

Report to: Resources and Governance Scrutiny Committee
6 September 2018

Subject: Blacklisting

Report of: The City Treasurer

Summary

To provide a report on the Council's position and actions in relation to organisations/contractors that have previously or currently blacklist trade union members and officers.

Recommendations

Members are asked to note and comment on the report.

Wards Affected - All

Manchester Strategy outcomes	Summary of the contribution to the strategy
A thriving and sustainable city: supporting a diverse and distinctive economy that creates jobs and opportunities	The Council is committed to improving engagement with Small – Medium organisations, voluntary sector and charitable organisations, and where appropriate procurement processes will be adapted to their needs, particularly with regard to dividing large contracts into lots, in accordance with the public procurement rules
A highly skilled city: world class and home grown talent sustaining the city's economic success	Provide better Health and Wellbeing for Manchester residents through promotion of fair working conditions, better training opportunities and sustainable economic growth.
A progressive and equitable city: making a positive contribution by unlocking the potential of our communities	The Council favours an asset based approach which looks at the uniqueness of people, their potential skills, assets, relationships and community resources. This approach concentrates primarily on what is important to people, what they want to do, and the strengths and nature of their social networks. This underpins wider Council priorities of building self-reliance and strengthening communities.
A liveable and low carbon city: a destination of choice to live, visit, work	The supplier, service provider and contractor endeavour to purchase through suppliers and contractors who are continuously working at improving labour and environmental standards in the supply chain.

A connected city: world class infrastructure and connectivity to drive growth	Through commissioning and procurement activities this will promote Manchester as an attractive place to work by securing wider benefits and improvement to the lives of people in Manchester and the environment.
---	---

Contact Officers:

Name: Carol Culley
Position: City Treasurer
Telephone: 0161 234 3564
E-mail: c.culley@manchester.gov.uk

Name: Paul Murphy
Position: Group Manager
Telephone: 0161 234 3591
E-mail: p.murphy@manchester.gov.uk

Name: Karen Lock
Position: Procurement Specialist
Telephone: 0161 234 3411
E-mail: k.lock@manchester.gov.uk

Background documents (available for public inspection):

The following documents disclose important facts on which the report is based and have been relied upon in preparing the report. Copies of the background documents are available up to 4 years after the date of the meeting. If you would like a copy please contact one of the contact officers above.

N/A

1.0 Background

- 1.1 The UK Government defines blacklisting as 'the systematic compilation of information on individual trade unionists and their use by employers and recruiters to discriminate against those individuals because of their trade union membership or because of their involvement in trade union activity'.
- 1.2 Blacklists are referred to in specific blacklisting legislation as 'prohibited lists' when concerned with trade union activity. However, a blacklist could potentially contain further details on individuals who have reported concerns, for example, regarding health and safety and / or environmental matters.

2.0 Current Position

- 2.1 The Council's current position is as set out in the Council's Ethical Procurement Policy.
- 2.2 The Council's Ethical Procurement Policy states the following on Blacklisting:

'Blacklists

Suppliers, service providers and contractors shall not unlawfully compile, use, sell or supply a prohibited list which:

- a. contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions, and*
 - b. is compiled with a view to being used by employers or employment agencies for the purpose of discrimination in relation to recruitment, or in relation to treatment of works within the meaning of The Employment Act of 1999 (Blacklists) Regulations 2010.*
 - c. contains details of persons who are or have been involved in whistleblowing to appropriate bodies as a result of becoming aware of any deficiency in service provision, impropriety, fraud, customer abuse, breach of procedure or maladministration.'*
- 2.3 The appendices of the Policy provide a link to The Employment Act of 1999 (Blacklists) Regulations 2010.
 - 2.4 The Employment Relations Act 1999 (Blacklists) Regulations 2010 includes for:
 - Define a prohibited list (eg a blacklist) and prohibit the compilation, dissemination and use of prohibited lists;
 - Make it unlawful for organisations to refuse employment, to dismiss an employee 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 for the employment tribunal to hear complaints about alleged breaches of the regulations; and

- As an alternative, provide for the courts to hear complaints from any persons that they have suffered loss or potential loss because of a breach of the regulations

3.0 Actions that can be taken relating to organisations/contractors that have previously or currently blacklisted trade union members and officers.

3.1 Below is an overview of the key legal issues relating to addressing blacklisting through procurement.

Can contracting authorities exclude blacklisters from procurement processes?

In principle, yes, blacklisting can amount to an act of grave professional misconduct or a violation of applicable obligations relating to social and labour law and so could justify exclusion of an economic operator from a procurement process in accordance with the public procurement rules. These grounds are discretionary exclusion grounds under the rules. However, the Council:

- would need to assess the seriousness of the offence;
- would need give the economic operator the opportunity to demonstrate any action it has since taken to rectify any breach or to address these issues; and
- must able to demonstrate any decision to exclude is proportionate to the seriousness of the offence.

Exclusion must be considered on a case-by-case basis – a blanket ban would not be lawful;

- Exclusion must be justified on the evidence – for example, an admission of wrongdoing by the operator or a decision of a tribunal, court or other public body exercising similar functions. In theory, it may be possible to rely on other evidence, but in practice it is difficult to envisage circumstances where other evidence will suffice;
- Exclusion is not a means of punishing operators for past wrongdoing, but rather a means of putting right past wrongdoing and ensuring that it does not re-occur (self-cleaning, see below).

The concept of self-cleaning

The “self-cleaning” regime in the public procurement rules provides that an operator convicted of an offence will not be precluded from participating in a procurement process if it can demonstrate that it has put in place effective measures to remedy the consequences of any criminal offences or misconduct and ensure that the conduct will not recur. Self-cleaning entails the following process:

- Potential suppliers are required to initially self-declare their status against the exclusion grounds.
- If a potential supplier, or any organisation they rely on to meet the selection

criteria, has breached any of the exclusion grounds, they have the opportunity to explain how and what action they have taken to rectify the situation

- Potential suppliers are required to demonstrate that they have taken remedial action, to the satisfaction of the contracting authority in each case. In order for the evidence provided to be sufficient it must prove the supplier has “self-cleaned” as follows:
 - paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
 - clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
 - taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The actions agreed on deferred prosecution agreements may be submitted as evidence of self-cleaning and evaluated by a contracting authority.

The measures taken are evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. If such evidence is considered by the Council as sufficient, the potential supplier shall be allowed to continue in the procurement process.

If the potential supplier cannot provide evidence of ‘self-cleaning’ that is acceptable to the Council, they may be excluded from further participation in the procurement and provided with a statement of the reasons for that decision.

The Council must accept a self-assessment of compliance with the exclusion and selection criteria at the early stages of a procurement process, though evidence may be required at any time during the procedure if that is necessary to ensure the proper conduct of the procedure.

Can contracting authorities terminate contracts with an economic operator that has or is engaged in blacklisting?

There is no automatic right to terminate a contract where an economic operator has been or is engaged in blacklisting. While express rights may be included these need to be balanced against proportionality and materiality of the blacklisting to the contract

4.0 Recommendations

- 4.1 Members are asked to note and comment on the report.