

# Oldham Council

## Briefing Note on Oldham Council's Procurement Processes & Promotion of Tax Compliance

**June 2016**

Nicola Wadley, Head of Strategic Sourcing (Interim)  
Strategic Sourcing Team  
Commercial & Transformation Services

**Ext: 8105**

# 1. Background

- 1.1 In accordance with Section 135 of the Local Government Act 1972 Oldham Council sets out its obligations that apply to all Contracts for the supply of works, goods or services made in the name of the Council. These are the Contract Procedure Rules.
- 1.2 Amongst a number of commitments Oldham Council has contract values (whole life of the contract) associated with these Contract Procedure Rules, these state what process officers must follow to comply.

These are as follows:-

Oldham Council's Contract Procedure Rules	Contract Value	Required Procedure
	Less than £1,000	1 verbal quotation
	Between £1,000 and £5,000	3 verbal quotations
	Between £5,000 and £50,000	3 written quotations
	Over £50,000 to EU thresholds	Tender process
	EU thresholds and above EU	Procurement procedure

EU Thresholds	Supplies/Services	Works	Light touch Regime
	£164,176	£4,104,394	£589,148

- 1.3 In February 2011 the Prime Minister and the Minister for the Cabinet Office announced a series of measures to make it easier to SMEs to compete for Government contracts. These were:-

- the standardisation of PQQs (Pre-Qualification Questionnaire) and;
- the abolition of PQQ's in the procurement process. for contracts below OJEU threshold

## 2. Current Position

- 2.1 The Council requires suppliers to act in a lawful way and procurement processes are designed where unlawful practices should be declared. Tax evasion, i.e. the illegal non-payment or underpayment of tax is unlawful.
- 2.2 AGMA Authorities (including associate members, Blackpool and Warrington) have not included these detailed questions in procurement documentation for contracts valued at less than the required threshold of £5 million.
- 2.3 The Procurement Policy Note: Measures to Promote Tax Compliance (Action Note 03/14) sets out the scope and background of how to take into account the measures to promote tax compliance in procurement documentation. It also provides details of how Departments should assess suppliers' responses.
- 2.4 New Public Contracts Regulations 2015 came into effect in February 2015. As part of these Regulations, Crown Commercial Services issued a standardised PQQ which incorporates mandatory tax compliance questions, as well as a number of other additional questions. These tax compliance questions apply to contracts with a value in excess of £5 million and relate specifically to central government contracts; they are not mandatory for other public bodies, although they can choose to use them if they wish. These tax compliance questions are as follows:-

*The authority reserves the right to use its discretion to exclude a Supplier where it can demonstrate the Supplier's non-payment of taxes/social security contributions where no binding legal decision has been taken.*

*Please note that Section 3.7 relating to tax compliance only applies where the authority has indicated that the contract is over £5million in value, and the authority is a Central Government Department (including their Executive Agencies and Non-Departmental Public Bodies).*

*"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 to be incorrect as a result of:*
- 1. 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;*
  - 2. 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*

(b) the Supplier's tax affairs give 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 penalty for civil fraud or evasion

<p>From 1 April 2013 onwards, have any of your company's tax returns submitted on or after 1 October 2012; (Please indicate your answer by marking 'X' in the relevant box).</p>		
xx	<p>Given rise to a criminal conviction for tax related offences which is unspent, or to a civil penalty for fraud or evasion;</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
xxx	<p>Been found to be incorrect as a result of:</p> <ul style="list-style-type: none"> <li>▪ HMRC successfully challenging it under the General Anti-Abuse Rule (GAAR) or the "Halifax" abuse principle; or</li> <li>▪ A Tax Authority in a jurisdiction in which the legal entity 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</li> <li>▪ 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.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>If answering "Yes" to either xx or xxx 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:</p> <ul style="list-style-type: none"> <li>● Corrective action undertaken by the Supplier to date;</li> <li>● Planned corrective action to be taken;</li> <li>● Changes in personnel or ownership since the Occasion of Non-Compliance (OONC); or</li> <li>● Changes in financial, accounting, audit or management procedures since the OONC.</li> </ul> <p>In order that the authority can consider any factors raised by the Supplier, the following information should be provided:</p> <ul style="list-style-type: none"> <li>● 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.</li> <li>● Where the OONC relates to a DOTAS, the number of the relevant scheme.</li> <li>● The date of the original "non-compliance" and the date of any judgement against the Supplier, or date when the return was amended.</li> </ul>		

- *The level of any penalty or criminal conviction applied.*

2.5 We can confirm that Oldham Council's Pre-Qualification Questionnaires and Invitation to Tender (ITT) documents include these tax compliance questions in procurements valued in excess of £5 million.

2.6 Oldham Council's procurement processes do not incorporate the detailed tax compliance questions referred to above in procurements valued from £5,000 to £4,999.999.

2.6.1 Bidders indicating a 'Yes' to this are informed in the procurement process that this is a criterion for exclusion. They then cannot continue their bid.

