaves the EU, although the timeframe and scope of this is currently unclear.

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 is undertaken through centralised framework agreements awarded by the Crown Commercial Service.

6. Are most defence and security procurements conducted in accordance with the Agreement on Government Procurement (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 GPA or the 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, but that there were also other exemptions, for example, an exemption relating to government-to-government sales. It also shows that since the introduction of the DSPCR there has been a decline in reliance on these exemptions - from 55 per cent to 25 per cent.

Disputes and risk allocation

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 DEFCON 530 (DEFCONs are MoD defence conditions), 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 DSPCR applies, there is a formal process under which suppliers may apply to the court to review the actions of the contracting authority during the procurement process, and the remedies available (which differ depending on whether the contract has been entered into or not).

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

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

DEFCON 530 requires the disputing parties to attempt, in good faith, to resolve disputes that may include ADR procedures, before commencing arbitration. The most appropriate form of ADR depends 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 commence proceedings, which provides an opportunity for the parties to try and 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 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.

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 says the MoD can offer a limited range of indemnities for specific risks, but 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 proposed by the government may not be negotiable depending on which contract award procedure is used.

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

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

Some DEFCONs contain indemnities relating to these issues.

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?

In principle, the government can agree to limit the contractor’s liability under the contract. However, the MoD’s policy is to not accept a limit unless it represents value for money. The contract award procedure used by the government will determine the extent to which this position is negotiable.

The government can limit its own liability under contract (although this is unusual), but this would limit the contractor’s potential to recover against the government for breach.

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 contracts. However, the MoD’s policy (even if the MoD procure under the DSPCR) is to comply with Regulation 113 of the Public Contracts Regulations 2015, which requires public sector buyers to pay prime contractors (Tier 1 suppliers) undisputed, valid invoices within 30 days. Generally, the risk of non-payment for an undisputed, valid invoice by the MoD is perceived to be very low.

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 DEFCON 24.

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 MoD will typically seek to include certain standard clauses in its contracts. Primarily, these are the 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.

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

Where the 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 SSRO as regulator).

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

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

Under SSCRs, there are statutory reporting requirements where the contractor is required to report on the costs that it will incur or has incurred in performing the contract. Particularly relevant to contract cost and pricing is the ‘contract pricing statement’, which is settled
on contract signature and sets out the cost information on which the price is agreed. Other reports are also required to be delivered regularly throughout the term of the contract (and at the end) that provide information on the costs actually incurred as the contract progresses.

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 (see question 15).

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, though the MoD guidance sets out when this is likely to be exercised in practice.

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

The MoD’s policy on the ownership of intellectual property (IP) arising under its contracts is that IP will normally vest with the contractor generating the IP, in exchange for which the MoD will expect the right to disclose, use and have used the IP for UK government purposes (including both military and civil defence).

This is achieved through the inclusion of IP-related DEFCONs in the contract. These DEFCONs are currently under review – the MoD intends to replace them with a single IP DEFCON (though this new DEFCON would still align with MoD’s policy on IP ownership).

MoD policy does specify certain scenarios when it expects that it should own the new IP created by the contractor, but in such cases the MoD will not unreasonably prevent the contractor from using the skills and expertise developed in carrying out the work without charge for its internal business purposes.

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 UK.

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

A joint venture (JV) could either be a corporate or commercial JV. A corporate JV would involve the JV 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 that is liable for its own debts. It is relatively straightforward and inexpensive to establish a company; the parties must file a Form IN01 and articles of association at Companies House and pay the applicable filing fee. The company is brought into existence when Companies House issues the certificate of incorporation. The shareholders (JV 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 JV does not involve any separate legal entity, and the parties contractually agree each party’s roles and responsibilities.

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.

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 (such as 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 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

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

The EU has adopted the Council Common Position 2008/944/CFSP defining common rules governing 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 implemented by EU member states into their own national legislation.

The fundamental UK legislation implementing export controls is the Export Control Act 2002. The Act provides authority for the UK government to extend the export controls set forth in the Act through secondary legislation. The main piece of secondary legislation under the Act is Export Control Order 2008, which controls the trade and exports of listed military and dual-use items (ie, goods, software and technology that can be used for both civilian and military applications).

The military and dual-use items captured by the Order are known as ‘controlled goods’ as trading in them is permitted as long as, where appropriate, a licence has been obtained. Licences are administered by the UK Export Control Organisation within the Department for International Trade. The UK’s HM Revenue & Customs is responsible for enforcing the legislation.

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

If the DSPCR applies, there is no scope for domestic preferences. However, where article 346 TFEU is relied upon in order to disapply the DSPCR, contracts are commonly awarded to national suppliers.

Within the MoD, there are specific approval levels for anyone wanting to rely on article 346 to award a contract without competition.

24 Are certain treaty partners treated more favourably?

Only those who are member states of the European Union or signatories of the GPA are able to benefit from the full protection of the DSPCR.

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

The EU implements embargoes and (financial) sanctions imposed by the UN and may also implement EU autonomous embargoes and sanctions. All of these embargoes and sanctions are implemented through EU regulations, which have direct legal effect in each member state. The UK makes statutory instruments (such as Orders) to provide for the enforcement of, and penalties for, breaches of the EU and UK embargoes and sanctions and for the provision and use of information relating to the operation of those sanctions.
Embroages 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 UK government website https://www.gov.uk/guidance/current-arms-embargoes-and-other-restrictions.

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. However, the UK has introduced an alternative to offsets, the Defence and Security Industrial Engagement Policy (DSIEP). Overseas defence suppliers bidding for contracts in the UK defence sector can voluntarily sign up to the DSIEP. The DSIEP does not impose any targets, commitments or penalties on those who sign up, except for a commitment to report annually on investments into the UK, including information on their UK supply chain, R&D investment, etc.

Ethics and anti-corruption

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 MoD, wishing to take up appointment in the private sector are bound by the Business Appointment Rules (the Rules). For most civil servants, the Rules are triggered in certain circumstances, for example when an individual has been involved in developing a policy affecting their prospective employer, have had official dealings with their prospective employer or have 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, SC53-level employees and equivalents) under the Rules. Similar provisions apply to members of the armed forces, intelligence agencies and the diplomatic service.

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

Private sector employees are not subject to any specific regulations governing the commencement of employment under 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.

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 accepted 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, SC53-level employees and equivalents) under the Rules. Similar provisions apply to members of the armed forces, intelligence agencies and the diplomatic service.

