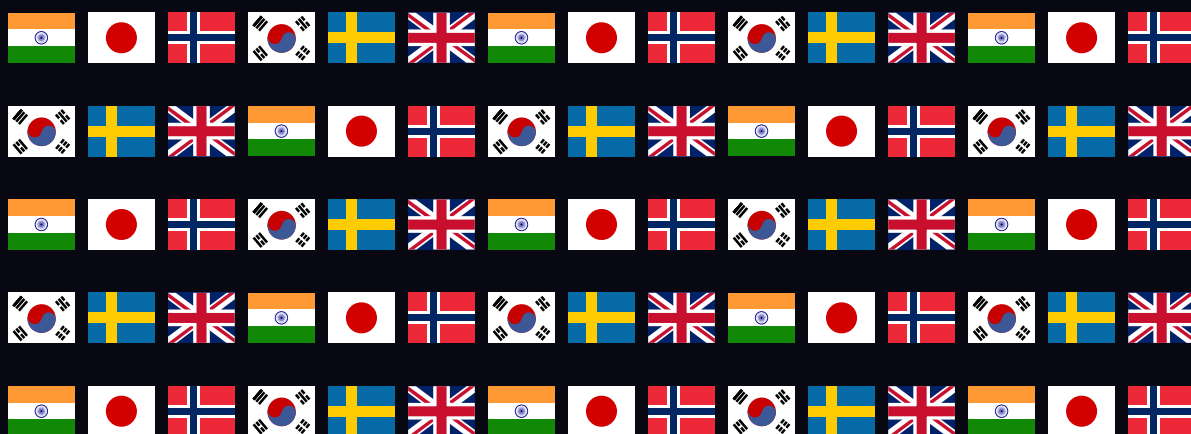


DEFENCE & SECURITY PROCUREMENT

Norway



Defence & Security Procurement

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Quick reference guide enabling side-by-side comparison of local insights, including into legal frameworks; dispute resolution and risk allocation; defence procurement fundamentals (such as mandatory clauses, IP ownership and supply chain management issues); trade rules; ethics and anti-corruption issues; aviation sector considerations; employment, personal information, licensing and environmental issues; and recent trends.

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UPDATE AND TRENDS

Key developments of the past year

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LEGAL FRAMEWORK

Relevant legislation

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

The following acts and regulations govern the procurement of defence and security articles in Norway:

- Public Procurement Act No. 73 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 procurements by the armed forces and 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 Agreement (EEA Agreement).

Regulation No. 1185 of 4 October 2013 on Defence and Security Procurement

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

Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013

Parts I and II of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 (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 article 123 of the EEA Agreement. These regulations are internal instructions for the Ministry of Defence and its agencies (see section 1-2 of DAR). They do not provide any rights to third parties and thus a breach of these rules cannot be relied on in court by a dissatisfied contractor.

Regulation No. 2053 of 20 December 2018 on Organisations' work on Preventative Safety (Operations Security Regulations)

This regulation applies where the procurement procedure requires a security classification.

National Security Act No. 24 of 1 June 2018

The National Security Act applies where the procurement procedure requires a security classification.

Law stated - 19 December 2021

Identification

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

Paragraph 1, section 1-3 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, or their requirements or specifications are classified, the entire procurement procedure may be exempt from ordinary procurement rules under article 123 of the EEA Agreement. In that case, only Part V of DAR applies, and the Ministry of Defence will also generally require offset agreements.

Law stated - 19 December 2021

Conduct

How are defence and security procurements typically conducted?

Section 7-3 of DAR 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 need assessment with realistic requirements for materiel and services (sections 7-1 and 6-1 of DAR). 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 the 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 a 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 sections 5-2 and 5-3 of FOSA, 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 Chapter 14 of FOSA).

Law stated - 19 December 2021

Proposed changes

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

No.

Law stated - 19 December 2021

Information technology

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 subject to offset purchases as Norway prioritises such technology under offset obligations in article 123 of the EEA

Agreement.

Law stated - 19 December 2021

Relevant treaties

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

Both the European Union 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 trading with third countries that continue to be governed by the GPA.

Norway does use a national security exemption on occasion, so may deviate from Directive 2009/81/EC where the procurement has essential security interests and falls under article 123 of the EEA Agreement, or warrants an exception in accordance with the Operations Security Regulation. Such exemptions require approval from the Ministry of Defence.

Law stated - 19 December 2021

DISPUTES AND RISK ALLOCATION

Dispute resolution

How are disputes between the government and defence contractor resolved?

