

Report of: Assistant Director (Service Finance) on behalf of the Procurement Board

Meeting of:	Date	Ward(s)
Policy and Performance Scrutiny Committee	5 October 2015	All

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SUBJECT: Non-payment of tax and procurement_the legal framework

1. Synopsis

1.1 This report sets out the legal framework, established by the Public Contracts Regulations 2015, for dealing with non- payment of tax as part of the procurement process. In order to enhance the enforcement of tax compliance measures the report recommends that the scope of tax inquiries conducted by the council is widened during the pre-qualification stage of the procurement process for contracts with a value of over £5million. It is also recommended that provision is made to terminate such contracts for non-compliance with tax payment obligations

2. Recommendations

2.1 To note the information in relation to the legal framework for dealing with the issue of non-payment of tax as part of the procurement process.

2.2 To approve the recommendation to widen the scope of tax inquiries made of suppliers during the pre-qualification stage of the procurement process for contracts with a value of over £5million.

2.3 To approve the amendment of the council's standard contract conditions, for contracts over the value of £5million, to allow for contract termination in relation to non-compliance with tax payment obligations.

3. Background

3.1 Mandatory exclusion for non-payment of tax

The council *must* exclude an economic operator from participating in a procurement procedure where it has established, by verifying in accordance with regulations 59 and 60, or is otherwise aware, that that economic operator has been *convicted of* (Reg 57(1)):

- The common law offence of cheating the Revenue
- Fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979 or section 72 of the Value Added Tax Act 1994
- An offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993

The obligation to exclude an economic operator also applies where the person *convicted* is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control in the economic operator (Reg 52(2)).

An economic operator *shall* be excluded where the council is aware of the breach relating to non-payment of taxes AND the breach has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of any of the jurisdictions of the UK (Reg 57(3)).

3.2 Discretionary exclusion for non-payment of tax

An economic operator *may* be excluded where the council can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes (Reg 57(4)).

The grounds for both mandatory and discretionary exclusion cease to apply when the economic operator has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes due (Reg 57(5)).

3.3 Exceptions to mandatory exclusion

The council may disregard the prohibitions related to mandatory exclusion on an exceptional basis for overriding reasons relating to the public interest such as public health or protection of the environment (Reg 57(6)).

The council may also disregard the prohibitions related to discretionary exclusion where an exclusion would be clearly disproportionate (eg where only minor amounts of taxes are unpaid)(Reg 57(7)).

3.4 Establishing compliance

In order to exclude an economic operator from participation in a procurement procedure the council needs to establish, by verifying in accordance with regulations 59 and 60, or is otherwise aware, that that economic operator has been convicted of any of the offences that give rise to mandatory exclusion.

Regulation 59 relates to the European Single Procurement Document (ESPD) which is designed to be a standardised EU wide process for self-declaration provided at time of submission of requests to participate. Such self-certification will include the status of the economic operator in relation to the grounds for exclusion. These provisions are not yet in force.

3.5 Proving the absence of grounds for exclusion

The council must accept the following as sufficient evidence that none of the cases specified in regulation 57 apply to the EO:

- a) In relation to mandatory exclusions – the production of an extract from the relevant register, such as judicial records or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the member State or country of origin or the country where the EO is established showing that those requirements have been met
- b) In relation to mandatory and discretionary exclusion for non-payment of taxes a certificate issued by the competent authority.

Where the country in question does not issue such documents or certificates they may be replaced by a declaration on oath made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body.

3.6 **Duration of Exclusion**

In relation to mandatory exclusion for tax evasion, the period of exclusion is 5 years from date of conviction (subject to exemptions and self-cleaning)(Reg 57(11)).

In relation to discretionary exclusion for tax evasion, the period of exclusion is 3 years from the date of the relevant event (Reg 57(12)).

3.7 **Self Cleaning**

Any economic operator that is in one of the situations for mandatory or discretionary exclusion may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion (Reg 57(13)).

In order for the council to be satisfied the economic operator shall prove that it has (Reg 57(15)):

- Paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- Clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- Taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operator shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct (ie requirement for proportionality) (Reg 57(16)).

Where the council considers such measures to be insufficient, the council shall give the economic operator a statement of the reasons for that decision (ie requirement for transparency) ((Reg 57(17)).

3.8 **Council's current procurement practice and proposal for change**

The standard form of Pre-Qualification Questionnaire (PQQ) used by the council (in accordance with statutory guidance issued by the Minister for the Cabinet Office in March 2015) asks the tenderer for a declaration in relation to whether any of the grounds for mandatory exclusion apply together with supplementary information where relevant. The standard form of PQQ contains additional provisions in relation to discretionary exclusion for non-payment of taxes but these provisions currently only apply to central government contracts over the value of £5million.

It is recommended that the council amends the standard form of PQQ in order for these provisions to also apply for council contracts over the value of £5million (Qualifying Contracts). The qualifying threshold of £5million has been adopted by the Cabinet Office in order to avoid adding an administrative burden to lower value procurements and to small businesses. It is recommended that the council adopts the same threshold for similar reasons.

In practice this would mean widening the net of enquiry at PQQ stage for Qualifying Contracts to cover a broader range of “Occasions of tax non-compliance” including:

Any tax return of the supplier submitted to a relevant tax authority on or after [a date to be specified] that is found to be incorrect as a result of:

- a. A relevant tax authority successfully challenging the supplier under the General Anti-Abuse Rule (as set out in Part 5 of the Finance Act 2013) or the Halifax Abuse Principle (contrives or abnormal transactions which serve no purpose other than to achieve a tax saving) 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;
- b. 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 Disclosure of Tax Avoidance Scheme (DOTAS) or any equivalent or similar regime; and/or
- c. The supplier’s tax affairs give rise on or after [a date to be specified] to a criminal conviction in *any* jurisdiction for tax related offences which is not spent or to a penalty for civil fraud or evasion.

The amendment recommended here to the standard form of the PQQ is a deviation for purposes of Regulation 107(4) and the council would be required to send to the Cabinet Office a report explaining the deviation.

It is also recommended that a specific right to terminate the contract is included within the terms of Qualifying Contracts. This may be done by including additional contract clauses which provide for a warranty from the supplier in relation to its declarations on Occasions of Tax Non-Compliance at contract commencement; an on-going obligation to inform during the term of the contract and a specific right to terminate the contract for breach of warranty or breach of duty to inform.

4. Implications

4.1 Financial implications

Introducing additional requirements within the procurement process to examine a broader range of tax avoidance issues may result in increased administrative burden for the council.

4.2 Legal Implications

Covered within the body of the report.

4.3 Environmental Implications

Not applicable.

4.4 Resident Impact Assessment:

Not applicable

5. Reason for recommendations

- 5.1 This report sets out the legal framework, established by the Public Contracts Regulations 2015, for dealing with non- payment of tax as part of the procurement process. In order to enhance the enforcement of tax compliance measures the report recommends that the scope of tax inquiries conducted by the council is widened during the pre-qualification stage of the procurement process for contracts with a value of over £5million coupled with the right to terminate such contracts for non-compliance with tax payment obligations.

Appendices: None

Background papers: None

Signed by: Director, Service Finance

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