

Defence and Security Public Contracts Regulations 2011

Chapter 12 – Security of Supply

Purpose

1. This guidance explains the security of supply provisions contained within the Defence and Security Public Contracts Regulations (DSPCR) 2011.
2. Specifically, the guidance explains what we mean by security of supply, what the legal framework is and how procurers should implement the security of supply provisions for contracts that fall within the scope of the DSPCR.

What is security of supply?

3. The DSPCR does not define security of supply. By security of supply, we mean a nation's ability to assure and to be assured of contracted supplies of goods and services sufficient to discharge its defence and security commitments in accordance with its foreign and security policy requirements. Where necessary, it includes the ability to use those goods and services under appropriate United Kingdom (UK) control, and free of third party constraints.

What is the legal framework?

4. Regulation 39 (Security of supply) of the DSPCR provides a number of examples of the measures procurers may adopt in reducing the risks to security of supply. The rules set out a non-exhaustive list of documents and commitments that procurers may specify for inclusion in tenders.
5. Regulation 39 aims to make cross-border defence and security procurement less risky and more efficient. Specifically, it aims to address the need for assurance that a foreign supplier will fully perform defence and security contracts.

When to consider security of supply

6. Procurers must consider at the start of the procurement the importance of an assured supply, in particular taking account of the criticality of the goods or services to meeting UK foreign and security commitments, and the ability to use them without constraint.
7. You must consider security of supply requirements whenever procurement involves:
 - a. tenderers located in other states;
 - b. elements of the supply chain located in other states;
 - c. cross border movement of goods and services.

8. The globalised nature of modern business means that even when a tenderer is UK based, the increased complexity of some equipment can mean the supplier sources critical parts of it or key raw materials from overseas. This may not be immediately obvious.

9. Security of supply can be a particular concern for simpler procurements where a crisis may create a surge in demand at short notice. However, for some procurement, security of supply will not be an issue because of the nature of the goods and the short duration of the contract.

Factors affecting security of supply

10. The procurer or tenderer must base their decision to source from overseas on a number of factors. In some cases, you might best achieve the overall benefits, including ensuring security of supply, by contracting with foreign suppliers.

11. Consideration of security of supply encompasses a range of industrial, technological, legal and political aspects, including:

- a. government policy on protecting our operational advantage and freedom of action, including the underlying technological and industrial capabilities, where this is essential to the UK's national security (see [Cm7953 – The National Security Strategy](#)). This policy will be set out in the White Paper on Technology, Equipment and Support for UK Defence and Security ;
- b. assuring value for money in a competitive global market;
- c. the cost of developing new technology or equipment versus the purchase of existing (commercial or military 'off the shelf') equipment options;
- d. the long term viability of a particular product or sector, taking into account the initial investment in product development and manufacturing infrastructure, ongoing costs and wider sales potential;
- e. the complex nature of the equipment or service required – particularly the origin of key components or raw materials that are critical to operational success, and which you must identify early in the acquisition process; and
- f. whether existing government-to-government agreements, in the form of a Memorandum of Understanding (MoU), or Foreign Military Sales arrangements could be used to reduce some of the risks.

Non-discrimination, equal treatment and transparency

12. Procurers must comply with the overriding principles of equal treatment of suppliers, non-discrimination on the grounds of nationality and transparency when drawing up security of supply requirements under the DSPCR.

13. Within the European Union (EU), you cannot use the nationality of a supplier, or the Member State in which the supplier is established, as a security of supply requirement.

14. Procurers must not create security of supply requirements that indirectly discriminate against suppliers from other EU Member States. For example, you cannot use the fact that you will be required to sign end-user certificates or suppliers will require international transfer licences or export permissions to exclude suppliers from contract award.

15. Requirements must also be proportionate in order that they do not unduly restrict market access for suppliers from other Member States. Where you imply these restrictions, procurers must be able to demonstrate that the restrictions are appropriate and you could not achieve the contract objectives by less restrictive requirements.

16. There may be such extremely demanding security of supply requirements where the DSPCR is insufficient to safeguard adequately the essential security interests of the UK. In these cases, it will be necessary to assess whether a Treaty exemption, such as Article 346 TFEU or Article 36 TFEU for non-military supplies, may apply (see Chapter 4 – Treaty Exemptions).

Security of supply requirements

17. You must describe security of supply requirements as neutrally and objectively as possible, using technical and operational terms. You will usually express these requirements in time limits and quantities (i.e. indication of quantities to deliver to specific locations within a given timeframe). These conditions must not be directly or indirectly discriminatory.

Contract notice

18. Procurers must indicate in the contract notice:
- a. the main features of the security of supply requirements; and
 - b. any minimum levels of capability or capacity on security of supply that potential suppliers must achieve.
 - c. any additional required levels of capability or capacity that may arise as a result of a crisis

Exclusion of potential suppliers

19. The security of supply grounds may justify the exclusion of a potential tenderer from a contract award procedure under the DSPCR. These “criteria for the rejection of economic operators” are:

- a. in Regulation 23(4)(e), grave professional misconduct, for example, where there is evidence that a tenderer has breached security of supply obligations in a previous contract; and
- b. in Regulation 23(4)(f), where there is evidence that the tenderer is not sufficiently reliable to exclude risks to the security of the UK.

20. Where considering the exclusion of a tenderer, the procurer should ensure that objective evidence exists and excluding the supplier is an proportionate course of action, such as:

- a. in Regulation 23(4)(e), a breach which is deliberate or negligent and has a material detrimental effect on security of supply is likely to meet a standard of “grave professional misconduct”;
- b. in Regulation 23(4)(f), you must base any exclusion of a tenderer on risks to the security of the UK. Moreover, subject to Article 346(1)(a) of the Treaty for the Functioning of the European Union (TFEU), the procurer must still be prepared to demonstrate to the tenderer, if necessary, the plausibility of its decision.

Selection criteria

21. The DSPCR allows procurers to take account of security of supply considerations during the selection of tenders. Procurers should define their selection criterion clearly and require potential suppliers to demonstrate in detail their technical capacity or ability to perform the contract – especially in times of crisis, but also in the through-life maintenance, modernisation and adaptation of the goods or services covered by the contract.

22. In addition to other selection criteria on technical or professional ability, the DSPCR allows the following selection criteria for security of supply:

- a. in Regulation 25(2)(e) “a statement of the economic operator’s internal rules regarding intellectual property”.
- b. in Regulation 25(2)(j) “a description of the tools, material, technical equipment, staff numbers, know-how and sources of supply (with an indication of their geographical location when it is outside the territory of the EU) available to the economic operator to perform the contract, cope with any additional needs required by the contracting authority as a result of a crisis or carry out the maintenance, modernisation or adaptation of the goods covered by the contract”.

23. You will only use the specific selection criterion on security of supply where it is relevant and proportionate to the requirement.

- a. You should check the response to the criterion at Regulation 25(2)(e) to ensure no rule (e.g. a UK subsidiary company being required to vest intellectual property in an overseas parent company) affects our ability to maintain or upgrade the goods or services;
- b. The criterion at Regulation 25(2)(j) contains two specific security of supply elements; the geographic location sources of supply outside the EU; and the ability of the contractor to cope with additional needs as result of a crisis:

(1) The geographical location of non-EU sources of supply (including subcontractors) may also justify the exclusion of a potential tenderer, where the procurer considers that the tenderer cannot demonstrate that the location of their supply chain will allow them to comply with the security of supply requirements, and could compromise the tenderers’ ability to perform the contract.

(2) The examination of the potential supplier's ability to meet the additional needs of the procurer (which you must describe in the requirement) is limited at this stage of the procurement to the capability and capacity of the potential supplier and its supply chain.

Award criteria

24. Regulation 31(2) allows procurers to take account of security of supply considerations during the tender evaluation if they are awarding the contract on the basis of the most economically advantageous tender.

