GOVERNMENT TENDERS AND TAX
BEHIND THE HEADLINES

John Overs and Katherine Calder of Berwin Leighton Paisner LLP explain the government's tax compliance requirements for tenders for public sector contracts, and the practical steps that businesses can take to comply.

On 25 July 2013, the government issued Policy Action Note 06/13 (the policy document) and, in so doing, finalised its controversial policy designed to prevent any organisation caught trying to avoid, or improperly reduce, its tax bill from winning government contracts.

This article examines the detail behind the headlines and what it really means for organisations that are looking to tender for government work, including what practical steps organisations that may tender for public sector contracts should be taking now.

TAX AND PROCUREMENT POLICY

In summary, the policy document states that organisations wishing to tender to any central government department, executive agency or non-departmental public body (the relevant public body) for a contract advertised after 1 April 2013 where the contract has a value in excess of £5 million will have to self-certify their tax compliance, post 1 April 2013, as part of the pre-qualification questionnaire (PQQ). The PQQ is the first selection stage in a public procurement after the initial advertisement has been published.

Occasions of non-compliance

Where there has been an occasion of non-compliance (OONC) found after 1 April 2013 in respect of a tax return submitted on or after 1 October 2012, the organisation may be excluded from going any further in the tender process. There will be an OONC if:

- The tenderer's tax affairs have given rise to a criminal conviction for tax-related offences that is unspent, or to a penalty for civil fraud or evasion.

- Any of its tax returns submitted on or after 1 October 2012 has been found to be incorrect as a result of:

  - HM Revenue & Customs (HMRC) successfully challenging it under the new general anti-abuse rule (GAAR) (introduced in the Finance Act 2013 (*see feature article "General anti-abuse rule: casting a wider net", www.practicallaw.com/1-545-4146*)) or the VAT abuse principle set out in the European Court of Justice's (ECJ) decision in *Halifax plc and ors v Commissioners of Customs & Excise* (*C-255/02; www.practicallaw.com/6-202-1535*) (*see box "The Halifax principle"*);

  - a tax authority in a jurisdiction in which the tenderer is established challenging it successfully under any tax rules or legislation that have an equivalent or similar effect to the GAAR or the *Halifax* principle; or

  - the failure of a tax avoidance scheme that the tenderer 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 tenderer is established.

Disclosure should apply to all OONCs in the preceding six years, but no further back than 1 April 2013.

Self-certification

Tenderers are asked to self-certify whether an OONC has occurred and (if it has occurred) what steps it has put in place to ensure it will not occur again in the future. This statement of assurance will be assessed by the relevant public body when deciding whether to exclude the tendering business from the competition.

Tenderers are, therefore, asked to provide details of:

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

In order to help the relevant public body decide whether or not to exclude a tenderer, tenderers are also asked for:

- A brief description of the OONC, the tax to which it applied, and the type of non-compliance; for example, whether HMRC or the foreign tax authority has challenged the non-compliance under the GAAR or the *Halifax* principle.
- Where the OONC relates to a DOTAS notification, the number of the relevant scheme.
- The date of the original non-compliance and the date of any judgment against the supplier, or the date when the return was amended.
- The level of any penalty or criminal conviction applied.

In addition, government contracts above the £5 million threshold are to include standard terms to allow for termination of the contract in the event of future occasions of non-compliance by the successful tenderer.

This standard drafting is published in the policy document and may now be familiar to businesses that are in the process of entering into government contracts to which the policy applies (*see box "Standard terms"*).

Which contracts are covered?

The policy document states that the policy applies to all government procurements that are in excess of £5 million. The majority of government procurements in excess of this figure will be subject to the Public Contracts Regulations 2006 (*SI 2006/5*) (as amended) (2006 Regulations) or the Defence and Security Public Contracts Regulations 2011 (*SI 2011/1848*) (2011 Regulations) (together, the Regulations).

This means that, in procuring the relevant works, supply or services, the relevant public body must follow one of the four procedures laid down in the Regulations: open; restricted; negotiated; or competitive dialogue.

All of these procedures begin with an advertisement in the Official Journal of the EU (the OJEU notice). Accordingly, if an organisation is responding to an OJEU notice to a government department or agency that has specified an estimated contract value of £5 million or more, then the policy will apply.

The requirement to self-certify will be in a tenderer's response to the first tender document received by it after responding to the OJEU notice. For the open procedure, this will be the invitation to tender and, for all other procedures, this will be the PQQ.