Section 9-10 of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 (DAR) prescribes that the procuring authority requires contracts in the defence and security sector to dictate Norwegian law as the governing law, with Oslo District Court as the governing venue.

Law stated - 19 December 2021

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

Generally, disputes are resolved through negotiations, and, if this is unsuccessful, through the Oslo District Court (see Armed Forces of Norway Form 5052 – General Purchase Conditions section 15). 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 prime contractor include clauses on conflict resolution equivalent or similar to those as stipulated in DAR.

Section 9-10 of DAR allows for deviations, such as accepting another country's jurisdiction or laws, if the contract involves international aspects and the deviation is necessary owing to the nature of the negotiations and the safeguarding of Norwegian interests. Whether 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.

Indemnification

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 is 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 owing 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 owing to patent infringement or other immaterial rights related to the completion of the agreement.

In accordance with Armed Forces of Norway Form 5055 – 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 the preparation of such.

Further, 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.

Law stated - 19 December 2021

Limits on 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?

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 (section 26-4 of DAR). Liquidated damages shall incur at 0.001 per cent of the contract price per working day, related to the part of the delivery that is unusable owing 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 kroner, the procuring authority must request prior approval from the Ministry of Defence (see sections 5-5 and 5-9, Parts I and II of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013).

Law stated - 19 December 2021

Risk of non-payment

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 procurement through a long-term strategy. The strategy is updated on an annual basis and is valid for a seven-year period. The current plan – Future Acquisitions for the Norwegian Defence Sector 2021–28 – is available from the Norwegian government’s website.

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.

Law stated - 19 December 2021

Parent guarantee

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 the 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 paragraph 6, section 18-6 or section 36-2 of DAR, 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 section 23-7 of DAR). The surety shall cover the full amount of any outstanding payment.

Law stated - 19 December 2021

DEFENCE PROCUREMENT LAW FUNDAMENTALS

Mandatory procurement clauses

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 its contract, such as clauses on termination, damages, transparency and warranties. The exact wording and depth of such clauses fall under the discretion of the procuring authority.

Law stated - 19 December 2021

Cost allocation

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 paragraph 1, section 26-9 of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 (DAR)). 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 paragraph 2b, section 19-2 of DAR); or
- price contracts: the contractor is obliged to deliver the goods or services at an agreed price, regardless of the actual costs incurred (see paragraph 2a, section 19-2 of DAR).

Law stated - 19 December 2021

Disclosures

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.

Law stated - 19 December 2021

Audits

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 to monitor their performance under the contract (see paragraph 1, section 27-2 of DAR).

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 when 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 section 27-4 of DAR).

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 (incentive, fixed or no compensation for general business risks, or cost-sharing) as well as price contracts with limited risk compensation or incentive.

Last, 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 5351 – Specification on Pricing Proposal, the contractor shall give the procuring authority the right to audit the costs in accordance with Form 5055.

IP rights

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

Section 24-3 of DAR 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 section 24-4 of DAR, is that the procuring authority shall acquire a non-exclusive licence to the intellectual property (IP) 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 section 24-5 of DAR, the procuring authority shall acquire the IP 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 section 24-6 of DAR).

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 section 24-10 of DAR).

Section 24-7 of DAR states that the procuring authority must ensure that a contract concerning IP rights contains provisions concerning, among other things, the possibility of the procuring authority making available documentation related to the IP rights to the entire defence sector within Norway, and other countries' armed forces should it prove necessary; and a clause that if the deliverable is not fully developed, produced, industrialised or commercialised, the defence sector receives the IP rights necessary to recover their costs through a resale. This clause must stipulate that the transferred IP 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.

Law stated - 19 December 2021

Economic zones

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.

Law stated - 19 December 2021

Forming legal entities

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, attorney or auditor that the share capital has been paid. The share capital requirement for a limited liability company is 30,000 Norwegian kroner, while public limited liability companies have a requirement of 1 million Norwegian kroner; 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.

Partnerships

Norwegian law recognises three forms of partnerships:

- a general partnership with joint liability;
- a 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 of signing the partnership agreement. The partnership's headquarters must be located within Norway, although its partners need not reside there.

Joint venture

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

While Norway does not consider a Norwegian-registered foreign enterprise (NUF) to be a separate legal entity, foreign companies frequently use them owing to their practical nature.

When a foreign company wants to register a branch in Norway, the 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 owing to the lack of recognition of its separate legal status.

