



Report of: Service Director (Property Services)

Meeting of:	Date	Agenda item	Ward(s)
Policy and Performance Scrutiny Committee	May 2015		

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SUBJECT: Construction Industry Blacklisting – Update report to the Policy and Performance Scrutiny Committee (May 2015)

1. Synopsis

- 1.1 The Policy and Performance Scrutiny Committee undertook a review of Construction Industry Blacklisting from June 2013. The results of the scrutiny were presented to the Council's Executive 14 January 2014.
- 1.2 This report updates the Policy and Performance Scrutiny Committee on work of Strategic Procurement, Council officers and matters presented before the Council's Procurement Board.

2. Recommendations

- 2.1 To note the Council approach to managing Construction Industry Blacklisting.
- 2.2 To note the recent work of the Procurement Board and the other matters as set out in this report.

3. Background

- 3.1 Blacklisting is the practice of systematically denying individuals employment on the basis of information, accurate or not, held on some kind of database. The Policy and Performance Scrutiny Committee commenced a review of Construction Industry Blacklisting with effect from June 2013. This report updates the Policy and Performance Scrutiny Committee on the actions

undertaken in response to that scrutiny only. The recommendations of the Committee were accepted by the Executive.

- 3.2 The Consulting Association was established and funded by a number of construction companies. These companies checked the names of prospective employees against the Consulting Association list and added information to the list from monitoring their workforce. Workers were denied employment without explanation, right of appeal or mechanism for challenge, resulting in financial hardship.
- 3.3 In 2009 the Information Commissioner 'raided' the offices of The Consulting Association, following an article in the press. This resulted in the closure of the database, which had been used to record details of union activity and health and safety campaigning by construction workers.
- 3.4 The Policy and Performance Scrutiny Committee noted the events of the Scottish Affairs Committee and heard evidence GMB, UNITE and Leigh Day Solicitors (acting on behalf of victims of blacklisting) in addition to presentations from Council officers on how Construction Industry Blacklisting could be managed, the approach of other public sector bodies and a moving presentation from a victim of blacklisting. 8 of the 43 confirmed organisations utilising the Consulting Association blacklisting scheme came forward and have offered a compensation scheme which the Trade Unions are opposed to, claiming the sums offered do not adequately reflect the damage done to the blacklisted individuals.
- 3.5 The Policy and Performance Scrutiny Committee's intentions were to ensure that the Council did not execute a contract with any organisation who had been engaged in blacklisting unless they could evidence they had 'self-cleansed'. The notion of 'self-cleansing' being where a company has taken sufficient measure to put right any wrong-doing and prevent it from re-occurring.
- 3.6 **Action 1: That the Leader of the Council and Chair of Policy and Performance Committee write to London Councils to inform them of the procedures that the Council is adopting with regard to companies in relation to 'blacklisting' of employees and call on all London Councils to adopt a similar approach.**

Action 2: That the Leader of the Council and Chair of Policy and Performance Committee write to the Minister for Local Government to request a public enquiry be instituted into 'blacklisting', given the findings of the Scottish Affairs Select Committee in relation to firms implicated in 'blacklisting'.

The Leader of the Council sent both letters in March 2014.

In addition to this work undertaken by the Leader of the Council and Chair of the Policy and Performance Scrutiny Committee, Council officers have sought London wide engagement with other Councils including:

- Islington hosting a pan London meeting of contract lawyers and procurement personnel to establish other Council's approaches to blacklisting;
- The approach to manage blacklisting being raised at the London Heads of Procurement hosted at London Councils;
- Responding to communications and correspondence with other London Boroughs in regard to Islington's approach to blacklisting.

3.7 Action 3: That the Council does not in the future enter into such contracts with companies implicated in ‘blacklisting’ unless they can demonstrate that they have ‘self cleansed’ and taken adequate measures to remedy past damage done and prevent future occurrence.

The Council’s Constitution sets out how the council operates, how decisions are made and the procedures which are followed to ensure that these are efficient, transparent and accountable to local people. The Council’s Standing Orders known as the ‘Procurement Rules’ lay out matters in regard to procurement and contracting. The Procurement Rules are mandatory for all officers of the Council and have been updated to reflect blacklisting. Procurement Rule 22.3 states: “...Organisations shall be required to make declarations in regards to professional and business conduct, including blacklisting, to the satisfaction of the Council before being invited to tender or tenders assessed.”