What is less clear is whether this policy will apply to procurements to which the Regulations do not apply. The policy document assumes that the Regulations will apply to all procurements over £5 million, but this is not necessarily the case.

In the defence sector, there may be, for example, high-value procurements for which the Ministry of Defence seeks to rely on the exemption for contracts related to national security under Article 296 of the Treaty on the Functioning of the European Union (TFEU). There are also other exemptions in the Regulations; for example, exemptions related to research and development, or the acquisition of land.

There are also some circumstances in which a contracting authority may negotiate directly

The *Halifax* principle

In *Halifax plc and ors v Commissioners of Customs & Excise*, the European Court of Justice (ECJ) held that transactions with a tax avoidance motive may constitute supplies in the course of an economic activity for VAT purposes, but should nonetheless be disregarded if they constitute an abuse of rights (*C-255/02*).

Halifax set out conditions for determining whether transactions constitute an abuse of rights for VAT purposes (the *Halifax* principle); namely, that:

- The transactions concerned result in the accrual of a tax advantage, the grant of which would be contrary to the purpose of the Sixth VAT Directive (*77/388/EEC*).
- It is apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage.

In summary, a transaction or arrangement may be held to be ineffective if, judged objectively, its essential aim is to generate a VAT advantage that was not the purpose of the relevant legislation that confers the advantage.

There have been several cases considering abuse both in the ECJ and also in the UK courts which have further illustrated and set limits to the *Halifax* principle. The most recent UK example was *Pendragon Plc v HMRC* in which the Court of Appeal called for "the adoption of a cautious approach as regards finding that the principle does apply, in any case which is not really clear on its facts" (*[2013] EWCA Civ 868*).

Standard terms

Policy Action Note 06/13 contains certain standard terms regarding termination that are required to be inserted into qualifying government contracts. The required terms are as follows:

1. *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.*

2. *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.*

3. *In the event that:*

    (a) *the warranty given by the Supplier pursuant to Clause 1 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 2; 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.*

"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:*

    (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*

(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,*

"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.

with one organisation without a call for competition; for example, where a previous procurement was aborted for lack of suitable tenders, or where one organisation could be said to have an exclusive right to provide the service.

In the authors' experience, since this policy was introduced, in these "non-regulated" procurements over the £5 million threshold, the relevant public body will take a view on whether it is sensible to apply the policy but, where there is a competition involved and a tender procedure in some form, it is likely that the policy will be applied. Clearly, if there is only one organisation that can deliver the contract (for example, an agreement for the purchase of land or where an exclusive right applies), the policy may be self-defeating.

The policy also states that other contracting authorities that are subject to the Regulations may also choose to apply this policy to their procurements over £5 million. The authors understand that some local authorities have chosen to do so.

The policy is also applicable to procurements for framework agreements. It states that where there is a multi-supplier framework agreement, the policy will only apply if it is anticipated that individual contracts created under the framework will be above £5 million. Although the policy document is not explicit on this point, presumably the policy will apply to single supplier frameworks where it is anticipated that the value of the entire framework (that is, the aggregate of the individual contracts) will be above the threshold.

Should an organisation be excluded from a procurement process due to an OONC, this will not prevent that organisation from bidding for future government contracts. A bidder cannot be prevented from responding to future adverts and one contracting authority may take a different view to another with regards to the seriousness of an OONC. However, if an organisation has been excluded from a procurement process in the past, it should look closely at its mitigating statement and consider redrafting to give further assurances that an OONC will not occur again.

Which bidders are affected?

As for all PQQ questions, the self-certification will need to be answered by the economic entity bidding for the contract. In practice, this means that if the tenderer is:

- A body corporate or association, or an individual, it will be the tax affairs of that company, association or person that are relevant.

- A joint venture or consortium, the self-certification must cover all members of the joint venture or consortium.

- A partnership, limited partnership or limited liability partnership (LLP), the self-certification must cover that partnership, limited partnership or LLP, but not its individual members.

Tenderers are not asked to certify in respect of other companies in the same group, including subsidiaries, affiliates or even parent companies if those companies are not specified as part of the bidding consortium.

In reality, however, bids are often submitted in the name of the parent company in order to ensure that the minimum financial standing test is also passed with flying colours, as that organisation is likely to have the strongest balance sheet. Where the financial covenant of the parent is being relied on in the form of a parent company guarantee, the contracting authority may consider it as part of the bidding consortium and require it to self-certify, but the contracting authority will need to include this requirement specifically within the PQQ.

Impact on tax planning

A vital issue for many businesses is the extent to which the new policy effectively prevents any business that has engaged in some tax planning from bidding for public contracts. However, it is important for companies to understand that not all tax planning will be caught, even if it has been challenged by HMRC or foreign tax authorities.

Clearly, criminal behaviour is caught, but tax avoidance (as distinct from evasion) is, in principle, lawful, although it might not prove to be effective to achieve its aims. In order for tax avoidance to be unacceptable under the policy, it has to have fallen foul of the GAAR, the *Halifax* principle or DOTAS (or a foreign equivalent).

GAAR. The GAAR targets what might be called highly artificial and aggressive tax avoidance. HMRC's guidance states that the GAAR legislation recognises that there are different courses of action that a taxpayer can choose between under the UK's tax code. The GAAR is carefully constructed to include a number of safeguards that ensure that any reasonable choice of a course of action is kept outside the GAAR's target area.

For the GAAR to apply, there must be arrangements where the main purpose or one of the main purposes is tax avoidance but, in addition, it must be shown that no reasonable person could regard the arrangements as a reasonable course of action in all the circumstances. The HMRC guidance gives examples of what falls on both sides of this rather complex line in the sand. The guidance recognises that taxpayers frequently have a choice as to the way in which transactions can be carried out, and that differing tax results arise depending on the choice that is made. The GAAR does not challenge such choices unless they are considered abusive.

As a result, in broad terms, the GAAR only comes into operation when the course of action taken by the taxpayer aims to achieve a favourable tax result that Parliament did not anticipate when it introduced the tax rules in question and, critically, where that course of action cannot reasonably be regarded as reasonable.

Much normal tax planning, the so-called "centre ground", should be safe from the GAAR.

The Revenue Scotland and Tax Powers Bill (published mid-December 2013) makes provision for a Scottish tax system to enable collection and management of devolved taxes. The devolved taxes are only the proposed Land and Buildings Transaction Tax in Scotland and the Scottish Landfill Tax at the moment. Part 5 of the Bill contains a Scottish general anti-avoidance rule which gives Revenue Scotland powers to deal with artificial tax avoidance schemes. The Scottish government has indicated that it intends the GAAR to be more rigorous and have wider criteria in determining tax avoidance than the existing UK rule.

The *Halifax* principle. Because VAT is essentially an EU-based tax, the GAAR does not apply to it, but the ECJ developed a similar principle in *Halifax*.

In summary, a transaction or arrangement may be held to be ineffective if, judged objectively, its essential aim is to generate a VAT advantage that was not the purpose of the relevant legislation that confers the advantage. Generally, one would not expect the *Halifax* principle to be engaged in a commercial transaction or uncontrived arrangement, even if there are VAT advantages.

DOTAS. DOTAS was introduced in 2004. Broadly speaking, certain arrangements or proposed arrangements where the main benefit, or one of the main benefits, expected to arise is the obtaining of a tax advantage are notifiable to HMRC before any tax return is submitted. This is primarily to give early warning to HMRC of marketed tax schemes.

However, DOTAS only catches schemes with certain hallmarks. For example: promoter imposed confidentiality, or promoter fees that are contingent on achievement of the tax savings or where the fee is a premium fee that shares in the potential saving, standardised tax products, loss schemes, or certain leasing arrangements.

Many, but not all, jurisdictions will have general anti-avoidance rules, but they will operate in different ways and the line between what is caught and what is not caught will no doubt be drawn in different places. A targeted anti-avoidance rule (intended to operate in a narrow area of a tax system) will arguably not be comparable with, or equivalent to, the UK GAAR, even if the line is drawn in the same place. The *Halifax* principle will apply across all EU member states as it is a principle of EU VAT law. It is believed that DOTAS-style schemes are less common.

Overall, it is unlikely that a tenderer will have inadvertently stumbled into the type of abusive tax arrangement that is caught by a GAAR, *Halifax* principle or DOTAS, but those in the tenderer's organisation involved in preparing the bid for a public contract affected by the new procurement policy may not necessarily be familiar with the tax history or the day-to-day tax affairs of the business.

THE POLICY IN PRACTICE

The question of tax compliance will be assessed on a pass/fail basis by the relevant public body. The legal basis for asking the question is at regulation 23(4)(g) of the 2006 Regulations (regulation 23(4)(g)) and regulation 23(4)(h) of the 2011 Regulations, which allows for discretionary exclusion of organisations from a tender process on the grounds that the economic entity has "not fulfilled obligations relating to the payment of taxes" (*see box "Legal basis for tax compliance"*).

