

**Report To: Policy & Resources Committee**

**Date: 17 May 2016**

**Report By: Corporate Director Environment,  
Regeneration and Resources**

**Report No: LP/070/16**

**Contact Officer: Head of Legal & Property Services**

**Contact No: 01475 712710**

**Subject: Procurement: Blacklisting Protocol**

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## **1.0 PURPOSE**

- 1.1 The purpose of this report is to seek the Committee's approval to the Blacklisting Protocol annexed to this report which provides guidance on how to appraise any remedial action taken by a tenderer who has previously engaged in the practice of blacklisting.

## **2.0 SUMMARY**

- 2.1 At the Committee meeting on 2 February, the Committee was advised that from 18 April 2016, it is mandatory for contracting authorities to exclude any tenderer found to have breached the Employment Relations Act 1999 (Blacklisting) Regulations 2010, or which has admitted to so doing, from participating in procurement exercises.
- 2.2 It is possible for a tenderer to provide evidence that it has taken appropriate measures to prevent a reoccurrence and that it should not be so excluded from tender exercises.
- 2.3 The Committee requested that a draft protocol be submitted to a future meeting setting out ways in which contractors who have previously engaged in blacklisting can demonstrate that they have taken such appropriate remedial action. A Blacklist Protocol is annexed to this report for consideration.

## **3.0 RECOMMENDATION**

- 3.1 It is recommended that the Committee considers and approves the Blacklisting Protocol annexed to this report.

**Gerard Malone**  
**Head of Legal & Property Services**

#### 4.0 BACKGROUND

- 4.1 The Public Contract (Scotland) Regulations 2015, which regulate EU Procurement exercises, being those which exceed the OJEU thresholds for goods, services and works and The Procurement (Scotland) Regulations 2016 which regulate national Procurement exercises, which are equal to or over £50,000 in the case of goods and services contracts and £2million in the case of works contracts, came into effect on 18 April 2016. Both state that a contracting authority must exclude a tenderer from participating in a procurement exercise where the tenderer has been found by a court to have committed a breach of or has admitted to breaching the Employment Regulations Act 1999 (Blacklists) Regulations 2010 (the “2010 Regulations”) otherwise termed “blacklisting”.
- 4.2 The European Single Procurement Document (Scotland) (“ESPD”), which replaces the standard pre-qualification questionnaire as from the same date, contains standard questions which identify whether a tenderer has committed a breach of the 2010 Regulations and if so, requests full details of the breach.
- 4.3 Any tenderer which has committed a breach of the 2010 Regulations must be excluded from participating in any procurement exercise for 3 years from the date of the relevant event, being the date of the court decision or the date of admission by the tenderer. This is subject to a tenderer providing evidence that it has taken measures which are sufficient to demonstrate its reliability despite the existence of this mandatory ground for exclusion and that it should not therefore be excluded from the procurement exercise.
- 4.4 At the Committee meeting on 2 February, the Committee requested that a draft protocol be submitted to a future meeting setting out ways in which tenderers who have previously engaged in blacklisting are able to demonstrate that they have taken such appropriate remedial action.

#### 5.0 PROPOSAL

- 5.1 It is proposed that the Council adopts the Blacklisting Protocol annexed to this report.

#### 6.0 IMPLICATIONS

##### Finance

- 6.1 Financial Implications – Annually Recurring Costs/ (Savings)

Cost Centre	Budget Heading	With Effect from	Annual Net Impact	Virement From (If Applicable)	Other Comments
				-	

The overall costs of this exercise will be contained within existing Budgets.

##### Legal

- 6.2 Legal advice must be sought from the Head of Legal & Property Services where a tenderer has been found by a court to have or has admitted to engaging in blacklisting to determine if any remedial action taken by the tenderer is appropriate and where this is found not to be the case, to prepare an appropriate statement of reasons as required by procurement legislation, which explains the grounds for excluding the tenderer from the tender process.

