



Legal and Technical Commission

Advance Unedited Version
19 April 2024

English only

Twenty-ninth session

Legal and Technical Commission, part II
Kingston, 1-12 July 2024
Agenda item 7

Consideration of the annual reports of contractors

Criteria for identifying contractors that have responded insufficiently or incompletely, or failed to respond, to the calls from the Council to address issues identified by the Commission in relation to their contractual obligations.

Issued by the Legal and Technical Commission.

I. Introduction

1. In November 2022, the Council requested the Legal and Technical Commission (the Commission), beginning at the twenty-eighth session of the Authority, to annually name contractors that have responded inadequately, or failed to respond, to the calls from the Council to address issues of concern identified by the Commission in relation to their contractual obligations.¹
2. In July 2023, the Commission considered the request by the Council and identified a number of general trends that required further consideration with regard to the performance of contractors, as outlined in paragraphs 10 to 27 of the report of the Chair of the Commission.² The Commission agreed to continue its consideration, including by identifying criteria for the naming of contractors, once contractors had had an opportunity to respond to the comments and questions formulated in the review of the annual reports for 2023. It also decided that it would further consider this matter during the first part of the twenty-ninth session.
3. The Commission took up its consideration on the matter during the twenty-ninth session on the basis of a background document prepared by the Secretariat.

¹ ISBA/27/C/44, paragraph 7

² ISBA/28/C/5/Add.1

II. Process for monitoring compliance of contractors

4. The various organs of the Authority have specific and clearly defined roles and responsibilities in relation to monitoring compliance with plans of work for exploration, which are derived from the Convention, the 1994 Agreement, the Regulations, and the standard clauses for exploration contracts.

5. Under article 162(2)(1) of the Convention, the Council shall exercise control over activities in the Area in accordance with article 153(4) and the rules, regulations, and procedures of the Authority.³ Only the Council may take enforcement action against contractors (by imposing monetary sanctions, or by suspending or terminating contracts). To evaluate compliance, the Council must rely on information provided by the Secretary-General and the Commission. In due time, the Council will be required to establish an appropriate inspection mechanism pursuant to article 162(2). This matter is presently under discussion in the context of the draft exploitation regulations.

6. Under the terms of the exploration contract, the contractor is required to submit an annual report to the Secretary-General within 90 days of the end of each calendar year covering its programme of activities in the exploration area.⁴ The contractor is also required to submit such additional information to supplement the report as the Secretary-General may require.⁵ The contractor and the Secretary-General are also required to jointly undertake a periodic (five-year) review of the implementation of the plan of work for exploration and agree on a revised schedule.⁶

7. The annual review of contractors' annual reports allows the Secretary-General to monitor the execution of contractors' activities against the planned activities agreed under their respective programmes of activities. Every annual report is reviewed in detail by the experts of the Secretariat, followed by a review by the Commission to complement the analysis undertaken. At the end of its review, the Commission prepares an evaluation report for the Secretary-General to support the Secretary-General with the duty of reporting to the Council, including on any instances of alleged non-compliance. This report is also taken into consideration in the Secretary-General's individual feedback to each contractor. Whilst specific comments are made in respect of each contractor, the Commission also makes general comments on the overall progress of exploration and the work of contractors, which are included in its report to the Council.

8. The comments made by the Commission on the reports of individual contractors are shared with each contractor by the Secretary-General. In general, these comments are of a legal and/or technical nature or involve suggestions by the Commission as to the implementation of each contractor's respective programme of activities. Concerns identified by the Commission in the review of annual reports do not necessarily imply a contractor's non-compliance with its contractual obligations.

III. Criteria for assessing the responses of contractors to concerns identified by the Commission in relation to their contractual obligations

9. The identification of contractors by name, based on their failure to respond to calls from the Council, or based on inadequate or incomplete responses to the Commission, short of non-compliance, in publicly available documents to be introduced to the agenda of the Council, does not have an express legal basis in the Convention, the 1994 Agreement or the regulations. A key concern relates to the issue of due process. It is an elementary due process requirement, as well as a requirement of legal certainty, that contractors are aware of the potential measures and penalties they may be subject to, depending on their contractual performance, in advance.

³ See ISBA/24/C/4.

⁴ See section 10.1 of the standard clauses.

⁵ See section 10.3 of the standard clauses.

⁶ See section 4.4 of the standard clauses.

10. In that context, the process for identifying contractors that may have not responded or responded inadequately shall be: 1) neutral and objective; 2) transparent, giving due regard to confidentiality obligations; 3) timely and efficient (bearing in mind the workload of the Commission and the timing of the annual reports' reviews); 4) one that elicits positive responses and encourages contractors generally to carry out their plans of work effectively.

11. Following consideration of the matter, the Commission decided to issue the criteria for assessing the responses of contractors to concerns identified by the Commission in relation to their contractual obligations as contained in the annex to the present document, with the aim of naming contractors that have responded inadequately, or failed to respond, in the next reporting period.