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Private sector employees are not subject to any specific regulations governing the commencement of employment under 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.

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

The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 requires that anyone in the business of consultant lobbying be registered with the Registrar of Consultant Lobbyists. Consultant lobbying includes any personal oral or written communication to a Minister of the Crown or permanent secretary relating to any contract or other agreement or the exercise of any other function of the government. Such a business must then record details of the company and its directors, of any code of conduct that it adopts and, on a quarterly basis, the names of any entities on whose behalf it has actually submitted any communications.

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

Public sector procurement in the UK is based on free and open competition designed to achieve value for money for the taxpayer, with a high level of transparency of the procurement process and tender terms. Part of the objective is to discourage the perceived benefit of using intermediaries to liaise with government procurement officials and thereby put a given supplier at an advantage. As a result, it is uncommon to use success-fee based agents and intermediaries in the way that happens in certain other markets, although some suppliers do use external assistance to help them understand the procurement process. However, there is no general prohibition on the use of agents or on 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 in question 29.

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 Regulations do not prescribe maximum or minimum levels of remuneration.

Aviation

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) 216/2008 or, if they fall within Annex II thereto, are approved by individual member states. Regulation 216/2008 requires a type of certification process in accordance with certification specifications promulgated by the European Aviation Safety Agency (EASA). Annex II permits member states to approve ex-military aircraft unless EASA has adopted a design standard for the type in question. Most military aircraft are designed in accordance with a certification basis that is very different from the civil requirements, so the process of civil certification is often prohibitive. In that event, the Civil Aviation Authority may issue a ‘permit to fly’ if satisfied that the aircraft is fit to fly with regard to its overall design, construction and maintenance. Ordinarily, such aircraft are unable to conduct commercial air transport operations or to fly outside the United Kingdom. Details governing operations are contained in CAP652 and maintenance standards in BCAR Chapters A8-23 and A8-25, all available from the Civil Aviation Authority.

The UK Military Aviation Authority regulates the certification and maintenance of military aircraft. Since 2010, military processes have been more closely based on the civil airworthiness philosophy than previously, but this is documented and administered separately from the civil process. Accordingly, a similar process is necessary if someone wishes to convert a civilian aircraft for military purposes, whereby the original certification has to be revalidated in accordance with military standards.
**32 What restrictions are there on manufacture and trade of unmanned aircraft systems or drones?**

The unmanned aircraft system (UAS) sector is controlled by restrictions on operation, rather than on manufacture. In the UK, UAS over 150kg are subject to regulation by EASA and may not be flown without a certificate of airworthiness. Those under 150kg fall within Annex II and are subject to regulation by member states.

In the UK, most requirements of the Air Navigation Order are dispensed with for small UAS (those under 20kg), in favour of a simple set of operational rules.

In late 2016, EASA published a Prototype Regulation to indicate how it proposes to govern UAS in anticipation that the current regime will be amended to give it jurisdiction over UAS below 150kg. This may come into force during 2018. It would contain more detailed requirements on equipment fit so as to automatically limit flight in restricted airspace. That regime is likely to include specific obligations on retailers to ensure dissemination of information about safe operation of small UAS.

UAS specially designed or modified for military use always require a licence for export from the UK. Likewise, a licence is required for 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 300km 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**

**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 detriment or being dismissed for whistle-blowing (from day one of employment);
- rights to the national minimum wage, a minimum amount of paid holiday and a statutory redundancy payment, where applicable;
- certain maternity and parental rights; and
- rules relating to working hours.

**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 MoD and defence contractors, most notably the DSPCR and the SSCR.

**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 of the UK.

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

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

An awarded contract (or security aspects letter) may require directors or employees to submit to security clearance – so employees’ personal information would need to be provided to the MoD in that scenario so that relevant checks could be carried out.

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

There are not any specific licensing or registration requirements to operate in the defence and security sector in the UK.

The MoD may impose security requirements, but this is done by treating projects on a case-by-case basis and stipulating particular requirements depending on the nature of the particular project and its degree of sensitivity. Those requirements will typically be included in a security aspects letter that will bind the contractor upon contract award.

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

Contractors producing or supplying goods and services in, or importing them into, the UK will face different environmental legislation depending on their operations, product or service. Contractors could face regulations encompassing, inter alia, air emissions, water discharges, water pollution, noise and waste disposal, and face responsibility for electrical waste and electronic equipment and restrictions on hazardous substances in such equipment. Applicable requirements may also incorporate energy efficiency, carbon emissions and energy consumption (eg, the Energy Savings and Opportunity Scheme or the CRC Energy Efficiency Scheme). Contractors involved with nuclear substances are subject to a separate or additional set of environmental obligations as well as strict nuclear waste disposal restrictions.
Finally, in some circumstances, there are exemptions, derogations or disapplications from environmental legislation for defence and military operations.

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

There are several areas to consider. First, general targets in legislation such as the Climate Change Act and Renewable and Energy Efficiency Directives will indirectly lead to targets for individual operators through more specific legislation and regulation. Next, for example, the Environment Agency leads on the integrated environmental permitting regime – individual permits may impose targets and limits for air emissions, water discharges, etc. Also, for example, the EU Emissions Trading System (managed by the Department for Business, Energy and Industrial Strategy) requires participating companies with, for instance, larger generating capacity or heavy industrial operations to cover their greenhouse gas emissions by surrendering EU Emissions Trading System allowances. Finally, companies may face individual targets (including reducing waste, chemical spills and water consumption) through their own environmental management system or corporate reporting initiatives.

