

Information Note – Promoting Tax Compliance and Procurement: Guidance to Suppliers

(As per Information Note 03/13 14 February 2013)

What is changing?

Any supplier bidding for central government above-threshold contracts advertised in OJEU and to which EU procurement rules apply will, from 1 April 2013, be required to make a declaration regarding their tax compliance at the selection stage of the procurement procedure.

This declaration or 'self-certification' will be required by the Contracting Authority to establish whether the supplier has had an '**occasion of non-compliance**' as defined in the guidance, during the specified time period.

Where a supplier is unable to self-certify that there have been no '**occasions of non-compliance**', they will be required to supplement their response with an explanatory statement. This provides the supplier with an opportunity to explain the circumstances surrounding the 'non-compliance' and to detail the corrective action taken (or will be undertaken).

Who is affected?

This policy will affect all suppliers bidding for central Government contracts, i.e. UK suppliers including those with tax obligations in foreign jurisdictions and foreign suppliers operating in the UK.

To ensure a fair application of this policy across all suppliers, and to ensure UK suppliers are not unfairly disadvantaged, foreign suppliers and suppliers with tax obligations in foreign jurisdictions will be required to certify that there has not been an '**occasion of non-compliance**' in relation to the equivalent foreign tax rules.

What is an 'Occasion of Non-Compliance'?

An '**occasion of non-compliance**' occurs if:

Any tax return is found to be incorrect as a consequence of HMRC successfully taking action:

- under the General Anti-Abuse Rule (GAAR) to be enacted in Finance Bill 2013; or
- under any targeted anti-avoidance rule (TAAR); or
- under the "Halifax abuse" principle; or

Any tax return is found to be incorrect because a scheme which the supplier was involved in, and which was, or should have been, notified under the Disclosure of Tax Avoidance Scheme (DOTAS) rules, has proved to have failed; or The supplier's tax affairs have given rise to a conviction for tax related offences or to a penalty for civil fraud or evasion.

Where a return is amended, whether following the outcome of litigation or simply by agreement between HMRC and the taxpayer, by reason of GAAR, TAAR, etc, that is also an 'occasion of non-compliance'

Which taxes does it apply to?

This will apply to all HMRC administered taxes and foreign equivalents, including (but not limited to): Corporation Tax, Environmental taxes and duties and Petroleum Revenue Tax;

Income Tax, Capital Gains Tax and National Insurance;

VAT and other duties and indirect taxes; and

Stamp Duty Land Tax and Stamp Duty Reserve Tax

Examples of ‘non-compliance’

A group uses a loan relationship scheme that is disclosed under DOTAS and shown later not to work in the first tier tribunal (FTT).

A financial organisation acquired new assets using a complex set of transactions designed to reduce the VAT cost. The Court decided the structure was ineffective due to the application of “Halifax abuse”.

A company entered into transactions with related companies to exchange equity for new debt. The Court found that a main purpose of the transactions was the tax advantage and the relevant TAAR disallowed the payments made by the company in relation to the debt.

How do I respond to these changes when bidding for Government contracts?

Suppliers expecting to bid for above threshold central Government contracts from 1 April 2013 will be asked to self-certify their tax compliance during the selection stage of the procurement process via a simple question. In order to respond, suppliers should ensure they have gathered the necessary information required for them to self-certify their tax compliance.

In most cases this will require a declaration to be made by a director, officer, partner, trustee or proprietor who is responsible for the supplier’s tax compliance obligations and can make self-certify (i.e. make a declaration of tax compliance) on behalf of the supplier. Any supplementary information accompanying the certificate will also need to be produced and signed in the same way.

If my organisation has had an ‘occasion of non-compliance’, how do I present that information to the Contracting Authority?

Although all relevant procurement documentation will contain details of what is required to be provided, in summary Suppliers will likely be asked to provide the following: -

A brief description of the occasion, the tax to which it applied, and the type of ‘non-compliance’ i.e. GAAR, TAAR, Halifax Abuse Principle etc.

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.