25. Award criteria must be relevant and proportionate to the subject of the contract, so you may only consider those parts of the tenderer's supply network that the supplier will use for that particular contract.

26. The award criteria must not give the procurer unrestricted freedom of choice for the award of the contract, i.e. you must clearly express the award criteria in measurable terms that allow you to verify effectively the information supplied by the tenderers.

27. The award criteria must comply with the EU law principles of non-discrimination, equal treatment and transparency.

28. Procurers should define their award criterion clearly and require potential suppliers to demonstrate in detail their technical capacity or ability to perform the contract – especially in times of crisis, but also in the through-life maintenance, modernisation and adaptation of the goods or services covered by the contract.

The tendering exercise

29. Regulation 39 of the DSPCR sets out a non-exhaustive list of security of supply requirements that suppliers may need to include in tenders. These particulars may require associated contract conditions. It contains a non-exhaustive list of documentation and commitments that procurers may require tenders to contain. These are broadly split between:

- a. export controls;
- b. supply chain;
- c. intellectual property rights (IPR).

Export controls

30. Procurers may request certification or documentation demonstrating to the satisfaction of the procurer that the supplier will be able to honour its obligations regarding the export, transfer and transit of goods associated with the contract, including any supporting documentation received from the Member State concerned.

31. As, in most cases, any authorisations required will not be applied for or granted until after the contract is awarded, the procurer can only require tenderers to provide an indication that they will be able to obtain the necessary

licences if the contract is awarded to them. For this purpose, tenderers could provide, for example:

- a. a record of past transfers of the same equipment or technology to the UK or another Member State, which would demonstrate that the relevant authorities do not normally refuse these transfer licences, or do not place end use / end user restrictions on the exported equipment that would interfere with the operational sovereignty of the procurer; or
- b. any supporting documents obtained from national authorities through exploratory enquiries or other official contacts.

32. Procurers should ensure that tenderers demonstrate that necessary planning and resources are available for obtaining, in good time, any transfer or export licences that are required. Contract conditions could require the contractor to:

- a. notify the procurer of all licensing requirements or other transfer restrictions applicable to the products to be delivered and to any parts, sub-systems of them, in particular if these have to be provided from third countries;
- b. notify the procurer of export-controlled content;
- c. institute timely action to obtain export licences;
- d. liaise fully with the procurer and other relevant authorities on the export licensing process to ensure that all requirements are met;
- e. ensure that contractual requirements are passed down to any subcontractor who may have to apply for export or transfer licences.

33. For Ministry of Defence (MOD) procurers, DEFFORM 47 (Invitation to Tender) requires tenderers to identify any third party IPR or foreign export control restrictions applicable to their tenders and DEFCON 528 (Overseas Expenditure And Import Licences) places a specific responsibility on contractors for obtaining export licences where required.

34. Procurers may request an indication of any restriction on the procurer regarding disclosure, transfer or use of the products and services or any result of those products and services, which would result from export control or security arrangements. This will allow you to assess whether:

- a. your security of supply requirements can be met;
- b. the goods and services can be used under appropriate national control;
- c. there are any restrictions that would adversely affect future support or maintenance of particular equipment.

35. This aspect concerns in particular:

- a. components and sub-systems of equipment that the procurer or its contractors cannot access or modify;
- b. items covered by export control regimes or end use monitoring such as the United States (US) International Trade in Arms Regulations (ITAR).

36. Tenderers should provide complete and detailed information about such restrictions where these exist.

37. Regulation 39(3) means that you may not require tenderers to obtain a commitment from a Member State that would prejudice that Member States' freedom to apply, in accordance with international or EU law, its national export, transfer or transit licensing criteria in the circumstances prevailing at the time of such a licensing decision.