40 Do ‘green’ solutions have an advantage in procurements?

The UK government has mandatory and best practice government buying standards, and a greening government policy that may be required of applicants to public tenders. The government buying standards mostly look to reduce energy, water use and waste when dealing with contracts for transport, textiles and electrical goods, among other things. Under the DSPCR, only environmental issues relevant to the contract itself can be taken into account – not the supplier’s wider efforts. In our experience, green solutions do not tend to gain any significant advantage; they do not carry significant weight in evaluation methodologies.
United States

Matthew L Haws, Mark J Nackman, Grant B Schwei kert, Marc A Van Allen and Carla J Weiss
Jenner & Block LLP

Legal framework

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

Defence and security procurement can take place at the federal, state or local (county, city, town, etc) levels. In general, procurements at the state and local levels will be for non-military equipment utilised by state and local law enforcement activities. The rules for state and local procurements are not standardised and can vary greatly by jurisdiction. However, the majority of the defence and security procurements at the federal level will be governed under Title 41 of the United States Code for non-Department of Defense (DoD) procurements and Title 10 for DoD procurements. Those statutes are then implemented and often further expanded upon in the Code of Federal Regulations (CFR), where the Federal Acquisition Regulation (FAR) can be found in Chapter 1 of Title 48. The FAR will serve as the foundational procurement regulation for all procurements, including defence and security, conducted by the various departments and agencies of the executive branch of the United States. However, each agency or department will often have a supplemental regulation that expands upon the rules set out in the FAR. In the case of the Department of Defense, the Defense Federal Acquisition Regulation Supplement (DFARS) will provide additional rules for DoD procurements. Similarly, the service branches, agencies and many specific commands of the DoD have additional supplemental regulations that will also apply to their respective procurements. However, in each case, the higher level regulation will have authority and will control in the event of conflicts. For example, an acquisition conducted by the Air Force Material Command will be governed by the FAR, DFARS, Air Force Federal Acquisition Regulation Supplement and the Air Force Material Command Mandatory Procedures. The bulk of the regulations will be at the FAR and DFARS levels as generally the lower-level supplements tend to only address minor and specific details. Some other department and agency FAR supplements that will apply for acquisitions within those organisations are the Department of Energy Acquisition Regulation, Department of State Acquisition Regulation, Department of the Treasury Acquisition Regulation, Department of Homeland Security Acquisition Regulation, Department of Justice Acquisition Regulation, and Nuclear Regulatory Acquisition Regulation. Members of the US intelligence community also often have FAR supplements, which are not generally publicly available. Finally, the US Air Force maintains an excellent website where current (and previous) electronic versions of the FAR and various FAR supplements can be found: http://fasite.hill.af.mil.

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

Generally, defence and security procurements constitute a broad range of acquisitions. Sometimes defence and security agencies conduct their procurements through the General Services Administration – this is conducted like any other civil procurement for products such as office supplies. Such a procurement would be subject to the FAR and the General Services Acquisition Regulation, even though it was ultimately being procured for a defence or security agency and purpose. In recent years, this has become increasingly common, with the use of Government Wide Acquisition Contracts (GWACs) in addition to General Services Administration (GSA) Schedule contracts. However, large traditional defence and security procurements will ultimately be identified as such by the type of appropriation being used to pay for them. The US Congress annually passes a National Defense Authorization Act, which authorises the agencies to make the expenditure by identifying the relevant section of the federal budget from which the funds will ultimately be withdrawn, and a National Defense Appropriations Act, which will make the funds available. Otherwise the primary difference between a federal defence and security procurement and a civil procurement is that the DFARS or other agency FAR supplement will apply in addition to the FAR as described above.

3 How are defence and security procurements typically conducted?

Depending on the dollar value, defence procurements are conducted somewhere on a spectrum of procedures that grow increasingly complicated and intricate the larger the dollar value of the procurement. At the lowest levels, the micro-purchase threshold will generally allow for abbreviated procedures for procurements of items below US$3,000. Most of the FAR requirements will not even apply to these types of procurements. The next step up is procurements below the simplified acquisition threshold, which is generally US$150,000. Procurements below this threshold have only the most basic requirements of the FAR applying to them. Conversely, the highest dollar-value procurements within the DoD are conducted in accordance with the full FAR, DFARS and other supplements, including DoD Instruction 5000.2. Procurements conducted under DoD Instruction 5000.2 are also tiered into Program Acquisition Categories (ACATs) I-III, with ACAT I programmes representing the largest weapon system purchases in the DoD. DoD Instruction 5000.2 procurements are among the most sophisticated acquisition processes in the world, complete with milestone decisions and a system that interweaves the capability requirements determination process, budgeting, and actual acquisition.

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

While there are always changes being proposed and implemented to the defence procurement process, there are generally no proposals pending that would radically alter the process. While some politicians frequently talk about significant wholesale acquisition reform, the system is generally slow to be altered. That said, when significant changes to the defence procurement process do occur, they are most typically achieved via statute and are usually called out in section 800 of the National Defense Authorization Act for that year. Those changes are then implemented as amendments to the FAR or DFARS through a rule-making process that allows for notice and comment in the Federal Registrar. There they are assigned a case number and move through a process that typically allows for the public to comment on proposals, and for the government to adjust the proposals accordingly. Occasionally, when there is a documented urgent and compelling need for a new rule, an interim rule will be published, meaning the rule comes into effect immediately. In this instance, however, there is still an opportunity to make changes through the notice and comment process. Occasionally, a significant change to the procurement process occurs as a result of an administrative or judicial proceeding, resulting in a published decision that clarifies existing regulations. This can generally occur at numerous levels, from a Government Accountability
Office (GAO) bid protest decision, to the Court of Federal Claims, or Armed Services Board of Contract Appeals, all the way up to the Supreme Court of the United States. Occasionally these decisions will also drive the creation of new regulations. Finally, in recent years, the DoD has published a series of ‘Better Buying Power’ (BBP) memoranda, which are:

- a set of fundamental acquisition principles to achieve greater efficiencies through affordability, cost control, elimination of unproductive processes and bureaucracy, and promotion of competition.
- BBP initiatives also incentivise productivity and innovation in industry and government, and improve tradecraft in the acquisition of services.

Occasionally, items proposed in these memoranda are policy objectives that will require the passing of new statutes; at other times they will simply require rule-making through the Federal Registrar process discussed above; and in some cases they are simply best practices that the DoD acquisition workforce will need to incorporate into the existing process.

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

No. Generally, not all IT acquisitions are conducted in the same manner. Frequently agencies will use GSA GWAC or Schedules contracts to make IT acquisitions. At other times they will conduct stand-alone negotiated procurements for them. There are, however, certain provisions and clauses in the FAR and DFARS that either will or will not be applicable depending on what kind of IT is being acquired. An example is the clause for data rights in software, which would apply to software delivered under a government contract, but not necessarily to computer monitors or IT support services.

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

The United States is a signatory to the GPA and Revised GPA. Defence procurements in the United States are conducted in accordance with the FAR as discussed above, and requirements of treaties are generally incorporated into that regulation. However, like most countries, the United States’ accession to the GPA was made with qualifications and some pre-existing domestic and socio-economic preferences remained. There is an extensive list of DoD procurements for which the United States does not apply GPA coverage (https://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#us). In addition, the United States takes the position that many non-DoD procurements are similarly exempt, such as national security procurements by of the Department of Homeland Security, the Transportation Security Administration, US Coast Guard, etc.

Disputes and risk allocation

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

Disputes between the DoD and a defence contractor regarding matters of contract performance are generally covered under the Contract Disputes Act, 41 USC Chapter 7. That act is implemented and incorporated into the FAR at Subpart 33.2 Disputes, and ultimately into each contract through the use of the mandatory contract clause FAR 52.233-1. Once a dispute transitions from a request for equitable adjustment into a certified claim, it can generally be litigated at either the Armed Services Board of Contract Appeals or the Court of Federal Claims. For disputes regarding matters of contract formation, bid protests (also referred to as ‘challenges’ outside the United States) can be filed by disappointed offerors at either the GAO under jurisdiction of the Competition in Contracting Act 31 USC section 3556 and FAR 31.104, the Court of Federal Claims under jurisdiction of the Tucker Act, 28 USC section 1492(b), as amended by the Administrative Dispute Resolution Act of 1996 and FAR 31.105, or with the procuring agency under FAR 32.103. Protests for issues regarding the solicitation should be raised before contract award, and protests regarding award decisions have strict timelines requiring them to be filed soon after award.

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

Alternative dispute resolution (ADR) exists largely as part of the existing formal process described above. At the GAO, ADR exists in the form of outcome prediction and with the agency’s ability to take corrective action prior to a decision by the GAO. At the Court of Federal Claims, the ADR Automatic Referral Program utilises early neutral evaluation, mini-trials, settlement judges and third-party neutrals. At the Armed Services Board of Contract Appeals, the parties can agree to enter into either binding or non-binding ADR. Many of the prime defence contractors include some form of ADR in their standard terms and conditions, whether it be mediation or arbitration, binding or not. However, those terms and conditions are always subject to case-by-case negotiation.

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 general, the Anti-Deficiency Act at 31 USC section 1341 prohibits an officer or employee of the United States from creating any unfunded obligation for the government, which includes blanket indemnification of contractors. However, several statutes exist providing authorisation for the government to do so in some unusual situations, many of which arise in the defence and security context. Some examples are:

- the National Defense Contracts Act, 50 USC section 4141, as implemented by Executive Order 10789 (this provides indemnification under defence contracts for unusually hazardous or nuclear risks);
- 10 USC section 2354 (this provides indemnification for unusually hazardous defence research and development);
- the Atomic Energy Act, as amended by the Price-Anderson Act of 1957, 42 USC section 2210(d) (this provides indemnification for the risk of a substantial nuclear incident);
- the Federal Aviation Act, as amended, 49 USC section 3321 et seq (this provides indemnification for aircraft operations risks necessary to carry out US foreign policy); and
- the National Aeronautics and Space Act, as amended, 42 USC 2458b (providing for indemnification for damages related to the launch, operation or recovery of space vehicles).

Contracting officers are not legally permitted to provide a contractor indemnification without a statutory authorisation such as the examples listed above. Government contractors can also raise a legal defence for tort liability in state and federal law suits known as the ‘government contractor defence.’ While not an indemnification provided by the contract, this legal defence generally protects contractors in cases where third parties sustain injuries from defects in products or equipment supplied or built under a government contract. This legal defence has also been successfully used to protect contractors from providing services to the government as well. It is not an absolute defence, but very generally will provide coverage when the product or service provided meet the specifications or statement of work in the contract. The government does not typically require contractors to indemnify the government. However, the government does often require that contractors obtain insurance or demonstrate self-insurance as set forth in clauses such as FAR 52.228-5, -7 and -8, and DFARS 252.247-7007. The government also frequently requires irrevocable letters of credit and performance and payment bonds from contractors as set forth in FAR 52.228-14, -15 and -16.

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?

Yes, government limitations of contractor liability are standard contract clauses at FAR 52.228-23, -24 and -25, which are utilised in procurements over the simplified acquisition threshold (generally US$150,000). The government also uses a very simple limitation of government liability clause at FAR 52.216-2 for letter contracts, where the government issues an abbreviated contract for expediency in the anticipation of finalising a full contract at a later date. Otherwise, the
US government uses a variety of contract types including fixed-price, cost-type, and time-and-materials contracts. Under a fixed-price contract, the government’s liability will usually be limited to the total contract price, unless the contract contains a price adjustment clause agreed to by the government either constructively or actually changes the contract. Under cost-type and time-and-materials contracts, the government is generally liable for actual allowable costs incurred by the contractor in performance of the contract. However, cost-type and time-and-materials contracts must contain either limitation-of-costs or limitation-of-funds clauses at FAR 52.232-20 and 52.232-22. These clauses serve to limit the total liability of the government, in order to comply with the Anti-Deficiency Act described above, on what would otherwise potentially be unlimited liability, to either the amount of appropriated funds obligated in the case of the limitation-of-costs clause or the amount actually funded in case of the limitation-of-funds clause.

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 if a contractor performs work and incurs costs in excess of the funds obligated to the contract. Pursuant to the Anti-Deficiency Act, the US government cannot undertake contractual liabilities in excess of funds obligated to the contract. In other words, the US government’s contractual liability to a contractor cannot exceed the funds obligated to the contract. In some circumstances, the government will ‘fully fund’ the contract before the contractor begins performing work. In other circumstances, the government will ‘incrementally fund’ the contract during performance. However, even in the latter situation, the contract does not authorise the contractor to perform work and incur costs in excess of funds obligated to the contract. With respect to fixed-price contracts, the government will obligate funds in the amount of the contract price. With respect to cost-reimbursable contracts, there are two important contract clauses that may apply. First, the Limitation of Costs clause at FAR 52.232-20 applies to fully funded contracts. The Limitation of Costs clause requires a contractor to notify the government when it expects in the next 60 days to have spent 75 per cent of the estimated cost, or expects expenses to be greater or substantially less than previously estimated. The clause allows variations in the number of days (between 30 days and 90 days) and variations in the percentage (between 75 per cent and 85 per cent). Second, the Limitation of Funds clause at FAR 52.232-22 applies to incrementally funded contracts. The Limitation of Funds clause requires a contractor to notify the government that it is coming to the end of obligated funding, and send notification to the contracting officer that obligated funds will be spent within the next 60 days.

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

Before entering into a contract with the US government, a contractor must qualify as a ‘responsible source’ to perform the contract (see FAR 9.104). Under this procurement rule, the contracting agency will conduct a pre-award survey to evaluate the contractor’s financial condition and to determine if the contractor has ‘adequate financial resources to perform the contract, or the ability to obtain them’ (see FAR 9.104-1(a)). If the contractor does not have adequate financial resources, it must provide ‘acceptable evidence’ of its ability to obtain ‘adequate financial resources’ to perform the contract (see FAR 9.204-3(a)). In some cases, this ‘acceptable evidence’ may consist of a letter of credit setting aside immediately available funds in the event of a contractor default. In other cases, the contractor may ask the contracting agency to rely on the financial position of the contractor’s parent corporation. In these situations, the contracting agency will likely require a financial guarantee from the contractor’s corporate parent. In addition, a contracting agency will likely require a corporate parent guarantee if the contractor is a new entity formed solely to perform the contract. However, a corporate parent guarantee may not be an option if the parent is a foreign company (see Betakut USA Inc, Comp Gen Dec B-134142, 89-1 CPD paragraph 432 (a contracting agency declined to accept a corporate parent guarantee due to the difficulty of making collections from a foreign company in the event of the subsidiary’s default)).

Defence procurement law fundamentals

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?

Yes, there are mandatory procurement clauses that will be ‘read into’ a US government contract. In other words, certain procurement regulations are incorporated ‘as a matter of law’ into US government contracts. Under the ‘Christian doctrine’, a procurement regulation that ‘expresses a significant or deeply ingrained public policy is considered to be included in a contract by operation of law’. For more details, see SJ Amazon Com Co v United States, 12 Fed Cl 1057, 1075 (Fed Cir 1993) (citing GL Christian & Assocs United States, 312 Fed 418, 416 (CI Ct1963)). To determine if an omitted clause should be included in the contract, courts and boards of contract appeals apply a two-part test. First, was the omitted clause a mandatory FAR or DFARS clause? Second, does the clause express a significant or deeply ingrained public procurement policy? If the answer is ‘yes’ to both questions, then the omitted clause will be incorporated into the contract by operation of law. Examples of clauses that will be incorporated by operation of law into a US government contract include:

- the Disputes clause at FAR 52.233-1;
- the Changes clause at FAR 52.204-31 and 52.249.

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

The way costs are allocated between the contractor and the US government depends on the contract type. In general, there are three different contract types for allocating costs between the US government and the contractor. First, the parties may enter into a cost reimbursement contract. Under this arrangement, the contractor has very little risk. All of the contractor’s reasonable, allowable and allocable costs will be paid by the US government. In addition, the contractor will typically earn some form of fee for performing the cost reimbursement contract. Second, the parties may enter into a ‘fixed-price’ contract. Under this arrangement, the contractor has significant risk. When it performs the work, the contractor will receive a fixed sum, regardless of the actual costs incurred. In other words, none of the contractor’s costs will be allocated to the US government. Third, the parties may enter into a ‘fixed-price incentive’ contract. Under this arrangement, the parties share the cost risk. The parties will agree to a ‘target-cost’ figure, which reflects the expected cost of the work when the contract is awarded. Cost overruns occur when actual costs exceed the target cost. Cost underruns occur when actual costs are less than the target cost. Under a fixed-price incentive contract, the parties will share an agreed-upon percentage of cost overruns or cost underruns. However, any cost overruns that exceed an agreed-upon ceiling amount will be allocated 100 per cent to the contractor.

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

In situations where it applies, the Truth in Negotiations Act (TINA) requires the contractor to submit cost or pricing data that is certified to be accurate, current and complete as of the date of agreement on price (see 10 USC section 2306(f ) (1983)). A TINA certification is required for all sole-source, non-competitive contracts with an award worth US$750,000 or more (see FAR 15.403-3). Contractors are not required to disclose TINA-certified cost or pricing data in procurements where:

- there is adequate price competition;
- the price is set by statute or regulations; or
- the contract is for a commercial item (see FAR 15.403-1(a)–(b)).

For procurements where TINA applies, the contractor’s certified cost or pricing data must include ‘all facts that a prudent buyer or seller would reasonably expect to affect the negotiations of price significantly’ (see 10 USC section 2306(a)). Examples of information that may constitute ‘cost or pricing data’ include:

- vendor quotations;
- non-recurring costs;
- information on changes in production methods or volumes;
If the contractor submits inaccurate, incomplete, or non-current data, the contractor will be subject to contractual, civil, and possible criminal liability, including fraud. If pricing is found to be defective, this can result in the reduction of contract price.

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

Contractors are subject to audits performed by the US government to assure compliance with the terms of the contract. The primary federal agency with responsibility for overseeing contractor performance is the Defense Contract Audit Agency (DCAA). For most competitive and non-competitive negotiated acquisitions, the contract will contain FAR 52.215-2 (Audit and Records – Negotiation). Under this clause, the term ‘records’ includes books, documents, accounting procedures and practices, and other data. Under this clause, the DCAA has the right to audit the following contract types:

- cost-reimbursement;
- incentive;
- time-and-materials;
- labour-hour; and
- price re-determinable contracts.

For these contract types, the contractor must maintain, and the DCAA has the right to examine and audit, all records and other evidence sufficient to properly reflect all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of the contract. The DCAA routinely performs three types of audits: pre-award audits, post-award audits and business system audits. Pre-award audits include a review of the contractor’s financial ability, proposal pricing, forward-pricing rates and accounting system. Post-award audits include a review of costs incurred, compliance with TINA and compliance with Cost Accounting Standards (CAS). Business system audits include a review of significant accounting, estimating, billing, purchasing, time-keeping and supply management systems.

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

Under US government contracts, there are two general categories of intellectual property:

- patent rights; and
- rights in technical data and computer software.

With respect to patent rights, the contractor may elect to retain title of any invention introduced to practice in the performance of work under a US government contract (see FAR Subpart 27.3 – Patent Rights under Government Contracts). Under these circumstances, the US government obtains a licence to use the invention, which is non-exclusive, non-transferable, irrevocable and paid-up. If the contractor does not elect to retain title, the US government obtains title to the invention. Under these circumstances, the contractor gets a licence that is revocable, non-exclusive and royalty-free. With respect to data or software, the contractor gets title and the US government gets a licence (see FAR Subpart 27.4 – Rights in Data and Copyrights). There are three categories of licence rights:

- unlimited rights;
- limited or restricted rights; and
- government purpose rights.

