

APPENDIX 1

DRAFT

Cambridge City Council – policy with regard to the practice of Blacklisting

Blacklisting

Blacklisting is:

- the systematic compilation of information about individual trade unionists and others (including those not in a union) who have reported concerns about eg health and safety or environmental matters
- the use of this information by employers and recruiters to refuse employment, or to dismiss an employee or otherwise cause detriment to a worker because of their trade union membership or activity or action to raise workplace concerns

Blacklisting is unlawful and can cause serious detriment to a worker including financial loss

Background to this Policy

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” eg a blacklist and prohibit the compilation, circulation or use of such lists
- Make 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
- Make it unlawful for an employment agency to refuse a service to a worker for a reason related to a prohibited list
- Provide a remedy, through an employment tribunal, to hear complaints about alleged breaches or alternatively the County Court to hear complains about loss or potential loss

Our commitment

The Council recognises and accepts the right of individual employees to be members of a Union and to take part in union activities at a local and regional level. The Council also considers it essential that employees can raise health and safety concerns without fear of victimisation.

The Council deplores the illegal practice of “blacklisting” within the construction and other industries.

As a service provider we will ensure that any company known to have been involved in blacklisting practices and not to have indemnified their victims or “self-cleaned” 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

Self-cleaning

A company that has taken measures to put right its earlier wrongdoing and to prevent it from re-occurring should complete the following four stages in order to effectively self-clean:

- Clarification of the facts and circumstances - including what happened, when it happened and whether there has been any subsequent wrongdoing;
- Effective repair of the damage caused – what has the company done to repair the damage caused by its wrongdoing. This could take the form of compensation or reinstatement of the victims of blacklisting but does not necessarily involve an apology;
- Personnel measures – have appropriate personnel measures been taken to prevent a reoccurrence of the wrongdoing? For example, the company must give its assurance that they do not employ any individuals who were named contacts for The Consulting Association.
- Structural and organisational measures – what measures has the company taken to prevent a re-occurrence of the wrongdoing?

Embedding this policy in our Procurement Processes

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.

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 company, a court or tribunal decision (or other public body exercising similar functions) is likely to be acceptable evidence.

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

In our procurement activities we will work to the following principles and procedures:

- We will incorporate a clear 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
- Organisations wishing to carry out work for the Council will be required to:
 - Self-declare in a pre-qualification or tender that they have not been involved in blacklisting and will not take part in blacklisting in the future
 - Explain why they are unable to complete the declaration
 - Confirm where they have been involved in blacklisting practices, that they have effectively “self-cleaned” and indemnified any victims
- We will investigate each admission or allegation of blacklisting arising during the course of a procurement and take appropriate

action up to and including exclusion of a potential bidder from a procurement process where legally permissible

- Decisions to exclude a potential bidder from a procurement process will be taken by Heads of Service (for contracts below £50,000) or Directors (for contracts above £50,000) after considering a report from the investigating officer and having consulted Legal Services and Strategic Procurement
- We will incorporate a suitable provision in relevant terms and conditions of contract (including the Council's standard terms and conditions) to allow 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 and the contractor admits to blacklisting or is found guilty of a blacklisting offence where it would be legally permissible to do so.
- We will ensure that all potential bidders have access to this Policy and produce guidance about the process for organisations that are unable to self-certify.

Date for review of Policy

This Policy will be reviewed by the Head of Legal Services following the implementation of the new Public Contracts Regulations

December 2014