The draft Procurement Strategy 2015/20 specifically addresses blacklisting as one of the areas which the Council has set procedures in place to manage.

The procurement process had been adapted to include a series of questions in regards blacklisting as part of the selection criteria of the Council contained within the procurement application pack known as the Pre-Qualification Questionnaire or PQQ. These questions are as follows:

- Do you certify that your organisation has not done any act contrary to the Employment Relations Act 1999 (Blacklisting) Regulations 2010, s137 of the Trade Union and Labour Relations (Consolidation) Act 2002 and/or the Data Protection Act 1998 at any time in relation to:
 - the recruitment of prospective employees (e.g. seeking references, vetting);
 - the dismissal of an employee;
 - the treatment of existing employees (including through the provision of names for inclusion in any blacklist, or through the imposition of other detriment for any related reason);
 - the use of a blacklist for any reason.

- Do you undertake, on behalf of your organisation, to not do any act contrary to the Employment Relations Act 1999 (Blacklisting) Regulations 2010, s137 of the Trade Union and Labour Relations (Consolidation) Act 2002 and/or the Data Protection Act 1998 at any time in relation to:
 - the recruitment of prospective employees (eg seeking references, vetting);
 - the dismissal of an employee;
 - the treatment of existing employees (including through the provision of names for inclusion in any blacklist, or through the imposition of other detriment for any related reason);
 - the use of a blacklist for any reason.

- Do you certify that the principles contained in the Employment Relations Act 1999 (Blacklisting) Regulations 2010 and the Data Protection Act 1998 have been, or will be, brought to the attention of all your employees as well as all your sub-contractors, suppliers, employment/recruitment agencies and associated companies providing services, information or materials connected with the tender and any contract entered into with such sub-contractors, suppliers, employment/recruitment agencies or associated companies will be made on the basis of compliance with the above principles by all parties.

- Do you certify that any organisation with which you are legally related (through any parent/subsidiary or group structure) has not done any act contrary to the Employment Relations Act 1999 (Blacklisting) Regulations 2010, s.137 of the Trade Union and Labour Relations (Consolidation) Act 2002 and/or the Data Protection Act 1998 in relation to:
 - the recruitment of prospective employees (e.g. seeking references, vetting);
 - the dismissal of an employee;
 - the treatment of existing employees (including through the provision of names for inclusion in any blacklist, or through the imposition of other detriment for any related reason);
 - the use of a blacklist for any reason.

3.8 Action 4: That the Council amend its standard contract terms and conditions to introduce a new clause on 'blacklisting' to make explicit the link between 'blacklisting' by the contractor, or any sub contractors that the employ, and the Council's ability to terminate the contract.

The Council has amended its standard committee reports where relevant to include wording in regard to Procurement Strategies and Contract Award Reports to state:

“The Employment Relations Act 1999 (Blacklist) Regulations 2010 explicitly prohibit the compilation, use, sale or supply of blacklists containing details of trade union members and their activities. Following a motion to full Council on 26 March 2013, all tenderers will be required to sign the Council's anti-blacklisting declaration. Where an organisation is unable to declare that they have never blacklisted, they will be required to evidence that they have 'self-cleansed'. The Council will not award a contract to organisations found guilty of blacklisting unless they have demonstrated 'self-cleansing' and taken adequate measures to remedy past actions and prevent re-occurrences. The adequacy of these measures will initially be assessed by officers and the outcome of that assessment will be reviewed by the Council's Procurement Board.”

Strategic Procurement provides commissioning client officers with the anti-blacklisting declaration for each procurement tendered.

The Council's standard contract terms include clauses pertaining to business gross misconduct which would cover matters of blacklisting. Colleagues in legal services have expanded these terms with a specific contract condition in relation to blacklisting where relevant which states:

“The Service Provider must not commit any breach of Employment Relations 1999 Act (Blacklist) Regulations 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1991 or commit any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities. Breach of this clause is a material default which shall entitle the Council to terminate the Contract with immediate effect.”

3.9 Action 5: That if during the tender process, where a candidate is unable to declare that they have never 'blacklisted', that they are now required to evidence that they have 'self cleansed'. This require providing evidence of the steps taken to remedy past damage done and prevent future occurrence.