If the data or software is developed exclusively with government funds, the US government gets unlimited rights and can do whatever it wants with the data or software. If the data or software is developed at private expense (ie, it is not developed in the performance of a government contract), then the US government gets limited or restricted rights to make additional copies and may not disclose the data or software to third parties. If the data or software is developed with mixed government and private funding, then the US government may use the data or software within the government and may authorise others to use it for any government purpose.

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?

While there are no special economic zones for foreign contractors per se, there are special economic zones for small contractors (see FAR Subpart 19.33 – Historically Underutilised Business Zone (HUBZone) Program). The HUBZone programme helps small contractors located in certain urban and rural communities gain preferential access to federal procurement opportunities. The federal government has a goal of awarding at least 5 per cent of all dollars for federal prime contracts to HUBZone-certified companies. Agencies may set aside contracts for which only HUBZone companies are allowed to bid, or they may award sole-source contracts to HUBZone firms in an effort to meet that goal. HUBZone-certified contractors may also be eligible for a 10 per cent price evaluation preference in some cases. There are about 5,000 small contractors certified in the HUBZone programme. To qualify for the programme, a business must meet the following criteria; it must:

- be a ‘small business’ (under the Small Business Association’s rules);
- be owned and controlled at least 51 per cent by US citizens, or a community development corporation, an agricultural cooperative or an Indian tribe;
- have its principal office located within a ‘historically underutilised business zone’, which includes lands considered ‘Indian country’ and military facilities closed by the Base Realignment and Closure Act; and
- have at least 35 per cent of its employees residing in a HUBZone.

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

In the United States, a joint venture (JV) is a business entity created by two or more parties pursuant to a JV agreement. In this agreement, the parties agree to contribute equity to the new entity and to share in its control, revenues, and expenses. The JV may be unincorporated (eg, a general partnership) or incorporated (eg, a limited liability company or C corporation). An unincorporated JV does not need special formation documents to come into existence, and its partners are liable for any debts the business incurs. The incorporate JV is governed by the law of the state specified in the JV agreement. On the other hand, an incorporated JV is an independent legal entity. In other words, the incorporated JV is legally liable for debts the business incurs, not the shareholders or members that own it. The incorporated JV is governed by the law of the state where it is incorporated. To create an incorporated JV, the parties must file a document called the ‘articles of incorporation’ with the Secretary of State or other appropriate state agency. In addition, in most states, by-laws and organisng resolutions must be adopted. An incorporated JV will also need to apply for a tax identification number with the Internal Revenue Service. In addition, most states require incorporated JVs to have and maintain a registered agent who resides in the state.

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 (FOIA) (5 USC section 552), federal agencies are required to disclose records upon receiving a written request for them, subject to nine exemptions set forth in the FOIA that protect certain records from disclosure requests. FOIA requests for records held by the federal government may be made by ‘any person,’ which includes foreign citizens, corporations and governments (see Stone v Export-Import Bank of the United States, 552 F2d 132 (3rd Cir 1977)). Thus, if a company is interested in competing on a particular contract in the future, it can request copies of the current contract, the incumbent contractor’s proposal and any correspondence between the agency and the incumbent contractor. Although the released documents may be redacted to protect trade secrets and other proprietary information, they may still provide useful information on the programme and the incumbent contractor. A FOIA request must ‘reasonably describe’ the records sought – the more detailed the description, the better (see 5 USC section 552(a)(3)). Sometimes a date range also
provides a good method for narrowing a search for documents. The request should mention that a reply is expected within the statutory time frame, which is 20 days (see 5 USC section 522(a)(6)(A)(i)-(ii)). On 30 June 2016, President Obama signed into law the Freedom of Information Act (FOIA) Improvement Act of 2016, which revised the FOIA to codify the presumption that openness prevails.

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

The Department of Defense imposes specific obligations on defence contractors and their suppliers to maintain an acceptable counterfeit electronic parts detection and avoidance system (DFARS 246.870-2). The requirement applies to all contractors that supply electronic parts and are subject to CAS, as well as their subcontractors that produce electronic parts. For example, such a system must include risk-based policies that address personnel training, inspections and testing, and procedures to remove counterfeit parts from the supply chain, promote traceability and report and quarantine suspected counterfeit parts. For a complete list of system requirements, see DFARS 246.870-2(b). In addition, there is a mandatory clause, which addresses the rule against counterfeit parts, contained in all solicitations and contracts for the procurement of electronic parts except for those that are specifically reserved for small businesses (DFARS 252.246-7007).

International trade rules

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

The International Traffic in Arms Regulations (ITAR) control the export and import of defence-related articles and services on the United States Munitions List. The Department of State Directorate of Defense Trade Controls (DDTC) is responsible for managing articles and services that fall under ITAR. Generally, any person or company who intends to export or to temporarily import a defence article, defence service or technical data must obtain prior approval from the DDTC. This includes the furnishing of ITAR-controlled products or defence assistance to foreign persons within the United States. The Department of Commerce Bureau of Industry and Security (BIS) is responsible for regulating the export of most commercial items, often referred to as ‘dual-use’ items, which are those having both commercial and military applications. Dual-use export licences are required in certain situations involving national security, foreign policy, short-supply, nuclear non-proliferation, missile technology, chemical and biological weapons, regional stability, crime control or terrorist concerns. Relatively few exports of dual-use items require obtaining an export licence from BIS prior to shipment.

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

Two major programmes provide domestic preferences for government procurements. The Buy American Act (BAA) is the major domestic preference statute governing procurement by the federal government. The BAA is not a prohibition against purchasing non-domestic products, but is a proposal evaluation criterion that imposes a price evaluation penalty on offers of foreign end-products. The BAA applies to direct purchases by the federal government of more than US$1,000,000, providing their purchase is consistent with the public interest, the items are reasonable in cost and they are for use in the United States. The BAA requires that ‘substantially all’ of the acquisition be attributable to American-made components. The BAA applies a two-part test: the item must be (i) manufactured in the United States, and (ii) comprised of US ‘manufactured’ components, the cost of which exceeds 50 per cent of the total component cost. The component test is waived for commercial off-the-shelf items. There is also a group of ‘qualifying countries’ where products from those countries are treated by the Department of Defense as domestic-end products for the purposes of the BAA. These countries are Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Israel, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom. The Trade Agreement Act (TAA) opens procurement to products from ‘designated countries’ but prohibits supplying products and services from non-designated countries without a government waiver. Designated countries include countries that have signed on to the World Trade Organization Government Procurement Agreement, countries that have entered into free trade agreements with the United States and certain Caribbean countries and least-developed countries. In addition, free trade agreements (eg, NAFTA, GPA) may override BAA requirements. The TAA applies a ‘rule of origin’ test where a product is of the country in which it was ‘substantially transformed into a new and different article’.

24 Are certain treaty partners treated more favourably?

Under both the Buy American Act and the Trade Agreements Act, certain qualifying countries and designated countries, respectively, are treated more favourably in government procurements.

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

The Office of Foreign Asset Control (OFAC) within the Department of Treasury administers a number of different sanctions programmes targeting both geographic regions and governments. Some programmes are comprehensive in nature and block the government, and include broad-based trade restrictions, while others target specific individuals and entities. In some situations, authority to engage in certain transactions with embargoed countries or entities is provided by means of a general licence. In instances where a general licence does not exist, a written request for a specific licence must be filed with OFAC. The United States has sanctions programmes against Belarus, Burma, Burundi, the Central African Republic, Cuba, the Democratic Republic of the Congo, Iran, the Ivory Coast, Libya, North Korea, Somalia, Sudan, Syria and Zimbabwe. There are also Balkans-related, Iraq-related, Lebanon-related, South Sudan-related, Ukraine-/Russia-related, Venezuela-related and Yemen-related sanctions. OFAC also maintains sanctions related to counter-narcotics trafficking, cyber-secured, non-proliferation, the rough diamond trade and transnational criminal organisations.

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

The United States does not use defence trade offsets in its procurement regime.

Ethics and anti-corruption

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

Federal employees in the executive branch of government are restricted in performing certain post-employment ‘representational’ activities for private parties, including:

- a lifetime ban on ‘switching sides’, that is, representing a private party on the same ‘particular matter’ involving identified parties on which the former executive branch employee had worked personally and substantially for the government;
- a two-year ban on ‘switching sides’ on a somewhat broader range of matters, which were under the employee’s official responsibility;
- a one-year restriction on assisting others on certain trade or treaty negotiations;
- a one-year ‘cooling off’ period for certain ‘senior’ officials barring representational communications to and attempts to influence persons in their former departments or agencies;
- a two-year ‘cooling off’ period for ‘very senior’ officials barring representational communications to and attempts to influence certain other high-ranking officials in the entire executive branch of government; and
- a one-year ban on certain former high-level officials performing certain representational or advisory activities for foreign governments or foreign political parties.

In addition to the above restrictions, ‘procurement personnel’ are also prohibited from receiving compensation from certain private contractors for a period of time after being responsible for procurement action on certain large contracts as government officials. Procurement personnel also have additional rules on reporting ‘contacts’ from prospective employers who are government contractors. In the legislative
branch. Members of the House and senior legislative staff have a one-year cooling off period, as well as restrictions on representations on behalf of official foreign entities and assistance in trade negotiations. United States Senators are subject to a two-year cooling off period in which they may not lobby Congress after leaving the Senate.

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

To address domestic corruption, 18 USCA section 201, a criminal statute, prohibits bribery and gratuities. Both the government official and the offeror of the bribe or gratuity are responsible under the statute. Contractors that violate criminal statutes related to bribery or illegal gratuities can have their contract terminated, and may face suspension or debarment from government contracting altogether. In addition, under FAR 52.203-13, the Contractor Code of Business Conduct and Ethics, contractors are required to disclose to the government any credible evidence that the contractor has committed a violation of this law. The government also has limitations on gifts and hospitality that can be given to government employees by contractors. As a general rule, government employees are prohibited from (directly or indirectly) soliciting or accepting ‘gifts’ from a ‘prohibited source’, or that are given because of the employee’s official position. Government contractors fall within the definition of ‘prohibited source’. The primary tool to address foreign corruption is the Foreign Corrupt Practices Act (FCPA). In general, the FCPA’s anti-bribery provisions prohibit offering to pay, paying, promising to pay or authorising the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business. The FCPA applies to any person who has a certain degree of connection to the United States and engages in foreign corrupt practices. Under the Contractor Code of Business Conduct and Ethics, contractors are required to disclose to the government any credible evidence of an FCPA violation, regardless of materiality. Contractors should maintain robust compliance programmes appropriate for the size and risk profile of their organisation and make sure that the programme is operating effectively by updating it and testing it on an ongoing basis.

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

The Lobbying Disclosure Act requires individuals who are paid for lobbying at the federal level to register with the Secretary of the Senate and the Clerk of the House. Lobbying firms, self-employed lobbyists and organisations employing lobbyists must file regular reports of lobbying activity. A lobbyist includes any person who:

- receives financial or other compensation for lobbying in excess of US$2,500 per three month period;
- makes more than one lobbying contact; and
- spends 20 per cent or more of his or her time over a three-month period on lobbying activities on behalf of an employer or individual client.

All three criteria must be met to require registration.

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

Contractors’ arrangements to pay contingent fees for soliciting or obtaining government contracts have long been considered contrary to public policy because such arrangements may lead to attempted or actual exercise of improper influence (FAR 3.4). By statute, the government:

- requires in every negotiated contract a warranty by the contractor against contingent fees;
- permits, as an exception to the warranty, contingent fee arrangements between contractors and bona fide employees or bona fide agencies; and
- provides that, for breach or violation of the warranty by the contractor, the government may annul the contract without liability or deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

‘Bona fide agency’ means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain government contracts nor holds itself out as being able to obtain any government contract or contracts through improper influence. ‘Bona fide employee’ means a person, employed by a contractor and subject to the contractor’s supervision and control as to time, place and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain government contracts nor holds out as being able to obtain any government contract or contracts through improper influence.

Aviation

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

In the United States, the Federal Aviation Administration (FAA) has jurisdiction over civilian airports, air traffic control, aviation safety and aircraft certification and registration. While military aircraft are technically governed by military regulations and not the FAA, practically speaking, they operate in accordance with FAA regulations when flying in the US. Generally, aircraft used by the DoD for military purposes are manufactured as military aircraft and delivered directly to the customer as such. Most military aircraft spend their lifetime in military service. However, some are sold through the DoD’s Foreign Military Sales programme and, in limited instances, a small number of surplus aircraft may be converted to non-commercial civilian use by obtaining a Special Airworthiness Certificate from the FAA. If a commercial enterprise desires to purchase military aircraft for civilian commercial use, the aircraft would then become subject to FAA regulations governing all commercial aircraft. In general, due to numerous technical specifications and requirements, military aircraft are more expensive than their civilian counterparts and, as a result, conversion of aircraft from civilian to military use is more common in the US than conversion from military to civilian use. The conversion of a civilian aircraft to military use will largely depend on the requirements of the customer requesting the conversion. For example, the Department of the Navy would have authority in making decisions regarding the purchase of a civilian aircraft to be converted for Navy military transport purposes. The military customer is given the ultimate responsibility of ensuring airworthiness and compliance with both FAA and DoD regulations governing the operation of aircraft in the US and abroad.