The fact that an OONC is not an automatic bar to qualification has enabled the government to imply in the policy that the relevant public body may, at its discretion, make a judgment as to whether an organisation should be excluded, taking into account any mitigating factors set out in the tenderer's response. If in doubt, the public body should seek guidance from the Efficiency and Reform Group Service Desk, as HMRC will provide support to other government departments in making these highly technical judgments.

Other than the guidance set out in the annex to the policy document, (which, in the authors' view, is not much guidance at all) there is no clear message from HMRC as to what mitigating factors might be considered acceptable and what would not (*see box "The guidance"*). Even in respect of criminal convictions and civil fraud penalties, which are advised to be always considered as "serious matters", the policy stops short of directing contracting authorities to exclude the offending organisations.

Tenderers based abroad are expected to self-certify in respect of equivalent foreign tax rules. Whether an OONC has occurred, how it will be assessed and where the contracting authority should obtain the necessary advice in respect of the applicable foreign tax law (which presumably even HMRC would struggle to cover) is not covered by the policy document.

The contracting authority is not required to carry out any enquiries of its own into the truth or otherwise of any self-certification and may rely solely on the representations made by tenderers.

Contract terms and conditions

The government requires certain standard drafting to be included in all qualifying (that

Legal basis for tax compliance

The basis on which public bodies can exclude companies from tendering for public contracts due to their tax compliance is set out in regulation 23(4)(g) of the Public Contracts Regulations 2006 (*SI 2006/5*) (as amended) or regulation 23(4)(h) of the Defence and Security Public Contracts Regulations 2011 (*SI 2011/1848*), which both state that:

"A contracting authority may treat an economic operator as ineligible or decide not to select an economic operator in accordance with these Regulations on one or more of the following grounds, namely that the economic operator: (g)/(h) has not fulfilled obligations relating to the payment of taxes under the law of any part of the United Kingdom or of the Member State in which the economic operator is established."

In contrast, the new proposed EU procurement directives make it explicit that where any dispute with the relevant tax authority has been settled either by negotiation, payment of interest or fine, the right of the public body to exclude the economic operator from the competition then falls away:

"Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure an economic operator where the relevant public body can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions. This paragraph shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the due taxes or social security contributions, including, where applicable, any interest accrued or fines."

This is obviously at odds with government policy set out in Policy Action Note 06/13 which allows an exclusion to be made on the basis of that public body's subjective opinion of the seriousness of the "wrongdoing" and/or whether it believes similar behaviour may be repeated in the future. It remains to be seen whether the policy will survive into 2015 given this conflict with future EU law.

is, above £5 million) procurement contracts entered into after April 2013, which:

- Inserts a warranty from the supplier that it has notified the relevant public body of any OONC or litigation related to it.
- Places an obligation on the supplier to notify the relevant public body of any future OONC within five working days of its occurrence together with measures that are being taken to address it and to prevent it re-occurring, any other mitigating factors and any other information the public body might reasonably require.
- Provides a right for the relevant public body to terminate the agreement for supplier breach should the warranty be materially untrue; there occurs a material breach of the obligation to notify or the supplier fails to provide mitigating factors that are acceptable in the reasonable opinion of the public body.

As a termination would be on the grounds of supplier breach it is possible that the contracting authority may seek to recover its losses in having to re-procure the contract sooner than the expiry of the original term in a damages claim against the supplier. However, it is difficult to see that this option would be an attractive one given the time and resource issues inherent in large procurement projects.

The obligations apply only to the contracting entity and not to any group companies or sub-contractors. As a result, the government considers that these matters should be within the reasonable control of the contracting entity. It also raises the possibility that organisations bidding for public contracts will demonstrate a greater attachment to setting up special purpose vehicles to deliver specific contracts.

The issue may be one for third-party investors in a project in terms of the level of control that they will have over the tax planning activities of the tendering entity that is entering into both the contract and the finance documents.

Currently, this issue does not seem to be on the radar of investment institutions. However, where the asset that is being financed is, or relies on, a public contract that contains these provisions, legal advisers to such investors will need to build appropriate protections into finance documents.

WHAT STEPS TO TAKE?

PQQ documents often have very short response times within which the tenderer is going to have to provide information on its tax compliance status. The Regulations stipulate a standard minimum period of 30 days, but this can be reduced to 15 days where the OJEU notice was published electronically (which most now are) and even ten days in urgent cases.