Annex

General guidance on the use of the criteria

1. Purpose

The present document aims to provide the Legal and Technical Commission (the Commission) with general guidance on the use of the criteria for assessing the responses of contractors to concerns identified by the Commission and communicated by the Secretary-General in relation to their contractual obligations. The results of such assessment will be used as the basis for reporting to the Council the names of contractors that have responded inadequately or failed to respond to the identified concerns.

2. Scope

The assessment is undertaken for each contractor that received a notification by the Secretary-General of concerns identified by the Commission in relation to their contractual obligations arising out of the review of their annual report. The Commission only assesses specific contractual obligations on which concerns were identified by the Commission and communicated by the Secretary-General.

3. Methodology

The process involves three steps (see appendix 1). First (Step 1), during its July meetings of Year 1, the Commission supports the review of annual reports by the Secretary-General by making observations on the contractor's fulfillment of contractual obligations (see appendix 2) in the context of the execution of their respective plans of work. The assessment carried out by the Commission will be used as a tool to "map" the work of contractors generally whilst at the same time identifying issues of concern. This "checklist" approach would be neutral and objective and with due consideration for past performance. This checklist will remain for the internal use of the Commission only.

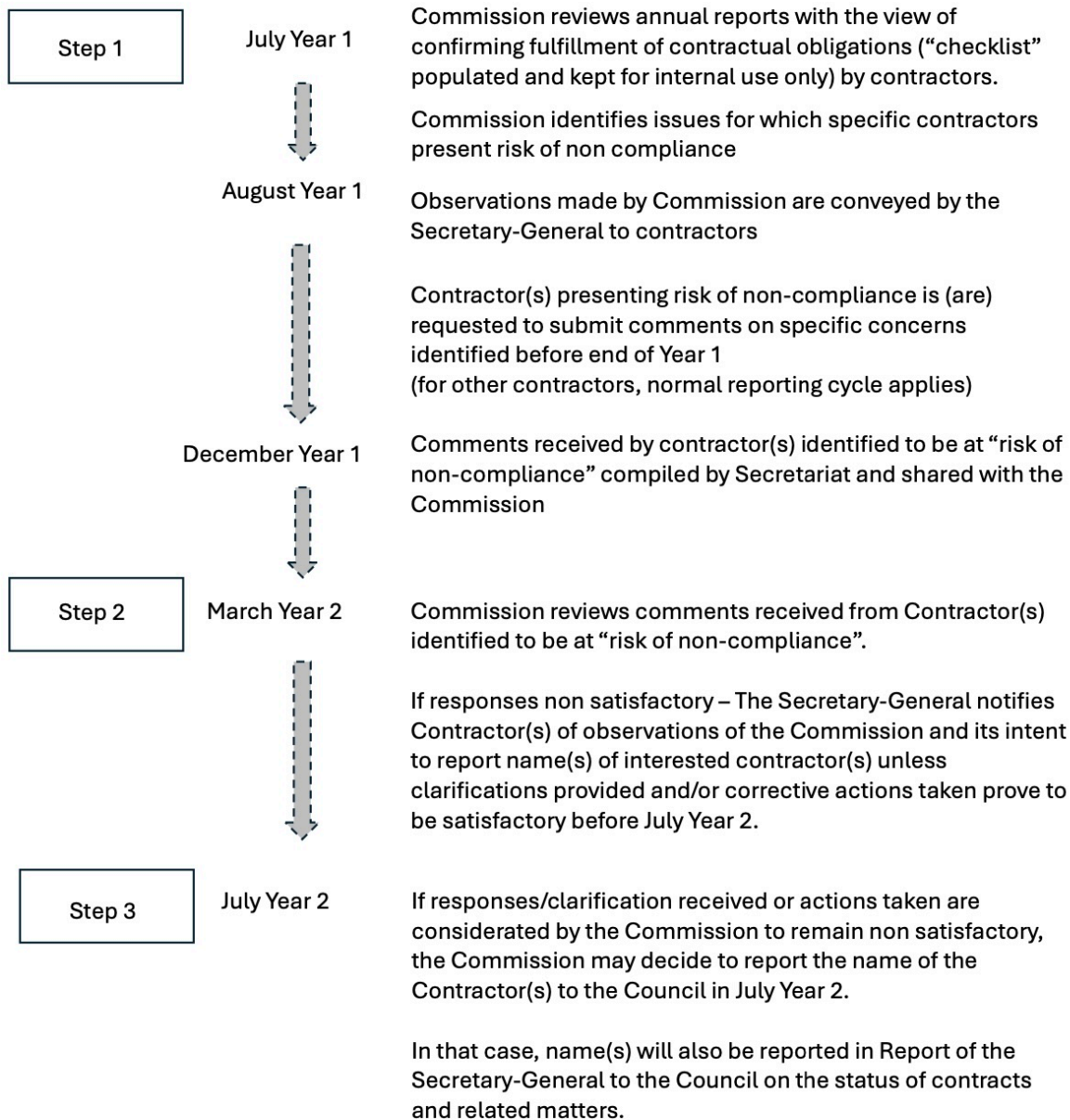
It is on that basis, that the Commission would be able to make observations to be communicated by the Secretary-General upon the conclusion of the review of the annual report of contractors. In the case of specific concerns expressed in relation to contractors at risk of non compliance, the expectation would be for the affected contractors to provide responses to the Secretary-General before the end of Year 1. The responses received by the Secretary-General would then be compiled and shared with the Commission.

