



**HM Revenue
& Customs**

Tax and Procurement

Discussion Document and Draft Guidance
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Introduction

This document outlines the background of the proposal and sets out in detail the elements of the proposal on tax compliance and procurement relating to the declaration of tax compliance.

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Chapter 1

Background

The Chief Secretary to the Treasury (CST) made an announcement on 25 September 2012 concerning procurement by Government, which stated:

“Taxpayers’ money should not be funding tax dodgers. So I have tasked HMRC and the Cabinet Office to come up with a workable solution to this problem and we will set out more details later this year.”

The Government confirmed in the Autumn Statement that it intended to consult informally on how the Government procurement process would be used to deliver this.

The EU procurement directive¹ and Public Contracts Regulations 2006² allow procuring authorities to apply tax and propriety based criteria at the selection stage. In particular, a potential contractor can be asked whether it has fulfilled all its obligations relating to the payment of taxes.

The Government now proposes to set out new guidance, requiring potential suppliers to confirm their tax compliance as part of the procurement process. The new guidance is compatible with the existing procurement process, providing a useable framework to ensure that procuring departments are able to apply it consistently and fairly.

Purpose of policy

The purpose of this policy is to use the procurement process for government contracts to promote tax compliance.

Outline of policy

Under the new policy, from 1 April 2013 potential suppliers to central government will have to self-certify, as part of the selection stage of above-threshold procurements, their recent tax compliance history.

In addition, Contracting Authorities will ensure contractual documentation contains a standard clause enabling them to terminate a contract, at their discretion, if a supplier has had an ‘*occasion of non-compliance*’. It also places a contractual obligation on the supplier to keep the Contracting Authority notified of changes in relation to tax compliance. Failure to do this will also trigger remedies including, potentially, termination of the contract.

¹ Full text available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:EN:PDF>

² Full text available at: <http://www.legislation.gov.uk/ukxi/2006/5/part/4/made>

Chapter 2

Definition of “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"

Non-UK suppliers, and suppliers with international tax obligations

To ensure that UK suppliers are not unfairly disadvantaged, and to meet the UK’s international commitments/ commitments under EU law 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.

Examples of occasions 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.

Chapter 3

Applicability of the new policy

- This new policy will apply to all central government above-threshold contracts³ advertised from 1 April 2013.
- The intention is that this will apply to all central Government departments, their executive agencies and Non-Departmental Public Bodies. It could also be used by any public body or public service provider, and they will be encouraged to look at the practicality of applying this guidance.
- The new guidance will apply to contracts for both Part A and Part B services above the agreed thresholds⁴.

Suppliers to which the new policy will apply

The new policy will apply to:

- UK and foreign suppliers participating in in-scope procurement exercises;
- Sub-contractors performing a significant part of the contract; and
- Individuals and partnerships as well as companies bidding (whether individually or as part of a consortium or other wider body) for any contracts over the threshold value.

Timeframe for declaration

It is recognised that the historical extent must be proportionate. A supplier may reasonably not hold records beyond a certain point, particularly where there is no statutory or regulatory requirement to do so. So there needs to be a time limit, beyond which earlier events are disregarded.

The time limit will apply to the date of that the non-compliance is recognised (eg the date of a Court decision, or date when the return was amended) rather than the date that the particular arrangements were entered into or carried out. This is intended to provide greater clarity and certainty, and remove any incentive for disputes to be spun out so that by the time they are concluded the original event has passed beyond a time limit. Furthermore, some firms may not change their behaviour until their arrangements have been ruled as abuse.

The exact time limit is still under consideration, but it must take into account that:

- Tax cases can take a number of years before a court hands down a final decision; and
- There are existing regulatory, statutory and other time limits for record keeping, including:
 - Six years as required by the Companies Act 2006;
 - Varying time limits for tax records (see Annex).

The current proposal is that *ten years* is a reasonable length of time.

³ Call-off contracts awarded under existing Framework Agreements will not be automatically subject to this new process

⁴ http://ec.europa.eu/internal_market/publicprocurement/rules/current/index_en.htm

Chapter 4

Procedures

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.

The Contracting Authority will use the information as part of the overall assessment of the selection stage. Response will likely be marked on a 'Pass/Fail basis'.

The detail of the procedure is set out in the draft procurement policy notice available on the Cabinet Office Website⁵.

Taxes to which the new guidance applies

The intention is that this will apply to all HMRC administered taxes, 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

Potential remedies available to departments

A range of remedies is already available where a supplier breaches the terms of a contract. Standard remedies will be available to departments within contracts, enabling up to and including termination of contract in circumstances where suppliers either fail to disclose an occasion of non-compliance at the outset, or where such an occasion occurs during the lifetime of the contract.

⁵ <http://www.cabinetoffice.gov.uk/resource-library/type/1384>

Annex – Current HMRC record-keeping requirements

Extract from “Keeping records for business – what you need to know”⁶

How long to keep your records

As a general rule, you should keep your records for a minimum of six years. However, if you are:

- an employer, you need to keep Pay As You Earn (PAYE) records for 3 years (in addition to your current year)
- a contractor in the Construction Industry Scheme (CIS), you need to keep your CIS records for 3 years (in addition to your current year)
- keeping records to complete a personal (non business) tax return, you only need to keep them for 22 months from the end of the tax year to which they relate.

If you need to keep records for other reasons, for example the Companies’ Act requires limited companies to keep specific records and you also use those records for tax purposes, you need to be aware that there may be different time limits for retaining them. Be careful not to destroy any records you also use for tax purposes too soon.

⁶ <http://www.hmrc.gov.uk/factsheet/record-keeping.pdf>