

HUB PROGRAMME DELIVERY OFFICE

GUIDANCE NOTE 01/14

Exclusion from Public Contracts of Companies which Engage in Blacklisting

27 January 2014

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1. Introduction

In November 2013 the Scottish Government introduced guidance, to be followed for all public contracts, on how to deal with companies that engage in “blacklisting” activities. The guidance is contained in Scottish Procurement Policy Note (SPPN) 4/2013¹.

Scottish Government policy is that companies which engage or have engaged in blacklisting of employees or potential employees should be considered to have committed an act of grave misconduct and should be excluded from bidding for public contracts unless they can demonstrate that they have taken appropriate remedial steps.

The guidance contains new questions to be asked of suppliers at pre-qualification stage and a new contract clause that provides for termination of a contract if a supplier is found to have breached the relevant legislation.

This note sets out SFT’s recommendation as to how the new guidance should be implemented across the hub programme and the changes to the Standard Project Agreements that SFT requires to be adopted on D&B and DBFM projects.

2. Supply Chain Selection for hub Projects

In each New Project Request the Participant should include a requirement that hubco complies with the new guidance in its process for selecting its supply chain for the project by asking potential suppliers the questions contained in Annex A of the guidance and considering whether exclusion is an appropriate and proportionate response to any offence or misconduct, and remedial steps, that a supplier discloses.

The following wording is recommended for including in the “Project Specific Requirements” section of New Project Requests:

“In selecting its supply chain for the project, the Participant requires hubco to comply with the Scottish Government’s policy on “blacklisting” as set out in Scottish Procurement Policy Note 4/2013 (“SPPN 4/2013”). Suppliers must be asked to respond to the questions contained in Annex A of SPPN/2013 and hubco must consider in good faith whether the exclusion of a supplier from the supply chain is an appropriate and proportionate response in light of any offence or misconduct (and remedial steps) that is disclosed”.

3. Supply Chain Review / Refresh

The Participants should ensure that hubco’s routine review/refresh of its supply chain complies with the new guidance by asking potential suppliers the questions contained in Annex A of the guidance and considering whether exclusion is an appropriate and proportionate response to any offence or misconduct, and remedial steps, that a supplier discloses.

¹ <http://scotland.gov.uk/Resource/0043/00438311.pdf>

4. Standard Form hub DBDA Update

Amend Clause 34.1 as indicated in red below:

- 34.1 The term "Prohibited **Act**" means:
- 34.1.1 offering, giving or agreeing to give to the Authority or any other public body or to any person employed by or on behalf of the Authority or any other public body any gift or consideration of any kind as an inducement or reward:
 - (a) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with the Authority or any other public body; or
 - (b) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with the Authority or any other public body;
 - 34.1.2 entering into this Agreement or any other agreement with the Authority or any other public body in connection with which commission has been paid or has been agreed to be paid by Sub-hubco or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Authority;
 - 34.1.3 committing any offence:
 - (a) under the Bribery Act 2010;
 - (b) under any Law creating offences in respect of fraudulent acts; or
 - (c) at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with the Authority or any other public body;
 - 34.1.4 defrauding or attempting to defraud or conspiring to defraud the Authority or any other public body; ~~or~~
 - 34.1.5 committing any breach of the Employment Relations 1999 Act (Blacklists Regulations) 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992; or
 - 34.1.6 committing any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities.

5. Standard Form hub DBFM Agreement Update

Amend Clause 44.1 as indicated in red below:

- 44.1 The term "Prohibited **Act**" means:
- 44.1.1 offering, giving or agreeing to give to the Authority or any other public body or to any person employed by or on behalf of the Authority or any other public body any gift or consideration of any kind as an inducement or reward:
 - (a) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with the Authority or any other public body; or
 - (b) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with the Authority or any other public body;
 - 44.1.2 entering into this Agreement or any other agreement with the Authority or any other public body in connection with which commission has been paid or has been agreed to be paid by Sub-hubco or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Authority;
 - 44.1.3 committing any offence:
 - (d) under the Bribery Act 2010;
 - (e) under any Law creating offences in respect of fraudulent acts; or
 - (f) at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with the Authority or any other public body;
 - 44.1.4 defrauding or attempting to defraud or conspiring to defraud the Authority or any other public body;
 - 44.1.5 committing any breach of the Employment Relations 1999 Act (Blacklists Regulations) 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992; or
 - 44.1.6 committing any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities.