



To: The Leader and Executive Councillor for Strategy and Transformation: Councillor Lewis Herbert

Report by: Simon Pugh Head of Legal Services

Relevant scrutiny committee: Strategy & Resources
19/1/2014
Scrutiny Committee

Wards affected: All

PROCUREMENT AND BLACKLISTING

Not a Key Decision

1. Executive summary

On 24th July 2014 the Council resolved that:

“Cambridge City Council deplores the illegal practice of “blacklisting” within the construction industry and will ensure that any company known to have been involved in blacklisting practices and not to have indemnified their victims will not be invited to tender for contracts until they have:

- (i) Identified the steps taken to remedy the blacklisting for affected workers
- (ii) Identified the steps taken to ensure that blacklisting will not happen again; and
- (iii) Given assurances that they do not employ individuals who were named contacts for The Consulting Association

The Council asks officers to prepare a report for the Leader and Strategy and Resources Scrutiny Committee on implementation of this policy.

The report will develop the policy and consider how it will be embedded into the Council’s procurement process and practice”.

This report responds to that decision and sets out, at Appendix 1, a draft of the Council’s policy toward the practice of blacklisting and explains how the policy will be embedded into the Council’s procurement processes.

2. Recommendations

The Leader is recommended:

- (1) To approve the draft policy with regard to Blacklisting set out at Appendix 1
- (2) To approve the actions to embed the policy in the Council's procurement processes set out at section 6 of this report.

3. Background

In March 2009 the Information Commissioners Office (ICO) seized a database kept by The Consulting Association (TCA) which contained the names of over 3000 construction workers, including active union members and shop stewards, health and safety representatives and political activists, which had been used by a number of construction companies for employment vetting purposes.

The discovery of the database and subsequent enquiries led to the Employment Relations Act 1999 (Blacklists) Regulations 2010 (the Regulations) which came into force in the UK in March 2010. The Regulations protect employee rights, job applicants and workers who are members of trade unions and participate in trade union activities. Trade union members are not the only group covered by the Regulations and blacklists could potentially contain details about non-union individuals who have reported concerns about eg health and safety or environmental matters (so-called "mixed lists").

The Regulations:

- Provide a definition of "prohibited lists" e.g. a blacklist and prohibits the compilation, circulation or use of such lists
- Makes it unlawful for organisations to refuse employment, to dismiss a worker or otherwise cause detriment to a worker for a reason related to a prohibited list
- Makes it unlawful for an employment agency to refuse a service to a worker for a reason related to a prohibited list
- Provides a remedy, through an employment tribunal, to hear complaints about alleged breaches or alternatively the County Court to hear complaints about loss or potential loss

TCA database was used by more than 40 construction firms to check the names of prospective employees. As a result of the information gathered by TCA it appears that some individuals were denied employment opportunities, that would otherwise have been available to them, without explanation. The companies involved in blacklisting benefitted as a result

since industrial relations or health and safety disputes on construction sites could result in delays to the completion of work, penalty clauses being invoked and financial loss.

In March 2013 the House of Commons Scottish Affairs Committee produced an interim report¹ on Blacklisting which confirmed that the big construction companies, via TCA, had set up a structure which allowed them to submit names and details of workers they deemed to be “unsuitable” to a central list and to check prospective employees, or the employees of sub-contractors on their sites, against this list. The Committee enquiry into the matter is continuing.²

4. Blacklisting and Procurement

In principle the Council can exclude companies or individuals that use blacklists from bidding for its contracts. The Public Contracts Regulations 2006, which regulates the Council’s procurement activities, permits bidders to be excluded from a tendering process for, among other things, grave professional misconduct.

Blacklisting in breach of the Regulations can amount to an act of grave professional misconduct. Blacklisting can not only penalise legitimate trades union activity it can also punish individuals for raising health and safety issues. There are obvious and serious implications for the well-being of employees, other workers and members of the public if people feel intimidated into not raising health and safety concerns.

The right to exclude a bidder on the grounds of grave professional misconduct is a discretionary one which must be exercised in a transparent and fair manner and has to be considered on a case by case basis. The following safeguards must be considered in any decision to exclude an organisation:

- (i) **Proportionality** – we cannot impose a blanket ban which excludes all blacklisting companies from tendering for Council contracts forever. Companies may only be excluded until such-time as they can evidence that they have carried out adequate “self-cleaning” (see section 5 below)
- (ii) **Evidence** –it must be established that the company that has applied to take part in the tendering exercise is the same company that has been engaged in blacklisting. Many companies have very similar names. Admission by the applicant

¹ “Blacklisting in Employment”

<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmsscota/1071/107102.htm>

² <http://www.parliament.uk/business/committees/committees-a-z/commons-select/scottish-affairs-committee/inquiries/parliament-2010/blacklisting-in-employment/>

company, a court or tribunal decision (or other public body exercising similar functions) is likely to be acceptable evidence. The current Public Contracts Regulations don't impose any specific limit on how far back an authority can look for evidence of wrongdoing but new procurement regulations, which are expected to become law in spring next year, will impose a time limit of 5 years from the date of any conviction for Blacklisting and 3 years for other "relevant events". The Policy may have to be reviewed when the new regulations become law.

