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GLA APPLICATION AND INSPECTIONS CONSULTATION RESPONSE BY THE ASSOCIATION OF LABOUR PROVIDERS

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Introduction

The Gangmasters Licensing Authority's (GLA) mission is to "To safeguard the welfare and interests of workers whilst ensuring Labour Providers operate within the law."

The GLA has published a consultation, open until 22 March 2013, on proposed changes to:

- The application inspection process
- Earned recognition
- Renewal process
- Changes to the public register and active check process

This consultation is welcomed in line with the Regulators' Compliance Code 3.2 which states: "Regulators should keep under review their regulatory activities and interventions with a view to considering the extent to which it would be appropriate to remove or reduce the regulatory burdens they impose."

The Association of Labour Providers (ALP), together with most other stakeholders, acknowledges the significant improvement achieved in labour supply standards within the food and agricultural supply chain within the last eight years. The GLA has played a major role in this improvement.

The ALP represents labour providers, all of which are subject to the licensing standards of the GLA. The Association has been heavily involved in the regulation of labour providers over the last seven years. It therefore has a major interest in this consultation.

Legitimate labour providers want, and have a right to expect, a "level playing field" in order to compete fairly within the law. To enable this it is essential that action is taken to prevent rogue businesses from undercutting legitimate labour providers, either through tax evasion, worker exploitation or both. To this end, the industry fully supports an intelligence-led, risk-based proportionate enforcement regime that facilitates a fair, competitive trading environment.

Consultation Response

1 Do you agree that the GLA should adopt a risk based approach to determine whether an inspection is required on receipt of an application?

The Written Ministerial Statement by Jim Paice, 24 May 2012, proposes, subject to public consultation, to streamline the process for issuing licences and remove the general requirement for an application inspection and associated fee. The Statutory Code of Practice for Regulators states at 4.1 that “Regulators should ensure that the allocation of their regulatory efforts and resources is targeted where they would be most effective by assessing the risks to their regulatory outcomes. They should also ensure that risk assessment precedes and informs all aspects of their approaches to regulatory activity, including: inspection programmes.” The Code of Practice goes on to state at 4.4 that, “Regulators should consult and involve regulated entities and other interested parties in designing their risk methodologies, and publish details of the methodologies.”

The GLA has previously undertaken two reviews by external consultants to determine whether it could introduce a risk profile to remove the general requirement for an application inspection. Both reviews concluded that there was no risk methodology that could provide reassurance with any significant degree of reliability that an applicant was compliant with the GLA’s licensing standards. The decision to retain the general requirement for application inspections was unanimously supported by the GLA Board following these reviews.

Within this consultation it is proposed that the application process be revised with an inspection on application only being required in the following circumstances.

- Where the Government check element of the process indicates a risk of non-compliance, based on previous contact with other Government departments (OGD)
- Where information is received that suggests there are factual inaccuracies on the application form, or there is lack of evidence of procedures to ensure compliance or lack of evidence that the prospective licensee would conform to licence condition 1.1 (“Fit and Proper”)
- Where an application follows a previous revocation of a licence
- In 10% of all other cases where there is no apparent indication of non-compliance, and which will act as a control and assurance of the effectiveness of the revised process.

It is useful to examine these criteria in turn to see whether they provide a reliable risk based methodology to provide assurance that an applicant is compliant with the GLA’s licensing standards.

On the first criterion, whether the Government check element of the process indicates a risk of non-compliance, based on previous contact with other Government departments (OGD). The statistics show that of the 243 licence applications in 2011-12 there were 94 or 39% that had adverse OGD reports. Of these 94, 78% were issued with a GLA licence following a “clean” inspection. Conversely 22% were refused a licence or issued with ALCs following an inspection. Of the 147 licence applications in the same period that had a “clean” OGD response, 100 of these or 68% were issued with a GLA licence. 32% were refused a licence or issued with ALCs.

In other words a substantively higher percentage of businesses with a clean OGD check were refused a licence or issued with ALCs than those who had received adverse OGD reports. This analysis in itself indicates that adverse OGD reports are not a reliable means of identifying risk. The statistics inform us that this is not a reliable indicator.

On the second and third criteria, there is no argument that in these cases an inspection is needed. However this will be a very small number of cases. So small, in fact, that the GLA makes a zero allowance for this in its data analysis.

On the fourth criteria, an arbitrary figure of 10% has been chosen for random checking. As this is an arbitrary figure there is no merit in commenting upon it.

