



Policy and Performance - Transformation and Resources Committee

Date:	Tuesday, 22 March 2016
Time:	6.00 pm
Venue:	Committee Room 1 - Wallasey Town Hall

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AGENDA SUPPLEMENT

**8a NOTICE OF MOTION - SEEKING FAIRNESS IN PURCHASING
(Pages 1 -12)**

The Chair has agreed to this item as a matter of urgent business to enable its consideration prior to the new municipal year.

At the meeting of the Council held on 14 March, 2016, the attached Notice of Motion proposed by Councillor Pat Williams and seconded by Councillor Alan Brighouse, was referred by the Mayor to this Committee for consideration. In accordance with Standing Order 7 (6), Councillor Brighouse will attend the meeting to explain the Motion.

Also attached, for ease of reference, is the Cabinet Office Procurement Policy Note 03/14 which is referred to in the Notice of Motion.

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NOTICE OF MOTION - SEEKING FAIRNESS IN PURCHASING

(as referred by the Civic Mayor to the Transformation and Resources Policy and Performance Committee)

Proposed by: Councillor Pat Williams

Seconded by: Councillor Alan Brighthouse

Council notes that Wirral's Procurement Strategy was last refreshed in April 2011. At that time, this ensured environmental and sustainability considerations were included, along with a partnership approach. Council believes it is time for this Strategy to be reviewed to formally recognise the changes in legislation and practices since then with a view to enshrining ethical and social issues.

Council notes that:

- corporate tax evasion and tax avoidance are now matters of public interest and concern, not only at national level but also internationally.
- corporate tax evasion and avoidance are having a damaging impact, not just on public services in well-established economies but also on the world's poorest countries. The loss to the latter has been assessed as being higher than they receive in aid.

Council further notes:

- that the UK Government has taken steps to tackle the issue of tax avoidance and evasion by issuing Procurement Policy Note 03/14, applying to all central government contracts worth more than £5m.
- the availability of independent means of verifying tax compliance, such as the Fair Tax Mark.

Council understands that, in early 2015, new regulations required public bodies, including Councils, to ask procurement qualification questions of all companies for tenders over £173,000 for service contracts and £4m for works contracts. However, these questions are not as detailed as the Procurement Policy Note 'Measures to Promote Tax Compliance' (PPN 03/14) issued in February 2014.

Council believes that it is now reasonable to require bidders for Council contracts to self-certify that they are fully tax-compliant in line with central government practice using the standards in PPN 03/14 rather than lower standards.

Council asks officers to report to the Transformation & Resources Policy and Performance Committee and Cabinet to investigate whether and how this policy could be effectively included in the Council's Procurement Procedures, taking into account the need not to unfairly prejudice small businesses.

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Procurement Policy Note: Measures to Promote Tax Compliance

Action Note 03/14

06 February 2014

Issue

1. A new policy was announced in the March 2013 Budget on the use of the procurement process to promote tax compliance. The new policy applies with effect from 1 April 2013 to all central government contracts over £5million. Suppliers bidding for these government contracts must self-certify their tax compliance.
2. This Action Note replaces Action Note 06/13 dated 25 July 2013. It sets out the scope and background of the new policy, advises on how to take account of it in procurement documentation and provides further detailed guidance at Annex A on how Departments should assess suppliers' responses and the inclusion of new clauses in contract terms. **This Action Note provides additional clarification on the application of mandatory exclusion criteria (updates to Paragraph 4 below, Annex A Section B Q1 (1.1 and 1.2) and Annex A Section D, Definition of Occasion of Non Compliance, a) and b)), and clarifies more precisely the scope of an Occasion of Non Compliance (updates to Paragraph 8 below and Annex A Section C Paragraphs 9 and 15) with updated drafting for inclusion on both procurement documentation and contracts.**

Action

3. Departments must, with effect from 1 April 2013, include the relevant questions to suppliers in their procurement documentation at the selection stage (e.g. in the Pre Qualification Questionnaire (PQQ)) or the Invitation to Tender (in the case of the Open procedure only) for all procurements which have or are likely to have a value of £5million or over. **With effect from the date of this Action Note, departments must include the amended questions as set out at Paragraph 4 below and in Annex A Section B.**
4. The questions are set out in Annex A. The key provision is that from 1 April 2013 onwards a supplier must state whether any of its tax returns submitted on or after 1 October 2012:
 - has given rise to a criminal conviction for tax related offences which is unspent, or to a civil penalty for fraud or evasion; and/or
 - has been found to be incorrect as a result of:



- HMRC successfully challenging it under the new General Anti-Abuse Rule (GAAR) (contained in Part 5 of the Finance Act 2013) or the “Halifax” abuse principle; or
 - a tax authority in a jurisdiction in which the supplier is established successfully challenging it under any tax rules or legislation in any jurisdiction that have an effect equivalent or similar to the GAAR or the “Halifax” abuse principle; or
 - the failure of an avoidance scheme which the supplier was involved in and which was, or should have been, notified under the Disclosure of Tax Avoidance Scheme (DOTAS) or any equivalent or similar regime in any jurisdiction. This only applies in relation to a DOTAS scheme which a supplier has used in relation to its own tax return.
5. The date on which a return is “submitted” for the purposes of this policy is when it is first submitted to HMRC and any subsequent amendments or re-submissions do not change that. For example, if a return is submitted on 30 September 2012 and then requires amendment and “re-submission” after 1 October 2012 that return would still count as being submitted before 1 October and therefore outside of the effect of this policy.
 6. HMRC, or an equivalent tax authority, will not be deemed to have “successfully challenged” a supplier until all appeal avenues are completed.
 7. This policy will apply to all suppliers (technically all “economic operators” as defined in the Public Contracts Regulations 2006 and the Defence and Security Public Contracts Regulations 2011 (together, the “**Regulations**”)) bidding for central government contracts of £5 million or more. Further details of how the policy applies to different types of suppliers are given in Annex A. Suppliers are not required to certify on behalf of any subcontractor or any other members of the supply chain or any member of their group.
 8. Where a supplier declares that it has had an Occasion Of Non Compliance (“**OONC**”), the contracting department can, at its discretion, decide whether or not to exclude that supplier from the procurement process. In reaching a judgement, Departments may take into account any mitigating factors provided as part of the supplier’s response; for example measures that the supplier has implemented to ensure future tax compliance. **However, it should be noted that if an OONC also falls within the mandatory exclusion criteria under the Regulations then the Authority will have no discretion.**
 9. Further guidance on the assessment of suppliers’ responses to the questions is set out in Annex A.
 10. Departments must also ensure that for any procurements where the policy applies, the terms and conditions of contract contain clauses enabling them to terminate the contract, at their discretion, if a supplier has had an OONC and placing an obligation on the supplier to keep the Department notified of changes in relation to its tax compliance. Further guidance, together with some standard drafting, is provided at Annex A.



Dissemination and Scope

11. Please circulate this PPN within your organisation, its Executive Agencies and Non Departmental Public Bodies and to all Contracting Authorities for which you are responsible, drawing it to the attention of those with a purchasing role.
12. The contents of this PPN apply to all Central Government Departments including their Executive Agencies and Non Departmental Public Bodies. It replaces Action Note 06/13 dated 25 July 2013, Information Note 03/13 (which consulted on the measures), and Action Note 04/13 which gave advance notification of the policy. Other contracting authorities (e.g. in local government and the wider public sector) may choose to apply the measures set out in this PPN.

Contact

13. Enquiries about this PPN should be should be directed to the Service Desk 0845 000 4999 servicedesk@cabinet-office.gsi.gov.uk.

Background

14. The Chief Secretary to the Treasury announced in September 2012 that HM Revenue & Customs (HMRC) and the Cabinet Office had been tasked with looking into how the government could use the procurement process for government contracts to deter the very small minority of suppliers and individuals that do so from evading tax and using aggressive tax avoidance schemes.
15. The Autumn Statement announced that HMRC and Cabinet Office would consult on the use of the procurement process to deter tax avoidance and evasion, with a view to new arrangements coming into effect from 1 April 2013. HMRC's response to the consultation can be found at www.hmrc.gov.uk/budget2013/tax-procure-con-resp.pdf.
16. The government announced in the March 2013 Budget a new policy requiring potential suppliers to confirm their tax compliance as part of the procurement process. Initial guidance on implementation of the new policy was issued in Action Note 04/13 on 28 March 2013.
17. Under the Regulations, an authority can disqualify a supplier from participating in a procurement process if it has not fulfilled its tax obligations under UK law or of the relevant State in which the economic operator is established.
18. Disclosure of tax avoidance schemes (DOTAS) is the legislative regime which requires promoters and taxpayers to disclose to HMRC the marketing or the use of certain tax avoidance arrangements. A failed DOTAS scheme is one which has been shown either through litigation or through settlement not to achieve the tax result that it set out to obtain. (For further clarification see also the expanded definition in Para 24 in Annex A.)