38. On implementation of [Directive 2009/43/EC](#) for intra-EU transfers of defence products, whose measures are to apply from 30 June 2012, there will be a system for the granting of general licences for some defence products. This should assist in ensuring some degree of security of supply for items covered by these licences. However, these licences can be withdrawn or granted with end-use restrictions that may hinder security of supply. Therefore, the procurer will need to check general licences to ensure that the licence meets their needs for security of supply.

39. If, subsequent to contract award, necessary licences are not granted, or are granted on terms which mean that the security of supply requirements specified in the contract documents are not met, procurers should ensure that they have the right to terminate the contract under the relevant contract termination conditions if those security of supply requirements are fundamental to the contract.

Supply chain issues

Analysis of the supply chain

40. Procurers may request:

- a. certification or documentation demonstrating that the organisation and location of the supplier's supply chain will allow it to comply with the requirements of the procurer concerning security of supply as set out in the contract documents;
- b. a commitment that possible changes in its supply chain during the execution of the contract will not adversely affect compliance with these requirements.

41. Tenderers must base their evidence that the supply chain is stable and reliable exclusively on objective and performance oriented requirements. These could include identification of key components or potential single points of failure so that they can manage the risks presented.

42. For elements of the supply chain within the EU this could include an analysis of the dispersed facilities showing, for example, production capacities and skills and transportation capacities, and alternatives available, which demonstrate the ability of the tenderer to meet the contracted time scales and other performance aspects.

43. Procurers may seek a commitment from the tenderer to inform them in due time of any change in its organisation, supply chain or industrial strategy that may affect its obligations to the procurer. You should seek this commitment to

ensure that suppliers provide sufficient notice of changes or business decisions that may affect security of supply, and to provide adequate time to put alternative solutions in place.

Regulations 37(3) (Subcontracting)

44. Where a procurer requires a tenderer to award all or part of its subcontracts under Regulation 37(3), the tenderer may find that bids submitted under competition do not meet the security of supply requirements of the ITT or contract. Under these circumstances, the procurer cannot require the tenderer to comply with the subcontracting requirement under Regulation 37(3).

Additional needs

45. Procurers may seek a commitment from the tenderer to establish or maintain, or both, the capacity required to meet additional needs of procurer because of a crisis, according to terms and conditions to be agreed.

46. Procurers may also require a tenderer to provide any supporting documentation received from the supplier's national authorities regarding the fulfilment of additional needs of the procurer because of a crisis.

47. Your assessment of additional needs required in a crisis may identify critical items produced by limited industrial capacity in a foreign state. The supplier's ability to deliver your additional needs may require prioritisation of these critical items among different customers.

48. This may include details of any relevant agreements between international organisations and states establishing prioritisation systems for conflicting orders providing additional assurance to the procurer.

49. Procurers can reduce the risks to security of supply through the provision of options or conditional orders in contracts, and further, by agreeing pricing and delivery mechanisms up front. These additional commitments are, however, likely to attract additional cost.

Maintenance, modernisation or adaptation of the goods

50. Procurers may require a commitment from the tenderer to carry out the maintenance, modernisation or adaptation of the goods covered by the contract. Where possible, the procurer should specify the details of follow on work, which could be included as an option. This increases the usefulness of the commitment sought from the tenderer, and reduces the legal risks that may arise because of modification or extension of substantial terms of the contract.

Intellectual property rights

51. Procurers may seek a commitment from the supplier to provide the procurer, according to terms and conditions to be agreed, with all specific means necessary for the production of spare parts, components, assemblies and special testing equipment, including technical drawings, licences and instructions for use, in the event that it is no longer able to provide these goods.

52. Procurers may wish to have in place measures to reduce the risks to security of supply arising from closure of a contractors' business or withdrawal from the market sector for example.

53. This may be of particular concern in long-term support or service type contracts, where the procurer may become increasingly dependent upon the ability of an original manufacturer (and its supply chain) to maintain equipment availability.

54. Even where tenderers give a commitment, the know-how and rights of use may provide the tenderer with significant commercial leverage over the procurer at the point of occurrence, unless contract conditions are sufficiently detailed and clear on the arrangements.

55. For MOD procurers, the IPR topic on the Commercial Toolkit provides relevant terms and conditions, and gives comprehensive guidance on how to ensure contracts allow access to technology, support data or software and user rights, including by third parties.

56. MOD procurers should also check with Defence Intellectual Property Rights (DIPR) to see whether a supplier has signed up to a Head Agreement (DEFFORM 710) with the MOD, which enables the MOD to procure software from that supplier on certain standardised software licence terms in respect of programs identified in the Annexes to the Attachment to the Head Agreement.

57. When examining tenders, procurers must check whether the tenders are complete and conform to their requirements. You may reject tenders that lack the required particulars.

58. If you consider that a tender merely lacks sufficient detail to demonstrate satisfactory security of supply, you should allow the tenderer (and all other tenderers) the opportunity to provide further clarification. Any decision to exclude must be proportionate, related to the subject matter of the contract and based on the individual circumstances of the particular procurement.

Contract conditions

General rules

59. Procurers may draw up contract conditions to implement the security of supply requirements set out in Regulation 39. Any specific contract performance conditions on security of supply must be compatible with EU law and you must detail them in the contract documents.

60. You should note that according to Recital 45 of the Directive, no performance condition can pertain to requirements other than those relating to the performance of the contract itself.

61. After the award of the contract, you may have to amend the contract to take account of an changing security of security of supply requirement including:

- a. prioritisation, acceleration or expansion of the production of goods covered by the contract; or

- b. maintenance, modernisation or adaptation of the goods covered by the contract.

62. If the amendment results in material changes to the contract, it is likely to give rise to a new contract that you must:

- a. justify under the non-competitive negotiate procedure at Regulation 16; or
- b. conclude under a Treaty exemption or general exclusion.

Conditions for prioritisation, acceleration or expansion of goods

63. Your assessment of additional needs required in a crisis may identify critical items produced by limited industrial capacity in a foreign state. You may wish to address this issue by a “sleeping clause” in the contract that will activate should a crisis occurs.

64. For illustrative purposes, Annex A provides an example of such a “sleeping” contract condition for prioritisation, acceleration or expansion of production of goods for a future crisis. You should seek legal advice when drafting a narrative condition to address prioritisation of supplies should a crisis occur in the future.

65. Procurers may only be able to assess their additional needs in a crisis when the crisis occurs, with a supplier only able to determine its approach to meeting those needs at the point where you quantify the additional requirements. Therefore, it may only be possible to agree the detailed terms and conditions at the point of crisis. The supplier’s ability to deliver your additional needs may require prioritisation of supplies amongst different customers.

66. For illustrative purposes, Annex B gives example contract conditions for prioritisation, acceleration or expansion of production for inclusion in contracts raised in response to a crisis that has arisen. You should seek legal advice when drafting a narrative condition to address prioritisation of supplies when a crisis has arisen.

What are the key points to remember?

1. The DSPCR allows procurers to reduce the risks to security of supply through several iterative procurement stages:
 - a. excluding potential tenderers based on past grave professional misconduct in relation to security of supply or not possessing the reliability necessary to exclude risks to the security of the UK.
 - b. establishing selection criteria for prospective tenderers related to security of supply.
 - c. requiring fulfilment of security of supply criterion at the contract award stage.
 - d. using contract conditions that create specific security of supply obligations on the supplier.
2. Security of supply considerations apply to specific contracts, and are limited to their subject and the duration of the contract.
3. You must include a detailed description of the security of supply requirements in the contract documents.
4. You must specify in the contract documents the commitments, certificates, documentation and information that a tender must include in its tender.

Annex A

Example Contract Condition - Security of Supply Support

Note: This example condition is drafted from a MOD perspective and is provided for illustrative purposes only

Purpose

Use of this condition can assist future prioritisation, acceleration or expansion of production of Defence Articles where the procurer may require scarce resources from the territories of foreign States to meet potential operational requirements.