Law stated - 19 December 2021

Access to government records

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 Act No. 16 of 19 May 2006 on the Freedom of Information. 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.

Law stated - 19 December 2021

Supply chain management

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, although the contractor must certify that the deliverables conform in all aspects to the contract requirements (see the Armed Forces Form 5357 – 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, among other things.

Law stated - 19 December 2021

INTERNATIONAL TRADE RULES

Export controls

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

The 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 European Economic Area 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 the North Atlantic Treaty Organization (NATO), as well as certain countries with close relations to Norway;
- Group 2: countries not belonging to Group 1 that the Ministry of Foreign Affairs have approved as recipients of arms;

- Group 3: countries not belonging to Group 1 or 2 and to which Norway does not sell weapons or ammunition, but which can receive other goods as listed in Annex I of Regulation 2009/428/EC; and
- Group 4: countries that 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 that is subject to sanctions by the United Nations, European Union or the Organization for Security and Co-operation in Europe (OSCE). As a member of the UN, Norway is a state party to the UN Arms Trade Treaty.

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

- export licence: valid for one year and a single export of goods;
- service licence: valid for one year and a single export of services;
- technology transfer licence: valid for one year and a single export of technology;
- global export licence: valid for a maximum of three years and one or several exports of one or several defence-related goods to one or several specific recipients outside of the European Economic Area, within NATO or other countries with relations to Norway; and
- project licence: valid for one or several exports of defence-related goods, services or technology to one or several collaboration partners 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 an EEA member state, Norway also adheres to the Council Common Position 2008/944/CFSP (the Position) defining common rules governing control of exports of military technology and equipment, and has transposed its criteria listed in article 2 of the Position when assessing whether to grant a licence.

Law stated - 19 December 2021

Domestic preferences

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 the rules governing the procurement procedure.

In accordance with article 3-2 of Regulation No. 1185 of 4 October 2013 on Defence and Security Procurement (FOSA) 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 owing to nationality or local affiliation. Section 34-2, Parts I and II of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 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.

Further, Norway may deviate from Directive 2009/81/EC where the procurement has essential security interests and falls under article 123 of the European Economic Area Agreement, or warrants exception in accordance with the Operations Security Regulation. 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.

*Law stated - 19 December 2021***Favourable treatment****Are certain treaty partners treated more favourably?**

Certain countries enjoy the benefit of bilateral security agreements with Norway, which eases the exchange and certification of contractors with regard to classified information related to procurements. Members of the European Economic Area also have the advantage of a common transfer licence arrangement.

*Law stated - 19 December 2021***Sanctions****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 Artsakh, also known as Nagorno-Karabakh, which remains internationally recognised as being part of Azerbaijan, through its membership of the OSCE.

*Law stated - 19 December 2021***Trade offsets****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 Regulation No. 974 of 12 August 2016 on Public Procurement;
- conducted in accordance with FOSA, where the contractor (and most of its subcontractors) are located within the European Economic Area:
 - if the contractor is domiciled in the European Economic Area, but one of its subcontractors is not and the value of the subcontract exceeds 50 million Norwegian kroner, said subcontractor shall be made a party to an offset agreement with the procuring authority; and
- conducted with a contract price less than 50 million kroner, provided that the contract 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 less than 50 million Norwegian kroner 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.

Law stated - 19 December 2021

ETHICS AND ANTI-CORRUPTION

Private sector appointments

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 wanting 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.

Section 2-5 of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 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 Norwegian defence.

The contractor shall inform the procuring authority if they have hired or otherwise used such personnel.

There are no general restrictions on private sector employees' appointment to public sector positions.

Law stated - 19 December 2021

Addressing corruption

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 sections 387 and 388 of the Norwegian Penal Code).

Section 3-2 of DAR dictates that in any procurement that exceeds the current national threshold value at the time of the request for tender's publication, the procuring authority must contractually require the contractor to warrant that it has measures or systems in place 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, section 4-1 of DAR 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 5).

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

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.

Law stated - 19 December 2021

Lobbyists

What are the registration requirements for lobbyists or commercial agents?

Lobbyists or commercial agents are not subject to any general registration requirements, although 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.

Paragraph 2, section 7-4 of DAR 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):

Law stated - 19 December 2021

Limitations on agents

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

Norwegian law does not contain any limitations on the use of agents or representatives that earn a commission on transactions between a contractor and a 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 paragraph 7, section 17-3 of DAR).

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

Law stated - 19 December 2021

AVIATION

Conversion of aircraft

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, followed by applicable procedures for registration of ownership, security and certification from the civil aircraft register.