ANNEX A: GUIDANCE ON TAX COMPLIANCE PROCUREMENT MEASURES

This Annex provides more guidance on implementation of the tax compliance policy. It covers the following:

- A: Scope of Application:** when the policy applies;
- B: Selection Stage Questions:** what must be included in procurement documentation;
- C: Selection Stage Evaluation:** how to deal with suppliers' responses to the tax questions; and
- D: Contract Terms & Conditions:** the standard clauses to be included.

A: SCOPE OF APPLICATION:

1. The policy applies to all suppliers (technically all “economic operators” as defined by the Regulations) bidding for all central Government contracts (including Framework Agreements and for further clarification see also Para 5 below) of £5 million or more. It applies equally to suppliers which are:

- a body corporate or association, or an individual;
- a joint venture or consortium, where the self-certification must cover all members of the joint venture or consortium;
- a partnership, limited partnership or limited-liability partnership (LLP), in which case the self-certification must cover that partnership, limited partnership or LLP, but not the individual members; and/or
- a member of a group although in that case the self-certification does not cover other group companies, whether UK or non UK based.

2. The policy applies:

- to all HMRC administered taxes and foreign equivalents;
- to an OONC occurring in a period of 6 years prior to the self-certification date, but only where the OONC:
 - occurs on or after 1 April 2013; and
 - is in respect of tax returns submitted on or after 1 October 2012.

and

- to all Central Government Departments including their Executive Agencies and Non Departmental Public Bodies (collectively referred to hereinafter as “Authorities” or the “Authority”). Other contracting authorities (e.g. in local government and the wider public sector) may choose to apply it to their procurements where they are over £5m in value.



3. The £5m value threshold has been set in order to avoid adding an administrative burden to lower value procurements and to small businesses.

4. The policy does not apply to call off contracts made pursuant to existing Framework Agreements (i.e. framework contracts awarded before 1 April 2013), nor does it apply to extensions to existing contracts where the existing contract was awarded before 1 April 2013.

5. The policy applies in relation to multi supplier Framework Agreements only where it is anticipated that the value of any individual call-off orders or agreements in respect of the goods and/or services covered by the Framework Agreement will be £5 million or greater.

B: SELECTION STAGE QUESTIONS:

6. The European Union (EU) procurement directive¹ and the Regulations allow procuring authorities to apply tax and propriety based criteria at the selection stage. In particular, a potential supplier can be asked whether it has fulfilled all its obligations relating to the payment of taxes.

7. The following questions must be incorporated in the procurement documentation at the selection stage (i.e. the PQQ or, in the case of the Open procedure, the ITT) for all qualifying procurements:

Q1: The supplier must state whether, from 1 April 2013 onwards, any of its tax returns submitted on or after 1 October 2012:

1.1 has given rise to a criminal conviction for tax related offences which is unspent, or to a civil penalty for fraud or evasion and/or

1.2 has been found to be incorrect as a result of:

- *HMRC successfully challenging it under the General Anti-Abuse Rule (GAAR) or the “Halifax” abuse principle; or*
 - *a tax authority in a jurisdiction in which the supplier is established successfully challenging it under any tax rules or legislation that have an effect equivalent or similar to the GAAR or the “Halifax” abuse principle; or*
 - *the failure of an avoidance scheme which the supplier was involved in and which was, or should have been, notified under the Disclosure of Tax Avoidance Scheme (DOTAS) or any equivalent or similar regime in a jurisdiction in which the supplier is established.*
- *If answering “yes” to either Q1.1 or 1.2 above, the supplier may provide details of any mitigating factors that it considers relevant and that it wishes the Authority to take into consideration. This could include, for example:*
 - *Corrective action undertaken by the supplier to date;*
 - *Planned corrective action to be taken;*
 - *Changes in personnel or ownership since the OONC; or*

Directive 2004/18/EC



- *Changes in financial, accounting, audit or management procedures since the OONC.*

In order to consider any factors raised by the supplier procuring Authorities will find it helpful to have the following information:

- *A brief description of the occasion, the tax to which it applied, and the type of “non-compliance” e.g. whether HMRC or the foreign tax authority has challenged pursuant to the GAAR, the “Halifax” abuse principle etc.*
- *Where the OONC relates to a DOTAS, the number of the relevant scheme.*
- *The date of the original “non-compliance” and the date of any judgement against the supplier, or date when the return was amended.*
- *The level of any penalty or criminal conviction applied.*

C: SELECTION STAGE EVALUATION

Suppliers’ Responses:

8. The Authority will use the information provided by suppliers in their responses as part of the overall assessment of the selection stage. The responses to the tax compliance questions should be evaluated on a ‘Pass/Fail’ basis. The policy operates entirely on the basis of self -certification by suppliers; there is no obligation on the Authority to investigate a negative response to the questions, nor to seek to verify negative responses.