- (iii) **Exclusion** is not a means of punishing an organisation for past wrongdoing but rather a means of putting right the wrongdoing and ensuring that it does not re-occur ("self-cleaning").

5. Self-cleaning

The concept of self-cleaning comes from competition law and describes circumstances in which a company has taken measure to put right its earlier wrongdoing and to prevent it from reoccurring.

Self-cleaning comprises 4 stages **all** of which have to be completed for the process to be considered effective. The four stages are:

1. **Clarification of the facts and circumstances** - including what happened, when it happened and whether there has been any subsequent wrongdoing.
2. **Effective repair of the damage caused** – what has the potential tenderer done to repair the damage caused by its wrongdoing. This could take the form of compensation/reinstatement of the victims of blacklisting but does not necessarily involve an apology.
3. **Personnel measures** – have appropriate personnel measure been taken to prevent a reoccurrence of the wrongdoing? Asking a company to give assurances that they do not employ individuals who were named contacts for The Consulting Association could fall into this category.
4. **Structural and organisational measures:** What measures have been taken to prevent a re-occurrence of the wrongdoing?

Where a company can demonstrate that it has successfully completed all four stages of the self-cleaning process, exclusion from a tender process would generally be disproportionate and subject to challenge by the excluded contractor.

In July this year, eight of the firms that had previously been involved in blacklisting established a compensation scheme for affected workers. Under the scheme, individuals who believe that they may be included on blacklists have until 30th June 2016 to notify the administrators of the scheme of a claim. The scheme offers a “fast track” option and a “full review” option for claimants. The fast track scheme will pay out fixed compensation of between £4,000 and £20,000 depending on how much information was held about the claimant and whether the information was ever accessed for employment vetting purposes. The full review will enable claimants to claim compensation for proven losses up to £100,000. These claims will be assessed by an adjudicator on the basis of written submissions.

6. Embedding the policy into the Council’s procurement processes

The draft policy at Appendix 1 sets out the measures that are being recommended to ensure, insofar as is possible, that the Council does not contract with an organisation that has been involved in blacklisting unless and until they can demonstrate that they have effectively self-cleaned.

It is recommended that the Council adopts the following measures to embed the policy into the Council’s procurement processes:

- Incorporate a statement about the Council’s policy with regard to blacklisting:
 - On the Procurement pages of the Council’s website
 - In the Council’s Procurement Strategy
 - In advertisements or notices about Council tendering opportunities
 - In any pre-qualification and tender documents
- Require organisations wishing to carry out work for the Council to
 - Self-declare (in a pre-qualification questionnaire or tender) that they have not been involved in blacklisting and will not take part in blacklisting in the future
 - Or to explain why they are unable to complete the declaration.

Where an applicant is unable to complete a self-declaration, the officers will carry out a review in a proportionate and reasonable manner to conclude whether or not the organisation should be excluded from the competition.

- Decisions about exclusion will be taken by Heads of Service (for contracts below £50,000) or Directors (for contracts of £50,000 or above) having first considered a report from the investigating officer.

- Incorporate a suitable provision in the terms and conditions of contract (including the Council’s standard terms and conditions) that allows a contract to be terminated if there is unequivocal evidence of blacklisting, no self-cleaning has taken place and it is proportionate in the circumstances to do so.
- Produce guidance about the review process for organisations that are unable to self-certify.

7. Implications

(a) **Financial Implications**

There are no additional resources required to implement the recommendations in this report. The exclusion of tenderers under the policy may reduce the number of competitive bids received.

(b) **Staffing Implications** (if not covered in Consultations Section)

The policy should help guard against intimidation of workers who have health and safety concerns, and so should promote the well-being of employees and others.

(c) **Equality and Poverty Implications**

The EQIA for this policy is at Appendix 2

(c) **Environmental Implications**

Nil

(e) **Procurement** The procurement implications are contained within the body of the report

(f) **Consultation and communication**

None. While some organisations may be excluded from doing business with the Council as a result of the recommended policy, this will take place following an evidence-based, objective and transparent process. No organisation will be permanently excluded from doing business with the Council.

(g) **Community Safety** – See “Staffing Implications”.

8. Background papers

The following background papers can be found on the web:

BIS Guidance on Blacklisting March 2010

Blacklisting the Blacklisters - Leigh Day September 2013

Value Wales Policy Advisory Note for the Public Sector in Wales

Scottish Affairs Select Committee – Interim Report on Blacklisting

9. Appendices

- 1 Draft Policy with regard to Blacklisting
- 2 Draft Equality Impact Assessment

10. Inspection of papers

To inspect the background papers or if you have a query on the report please contact:

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