### **Human Resources**

6.3 There are no human resources issues.

### **Equalities**

6.4 There are no equalities issues.

### **Repopulation**

6.5 There are no repopulation issues.

## **7.0 CONSULTATION**

7.1 This report has been produced in consultation with the Chief Financial Officer and Corporate Procurement Manager.

## **8.0 LIST OF BACKGROUND PAPERS**

8.1 None.

# **Blacklisting Protocol**

## **Protocol for appraising tenderers in breach of the Employment Relations Act 1999 (Blacklists) Regulations 2010**

### **1. Background**

- 1.1 Inverclyde Council regards blacklisting or the compiling of a blacklist as unacceptable. The Council expects contractors that are awarded public contracts to maintain high standards of business and professional conduct.
- 1.2 The purpose of this Protocol is to provide guidance to procuring officers on how, during a tender exercise, to assess a tenderer who has been found by a court to have or who has admitted to engaging in blacklisting practices.
- 1.3 This protocol applies to the procurement of all goods, services and works contracts, regardless of value.

### **2. Legal context**

- 2.1 Both EU<sup>1</sup> and national<sup>2</sup> Procurement laws, which came into effect on 18 April 2016, state that a contracting authority must exclude a tenderer from participating in a procurement exercise where the tenderer has been found by a court to have committed a breach of or has admitted to breaching the Employment Regulations Act 1999 (Blacklists) Regulations 2010 (the “2010 Regulations”) either before or during a tender exercise.
- 2.2 The Employment Regulations Act 1999 (Blacklists) Regulations 2010 state that no person shall 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 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 the treatment of workers. The colloquial term for this type of activity is “blacklisting”.
- 2.3 The period during which a tenderer must be excluded from participating in any procurement exercise is 3 years from the date of the relevant event, being the date of the court decision or date of such admission by the tenderer.

### **3. Establishing whether a breach has occurred**

- 3.1 From 18 April 2016, the European Single Procurement Document (Scotland) (“ESPD”) replaces the standard pre-qualification questionnaire. The ESPD contains standard questions which identify whether a tenderer has committed a breach of the 2010 Regulations and if so, requests full details of the breach.

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<sup>1</sup> EU Procurement law is contained in The Public Contract (Scotland) Regulations 2015 which apply to procurement exercises which exceed the OJEU procurement thresholds which change every 2 years.

<sup>2</sup> National Procurement law is contained in the Procurement Reform (Scotland) Act 2014 and The Procurement (Scotland) Regulations 2016 which apply to the procurement of goods and services contracts equal to or greater than £50,000 and the procurement of works contracts equal to or greater than £2million.

#### **4. Ability to self-cleanse**

Both EU and national Procurement laws permit a tenderer to provide evidence that measures it has taken are sufficient to demonstrate its reliability despite the existence of the mandatory ground for exclusion referred to at clause 2.1 above.

#### **5. Evidence of appropriate remedial action**

5.1 The remedial steps which can be evidenced by a tenderer include:

- An appropriate apology having been made acknowledging wrong-doing in relation to the compiling, use, selling or supplying of blacklists with a view to discriminating against an individual in terms of their trade union memberships status;
- The provision of a statement regarding future conduct;
- Collaboration with investigating authorities which clarified or clarifies the facts and circumstances in a comprehensive manner;
- Concrete, technical, organisational and personnel measures having been taken that are appropriate to prevent reoccurrence for example, employee training, review and updating of company policies etc;
- Fully complying with any tribunal ruling; and
- Paying or undertaking to pay compensation in respect of any damage caused by any wrong-doing.

5.2 The tenderer should be asked to provide actual evidence that proposed remedial steps have been fully implemented. The tenderer must in all cases have issued an apology for its actions and provided assurances regarding its future conduct.

5.3 The remedial steps and measures taken by a tenderer must be evaluated by the Council on a case by case basis, taking into account the gravity and particular circumstances of the offence. If the Council is satisfied that the evidence proves that the measures are sufficient, the tenderer must not be excluded from the procurement exercise.

5.3 If the Council considers the measures are insufficient, the Council must give the tenderer a statement of reasons for its decision to exclude the tenderer.

#### **6. Conclusion**

Any decision to exclude a tenderer from a tender process must be proportionate to the scale and nature of the offence. Legal advice must therefore be sought from the Head of Legal & Property Services where a tenderer has been found by a court to have or has admitted to engaging in blacklisting to determine if any remedial action taken by the tenderer is appropriate and where this is found not to be the case, to prepare an appropriate statement of reasons for excluding the tenderer from the tender process.