9. If suppliers respond ‘yes’ to the tax compliance questions (i.e. they declare that they have had an OONC) then the Authority may decide to exclude them on this basis. Any such decision is at the discretion of the Authority on the basis that the tax compliance provisions are discretionary exclusion criteria under the Regulations. It is entirely appropriate for Authorities to use their judgement in reaching any decision on whether or not to exclude a supplier from a procurement. **However, it should be noted that if an OONC also falls within the mandatory exclusion criteria under the Regulations then the Authority will have no discretion and shall be obliged, save in limited circumstances², to exclude the economic operator**

10. The questions provide for suppliers to cite mitigating factors where they have had an OONC. To help with evaluation some examples of mitigating factors are set out below. Reaching a judgement on whether or not mitigating factors are adequate or appropriate, and the subsequent decision as to whether or not to exclude a supplier from a procurement, is the responsibility of the Authority. In case of difficulty contracting authorities may seek advice from the ERG service desk (see paragraph 13 of the PPN); HMRC have undertaken to provide support and advice to departments through the service desk where questions arise on tax specific matters.

² If the Authority is satisfied that there are overriding requirements in the general interest which justify doing so (Reg.23 (2) of the Regulations).



Acceptability of mitigating factors

11. The policy allows for mitigating factors to be set against a self-certification of an OONC. This gives Departments discretion in relation to how to respond to an OONC and can also be a means by which the government's intention to encourage better tax compliance in future, rather than simply to punish past actions, is implemented. The acceptability of mitigating factors needs to be set against the particular context and nature of the OONC that is certified. The following paragraphs 12- 15 set out some general guidelines:

12. The following are examples of mitigating factors which may be taken into account:

- Since the transactions were entered into which gave rise to the OONC, the company's senior management, or key senior personnel with responsibility for tax matters, have changed and the new personnel have stated to the contracting authority that they will not engage in similar tax avoidance;
- The company's overall policy concerning tax planning has changed to become more in line with government objectives regarding tax avoidance;
- The OONC was an isolated one and there is no indication that the business generally adopts an "aggressive" tax stance;

13. Both the GAAR and the "Halifax" abuse principle are, as their names indicate, aimed at abusive tax schemes. These are schemes which involve contrived or abnormal transactions which serve no purpose other than to achieve a tax saving. The tax saving is also one that is contrary to the intentions of Parliament in relation to the legislation. The Halifax abuse principle relates to an ECJ case involving Halifax. Broadly, the ECJ ruled that whilst the tax authority can't consider the motives of taxpayers when considering whether or not a transaction is structured primarily to avoid tax, if there is no commercial substance to the relevant transaction(s), that will, prima facie, be abuse.

14. The DOTAS rules apply to transactions which contain certain "hallmarks" where one of the main aims is to achieve a tax saving. The aim of the DOTAS regime is to provide HMRC with information on new schemes as they arise and on the users of those schemes. By their nature, the DOTAS rules can capture transactions which, while partly motivated by a tax saving, may still be regarded as acceptable by HMRC. An OONC only arises when a DOTAS scheme is shown to have failed and this will typically cover a wider range of scenarios than the GAAR or "Halifax" abuse principle. "Shown to have failed" will generally mean that the taxpayer has accepted the arrangement does not achieve the tax saving anticipated and this may be shown by his amending the return; accepting a tax assessment; or failing in litigation and not appealing any further.

15. Criminal convictions and civil penalties for fraud giving rise to OONCs will always constitute serious matters and any mitigating factors must be considered in that context. However, as noted above at paragraph 9, if an OONC also falls within the mandatory exclusion criteria under the Regulations then it will be assessed on this basis; the Authority will have no discretion and mitigating factors will not be relevant.



Non-UK suppliers, and suppliers with international tax obligations

16. To ensure that UK suppliers are not unfairly disadvantaged, and to meet the UK's international commitments/ commitments under EU law in respect of foreign suppliers, any suppliers with tax obligations in foreign jurisdictions will be required to certify that there has not been an OONC in relation to the equivalent foreign tax rules.

17. An OONC can arise if a business has a scheme which fails under rules in other countries which are equivalent to the UK's DOTAS and GAAR rules or to the "Halifax" abuse principle. A number of countries have general anti-abuse or general anti-avoidance rules, and some have avoidance scheme disclosure regulations. Additionally, the "Halifax" abuse principle is common to all EU member states but does not have force outside of the EU.

