



House of Commons
Defence Committee

The Treatment of Contracted Staff for the MOD's Ancillary Services: Government Response to the Committee's First Report

**Second Special Report of Session
2022–23**

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The Defence Committee

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Second Special Report

The Defence Committee published its First Report of Session 2022–23, *The Treatment of Contracted Staff for the MOD's Ancillary Services* (HC 187) on 26 May 2022. The Government response was received on 22 July 2022 and is appended below.

Appendix: Government Response

The Government welcomes the Committee's report. The response is set out below. The Committee's conclusions and recommendations are highlighted in bold, with the paragraph numbering in brackets referring to their location within the report. The Government's response to each follows in plain text.

Ministry of Defence outsourcing practices

1. **Whilst the MoD can, and should, outsource activities which are not part of its core function, it should also give more consideration than it does at present to the potential to provide these services in-house, if doing so represents better value for money. At present, in-house services are not being properly appraised.** (Paragraph 12).

The Government notes the Committee's conclusion but does not agree with it.

The MOD faces a continuing challenge in achieving better value for money from the Defence budget. This requires constant effort to improve the way in which business is done, whether through improved in-house practices, outsourcing activities to the private sector or a combination of the two. There is no ideological preference for public over private provision or vice versa. The overriding objective is to provide defence outputs offering best value for money affordable to UK citizens. The process of ensuring a fair and rigorous comparison of the true costs and risks of undertaking activities commercially and those of retaining activities in-house are set out in the Department's Business Improvement Policy, which is embedded within Joint Service Publication 507 (JSP 507) Investment Appraisal and Evaluation, as published on Gov.uk.

The Business Improvement Policy within JSP 507 provides specific guidance on the requirements for value for money assessment whenever commercial options for delivering MOD outputs are to be considered. This includes the need to develop a robust and deliverable Value for Money Benchmark in all cases, engagement with Trade Unions and disclosure of financial information to industry. The relevant Approving Authority is required to be assured at Outline Business Case and when making the final decision at Full Business Case that the policy as set out in JSP 507 has been pursued.

In deciding whether to outsource a service, the MOD's Project Teams prepare a Combined Operational Effectiveness and Investment Appraisal (COEIA). This compares alternative options with the potential to offer solutions to an 'operational' or 'corporate' capability requirement, including in-house and outsourcing options, following engagement with industry and client. A recommendation is made based on the option offering the best Value for Money (VFM) in the Outline business case that will be approved at the relevant governance forum depending on the level of any investment.

Furthermore, our processes are aligned with and link into the Government outsourcing approach. The MOD is mandated to follow the Delivery Model Assessment (DMA) process in the Sourcing Playbook, published by the Cabinet Office. The DMA guidance states Central Government departments should conduct a proportional delivery model assessment before deciding to outsource, insource or re-procure a service. This drives evidence-based, analytical decisions and can help address the different challenges that come from outsourcing or insourcing a service, or one of its components.

2. It is an absurd state of affairs that a bidder's previous performance cannot be taken into account in deciding the award of new contracts, which the Government has said was due to EU rules. We welcome the Government intention to revisit these rules. Changes to contract and procurement rules to allow a bidder's previous performance to be considered must be brought in before the end of the current Parliament, especially in light of the appointment of a Minister for Brexit opportunities. (Paragraph 19).

The Government notes the Committee's recommendation and would like to clarify that the MOD procures in accordance with current public contract regulations. The current regulations and changes proposed in the Procurement Bill are explained below.

The Defence and Security Public Contracts Regulations 2011 (DSPCR) mandates that suppliers are excluded from a procurement selection process if they have been convicted of a range of offences: participation in a criminal organisation; corruption; fraud; bribery; terrorist offences or offences linked to terrorist activities; and money laundering. Additionally, procurers have the discretion to exclude suppliers based on a range of grounds including grave professional misconduct and convictions for criminal offences linked to its business. The more recent Public Contracts Regulations (PCR) also include past poor performance as a discretionary exclusion ground albeit there are limits to the circumstances in which the ground applies (Regulation 57(8)).

In the December 2020 Green Paper "Transforming Public Procurement" the Government proposed to broaden the range of instances in which poor performance can be taken into account. This included where a previous public contract has been terminated or partially terminated due to breach of contract, where damages were paid for breach, where a settlement agreement has been entered into in relation to poor performance or breach, or where the supplier has failed to remedy poor performance or breach in accordance with contractual measures. The Government response to the consultation published in December 2021 listed the full range of proposed future mandatory and discretionary grounds for exclusion of suppliers which includes modern slavery offences, corporate manslaughter, breaches of competition law and where the supplier poses a risk to national security. The move to a single unified procurement regime, encompassing DSPCR and PCR, will allow a wide range of MOD procurements to benefit from these new rules. In particular paragraph 13 of Schedule 7 to the new Procurement Bill includes a discretionary ground to exclude a supplier for breach of contract and poor performance, which is broader than the past performance ground in the PCR. The bill itself continues to progress through the House of Lords.

