

MAYOR AND CABINET (CONTRACTS)		
Report Title:	Blacklisting - Amendments to the Council's Code of Practice and standard tender documentation	
Key decision:	N/A	Item No.:
Ward:		
Contributors:	Head of Law	
Class:	Part I	Date: 15 February 2017

1. Executive Summary of the Report

- 1.1 This report asks the Mayor and Cabinet (Contracts) to approve the amendments to the Council's Code of Practice and standard tender documentation in relation to blacklisting of employees by service providers/contractors/suppliers.

2. Recommendation

It is recommended that Mayor and Cabinet (Contracts) approve the amendments to the Council's terms and conditions, the Invitation to Tender and the Council's Sustainable Procurement Code of Practice, as set out in this report at paragraphs 5.1, 5.2 and 5.3.

4. Policy Context and Background

- 4.1 The Community Strategy and Council priorities drive the Council's employment and procurement practice. The specific commitments made in the Community Strategy include:
- ambitious and achieving: where people are inspired and supported to fulfil their potential
 - safer – where people feel safe and live free from crime, anti-social behaviour and abuse
 - empowered and responsible – where people are actively involved in their local area and contribute to supportive communities
 - healthy, active and enjoyable – where people can actively participate in maintaining and improving their health and well-being
 - dynamic and prosperous – where people are part of vibrant communities and town centres, well connected to London and beyond
- 4.2 In addition the strategy is underpinned by two key principles:
- reducing inequality – narrowing the gap in outcomes for citizens
 - delivering together efficiently, effectively and equitably – ensuring that citizens have appropriate access to and choice of high quality services
- 4.3 The Council's ten 'enduring' priorities support the delivery of the community strategy and include:

- community leadership and empowerment: developing opportunities for the active participation and engagement of people in the life of the community
- young people's achievement and involvement: raising educational achievement and improving facilities for young people
- strengthening the local economy: gaining resources to regenerate key localities, strengthen employment skills and promote public transport
- inspiring efficiency, effectiveness and equity: ensuring efficiency and equity in the delivery of excellent services to meet the needs of the community.

4.4 The Employment Relations Act 1999 (Blacklists) Regulations 2010 ("Blacklisting Regulations"), introduced on 2 March 2010, make it unlawful to compile, use, sell or supply "prohibited lists", which are lists containing details of trade union members or activists, past or present, used for employment vetting purposes. The Blacklisting Regulations also create rights for employees and workers not to be refused employment, refused the services of an employment agency, dismissed or subjected to detriment by their employer, for a reason connected to a prohibited list.

4.5 A motion was proposed and agreed at Council on 18th January 2017 in relation to blacklisting to ensure that, so far as legally permissible, the Council does not enter into a contract with any organisation which has been engaged in blacklisting.

4.6 The Council resolved to amend the Council's Code of Practice and standard tender documentation to reflect the following:-

"This Council resolves to amend the Council's guide for contractors and standard tender documentation specifically to reflect the following:-

That the Council will only award contracts to companies who:

1. Give a commitment to no blacklisting.
2. If found guilty of blacklisting, have compensated all those they are known to have blacklisted, or taken reasonable steps to do so.
3. Have taken steps to ensure any past blacklisting does not reoccur, showing evidence of any action taken, including (if appropriate) any disciplinary action against, including dismissal of, known contracts for The Consulting Association.
4. Will give access to trade unions to workers on site for organising purposes as required by law.
5. Will recognise trade unions' rights to negotiate on behalf of members as required by law.
6. Will honour recognised construction industry agreements such as BATJIC, NAECL, PMES, or appropriate agreements for the relevant sector in so far as they are consistent with the Council's legal

obligations

Further resolves to encourage partners to take a similar approach to contract procedures.”

- 4.7 The Council already has protections in place to ensure that the Council does not engage with organisations that have breached the Blacklisting Regulations or does not do so whilst the Council is engaged with an organisation. As part of a procurement process a bidder must complete a Standard Questionnaire. This requires bidders to disclose if they have ever been in breach of labour law obligations (which includes the Blacklisting Regulations) and if they have been found guilty of grave professional misconduct.
- 4.8 If they disclose that they have been in breach of the Blacklisting Regulations and/or guilty of grave professional misconduct and did not evidence that they have put sufficient measures in place to put right any wrong doing to prevent it from occurring again, the Council may exclude the organisation from the procurement process.
- 4.9 In addition to the Standard Questionnaire the Council’s standard terms and conditions require that the contractor/supplier/service provider complies with all applicable law. Failure to comply would entitle the Council to terminate the contract.
- 4.10 Although the above protections are already in place, it is accepted that there is potential to be more specific and provide clarity in the tender documentation. Officers have reviewed this and now propose the amendments set out in section 5.