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

The FAA has authority regarding the operation of civilian small (less than 5kg) unmanned aircraft systems (UAS) in the US (see www.faa.gov/; 14 CFR Part 107). For example, pilots must be FAA and Transportation Safety Administration approved, aircraft must not fly below 400 feet, at less than 100mph and during the day, and all UAS must yield to manned aircraft. However, because the military departments do not fall under the authority of the FAA (although they typically comply with FAA rules), they are free to direct the manufacture and operation of UAS according to their own requirements. Civilian manufacturing of UAS is generally unrestricted and the FAR and DFARS do not specifically address the procurement of unmanned aircraft. However, certain systems might be restricted from private sales due to national security or informational classifications.

Miscellaneous

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

Defence contractors are subject to a host of labour and employment regulations, which are administered by the Department of Labor through the Office of Federal Contract Compliance Programs (OFCCP; https://www.dol.gov/ofccp/). The Equal Opportunity Clause, established by Executive Order (EO) 11246 and set out in FAR 52.222-26, applies to all contracts exceeding US$10,000 as well as those below US$10,000 if the contractor has contracts with the federal government with an aggregate value exceeding US$10,000 in a 12-month period, and requires the contractor not to discriminate against any employee or applicant for employment because of race, colour, religion, sex or national origin. EO 11246 also establishes an affirmative action requirement (41 CFR 60-2), which requires the contractor to ‘take affirmative
action to ensure that applicants are employed [and treated] without regard to race, colour, religion, sex or national origin. FAR 22.804-1 requires contractors to develop a written affirmative action programme and to include an Affirmative Action Compliance clause in applicable contracts (see FAR 52.222-25). Complaints of equal opportunity violations are required to be forwarded to OFCCP, and violators may be suspended or debarred from eligibility for future contracts. Another equal opportunity regulation applies specifically to veterans. The Vietnam Era Veterans’ Readjustment Assistance Act of 1972 (VEVRAA), 38 USC section 4211 and section 4214, as amended, requires that contractors take similar equal-opportunity steps with regard to ‘qualified covered veterans’, but only applies to contracts to be performed in the US. EO 11241 prohibits contractor discrimination on the basis of age under FAR 22.901(c). Other labour and employment statutes include the Davis-Bacon Act, the Walsh-Healey Act and the Service Contract Act, which establish minimum wages for different classifications of contracts (in certain instances, contracts to be performed outside of the US are exempt from these minimum wage laws).

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

The answers above have discussed in detail numerous laws and regulations applicable to government and defence contractors, notable among them, the FAR and DFARS.

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

The FAR and DFARS generally apply to all contractors performing under contracts with the federal government and DoD, regardless of location. Certain labour laws specifically do not apply to contracts to be performed outside of the US. For example, VEVRAA and the minimum wage laws generally do not apply to contracts to be performed outside the US.

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

Personal information is generally not required initially but, depending on the sensitivity of the contract, may be required in conjunction with a specific contract. However, during the System for Award Management (SAM) registration process (see question 37), the contractor will be asked a series of questions, several of which ask about past wrongdoing. The first asks the entity if any of its principals are currently debarred, suspended, proposed for debarment or declared ineligible for the award of contracts by a federal agency. The second asks if in the past three years the entity has been notified of wrongdoing. The third asks if in the past three years the entity has been notified of any delinquent federal taxes in an amount that exceeds US$3,000 for which liability remains unsatisfied. Additionally, the FAR implements the Federal Funding Accountability and Transparency Act of 2006 by requiring all solicitations and contracts for US$30,000 or more to include the clause found in section 52.204-11, which requires contractors to report the total compensation of the five most highly compensated executives of the contractor and the first-tier subcontractor. Contractors who had a gross income of less than US$300,000 during the previous tax year are exempt from this reporting requirement. This information will be requested during the SAM registration process and is made available to the public on www.usaspending.gov.

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

In order to bid on federal contracts, contractors must first register on the SAM website at www.sam.gov. During the SAM registration process, the contractor will be asked to provide a Taxpayer Identification Number (TIN) or Employer Identification Number (EIN). Contractors can obtain a TIN or EIN from the Internal Revenue Service online at https://www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online. Also, during the SAM registration process, contractors will be asked to provide their DUNS number. DUNS numbers are provided free of charge by Dun & Bradstreet (D&B) and can be obtained online at https://fedgov.dnb.com/webform. In addition to SAM registration, most states in the US require companies to register to do business in their state. This type of registration can typically be done online, for a small annual fee, at each particular state’s Secretary of State website. Depending on the type of entity, state and local tax authorities may also require registration for tax purposes.

38 What environmental statutes or regulations must contractors comply with?

Any business operations within the United States are subject to generally applicable US environmental laws. Most sectors of the economy are subject to a number of major environmental laws. For example, the discharge of pollutants into the air and water is regulated under the Clean Air Act and Clean Water Act. Under these laws, the Environmental Protection Agency sets emissions standards for various pollutants. Complying with these emissions standards often involves extensive permitting and monitoring. In some cases, violation of these environmental laws can lead to debarment from federal government contracting.
Must companies meet environmental targets? What are these initiatives and what agency determines compliance?

US environmental laws typically regulate pollutants instead of providing incentives to meet environmental targets. There are some tax credits and incentives for environmental improvements, such as clean energy investments.

Do ‘green’ solutions have an advantage in procurements?

Statutes, executive orders and FAR provisions create a host of specific preferences for environmentally friendly products. Agencies are required to ensure that 95 per cent of products purchased are energy-efficient (Energy Star or Federal Energy Management Program designated); water-efficient; bio-based; environmentally preferable; non-ozone depleting; or made with recovered materials. This does not necessarily require preference in a specific procurement, and there are significant exceptions to this preference, including for weapon systems and contracts performed outside the United States. Many of the specific preferences for environmentally friendly products are addressed in Part 23 of the FAR. A solicitation will identify specific clauses containing prohibitions or preferences for environmentally friendly products.
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[Link to Online Version] - www.gettingthedealthrough.com