Details of any mitigating factors:

- Corrective action undertaken by the supplier to date.
- Planned corrective action to be taken.
- Changes in personnel since the occasion.
- Changes in financial, accounting, audit or management procedures since the occasion.

How will the information I submit be used by the Contracting Authority?

The Contracting Authority will use the information as part of the overall assessment of the selection stage. Response will be marked on a ‘Pass/Fail basis’ as follows: -

Scenario 1 – Supplier responds by self-certifying they have had an “occasion of non-compliance” and does not provide an explanatory statement

Procurers will treat this response as a ‘fail’.

Scenario 2 - Supplier responds by self-certifying they have not had an “occasion of non-compliance”

Procurers will treat this response as a ‘pass’, ensuring the draft standard clauses are/have been included in the Invitation to Tender.

Scenario 3 – Supplier responds by self-certifying they have had an “occasion of non-compliance” and provides an explanatory statement

Procurers may treat this as ‘pass’ or ‘fail’ depending on the information provided, since it will contain information relating to a) the extent of the non-compliance (i.e. ‘aggravating factors’) and b) the extent to which the supplier has made improvements to prevent recurrence (i.e. ‘mitigating factors’). Departments may consider the nature of the ‘occasion(s) of non-compliance’, and the supplier’s progress in mitigating their position, to be serious enough to warrant a ‘fail’; this would exclude the supplier from further participating further in the procurement process.

Examples of ‘aggravating factors’:

Number of separate occasions of non-compliance – more than one occasion would be considered serious.

A large penalty or significant criminal sanction – both would be considered serious.

Length of time since the abuse - the more recent would be considered more serious.

Examples of ‘mitigating factors’ *Note* - Minor penalties for late filing should be disregarded:

Management – Where there has been a significant change in the management within or of the organisation since the occasion of non-compliance.

Change to tax practice – the supplier can demonstrate that they have undertaken steps to improve tax compliance. This may include changes to accounting practice, transparency agreements and changes to auditing procedures.

Where a supplier confirms that it is not or is no longer considered by HMRC to be a high-risk corporate – this would be low risk.

Scenario 4 – Supplier fails to confirm that they have no “occasion of non-compliance” and provides no explanatory statement

Suppliers failing to provide an answer risk being excluded from the procurement as their response would be deemed to be non-compliant (i.e. they have failed to answer all questions correctly).

Departments may or may not choose to follow-up with the supplier to get a response to the question so this response could be treated as ‘pass’ or ‘fail’

Will new contracts contain additional conditions relating to tax compliance?

Yes – this will ensure sufficient remedies, up to and including termination of the contract, are available through the contract to deal with non-compliance if it occurs during the life of contract or if a supplier is found to have fraudulently misrepresented their self-certification status during the procurement process. It will also include an obligation on suppliers to notify departments of a change to tax compliance status during the life of contracts.

Where a supplier has presented an improvement plan concerning their tax compliance as part of their self-certification response, the Contracting Authority may use this to monitor a supplier’s performance during the life of the contract.

What if an occasion of non-compliance arises during the life of the contract?

The contract conditions contain an obligation for the supplier to inform the Contracting Authority when an **‘occasion of non-compliance’** occurs at any point during the life of the contract.

A senior supplier representative (such as the person who declared the original self-certification) should urgently issue an explanatory statement detailing the **‘occasion of non-compliance’** to the Contract Manager. This should include:

Details of the occasion:

- A brief description of the occasion, the tax to which it applied, and the type of abuse
- The date of the original abuse, and the date of any judgement against the supplier
- The level of any penalty or criminal conviction applied

Details of any mitigating factors:

- Corrective action undertaken by the supplier to date
- Planned corrective action to be taken
- Changes in personnel since the occasion
- Changes in financial, accounting, audit or management procedures since the occasion

Where can I get more information from a tax perspective?

You should consult your tax adviser or accountant.

Where can I get more information from a procurement perspective?

Contact the Cabinet Office Service Desk in the first instance on Tel 0845 000 4999
servicedesk@cabinet-office.gsi.gov.uk .