2.6.2 Oldham Council's procurement processes, including its Request for Quotation (RFQ's) exercises (for values £5,000 to £50,000) have been designed to encourage quotations from SMEs and the voluntary sector. Our processes are constructed to make it easier for these small businesses and voluntary groups to compete for public sector opportunities. This has been achieved by making the procurement process more simplistic and making some contracts smaller.

### 3. Council Motion

3.1 The following motion was agreed at Council on 23 March 2016:

*"Oldham Council currently requires companies bidding for council contracts to have ethical and social policies.*

*Council believes that it should also require these bidders to account for their past tax record.*

#### *Council notes*

- *That the UK Government has taken steps to tackle the issue of tax avoidance and evasion by requiring bidders to account for their past tax record in accordance with Procurement Policy Note 03/14 (PPN 03/14). This applies to all central government contracts worth more than £5m.*
- *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 PPN 03/14.*

*Council believes that it should require bidders for council contracts to account for their past tax record, using the standards in PPN 03/14.”*

- 3.2 The instruction was given: To assess the implications of revising the Council's procurement procedures to require all companies bidding for council service contracts worth more than £173,000 and works contracts worth more than £4million to self-certify that they are fully tax-compliant in line with central government practice using the standards in PPN 03/14

## 4. Action Taken following Motion

- 4.1 Research has been undertaken to further understand the obligations and policy guidance in respect of the more detailed tax compliance questions as listed in section 2; 2.4 above, considerations include:-

4.1.1 The Council will need to 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 Council to investigate or verify the responses to the questions.**

4.1.2 If suppliers respond 'yes' to the tax compliance questions (i.e. they declare that they have had an OONC (occasion of non-compliance) then the Council may decide to exclude them on this basis. Any such decision is at the discretion of the Council on the basis that the tax compliance provisions are discretionary exclusion criteria under the Regulations. It is entirely appropriate for the Council to use their judgement in reaching any decision on whether or not to exclude a supplier from a procurement.

This discretionary option carries a degree of risk as Strategic Sourcing staff (and stakeholders within the organisation) do not have the necessary professional expertise in relation to the taxation system.

However, it should be noted that if and OONC also falls within the mandatory exclusion criteria under the Regulations they the Council will have no discretion and shall be obliged to exclude.

4.1.3 The questions provide for suppliers to cite mitigating factors where they have had an OONC. 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

Council. This gives Departments discretion in relation to how to respond to and 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.

This discretionary option carries a degree of risk as Strategic Sourcing staff (and stakeholders within the organisation) do not have the necessary professional expertise in relation to the taxation system.

4.5 On implementation of the detailed tax compliance questions of PPN 03/16 in the tender documentation there will be a requirement to ensure that;

4.5.1 contract terms and conditions are updated to contain provision for ensuring there is an obligation on the supplier to keep the Council notified of any OONC during the term of the contract and also that the statement made by the supplier at selection stage remains valid at the commencement of the contract.

4.5.1 the contract document has robust termination clauses, exercisable by the Council at its discretion.

*(Guidance on new contract clauses is available on the PPN 03/14 document.)*

4.6 Amended procurement documentation and templates have been drafted to reflect the detailed tax compliance questions in all tenders over £173,000 for service contracts and £4million for works contracts.

4.7 Relevant termination clauses have been reviewed and are included in contract documentation.

4.8 Timescales to obtain specialist independent advice in relation to developing a robust and consistent approach when applying discretionary decision making powers.

4.8.1 From date of decision to proceed, (this takes into account the Summer holiday period for potential suppliers):

- Draft specification – two weeks (August 2016)
- Advertise opportunity – two weeks (August 2016)
- Evaluate and award – one week (Sept 2016)

## 5. Strategic Sourcing's Recommendations

5.1 Due to the complexities of the tax system there is a need for a tax specialist to advice on the possibilities / implications of this as a corporate policy.

5.2 This advice should include but not be limited to the legal implications in respect of individuals and organisations with regards to tax efficiency and avoidance. This will ensure that we have minimised risks of challenge from organisations whom have been excluded from bids. The costs and consequences of complexity in discouraging economic activity and our policy decision/impact on this.

(Nicola Wadley, Head of Strategic Sourcing [Interim])

## 6. Finance Comments

6.1 There are practical and statutory restrictions on the amount of due diligence that can be carried out on responses to Pre-qualification questions (PQQ) relating to tax compliance and the usual compliance checks performed through credit reference agencies do not specifically contain information relating to tax compliance. In essence, this means the Council will largely have to accept PQQ tax compliance responses at face value. However, there is still merit in including these questions in PQQ documentation provided the Council has a remedy included in subsequent service contracts/agreements that allows for termination in the event of the material misstatement of information supplied as part of the PQQ process.

The initial recommendation about seeking specialist advice is removed as it is not required (assuming the council follows the advice given above).

(Andrew Moran, Assistant Director of Finance [Corporate])

June 2016  
Final  
Commercial & Transformation Services