The ALP considers that:

- a) Two previous consultancy led reviews have not been able to produce a reliable risk based methodology to be able to move away from the general principle of application inspections. The approach put forward in this consultation, as demonstrated in the ALP response above, does not provide a reliable risk based methodology that affords significant assurance that a GLA applicant was compliant with the GLA's licensing standards.
- b) The ALP has considered whether a reliable risk based methodology may be applied but on balance concludes that there is not. There are distinct advantages to retaining the principle of an application inspection for all new licence applicants:
 - i. It establishes a relationship between the labour provider and the GLA and enables the labour provider to gain a better understanding of the licensing regime.
 - ii. It enables GLA Inspectors to properly assess whether the Principal Authority has an understanding of the GLA licensing standards and / or has sufficient management processes to decide whether the Principal Authority's has the competence and capability to hold a GLA licence.
 - iii. It enables the GLA Inspectors to view the environment and context in which the labour provider is operating and the documentation and processes that they will be using. It enables inspectors to establish whether the named Principal Authority is the genuine "controlling hand" of the organisation and to investigate links with "connected persons".
 - iv. Compliant labour providers want and expect the GLA licence to mean something. The general requirement for an inspection ensures that stakeholders such as labour users and retailers have greater trust in the system. To move away from the principle of general licence inspections will devalue and demerit the holding of a GLA licence.
 - v. There is a heightened risk of damage to the GLA's reputation where it licences gangmasters that subsequently turn out to have a history of criminality, labour exploitation or tax evasion.
- c) To move away from the general requirement for an application inspection would be a false economy.
 - i. There is no evidence presented that the application process and fee is a barrier to entry. The continuing high level of new entrants demonstrates this is probably not the case.
 - ii. For labour providers it is commercially beneficial to know at an early stage the standards that they must comply with in order to compete in this sector of the market. It enables them to ensure that they have appropriate contracts and processes in place before seeking to compete with established providers.
 - iii. Whilst the GLA does not quantify the anticipated saving in man days through its proposal, it is likely to be very small and in the region of 200 inspection days or approximately £25,000 (not actual saving as manpower to be reallocated to other activities). For the GLA it is less time consuming and more cost effective to prevent rogue gangmasters from entering the licensed sector than it would be to deal with the increase in non-compliant activity. The additional requirement for compliance inspections, licensing decisions, enforcement activity and appeals activity will more than offset the resource saving from reduced application inspections.

- iv. For the Exchequer, the loss in tax revenue that will ensue from the increase in phoenixing will far outweigh any saving.
- d) Whilst there is no merit in removing the general requirement for an application inspection, there is scope to refine and improve the application process and for this to impact on the associated fee.

The current Application Inspection fee is between £1850 and £2900 depending on the turnover of the organisation being inspected. This is disproportionately high and does not reflect the actual cost to the GLA of conducting the application process. The current Application Inspection fee regime is therefore, as understood by the ALP, contrary to government policy and should be reviewed.

Whilst there should be an Application Inspection for all new applicants, there is scope for the level of detail of the inspection regime and the consequent fee to be risk based.

Detailed below are some of the considerations that should be taken into account when determining the Application Inspection Fee.

- i. Licence Applicants should be able to access a lighter touch inspection and lower application fee by being able to submit documents and evidence that demonstrate their readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards. This might include such methods of “earned recognition” as:
 - Internal audit using ALP Complyer Agency Labour Audit Tool
 - Completed Sedex self-assessment questionnaire
 - Independent social compliance audits
 - Written responses to the licensing standards
 - Relevant contractual documentation
 - ii. There should be a higher Application Inspection burden and consequent fee for organisations that have been found to be conducting unlicensed activity in the regulated sector.
 - iii. For businesses that are refused a licence following an initial application there should not be a requirement to pay another full application inspection fee unless an inspection is required.
- e) There should be a review of how the GLA can reduce the cost of undertaking Application Inspections. Examples of cost reduction activity (by no means at all an extensive list) might include:
- i. In many cases the Inspection Report can be written during the inspection and this all undertaken within a day.
 - ii. Phone or Skype based interviews with the Principal Authority may be used to undertake part of the inspection.
 - iii. Telephone based translation services

In summary:

To move away from the current general requirement for an application inspection has the potential to make it easier for rogue gangmasters to operate in the sector which would generate unfair competition for law-abiding labour providers and increase the risk of vulnerable workers being mistreated. This in turn risks damaging industry confidence in the GLA and consumer confidence in the UK food industry and labour conditions in the supply chain.

There is however scope to move to a risk based approach in terms of the level of detail and extent of the Application Inspection required and the consequent Inspection fee charged by the GLA.