Application

This condition is for use in contracts which the MOD considers essential to its security of supply where an urgent requirement in an emergency, crisis or armed conflict may arise some time after contract award for a critical item produced by a limited industrial capacity in the territories of a foreign State.

Special Notes

This condition is suitable for use where you may be required to prioritise, reallocate or accelerate defence goods and services in a narrow range of circumstances covering:

- procurement of arms, munitions and war material where the supplier(s) have ceased production from industrial facilities in the UK in favour of a facility located in the territory of a foreign State;
- co-operative armament projects involving the UK and one or more foreign State;
- imports from the territories of a foreign State; or
- procurement from supplier(s) located in the UK where the supply chain involves one or more of the defence industries of a foreign State.

The Authority may require the support of governments of foreign States to facilitate the performance of the contract, (e.g. by agreeing to delay their deliveries of the critical item).

1. In this Condition:

- a) “Defence Articles” means any weapon, weapon system, munitions, aircraft, vessel, vehicle, boat or other implement of war and any part or component of them and any related document;
 - b) “Defence Services” means any service, test, inspection, maintenance and repair, and other post design services, training, technical or other assistance, including the provision of technical information, specifically involved in the provision of any Defence Article;
 - c) “Security of Supply” means a nation’s ability to assure and to be assured of a supply of Defence Articles and Defence Services sufficient to discharge its commitments in accordance with its foreign and security policy requirements.
2. The following conditions apply to the Contract:
- a) where:
 - (i) the Authority informs the Contractor that in accordance with its national laws, procedures and policies, circumstances exist that give rise to a crisis, emergency or armed conflict that require priority performance under contracts or orders relating to Defence Articles or Defence Services, and
 - (ii) the Authority requires that the Defence Articles to be supplied or the Defence Services to be performed under the Contract are delivered prior to the delivery dates shown in the Contract or in greater quantities than those shown in the Contract, or both,

the Authority will notify the Contractor and, at the same time, provide full details of the change requested.

- b) The Contractor shall, within 15 (fifteen) working days or exceptionally such longer period that the parties agree after its receipt of the notification referred to in Clause 2 a) of this Condition, submit to the Authority a written appraisal of the change requested by the Authority, including full details of any impediments and the costs of fulfilling the change as requested by the Authority.
- c) If the Contractor is unable to fulfil the Authority’s requirements as requested, the Contractor shall inform the Authority and provide the Authority with alternative proposals for meeting the Authority’s request, in terms which the Contractor is able to accept, including the costs of fulfilling any of those alternative proposals. The Contractor shall show that these alternative proposals go as far as reasonably possible, in priority over other contracts and orders held by the Contractor, by means of resources that are available or become available as a result of agreement between the Authority and the Contractor and, where appropriate, through involvement of other representatives of the governments of other nation(s), to meet the Authority’s requirements, by providing evidence to the Authority that the alternative proposals have been made on this basis. Nothing in this Condition shall be construed as placing an obligation on the Contractor to breach any other contract or order between the Contractor and a third party.

- d) The Authority shall, within 15 (fifteen) working days, or such longer period as the Authority shall reasonably require, after its receipt of the written appraisal and any alternative proposals referred to in Clauses 2 b) and 2 c) of this Condition:
 - (i) inform the Contractor in writing whether the Contractor is authorised to proceed with the change requested by the Authority on the basis of the Contractor's response provided under Clause 2 b) and, where appropriate, Clause 2 c) of this Condition; or
 - (ii) require the Contractor to enter into negotiations with the Authority in order to agree mutually acceptable arrangements for meeting the Authority's requirements
- e) In cases where compliance with the Authority's request would seriously imperil the Contractor's future client-customer relations, the Contractor shall be entitled to immediately inform the Authority of its concerns. The Authority and the Contractor will agree how to resolve any such difficulty with the third party.
- f) The Contractor shall be entitled to reject the Authority's request for change in the following circumstances:
 - (i) where the Authority is unwilling to apply the terms of Clause 3 of this Condition to the requested change;
 - (ii) where compliance by the Contractor with the Authority's request would place it in breach of a law or regulation by which it is bound;
 - (iii) where the requested change is for Defence Articles or Defence Services that are not the object of the contract.
- g) Once agreement has been reached on the implementation of the request, the Contractor agrees that where the Authority has a requirement for additional Defence Articles or Defence Services then these will be supplied on fair and reasonable terms. The price for the change agreed shall be priced in accordance with the appropriate pricing conditions specified in the contract. Any agreed changes to the price for the change agreed or the revised delivery schedule, or both, shall be recorded in an amendment to the Contract.

3. A fair and reasonable payment shall be made to the Contractor in respect of any additional costs, losses and damages, directly attributable to the consequences of prioritising, accelerating or expanding production of Defence Articles to be delivered or Defence Services to be performed under the Contract. That payment shall be fixed as soon as practicable by agreement between the Authority and the Contractor in accordance with the appropriate pricing conditions specified in the Contract. For the purpose of fixing the payment the Contractor shall provide to the Authority evidence of any costs, losses and damages mentioned in this Clause 3 in such form and detail as the Authority may reasonably require in order to demonstrate to the Authority that the payment to be made to the Contractor will be fair and reasonable. The payment shall consist of reimbursement, as appropriate, of:

- a) Any additional costs incurred and losses arising, as a result of prioritising, accelerating or expanding the production of Defence Articles or performance of Defence Services which the Contractor is able to demonstrate to the Authority:
 - (i) have been occasioned by and are directly attributable as a result of the change agreed between the Authority and the Contractor; and
 - (ii) are not part of the price agreed for the change under Clause 2 g) of this Condition; and
 - (iii) have been properly incurred by the Contractor as a result of implementing the change agreed between the Authority and the Contractor in accordance with the provisions of this Condition.
 - b) Any damages due by the Contractor for breach of any other contract or any other written legal commitment and which the Contractor is able to demonstrate to the Authority are occasioned by and directly attributable as a result of compliance with the change agreed between the Authority and the Contractor in accordance with the provisions of this Condition.
 - c) Any claim for loss of profits suffered by the Contractor in relation to the loss of any prospective contract for which the Contractor is able to demonstrate to the Authority that:
 - (i) the Contractor had been officially selected as the preferred bidder at the time the Authority informed the Contractor to proceed with the change under Clause 2 d); and
 - (ii) the loss of the prospective contract was occasioned by and is directly attributable as a result of the Contractor undertaking the change requested by the Authority.
 - d) Any claim for loss of profits suffered by the Contractor in relation to the termination by a customer of the Contractor of any other contract which the Contractor is able to demonstrate to the Authority is occasioned by and directly attributable to as a result of compliance with the change agreed between the Authority and the Contractor.
4. The Contractor shall use reasonable endeavours to mitigate the consequences of the change including, but not limited to, the costs, damages and losses referred to in Clauses 2 g) and 3 of this Condition.
5. The Contractor and the Authority agree to consult at all times in the process of dealing with the Authority's requirements under this Condition, involving where necessary the representatives of the governments of the other nation(s) in which the Contractor and any sub-contractor(s) are situated, to ensure that any difficulties encountered in complying with the Authority's requirements are minimised. At the request of the Contractor, the Authority shall use its reasonable endeavours to liaise with the representatives of the governments in each of the nation(s) in which the Contractor and any of its subcontractors are situated to ensure mutual support from these nation(s) during the performance of the Contract.

6. The Contractor agrees to use its best efforts to do all that can reasonably be done to reflect this Condition in any sub-contract entered into to satisfy the requirements of the Contract and to require its sub-contractors to reflect this Condition in sub-contracts at any tier entered into to satisfy the requirements of the Contract.

Annex B

Example Contract Condition - Security of Supply in Crisis

Note: This example condition is drafted from a MOD perspective and is provided for illustrative purposes only

Purpose

Use of this condition can assist the prioritisation of scarce resources from the territories of foreign States which the procurer may require immediately to meet the urgent operational requirements of the Authority.

Application

This condition is for use in contracts for an urgent requirement in an emergency, crisis or armed conflict in a narrow range of circumstances where:

- a critical item is produced by a limited industrial capacity in the territories of foreign States; and
- the Authority may require the support of governments of foreign States to facilitate the performance of the contract, (e.g. by agreeing to delay their deliveries of the critical item).

Special Notes

This condition is only suitable for use for contract covering:

- imports from the territories of foreign States; or
 - procurement from supplier(s) located in the UK where the supply chain involves one or more of the defence industries of a foreign State.
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1. In this Condition:

- a) “Defence Articles” means any weapon, weapon system, munitions, aircraft, vessel, vehicle, boat or other implement of war and any part or component of them and any related document;
- b) “Defence Services” means any service, test, inspection, maintenance and repair, and other post design services, training, technical or other assistance, including the provision of technical information, specifically involved in the provision of any Defence Article;
- c) “Security of Supply” means a nation’s ability to assure and to be assured of a supply of Defence Articles and Defence Services sufficient to discharge its commitments in accordance with its foreign and security policy requirements.

2.

a) The Contract Price shall be established in accordance with the appropriate pricing regime and applicable conditions specified in the Contract for the pricing type. Except where payment of compensation referred to below has already been taken fully into account in determining the price, the final Contract Price shall include fair and reasonable compensation as appropriate of:

(i) Any costs incurred and losses arising, as a result of precedence being given by the Contractor in order to meet the urgency of the requirement of the Contract, which the Contractor is able to demonstrate to the Authority:

(a) have been occasioned by and are directly attributable as a result of that precedence; and

(b) have been properly incurred by the Contractor.

(ii) Any damages due by the Contractor for breach of any other contract or any other written legal commitment and which the Contractor is able to demonstrate to the Authority are occasioned by and directly attributable as a result of precedence being given by the Contractor in order to meet the urgency of the requirement of the Contract.

(iii) Any loss of profits suffered by the Contractor in relation to the loss of any prospective contract for which the Contractor is able to demonstrate to the Authority that:

(a) the Contractor had been officially selected as the preferred bidder at the time the Contract was entered into between the Authority and the Contractor; and

(b) the loss of the prospective contract was occasioned by and is directly attributable as a result of the precedence being given by the Contractor in order to meet the urgency of the requirement of the Contract.

(iv) Any loss of profits suffered by the Contractor in relation to the termination by a customer of the Contractor of any other contract which the Contractor is able to demonstrate to the Authority is occasioned by and directly attributable as a result of precedence being given by the Contractor in order to meet the urgency of the requirement of the Contract.

The Contractor shall use reasonable endeavours to mitigate the consequences of the Contract described by Clause 2.

b) The Contractor shall provide to the Authority evidence of any claim for compensations covered by Clause 2 in such form and detail as the Authority may reasonably require in order to demonstrate to the Authority that the compensation made to the Contractor is fair and reasonable.

For the avoidance of doubt, the provisions of this Clause 2 shall not permit double recovery of compensation.

3. The Contractor and the Authority agree to consult at all times in the process of dealing with the Authority's requirements under the Contract, involving where necessary the representatives of the governments of the other State(s) in which the Contractor and any sub-contractor(s) are situated, to ensure that any difficulties encountered in complying with the Authority's requirements are minimised. At the request of the Contractor, the Authority shall use its reasonable endeavours to liaise with the representatives of the other nation(s) in which the Contractor and any of its subcontractors are situated to ensure mutual support from these nation(s) during the performance of the Contract.

4. The Contractor agrees to use its best efforts to do all that can reasonably be done to reflect Clause 4 of this Condition in any subcontract entered into to satisfy the requirements of the Contract and to require its subcontractors to reflect Clause 4 of this Condition in subcontracts at any tier entered into to satisfy the requirements of the Contract.