Defence fire and rescue

3. Given Capita's past performance on other contracts, we are not convinced that Capita's "integrated risk management planning process" will not lead to cutting manning levels under the guise of risk management. (Paragraph 24)

The government notes the committee's comment. The Defence Fire and Rescue (DFR) Integrated Risk Management Plan (IRMP) is based on a detailed assessment of the fire risks at a site and provides a holistic, evidenced-based recommendation of the most appropriate measures to meet site requirements and mitigate the loss of Defence Critical Assets through the application of Prevention, Protection, and where required Response. Detailed analysis is undertaken at each of the locations where there is an on-site fire service to identify if changes such as to the workforce or asset base are required. The IRMP is scrutinised by the MOD and must be agreed by the MOD's Chief Fire Officer and the Head of Establishment/Station Commander before any recommendations, such as increases or decreases in staffing levels, are implemented.

Several factors can lead to increases or decreases in staffing levels, including improvements in firefighting technology, changes in the establishment's operations or operating hours, closure of sites etc. DFR has seen no evidence of a reduction in response capability. As described in recommendation 3 (Paragraph 24), requirements to maintain operational capability (including staffing levels) are informed by the IRMP which is subject to MOD scrutiny and agreement before being implemented.

The DFR team are working closely with Capita to ensure that business continuity will be maintained. DFR endorses, and the respective risk owners approve, any proposed changes to the fire response service. This includes identification and discussion of the current strategic fire and rescue risks, and scenarios present at a site which are then used to test the adequacy of the fire and rescue site resources.

4. The KPI of "availability of appropriate level of fire response" is in question given the crew reductions that are on the horizon and the voluntary exits. That said, a contractor's performance should not be judged only against performance indicators. A broader approach must be taken in assessing performance. The MoD should set out what its metrics are for assessing the KPI of "availability of appropriate level of fire response". (Paragraph 27)

The proposed fire risk mitigation measures for a site are subject to review and approval by both the MOD's Chief Fire Officer and Heads of Establishment. Where this results in the provision of an on-site response service, the contract Statement of Requirement specifies Service Requirements relating to the Response service.

Examples of assessing availability of appropriate level of fire response are listed below:

- A requirement for a response to emergency incidents within a specified time;
- A requirement for a minimum number of staff on a site (informed by an agreed IRMP and/or regulatory requirements in the case of Airfield Response Fire and Rescue); and,
- A requirement for the provision of an appropriately skilled workforce.

The KPIs and performance regime for Operational Capability form part of the regular performance management review and are reflected in the Pricing and Payment Incentivisation Mechanism.

In addition to the KPIs the Government has a Project Management Plan, Commercial Management Plan and Governance Management Plan.

The Governance Management Plan provides a structure of monthly meetings to support delivery of the services. Assessment of contractor performance is undertaken by DFR HQ. This involves monthly analysis of a Performance Monitoring Report submitted by Capita which is subject to validation.

This is supported by the Defence Fire and Rescue Service (DFRS) having the ability to directly 'mine' contractor data for more detail, and engagement with stakeholders to obtain views on wider contractor performance, including any concerns over service levels. Where there is evidence to demonstrate that contractor performance has fallen below contracted requirements, incentivisation measures enable the application of service credits (payment deductions) to be applied. Under the contract's governance structure, the Performance Monitoring Meeting reports through a defined escalation route, ultimately enabling the application of formal dispute arrangements.

We believe Capita are sufficiently incentivised to achieve service delivery in accordance with the contract, through a robust contract management plan and regular active engagement used to monitor wider performance, in addition to KPIs, noting that this is subject to continuous review. As part of regular meetings with Capita, the MOD has regular KPI reviews to ensure they are measuring the correct criteria in line with policy.

Capita are a strategically significant supplier with a designated Crown representative who is the focal point for cross cutting supplier related issues. A Memorandum of Understanding (MOU) is in place between strategic suppliers and government. As part of this MOU suppliers provide the government with what it needs to monitor and manage risk across its strategic supplier base. The Crown representative has bi-annual meetings with the MOD to monitor supplier performance. The DFR project report contract performance as part of the Government's publication of KPIs across government key contracts.

5. Evidence the Committee received, including numbers of voluntary exit applications, did not provide us with confidence and Capita's broader track record in performance against MoD contracts does not inspire confidence. The MoD should review Capita's general performance—not limited to KPIs—and consider what measures, both legal and informal, it could take and potential enforcing action to ensure that DFRS is carried out more satisfactorily. As part of this process, the MoD should ask Capita to share details of any exit interviews and require Capita to survey staff taking voluntary exit for the reasons why they are leaving or have left. (Paragraph 28)

The government notes the Committee's recommendation. As stated in recommendation 4, the MOD has mechanisms in place to monitor, review and incentivise performance, not just KPIs, to ensure DFRS is carried out satisfactorily. Contract mechanisms exist to enable legal, formal, and informal action to be taken to improve performance delivery. Capita's performance is monitored by the MOD with incentivisation and contractual remedies

available to apply where appropriate. Contracts are delivering the required outcomes, and the MOD is working collaboratively with Capita to continuously improve delivery and performance through the life of the contract.

The demographic of the workforce that Transfer of Undertakings (Protection of Employment) (TUPE) transferred from the MOD to Capita had a significant percentage close to retirement age. This is likely to have impacted on the take-up rate for voluntary exit. Responsibility for ensuring that staffing levels are sufficient to deliver the contracted services rests with Capita as the Service Provider and employer. Should the MOD become concerned that service delivery levels were at risk due to staffing levels, the Department will raise this with Capita.

As part of the bid process, Capita confirmed that they complete exit interviews for all employees as part of their staff attrition management plan. Capita is responsible for managing its workforce in accordance with employment law and ensuring service levels are maintained.

Treatment of staff

6. The Ministry of Defence should do more to ensure that contracted staff receive comparable employment contracts to staff directly employed by the MoD. The MoD should ensure that this is a standard part of the process when considering bids for contracts. (Paragraph 35)

The MOD notes the Committee's recommendation. A standard part of the process when evaluating bids, is to follow TUPE legislation. Under TUPE, the new employer takes over employees' employment contracts, including: all the previous terms and conditions of employment, holiday entitlement, period of continuous employment - an employee's start date is the same as before the transfer, so continuous employment is not broken - and any collective agreements previously made.

Where the requirement has the potential for outsourcing, the acquisition team ensures that the appropriate Human Resources (HR) section (or dedicated HR resource where available) is involved in agreeing the criteria for bid evaluation, the drafting and marking of the HR / TUPE elements of the requirement.

It is a breach of contract if the new employer doesn't meet the terms of the employment contract. If an individual voluntarily takes up promotion or a different role for example, their terms and conditions of employment may be changed at this point.

Staff who have been TUPE transferred as a result of outsourcing are no longer MOD employees and the MOD no longer has direct responsibility. The contracted staff remain a key part of the delivery of Defence objectives and, this is reflected in the MOD's 'Whole Force' approach, which recognises the value and role that service personnel, civil servants and contractors have in this.

7. Guidance from MoD to the chain of command and base commanders should include the importance of ensuring that contracted staff are actively integrated with directly employed staff wherever reasonably possible. (Paragraph 42) AND

8. The MoD's contracting for ancillary services represents a comparatively small part of the Department's spending compared to equipment projects, but it is worrying to see that rigidities in approach threaten value for money and can adversely affect staff morale. (Paragraph 43)

The government notes the Committee's recommendations.

As part of the contractual TUPE process, the contractor's HR Transition Proposal (which should form part of the HR/TUPE evaluation criteria) includes details of management of staff transfers under TUPE, integrating the workforce, skills, and knowledge.

The appraisal of options takes into account all relevant impacts to UK citizens, including social, economic, environmental, and financial to help inform decision making, in accordance with JSP 507 and the HM Treasury Green Book.

Furthermore, the Whole Force Approach, is about striking the optimum balance of regular forces, reserve forces, military, civil service, and industry resources for the delivery of defence outputs. As part of the overall defence effort, the MOD greatly values the relationship with industry partners and ensures they have access to MOD leisure activities, family days and any other site activities.

Contracted staff are fully included within the wider defence family. At a site level there are some excellent examples of this including integrations of contractors into staff schemes for use of catering, retail, and leisure facilities. Contractors are further integrated within the Defence family through their support of the Armed Forces covenant and by employing veterans and military family members.

The MOD also works in line with the government Sourcing Playbook, which recommends a partnership model for complex projects, with the principles of collaboration, openness, transparency, and flexibility based on contractual delivery can be beneficial in driving successful outcomes. Critical success factors of a partnership model include a focus on service delivery by both partners, clear roles and responsibilities, a shared understanding of how to effectively resolve disputes, and a collaborative culture. This could include, the colocation of employees, developing joint partnership principles and adopting a one team 'win together, fail together' approach and having a service delivery manager working alongside the contract manager.