2 Are there any specific situations in which you consider an inspection should always be required?

An Inspection should be conducted in all cases. There is likely to be a greater risk in the following situations:

- New business start ups
- Where there is adverse OGD reports
- Where the GLA has adverse intelligence on the business or individuals involved including to “connected persons”
- Where information is received that suggests there are factual inaccuracies on the application form
- Where there is lack of evidence of procedures to ensure compliance
- Where there is lack of evidence that the prospective licensee would conform to licence condition 1.1

3 Do you think there are any specific situations in which an inspection of an applicant should never be required?

No.

However the GLA should be able to make a risk based decision whether a further inspection is required in situations where a known licence holder who has previously undergone an application inspection is undergoing a change of business structure. Examples include a sole trader or LLP becoming a limited company or where a business decides to split into two or more trading divisions.

This is covered by the GLA powers in the Gangmasters (Licensing) Act 2004 9 (3): “A licence may be transferred with the written consent of the Authority and in such other cases as may be determined by the Authority.”

4 Do you consider the list of current Government organisations consulted by the GLA is adequate, or do you think that the GLA should seek information from other organisations? If so, please indicate which organisation(s) you consider appropriate?

The GLA Executive has many years’ experience and is aware which Government organisations it is beneficial to consult with.

However the Insolvency Service should be added to the named list.

5 What information do you believe the GLA should be seeking from OGDs or other organisations?

The GLA Executive has many years’ experience and is aware what information it should be seeking from Government Departments and other organisations.

However it is suggested that GLA develops protocols with the HM Revenue & Customs (HMRC) regarding the application of cash security deposits.

Since 6 April 2012 HMRC, in addition to being able to ask for a security for VAT, has been able to ask employers to pay a cash security deposit where there is serious risk that they deliberately try to defraud the government and won’t pay over their PAYE tax deductions or Class 1 National Insurance contributions (NICs).

This arises in situations where these employers:

- deliberately choose not to pay money from employees' pay packets deducted under the pretext of paying their employees' income tax and NICs.
- engage in phoenixism - this is where a business evades tax by becoming insolvent and then sets up a new company the next day to continue trading
- have no qualms about building up large PAYE or NICs debts, including penalties
- do not respond to HMRC's attempts to contact them

HMRC calculate the amount of the security on a case by case basis - depending on the amount of tax at risk, the previous behaviour of the employer and other risks. Those being required to pay a security can appeal against this decision.

This accords with the consultation that licensing standard 2.1 (PAYE, National Insurance and VAT compliance), is one of those named as having the highest frequency of identified non-compliance.

6 What documents do you consider the GLA should seek in place of an application inspection, which may also assist in determining whether an inspection should occur (which may include industry audits)?

There are no documents that may be used in place of an application inspection as detailed in the response to question 1.

However licence applicants should be able to access a lighter touch inspection and lower application fee by being able to submit documents and evidence that demonstrate their readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards. This might include such methods of "earned recognition" as:

- Internal audit using ALP Complyer Agency Labour Audit Tool
- Completed Sedex self-assessment questionnaire
- Independent social compliance audits
- Written responses to the licensing standards
- Relevant contractual documentation

7 What controls do you consider are necessary to ensure that an objective and reliable assessment of compliance can be made, including an assessment of the competency of the Principal Authority?

Assessment of the competency of the Principal Authority should be undertaken as part of the Application Inspection process as detailed in the response to question 1.

8 Do you think the renewal process should remain annual or that longer licensing periods should be contemplated?

The ALP supports longer licensing periods.

9 Do you agree that those labour providers who demonstrate a longer history of compliance should have longer licences? If so:

(a) what do you consider the maximum length of such licences ought to be?

The ALP supports scenario 1 proposed in the table in the consultation at point 4.14.

The ALP considers that this is proportionate in achieving Regulators Compliance Code 8.1, "Regulators should seek to reward those regulated entities that have consistently achieved good

levels of compliance through positive incentives, such as lighter inspections and reporting requirements where risk assessment justifies this.

(b) what additional controls/checks, if any, do you consider appropriate?

The GLA should undertake a trial to determine whether re-checking licence holders against information held by OGDs, produces relevant intelligence. This may be determined to be of value most significantly with HMRC.

10 Do you consider that the renewal process should be removed altogether? If so what additional controls/checks, if any, do you consider appropriate?

No – the GLA public register would become outdated and inaccurate with the ongoing churn of businesses.

11 Do you agree that the public register should be enhanced, to include?

(a) details of ALCs and, if so, list the specific areas of non-compliance by reference to the standards?