If a business knows that it is likely to bid for central government contracts above the qualifying threshold, it will be essential to understand whether an OONC exists and, if so, to which organisation in the company's group it relates.

The organisation may have undertaken or propose to undertake some tax planning that might be an issue in the future and this should be reviewed to determine whether the GAAR, DOTAS or the *Halifax* principle might be relevant. Organisations should be aware of whether they are likely to bid directly for government contracts that may qualify, or whether they might be asked to tender as part of a consortium with the parent or other group companies, so that these issues can be checked and the tenderer can be prepared. Foreign tax advice may be needed if the organisation is part of a multinational group of companies.

Existing OONC. If some tax planning that might be relevant is identified as part of this process, then urgent tax, procurement and corporate structuring advice may be needed.

The next step is to draft an appropriate statement to be included within the PQQ response that will address the government's concerns and seek to dissuade the relevant public body from disqualifying the company from tenders.

Mitigating factors will need careful preparation, and the supplier is likely to have to show that it has, or will introduce, acceptable tax compliance policies. Providers based in other jurisdictions will need to identify equivalent provisions to GAAR, DOTAS and the *Halifax* principle in those jurisdictions and formulate a similar strategy of response accordingly.

Current disputes. An organisation may have a current dispute in which a number of tax issues are not agreed with HMRC. In assessing the position, consideration should be given as to how the dispute might be resolved and whether litigation or a settlement is likely. Those dealing with the tax dispute need to be mindful of the new procurement policy (if relevant to the business of the company) in deciding how best to proceed to litigate or settle since an OONC is triggered by a tax return proving incorrect only as a result of certain types of tax behaviour that are arguably quite limited.

Generally, there needs to be an ongoing dialogue between those in a business that are responsible for the procurement process and their tax colleagues and advisers to ensure that both the PQQ is dealt with appropriately and the tax compliance of the business is monitored during the life cycle of the procurement contract.

The tax team needs to understand which entities are bidding for the contract or are parties to the contract so that they can identify where and when OONC issues might arise or how they might be avoided.

Because the policy only applies to OONCs that occur on or after 1 April 2013, it may be some time before a relevant OONC comes to light. While there can only be an OONC if a tax return submitted on or after 1 October 2012 proves to be incorrect, there is no OONC if a tax return submitted before that date is simply amended or re-submitted on or after that date. It is the first submission that counts.

Potential grounds for challenge

The initial consultation document that set out the first draft of this policy was particularly draconian. It received a large number of responses pointing out both inconsistency with EU procurement law and the general impracticality of the original proposal. The policy has been significantly watered down, but it will still pose interesting issues for any relevant public body seeking to implement it.

Exercise of discretion. In the authors' view, it is not correct to say, without some qualification, that the relevant public body has complete discretion as to whether or not it disqualifies a tenderer on the basis of its response to these PQQ questions. In any exercise of discretion, a relevant public body must have regard to the core TFEU principles, including non-discrimination and equal treatment. Under English administrative law principles, it must also act reasonably, taking

The guidance

The guidance to relevant public bodies set out in the annex to Policy Action Notice 06/13 sets out what factors the government considers to be legitimate mitigating factors for an occasion of non-compliance (OONC).

These include, for example:

- Since the transactions that gave rise to the OONC were entered into, 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.

The policy document also gives some explanation as to what terms such as *Halifax* principle and disclosure of tax avoidance scheme actually mean.

into account only relevant considerations and excluding irrelevant ones.

The potential risk for a relevant public body seeking to apply the policy by excluding a tenderer is in adopting an inconsistent approach. If, for example, a relevant public body treats the OONC of one bidder as acceptable, but that of another bidder as not acceptable, the relevant public body will need to be able to demonstrate in its audit trail both a clear understanding of both OONCs and a rational and reasonable justification for coming to a different decision in respect of each bidder, having regard to their mitigating statements.

Also, if there are two almost identical OONCs but one organisation submits a statement of mitigation and the other entity does not, is it legitimate for the relevant public body to exclude the organisation which failed to give representations as to future behaviour? After all, regulation 23 of the Regulations only gives the discretion in the context of past breaches of tax law, not the potential for future breaches.

How will government departments be able to judge what is unacceptable tax avoidance and what is not? Will HMRC be able to help with every affected procurement? Will the relevant public body or HMRC have the appropriate expertise to review notified OONCs in other tax jurisdictions? How can statements of assurances and mitigating factors put forward by tenderers from different tax jurisdictions, with very different tax laws, be evaluated equally?

The question for UK business is that, given the UK's new GAAR, UK tenderers are more likely than foreign tenderers to be adversely affected by the change, as the reality is that many other jurisdictions do not have this type of tax avoidance (as opposed to illegal tax evasion) legislation.

It may be that the answers to these questions and risks are simply put in the "too hard" box by busy procuring officers, so in order to avoid claims of discrimination (under procurement law) or irrationality (under public law), the relevant public body may simply decide to exclude every tenderer with an OONC or permit every such tenderer to proceed to the next stage taking their mitigating statement at face value.

The fact that mitigating statements are requested would tip the balance of probability into the latter category in the authors' view, as the request for such a mitigating statement raises the expectation that it will be taken into account.

EU law compatibility. The policy document is inconsistent with the European Commission's approach, which is that member states should not exclude any tenderer on this ground where the tenderer can show that they have since paid the taxes due or come to a settlement with the relevant tax authority (*see box "Legal basis for tax compliance"*). This UK policy, however, will enable UK relevant public bodies nevertheless to exclude such organisations, even where no liability has been admitted and/or settlement has been agreed and sums paid.

The draft EU procurement directives (the Directives) are expected to become law in early 2014.

Once the Directives come into force, any economic entity disqualified from a tender process for a past OONC which has since been settled will have a remedy under EU law and UK law (once the Directives have been implemented in the UK) and the policy document may need to be reconsidered by government.

Challenging a government decision

Where a tenderer believes it has been unfairly excluded from a competition on the basis of the policy document, specialist procurement advice needs to be sought immediately to avoid falling foul of the extremely short limitation period for procurement claims.

The limitation period in procurement law for a claim of this nature is 30 days from the date on which the tenderer became aware, or ought reasonably to have been aware, of the breach of the Regulations. A 30-day limitation period also applies in claims for judicial review. Organisations must move swiftly. The 30-day period is likely to run from the date of receipt of the rejection letter informing the tenderer of its failure to be shortlisted to be invited to tender on the basis of regulation 23(4)(g). (*For more information, see Briefing "Procurement time limits: watch the clock", this issue.*)

The challenging tenderer must issue and serve a claim form within the 30 days. It is not sufficient merely to make a written complaint or seek further information, although this is a sensible first stage in order to gather sufficient evidence to submit the particulars of claim that will be required very shortly afterwards unless the parties agree otherwise.

If, at the point when a claim form is served, the contract has been signed, it is unlikely that a claimant tenderer will be entitled to any remedy other than damages should the challenge be successful. It may be possible to have the contract rendered ineffective (that is, void as to future performance), but only if the breach was accompanied by a more serious breach of the Regulations: for example, that an OJEU notice was not published or a "stand still" or "Alcatel" letter was not sent to the rejected tenderers at least ten days before the signature of the contract containing the prescribed information.

However, as the policy only applies to high-value procurements, it is more than likely that the contract will not yet have been signed within 30 days of the receipt of the rejection letter. If it has not been signed, an automatic injunction will fall into place preventing signature by the relevant public body until the procurement dispute has been resolved.

The relevant public body may decide to abide by the injunction in order to resolve the dispute. However, if it believes that there is genuinely no case to answer or that there is a programme or timing imperative why it must have the new contract in place, it may apply to have the injunction lifted.

In considering this question, the courts will look at the grounds to be satisfied when applying for an interim injunction set out in *American Cyanamid v Ethicon Limited* (*[1975] AC 396*). Essentially, the court will look at whether there is a serious issue to be tried and whether damages would provide an adequate remedy. The onus will be on the claimant tenderer to lay out a sound case from the outset. This is no mean feat and to date the English courts have demonstrated a preference for lifting the injunctions.

Future uncertainty

From the perspective of companies tendering for high-value public works, services or supply contracts, the new policy will surely influence future behaviour. An organisation bidding for work in the public sector will need to think carefully about its tax planning in the future and the potential risks to its overall business plan.

But where a tenderer must nevertheless certify an OONC, it is not yet clear whether this policy will actually prevent that organisation from bidding for government work. As only the economic entity tendering for the contract will be assessed, not its whole group, large multinational or non-UK organisations may simply separate their UK public sector business entities from the rest of operations to ensure that there is no "cross-contamination" as a result of tax planning for the wider organisation. Or relevant public bodies may simply demonstrate no appetite to risk legal challenge and accept statements on mitigation at face value, thus ushering all tendering organisations through the door.

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