5. Amendments to the Code of Practice and Tender Documentation

Contract Amendments

- 5.1 The Council’s standard contract terms and conditions could be amended to include a clause on blacklisting to make explicit the link between blacklisting and the Council’s ability to terminate the contract. The following clause could be used in all contracts:

“Blacklisting

The Council supports equality within the workplace and is committed to tackling all forms of malpractice including the illegal practice of blacklisting.

The Contractor shall:

- a) *comply with all applicable laws, statutes, regulations, and codes relating to illegal blacklisting practices, including but not limited to the and the relevant provisions under the Data Protection Act 1998 (“Blacklisting Legislation”) and insert the same provision in any sub-contract relating to provision of any works, goods or services under the Contract;*

- b) *not engage in any activity, practice or conduct which would constitute an offence under Blacklisting Legislation;*
- c) *have and shall maintain in place throughout the term of this Contract its own policies and procedures including, but not limited to, adequate procedures under the Employment Relations Act (1999) Blacklisting Regulations 2010, to ensure compliance with the Blacklisting Legislation, and will enforce them where appropriate;*
- d) *take appropriate steps to ensure that neither the Contractor, sub-contractors nor any Personnel engage in any illegal blacklisting practices.*

Where the contractor has breached Blacklisting Legislation prior to entering into the Contract, the Contractor shall evidence to the Council that suitable processes have been put in place to ensure that the practice of Blacklisting does not reoccur.

Upon breach of this condition, the Council shall be immediately entitled to terminate the Contract or any part of it and to recover from the Contractor the amount of any loss resulting from such termination, including but not limited to, the costs of appointing a third party to complete the Contract requirements on the Contractor's behalf."

Invitation to Tender

- 5.2 When procuring works, services or supplies an Invitation to Tender (ITT) is included in the tender pack which is issued to all bidders. The ITT sets out the instructions on how to bid, the criteria on which the bids will be evaluated and the reasons the Council is entitled to reject a bid. The following additional text could be used in the ITT:

"Your Tender Submission may be rejected or not considered if you:

- (l) have breached the Employment Relations Act 1999 (Blacklisting) Regulations 2010 and not taken steps to ensure that any blacklisting does not reoccur;*

Any breach of the terms stipulated in Instructions 6.1(e) to (l) will entitle the Council to terminate at any time any existing or subsequent Contract(s) entered into between that Tenderer and the Council."

Code of Practice

- 5.3 The Council's Sustainable Code of Practice (the Code) is appended as a schedule to all contracts that the Council enters into and it is a requirement of the contract that the contractor/service provider/supplier must comply with the Code. The following additional wording could be used in the Code:

"The Employment Relations Act 1999 (Blacklisting) Regulations 2010 makes blacklisting unlawful. This makes it unlawful to compile, use, sell or supply "prohibited lists", which are lists containing details of trade union members or activists, past or present, used for employment vetting purposes. The

Blacklisting Regulations also create rights for employees and workers not to be refused employment, refused the services of an employment agency, dismissed or subjected to detriment by their employer, for a reason connected to a prohibited list.

The Council's Contract Documents have been amended to include terms and conditions to ensure that the Council does not enter into a contract with any organisation who has been engaged in blacklisting unless the organisation can demonstrate that they have 'self-cleansed' (has taken sufficient measures to put right any wrong doing and prevent it from occurring again). We request that our contractors, suppliers and service providers adopt the same approach with their sub-contractors.

Whilst the Council will always consider the facts of every individual case, if it is proven to its satisfaction that the organisation has breached the Employment Relations Act 1999 (Blacklisting) Regulations 2010 then any contract the contractor, supplier or service provider has with the Council is likely to be terminated and damages sought from the contractor, supplier or service provider. In addition, the contractor, supplier or service provider concerned will almost certainly be removed from any Council Approved List, Preferred List, Framework, Select or Tender List for which the organisation is being considered or has been approved.

All contractors, suppliers and service providers shall give a commitment to:

- no blacklisting*
- giving access to trade unions to workers on site for organising purposes as required by law*
- recognising trade unions' rights to negotiate on behalf of members as required by law*
- honouring recognised construction industry agreements, where applicable and consistent with the Council's legal obligations, such as BATJIC, NAECI, PMES, or appropriate agreements for the relevant sector."*

7. Financial Implications

7.1 There are no financial implications arising from this report.

8. Legal Implications

8.1 The Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010/493) (the Regulations) came into force on 2 March 2010. They make it unlawful for employers, employment agencies and others to compile, supply or use a blacklist of trade union members or activists for discriminatory purposes such as employment vetting.