(b) labour providers whose status has changed to “revoked without immediate effect”?

(c) businesses that are formally revoked and, if so, for how long should these details be displayed?

The GLA believe that to publish such information would create a pressure to raise the level of compliance within the industry with the labour provider more likely proactively and reactively to resolve, and correct, the identified areas of non-compliance.

The ALP supports this intention. However, as this information would be publicly available to competitors and clients there is a significant problem with what is proposed. The GLA recognise that to publish such information would enable labour users “to make contractual decisions with the full knowledge of the potential impacts and risks to their business and make contingency plans to avoid disruption”. In other words some labour users will cease to use that particular labour provider.

To publish such information prior to the outcome of the current Appeals Process creates a situation of “guilty until proven innocent”. Analysis of previous appeals demonstrates that the GLA loses or withdraws from one in eight appeal cases.

Therefore to publish such information prior to the completion of the Appeals Process:

- Is an unfair process, contrary to the principles of natural justice by creating a situation of “guilty until proven innocent”
- Has the potential in a significant number of cases to wrongly categorise the labour provider as non-compliant which will have subsequent commercial consequences on trading.
- Exposes the GLA to an enhanced risk of significant litigation for commercial damage, as has happened in practice previously, with consequent reputation damage.

The ALP submitted its concerns regarding the GLA appeals process to the Government Review of Regulatory Appeals Mechanisms on 31 January 2013 and made 4 recommendations for a fairer process

Recommendation 1 - GLA Inspectors should always hold a “summary of allegations” wrap up at the end of an inspection at which they highlight issues uncovered which may be potential breaches of the licensing standards. This allows the labour provider to offer a full response on these issues and present all relevant evidence prior to a decision being taken. This reduces the scope for error and misunderstanding and reduces the number of cases that will go to formal appeal.

Recommendation 2 – Prior to submitting the Inspection Report to the GLA Licensing Team, the GLA Inspector should provide a copy of the written report to the labour provider and allow a period of two weeks for the labour provider to respond in writing. This again reduces the scope for error and misunderstanding and reduces the number of cases that will go to formal appeal. At this stage the ALP could support its members on a without prejudice basis in resolving any points of difference between the GLA and the labour provider.

Recommendation 3 – The decision should be issued within four weeks of an inspection visit (or end of response period if Recommendation 2 is adopted) or an interim notification provided. It is not acceptable for the GLA to have provided no response to a labour provider, as regularly happens, for many months after an inspection visit.

Recommendation 4 – There should be a period of four weeks whereby the labour provider can submit evidence and enter into discussions with the GLA regarding the findings of the case. This again reduces the scope for error and misunderstanding and reduces the number of cases that will go to formal appeal. Again the ALP could support its members on a without prejudice basis in resolving any points of difference between the GLA and the labour provider.

These recommendations would bring the GLA appeals process in accord with the Regulators' Compliance Code, would demonstrate an evolution towards lighter touch regulation, would adhere to the principles of natural justice, would reduce the GLA's and labour provider's legal fees, would reduce the number of cases that the GLA loses or withdraws from and would reduce the risk of legal action against the GLA

With regard to the proposed change that the public register contain details of: (c) businesses that are formally revoked and, if so, for how long should these details be displayed? This information is already freely available on the GLA website and therefore this is merely an administrative matter of web design rather than a proposed change. ALP has no particular strong feelings.

The changes proposed in this Consultation, that the public register contain details of:

- (a) ALCs and specific licensing standards non-compliance
- (b) Status change to "revoked without immediate effect"?

Should not be considered until after completion of the appeals process.

12 Do you agree that the active check process should be enhanced to provide greater detail of changes to a licence status, and which may appear on the public register?

If the proposals in 11 above were implemented the GLA has proposed that the active check process would also be enhanced to trigger a notification when:

- Additional licence conditions were imposed and removed
- A licence status changed to "revoked without immediate effect", or if it was reversed back to licensed following appeal, should also trigger active checks that are clear what change(s) had actually occurred.

The ALP has made its comments on the publication of information in its response to question 11. It is appropriate that the active check notification process reflects this.

In 2012 the ALP worked with the GLA to improve the content of the Active Check letters sent. At the GLA Liaison Group on 18 January 2013 the ALP requested that the GLA prepare a Brief on the Active Check process to include which letters are sent in which circumstance and when and the appropriate actions that might be taken by labour users on receipt. The GLA felt that such a Brief would be useful and have committed to prepare this. It is hoped that this will bring clarity to the Active Check process and facilitate a proportionate dialogue between labour users and labour providers when such a letter is issued.