Self-cleansing originates from competition law and encompasses circumstances in which a company has taken measures to put right its wrong-doing and prevent it from re-occurring. Where the company has 'self-cleansed', exclusion would generally be disproportionate. Self-cleaning is a four stage process:

- Clarification of the relevant facts and circumstances of the wrong doing and whether there has been any subsequent wrong-doing;
- Whether there is effective repair of the damage caused such as compensation and/or offering further employment;
- Personnel measures to prevent the action from re-occurring
- Structural and organisational measures necessary to avoid a re-occurrence.

Under the questions within the PQQ, providers are specifically informed that:

“In the event that you are unable to provide the certification required in this section please inform the council accordingly providing details relating to the circumstances as to why you are not able to provide the certification. The council will then review the details provided and carry out any necessary investigation to form a view as to whether the facts giving rise to the non-certification amount to an act of grave misconduct in the course of business or profession for purposes of Public Contracts Regulations 2006, Regulation 23(4)(e)) such as to disqualify you from tendering for this contract. In order to make this assessment it would be of assistance to the council if you could provide the following information:

- A description of the scope and nature of the blacklisting activities that have been carried out;
- A description of the steps taken to repair the damage done by such blacklisting activities;
- A description of any personnel changes that have been made to address the problem of blacklisting;
- A description of any organisational / structural changes that have been made to prevent blacklisting occurring in the future.

If you are not able to provide the certification in respect of any related company, please provide details as is required of any blacklisting by your organisation (see above). In addition, please provide details of any matters that demonstrate that the offending behaviour cannot be attributed also to your organisation. In this respect, you may consider it relevant to include details of the ownership, management, control and power exercised by the related company and by any common parent company (if different) over your own.”

3.10 Action 6: That where a company has been required to provide evidence of 'self cleansing', the matter will be referred to the Council's Procurement Board for decision as to the adequacy of that evidence.

Action 7: That if the implementation of the recommendations contained in the report and in particular the recommendations related to the assessment of 'self cleansing', require additional officer resources, such reasonable resources, as may be necessary, be provided to carry out this work.

The Procurement Board considered the changes to blacklisting requirements on an operational

level. This included a summary of the advice from external counsel, considering issues in respect of groups of companies and at which stages of the procurement process blacklisting may be considered. This helped with the implementation of the policy into actions for officers.

The procedure adopted is that the Procurement Board considers the matters of self-cleansing. The decision must be taken by an authorised officer on behalf of the Procurement Board. For the purposes of blacklisting has been the Corporate Director of Finance and Resources.

The nature of the construction sector is often one of acquisition, merger, take-over and sale. Some organisations not implicated in blacklisting have subsequently become part of a group of companies which have been found guilty of blacklisting. In these circumstances, this is insufficient for disqualification from procurement. The commercial advice of the Head of Strategic Procurement and legal advice of the Chief Contracts Lawyer is always sought.

The Council has discretion whether or not to utilise an existing pre-procured framework agreement. Pre-procured framework agreements may include organisations which have been found guilty of blacklisting. All framework agreements should deliver value for money or the Council may ensure value for money by initiating a bespoke procurement.

The Policy and Performance Scrutiny Committee's recommendation has therefore been adopted.

4. Implications

4.1 Financial implications:

This is an information report only on work undertaken and thus has no additional financial implications.

4.2 Legal Implications:

This is an information report only on work undertaken and thus has no additional legal implications.

4.3 Environmental Implications

This is an information report only on work undertaken and thus has no additional environmental implications.

4.4 Resident Impact Assessment (incorporating the Equalities Impact Assessment):

The council must, in the exercise of its functions, have due regard to the need to eliminate discrimination, harassment and victimisation, and to advance equality of opportunity, and foster good relations, between those who share a relevant protected characteristic and those who do not share it (section 149 Equality Act 2010). The council has a duty to have due regard to the need to remove or minimise disadvantages, take steps to meet needs, in particular steps to take account of disabled persons' disabilities, and encourage people to participate in public life. The council must have due regard to the need to tackle prejudice and promote understanding.

Neither the initial screening for a Resident Impact Assessment (RIA) nor a full RIA has been completed.

This is an information report only on work undertaken and thus has no additional resident and/or equalities implications.

5. Conclusion and reasons for recommendations

5.1 This report updates the Policy and Performance Scrutiny Committee on the work undertaken in response to the scrutiny on Construction Industry Blacklisting.

Appendices

- None.

Background papers: (attached)

- None.

Final report clearance:

Signed by:

Service Director (Property Services)

Date

Received by:

Head of Democratic Services

Date

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