Second (Step 2), the Commission during its March meeting in Year 2 will review the responses and comments received from those contractors identified during Step 1 to be at risk of non compliance. If the Commission considers that the responses received remain non-satisfactory, the Commission will provide observations to the Secretary-General who will notify the affected contractors that they could be named in the Council at the July session of Year 2 unless they provide the required clarifications or take corrective action before that time. In that case, the responses received are to be assessed against three criteria, namely timeliness, completeness, and effectiveness, taking into consideration the indicative definitions provided in appendix 3.

Third (Step 3), during its July meeting of Year 2, the Commission will consider any further clarification provided by the contractors remaining non-satisfactory at Step 2. In case the clarification provided or actions taken are considered at this stage to remain non-satisfactory, the Commission and the Secretary-General in their respective reports to the Council may decide to report the name of the Contractor(s), and the specific deficiency identified for the Council to decide on the potential case of non-compliance as reported.

Appendix 1

Three-step process for the identification of contractors that have responded insufficiently or incompletely, or failed to respond, to the calls from the Council to address issues identified by the Commission in relation to their contractual obligations.



Appendix 2

Checklist to be used by the Commission for its assessment of general work of contractors following the review of annual reports.
The issues may vary widely in severity and scale, which do not necessarily imply a contractor's non-compliance with the obligations.

Category	Obligation	Reference	Yes	No	N/a	Partial (Inadequate / Unsatisfactory / Incomplete)	Comments
<i>Reporting</i>	Submission of an annual report per contract by 31 March each year	Exploration reg. 32; sect. 5.5 & 10 of the standard clauses					
<i>Environmental assessment</i>	Conduct of environmental baseline studies	Exploration reg. 32; sect. 5.3 of the standard clauses					
	Conduct of environmental impact assessment	ISBA/25/LTC/6/Rev.3					
	Establishment and implementation of environmental monitoring Programme	Exploration reg. 32; sect. 5.5 of the standard clauses					
<i>Data and information</i>	Submission of data and information on methods and equipment used	Sect. 10 & 11 of the standard clauses; ISBA/25/LTC/6/Rev.3					
	Submission of data and information on the geology of the mineral deposit and the resource assessments	Sect. 10 & 11 of the standard clauses; ISBA/21/LTC/15					
	Submission of environmental baseline data and information	Sect. 10 & 11 of the standard clauses; ISBA/25/LTC/6/Rev.3					
	Submission of other data and information, including navigation and bathymetric data	sect. 10 & 11 of the standard clauses; ISBA/21/LTC/15					
<i>Technology</i>	Submission of information on progress made towards mining technologies	ISBA/21/LTC/15					
	Submission of data and information on mining tests	ISBA/21/LTC/15					
<i>Training</i>	Conduct of training programmes	Exploration reg. 27; sect. 8.3 of the standard					

Category	Obligation	Reference	Yes	No	N/a	Partial (Inadequate / Unsatisfactory / Incomplete)	Comments
		clauses; ISBA/19/LTC/14					
	Cooperation with the Authority in implementing training programmes	Exploration reg. 27; sect. 8.3 of the standard clauses; ISBA/19/LTC/14					
<i>Expenditure</i>	Expenditure according to the committed budget of the approved workplan	Sect. 4.2 of the standard clauses; ISBA/21/LTC/11					
<i>Specific circumstances</i>	Compliance with emergency orders	Sect. 6.3 of the standard clauses					
	Cooperation with the Authority regarding inspection	Sect. 14.1 of the standard clauses					
	Reporting of incidents related to serious environmental harm	Exploration reg. 33; sect. 6.2 of the standard clauses					
	Notification of human remains or object/site of an archaeological or historical nature	Exploration reg. 35; sect. 7 of the standard clauses					
	Relinquishment of the allocated area	Exploration reg. 25					
<i>Other issues</i>		Relevant provision of exploration contract					

Appendix 3

The Step-2 assessment is carried out against three criteria, namely **timeliness**, **completeness**, and **effectiveness**, taking into consideration the indicative definitions below:

Criteria	Indicative definition
Timeliness	Assessment of whether the contractor successfully responded and/or reported to the concerns identified, within the required or agreed timeframe.
Completeness	Assessment of whether the contractor's response and/or report contain clear, well-organized, and complete data and information.
Effectiveness	Assessment of whether the contractor's response and/or report effectively address concerns identified and demonstrate the contractor's efforts to prevent reoccurrence of the concerns alike.