18. The policy is based on self-certification by suppliers and not on enquiry or audit by the Authority. Large international operators should be familiar with the tax rules applicable in those territories where they are required to pay tax, and this will include those rules which relate to avoidance or abuse. Therefore, there should not be particular difficulties for international operators when self-certifying.

19. All other countries have criminal and civil fraud sanctions for tax evasion and therefore there is a direct equivalent for such an OONC.

D: CONTRACT TERMS & CONDITIONS

20. Authorities must ensure that contractual documentation for qualifying procurements contains provisions which:

20.1 place an obligation on the supplier to keep the Authority notified of any 'occasion of tax non-compliance' during the term of the contract; and

20.2 ensure that the statements made by suppliers at selection stage remain valid at the commencement of the contract.

21. The contract must also include termination rights, exercisable by the Authority at its discretion, in the event that the supplier is in material breach of these provisions (see Para 23 below).

22. The recommended approach for including the obligations on the supplier in contracts is:

22.1 to include a warranty to cover the statements made in the procurement documentation. Standard drafting for inclusion in contracts is as follows:

"The Supplier represents and warrants that as at the Effective Date, it has notified the Authority in writing of any Occasions of Tax Non-Compliance or any litigation that it is involved in that is in connection with any Occasions of Tax Non Compliance;"

and

22.2 to include an ongoing obligation for the supplier to notify the Authority of any Occasions of Tax Non-Compliance which arises during the term of the contract. Standard drafting is as follows:

"If, at any point during the Term, an Occasion of Tax Non-Compliance occurs, the Supplier shall:

a) notify the Authority in writing of such fact within 5 Working Days of its occurrence; and



b) promptly provide to the Authority:

i) details of the steps which the Supplier is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating factors that it considers relevant; and

ii) such other information in relation to the Occasion of Tax Non-Compliance as the Authority may reasonably require.”

Termination Rights

23. The right to terminate the contract for breach of the tax compliance obligations should be included in the drafting. The recommended standard drafting is as follows:

“In the event that:

- (a) the warranty given by the Supplier pursuant to Clause [X]³ is materially untrue; or*
- (b) the Supplier commits a material breach of its obligation to notify the Authority of any Occasion of Tax Non-Compliance as required by Clause[X]⁴; or*
- (c) the supplier fails to provide details of proposed mitigating factors which in the reasonable opinion of the Authority, are acceptable*

the Authority shall be entitled to terminate this Agreement by giving a Termination Notice to the Supplier.”

Definition of “occasion of non compliance”

24. In the contract it is recommended that an OONC is defined as an ‘Occasion of Tax Non-Compliance’ (to avoid potential confusion with general non compliance or default of obligations under the contract). The following is the standard definition for inclusion in contracts:

“Occasion of Tax Non-Compliance” means:

- (a) any tax return of the Supplier submitted to a Relevant Tax Authority on or after 1 October 2012 is found on or after 1 April 2013 to be incorrect as a result of:*
 - (i) a Relevant Tax Authority successfully challenging the Supplier under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle;*
 - (ii) the failure of an avoidance scheme which the Supplier was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or*

³ This should cross-refer to the clause in the contract that contains the suggested clause wording set out at paragraph 22.1 above.

⁴ This should cross-refer to the clause in the contract that contains the suggested clause wording set out at paragraph 22.2 above.



- (b) *any tax return of the Supplier submitted to a Relevant Tax Authority on or after 1 October 2012 gives rise, on or after 1 April 2013, to a criminal conviction in any jurisdiction for tax related offences which is not spent at the Effective Date or to a civil penalty for fraud or evasion,*

In addition the following definitions will need to be included:

"DOTAS" means the Disclosure of Tax Avoidance Schemes rules which require a promoter of tax schemes to tell HM Revenue & Customs of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 and as extended to National Insurance Contributions by the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868 made under s.132A Social Security Administration Act 1992.

"General Anti-Abuse Rule" means (a) the legislation in Part 5 of the Finance Act 2013; and (b) any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions.

"Halifax Abuse Principle" means the principle explained in the CJEU Case C-255/02 Halifax and others.

"Relevant Tax Authority" means HM Revenue & Customs, or, if applicable, a tax authority in the jurisdiction in which the Supplier is established.

25. Authorities should note that the suggested drafting set out above will need to be carefully reviewed to ensure that it operates correctly within the contract in which it is incorporated e.g. that the clause cross-references are correct and the definitions in these clauses (e.g. "Effective Date", "Supplier" etc.) are consistent with the definitions used in the contract.