8.2 The amendments to the ITT, in addition to the Standard Questionnaire, will allow the Council to reject a bid should a bidder not be able to demonstrate that they comply with the Blacklisting Regulations or, where they have previously

breached the Blacklisting Regulations, cannot demonstrate to the Council's satisfaction that they have taken sufficient measures to put right any wrong doing and prevent it from occurring again ("self-cleansed"). Under the Public Contracts Regulations 2015 it is unlawful to reject a bid where the bidder can evidence that they have self-cleansed.

- 8.3 The amendments to the terms and conditions and the Code will allow the Council to terminate any contract that they have entered into where the contractor/service provider/supplier has breached the Blacklisting Regulations. Should a contractor/service provider/supplier have done so, the Council will be entitled to recover the amount of any loss resulting from such termination.
- 8.4 These amendments are executive functions and fall within the remit of Mayor and Cabinet (Contracts). No constitutional amendment is necessary as the amendments set out in this report are not constitutional documents.
- 8.5 The Equality Act 2010 (the Act) introduced a public sector equality duty (the equality duty or the duty). It covers the following protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
- 8.6 In summary, the Council must, in the exercise of its functions, have due regard to the need to:
- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
 - advance equality of opportunity between people who share a protected characteristic and those who do not.
 - foster good relations between people who share a protected characteristic and those who do not.

It is not an absolute requirement to eliminate unlawful discrimination, harassment, victimisation or other prohibited conduct, or to promote equality of opportunity or foster good relations between persons who share a protected characteristic and those who do not. It is a duty to have due regard to the need to achieve the goals listed at 8.6 above.

- 8.7 The weight to be attached to the duty will be dependent on the nature of the decision and the circumstances in which it is made. This is a matter for the Mayor, bearing in mind the issues of relevance and proportionality. The Mayor must understand the impact or likely impact of the decision on those with protected characteristics who are potentially affected by the decision. The extent of the duty will necessarily vary from case to case and due regard is such regard as is appropriate in all the circumstances.
- 8.8 The Equality and Human Rights Commission has issued Technical Guidance on the Public Sector Equality Duty and statutory guidance entitled "Equality Act 2010 Services, Public Functions & Associations Statutory Code of Practice". The Council must have regard to the statutory code in so far as it relates to the duty and attention is drawn to Chapter 11 which deals particularly

with the equality duty. The Technical Guidance also covers what public authorities should do to meet the duty. This includes steps that are legally required, as well as recommended actions. The guidance does not have statutory force but nonetheless regard should be had to it, as failure to do so without compelling reason would be of evidential value. The statutory code and the technical guidance can be found at: <https://www.equalityhumanrights.com/en/advice-and-guidance/equality-act-codes-practice>

<https://www.equalityhumanrights.com/en/advice-and-guidance/equality-act-technical-guidance>

8.9 The Equality and Human Rights Commission (EHRC) has previously issued five guides for public authorities in England giving advice on the equality duty:

- The essential guide to the public sector equality duty
- Meeting the equality duty in policy and decision-making
- Engagement and the equality duty: A guide for public authorities
- Objectives and the equality duty. A guide for public authorities
- Equality Information and the Equality Duty: A Guide for Public Authorities

8.10 The essential guide provides an overview of the equality duty requirements including the general equality duty, the specific duties and who they apply to. It covers what public authorities should do to meet the duty including steps that are legally required, as well as recommended actions. The other four documents provide more detailed guidance on key areas and advice on good practice. Further information and resources are available at:

<https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty-guidance#h1>

9. Equalities Implications

There are no equalities implications arising from this report.

10. Environmental Implications

There are no environmental implications arising from this report.

11. Conclusion

The suggested amendments to the Code and procurement documents as set out in this report will allow officers to ensure that the Council only enters into contracts with organisations that can demonstrate that they comply with the Blacklisting Regulations or that they have taken sufficient measures to put right any wrong doing and prevent it from occurring again. Further the amendments

to the terms and conditions will allow the Council to terminate a contract where an organisation has breach the Blacklisting Regulations.

If there are any queries on this report, please contact Kath Nicholson on 47648.

Background documents: Motion 1 Proposed Councillor Bonavia Seconded Councillor Kennedy dated 18th January 2017

