

Southwark Council - Consolidated repairs and maintenance services contract for the council's operational estate

Briefing Note

Council Guidance

Legal & Procurement Framework

The procurement of the contract in question followed the council's guidance. The council is satisfied that its procurement of this contract has complied with the council's requirements with respect to "blacklisting". As part of the council's Invitation to Further Competition (ITFC) process, an assessment of whether those tenderers invited to bid were in breach of the Employment Relations Act 1999 (Blacklisting) Regulations 2010 was undertaken.

All tenderers submitting a bid were requested to complete the council's Offences Certificate. The Offences Certificate covers a wide range of conviction offences in respect of Regulation 57 of the Public Contracts Regulations 2015 within the last five years and also includes being in breach of the requirements under Regulation 3(1) of the Employment Relations Act 1999 (Blacklisting) Regulations 2010. Further, the EU Regulations place certain restrictions on the council with respect to requesting information in relation to the Public Contracts Regulations 2015. For example, the council is only permitted to request contractors to disclose breaches within the last three years with respect to Regulation 57(8).

The procurement of the contract is a call off contract under the Crown Commercial Service (CCS) Framework Agreement [Ref. No. RM1056] for facilities management services. The council therefore did not undertake a pre-qualification questionnaire (PQQ). However, as part of the council's ITFC process, an assessment of whether those tenderers invited to bid were in breach of the Employment Relations Act 1999 (Blacklisting) Regulations 2010 was undertaken.

The form of contract issued by the council included specific clauses with respect to the:

- Employment Relations Act 1999 (Blacklists) Regulations 2010; and
- council's rights of termination.

The council can confirm that Kier Facilities Services Ltd completed and returned their Offences Certificate confirming that they are not in breach of any of the requirements, including the requirements under Regulation 3(1) of the Employment Relations Act 1999 (Blacklisting) Regulations 2010. Kier Facilities Services Ltd is a separate company to Kier Ltd.

In addition, the council has included its usual provision in the contract which require the contractor to comply with the Employment Relations Act 1999 (Blacklisting) Regulations 2010 during the contract term.

The council has already implemented clear guidance which demonstrates it may exclude the contractor pursuant to Reg 57(8)(c) of the Public Contracts Regulations 2015 if certain criteria is not adhered to. However, strict criteria must be met in these circumstances.

The council guidance states:

"What can the council do?"

Exclude blacklisters - blacklisting can amount to an act of grave professional misconduct which renders the organisations integrity questionable, and so could justify exclusion of an economic operator pursuant to Reg. 57(8)(c) of the Public Contracts Regulations 2015. **BUT** any exclusion must be:

- Proportionate
- Justified on the evidence
- Considered on a case-by-case basis
- Not a means of punishing operators for past wrong doing

Require "self cleaning" (Public Contracts Regulations 2015 Reg. 57(13)-(17)) - this enables an economic operator to show that it has or will take measures to put right its earlier wrongdoing and to prevent them from re-occurring and to provide evidence that the measures taken by the economic operator are sufficient to demonstrate its reliability. The economic operator should prove that it has:

- Paid or undertaken to pay compensation in respect of any damage caused
- 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."

Kier Facilities Services Ltd has submitted a statement (refer Kier Information Pack - Appendix A) which clearly demonstrates their commitment to ensuring that blacklisting does not occur again and ensures that their working practices will prevent further criminal offences or misconduct. Kier Facilities Services Ltd has condoned blacklisting in any form and has acknowledged that Kier Limited has apologised unreservedly for its part in the use of the services of the Consulting Association until early 2009. This statement is supported by their Business Ethos Policy (refer Kier Information Pack - Appendix B) and their Equalities and Diversity Policy (refer Kier Information Pack - Appendix C). Both policies make clear references to adhering to their responsibilities under various legislative requirements, including a reference on page 3 of their Business Ethos Policy in respect of not participating in obtaining information through blacklists. The policy states:

"We will not participate in, contribute to or obtain information from any blacklist or other similar service which undermines these principles and as part of this obligation we will ensure that compliance with our Equality and Diversity Policy, as well as this Business Ethics Policy, will form part of the selection process for appointing subcontractors and other members of our supply chain."

Enclosures

Appendix A - Southwark Council Guidance on The Source

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Blacklisting/Prohibited Lists

What is "blacklisting"

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'. A blacklist could potentially contain further details on individuals who have reported concerns, for example, regarding health and safety and/or environmental matters. Blacklists are prohibited by law and it is important therefore that council officers are aware of the relevant legislation and how it is applied.

The Employment Relations Act 1999 (Blacklists) Regulations 2010

- Defines a prohibited list (eg a blacklist) and prohibits the compilation, dissemination and use of prohibited lists.
- Makes 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.
- Makes it unlawful for an employment agency to refuse a service to a worker for a reason related to a prohibited list.
- Provides for the employment tribunal to hear complaints about alleged breaches of the regulations.
- As an alternative, provides for the courts to hear complaints from any persons that they have suffered loss or potential loss because of a breach of the regulations.

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The council must evaluate these measures taking into account the gravity and particular circumstances of the misconduct, if the council considers the evidence is sufficient the economic operator shall not be excluded from the procurement procedure. If the council considers the measures are insufficient, we must give the economic operator a statement of the reasons for that decision.

Request information - the council may request information such as:

- Confirmation from an economic operator that there has not been any complaint of blacklisting.
- Details of any complaints.
- Details of the economic operator's handling of those complaints.
- Details of the judgement and level of damages awarded by any adverse finding by a court or tribunal.

Terminate an existing contract - there is **no** automatic right to terminate a contract where an economic operator has been or is engaged in blacklisting. An ability to terminate will depend on the precise wording of the contract terms and the materiality of the blacklisting to the contract. Action taken under contract terms should be considered on a case by case basis and legal advice obtained from the contracts team.