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.

Law stated - 19 December 2021

Drones

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

There are none.

Law stated - 19 December 2021

MISCELLANEOUS

Employment law

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

The Working Environment Act No. 62 of 17 June 2005 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.

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 (section 3-1 of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 (DAR)). Further, 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 International Labour Organization (ILO) Conventions Nos. 29, 87, 98, 100, 105, 111, 138 and 182.

Law stated - 19 December 2021

Defence contract rules

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

The Armed Forces of Norway Form 5052 – General Purchase 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.

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 during a classified information disclosure, require that the prime contractor include clauses equivalent or similar to those as stipulated in the Parts I and II of DAR.

Section 9-10 of DAR prescribes that the procuring authority requires contracts in the defence and security sector to dictate Norwegian law as the governing law, with Oslo District Court as the governing venue.

Arbitration is rarely used in Norwegian defence contracts. Section 9-10 allows for deviations from Form 5052 (eg, accepting governing law or venue of a country other than Norway if the contract involves international aspects and the deviation is necessary owing to the nature of the negotiations and the safeguarding of Norwegian interests).

The procuring authority is entitled to compensation for direct losses caused by delay or defect (see Form 5052, sections 6.6 and 7.7). The contractor is 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 a contractor from any claim owing 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 owing to patent infringement or other immaterial rights related to the completion of the agreement.

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 (section 26-4 of DAR). Liquidated damages shall incur at 0.001 per cent of the contract price per working day, related to the part of the delivery that is unusable owing to the delay. Normally, the maximum liability shall be set at 10 per cent of the price for the same part.

As a main rule, the procuring authority shall request the right to review the contractor's accounting to monitor their performance under the contract (see paragraph 1, section 27-2 of DAR). 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 when the contractor is foreign.

The main rule, in accordance with section 24-4 of DAR, is that the procuring authority shall acquire a non-exclusive licence to the IP 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 section 24-5 of DAR, the procuring authority shall seek to acquire the IP rights or a whole or partly exclusive licence if this is considered necessary or appears to be the most economically advantageous option, or there are significant security considerations. 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 section 24-10 of DAR).

There are no general rules concerning counterfeit parts, although the contractor must certify that the deliverables conform in all aspects to the contract requirements (see the Armed Forces Form 5357 –Certificate of Conformity).

Law stated - 19 December 2021

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 (section 3-1 of DAR). Further, 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.

Law stated - 19 December 2021

Personal information

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?

Section 4-1 of DAR 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 5) 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:

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.

Law stated - 19 December 2021

Licensing requirements

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 materiel 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.

Law stated - 19 December 2021

Environmental legislation

What environmental statutes or regulations must contractors comply with?

Contractors that are 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.

Law stated - 19 December 2021

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

The procuring authority may impose environmental targets on contractors through the inclusion of environmental requirements in both contracts and framework agreements (see sections 8-3 and 8-16 of Regulation No. 1185 of 4 October 2013 on Defence and Security Procurement). 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.

Law stated - 19 December 2021

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 obliged 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.

Law stated - 19 December 2021

UPDATE AND TRENDS

Key developments of the past year

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

A minor case was decided by the Public Procurement Complaints Board regarding the procurement of vehicles for the Home Guard under Regulation No. 1185 of 4 October 2013 on Defence and Security Procurement. The issue was whether the Norwegian Defence Materiel Agency had changed the interpretation of award criteria. After an assessment of the facts, the Board found that this was not the case (see KOFA–2018–362).

More importantly, the future structure of the armed forces was discussed by Norway's parliament in 2020 and the relationship between the armed forces and the defence industry was discussed by parliament in 2021. The government proposed a resolution on the acquisition of new main battle tanks for the army during 2021, as well as the acquisition of new helicopters for the special forces by 2024. Regarding the defence industry, parliament's commission on defence noted the importance of the cooperation between the Norwegian Defence Research Establishment and the defence industry on innovation and that there might be a need for more flexible forms of defence procurement to safeguard innovation and access to new technology. The industry assessment also emphasised the development within information technology and the intention to prioritise future development in this sector along with munitions, submarine technology and lifecycle management.

Law stated - 19 December 2021

Jurisdictions

	India	Khaitan & Co
	Japan	Atsumi & Sakai
	Norway	Brækhus Advokatfirma
	South Korea	Yoon & Yang LLC
	Sweden	Advokatfirman Florenius & Co. AB
	United Kingdom	Bird & Bird LLP