



Exclusion from public contracts of companies which engage in blacklisting

Purpose

1. The purpose of this Scottish Procurement Policy Note (SPPN) is to provide advice on the exclusion from public contracts of companies which engage in the practice of blacklisting.

Key points

2. The key points are as follows:

- any company which engages in or has engaged in the blacklisting of employees or potential employees should be considered to have committed an act of grave misconduct in the course of its business and should be excluded from bidding for a public contract unless it can demonstrate that it has taken appropriate remedial steps;
- we have included three new questions in the standard Pre-Qualification Questionnaire (sPQQ) which requires suppliers to disclose if they have breached relevant legislation;
- we have also included a new contract clause in our standard terms and conditions which provides for termination of the contract if a supplier is found to have breached relevant legislation during the course of that contract; and
- this guidance applies to all public sector contracts regardless of value, although for lower value contracts pre-qualification procedures are unlikely to apply.

Background

3. The Scottish Affairs Committee is conducting an inquiry into blacklisting in employment. It is seeking to investigate the extent to which the practice of blacklisting has taken and may still be taking place in Scotland, and what is being done to eradicate it. The Scottish Government regards blacklisting or the compiling of a blacklist as totally unacceptable. We expect companies that are awarded public contracts to maintain high standards of business and professional conduct. We are following the progress of the inquiry closely and await its findings with interest.

4. The Employment Relations Act 1999 (Blacklists) Regulations 2010 states 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 the 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 purposes of discrimination in relation to recruitment or in relation to the treatment of workers.

5. The Trade Union and Labour Relations (Consolidation) Act 1992, states that it is unlawful to refuse a person employment, a) because he is, or is not, a member of a trade union, or b) because he is unwilling to accept a requirement – (i) to take steps to become or cease to be, or to remain or not to become, a member of a trade union, or (ii) to make payments or suffer deductions in the event of his not being a member of a trade union.

6. The colloquial term for this type of activity is “blacklisting”.

7. We are determined to ensure that blacklisting is not used in connection with the performance of public contracts in Scotland. We have therefore included three new questions in the sPQQ and a new contract clause in our standard terms and conditions to address the issue.

New questions in the sPQQ

8. The new questions in the sPQQ ask suppliers if they have breached the Employment Relations Act 1999 (Blacklists) Regulations 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992.

9. Suppliers which have breached the relevant legislation are asked to disclose full details of the breach, including any successful action against them under the relevant legislation and/or any finding by an employment tribunal that a complaint raised under the relevant legislation is well-founded. They are also asked to disclose any remedial steps they have taken.

10. The sPQQ already asks suppliers to disclose if they have been convicted of a criminal offence relating to the conduct of their business or profession. Breaches of the Data Protection Act 1998, for example passing on data relating to individuals to blacklisting companies, or compiling a list of individuals who have raised health and safety concerns, including failure to comply with an enforcement notice served in relation to a breach of the data protection principles, may result in criminal convictions which may in turn justify a supplier's exclusion under regulation 23(4)(d) of the Public Contracts (Scotland) Regulations 2012. Suppliers which have been convicted of a criminal offence are asked to disclose full details of the conviction, together with any remedial steps they have taken.

11. Any supplier which has committed a breach of the relevant legislation should be considered to have committed an act of grave misconduct in the course of its business and should be excluded from tendering under regulation 23(4)(e) of the Public Contracts (Scotland) Regulations 2012 until and unless it can demonstrate that it has taken appropriate remedial steps. Any exclusion must be proportionate to the scale and nature of the offence or misconduct.

12. Public bodies have a duty to act proportionately in deciding whether to exclude a supplier on the basis of regulation 23(4). Each case should be considered on a case by case basis taking account of the specific circumstances of the case. It might not, for example, be proportionate to exclude a supplier from competition if it had been the subject of a tribunal ruling on a different project at the other end of the country, yet wished to bid for a major Scottish infrastructure project, providing of course, that the supplier had complied with the terms of the ruling and offered an apology and assurances regarding its future conduct. It is therefore important that consideration is given to any remedial steps taken by the supplier. Suppliers should be asked to provide actual evidence that any such steps have been fully implemented. Also, for remedial measures to be regarded as appropriate, the

supplier must in all cases have issued an apology for its actions and provided assurances regarding its future conduct.

13. Remedial steps should include action by suppliers to:

- make an appropriate apology acknowledging wrong-doing in relation to the compiling, use, selling or supplying of blacklists with the view of discriminating against workers and/or the discrimination against an individual in terms of their trade union membership status;
- provide a statement regarding future conduct;
- collaborate with investigating authorities to clarify the facts and circumstances in a comprehensive manner;
- take concrete, technical, organisational and personnel measures that are appropriate to prevent further criminal offence or misconduct;
- comply fully with any tribunal ruling; and
- pay compensation in respect of any damage caused by any wrong-doing.

14. The new questions are at Annex A. The standard selection questions have been updated in the sPQQ and Invitation to Tender (ITT) templates within PCS Tender and on the sPQQ template on the Scottish Procurement website to reflect this change. These templates should be used as the basis for all PQQ and tender exercises.

New contract clause

15. We have also included a new contract clause in our standard terms and conditions which provides for termination of the contract if a supplier is found to have breached relevant legislation, during the course of that contract.

16. The new contract clause is included in Annex B and the standard terms and conditions have been updated on the Scottish Government web pages to include the new clause.

Information exchange and development of further guidelines

17. The Scottish Government intends to meet with the STUC and interested Trade Unions, on a quarterly basis initially, to review how the guidance is being applied and to exchange information about compliance. If evidence comes to light to suggest that blacklisting is still taking place, the Scottish Government will take further appropriate action, possibly including a recommendation that the company in question is not awarded public sector contracts. Also, we intend to continue working with the Unions and stakeholders to explore ways in which the guidelines can be further developed. For example, to take account of the conclusions and findings of the Scottish Affairs Committee and, for example, to further consider how to address companies working as sub-contractors.

Action required

18. Public bodies are asked to note the advice provided in this SPPN and to adopt the PQQ questions and contract clause in Annex A and B and should be used in current tendering exercises where it is feasible to do so.

19. All public bodies who do not use the Scottish Government's standard contracts are asked to amend their own standard terms and conditions to include the clause at Annex B. There is no requirement to amend existing contracts, but all public bodies should ensure that the clause forms part of the terms and conditions of contract used in all future tendering exercises.

Dissemination

20. Please bring this SPPN to the attention of all relevant staff, including those in Agencies, Non-Departmental Public Bodies and other sponsored public bodies within your area of responsibility.

Contact

21. The Scottish Government will continue to liaise with unions and stakeholders on this important matter. If you have any enquiries about this SPPN or would like to discuss the issues it raised, please contact Scottish Procurement: scottishprocurement@scotland.gsi.gov.uk.

Scottish Procurement

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New questions for inclusion in the sPQQ or a public body's own PQQ process

Discretionary exclusions

Existing question: Has your organisation been convicted of a criminal offence relating to the conduct of its business or profession?

Existing question: Has your organisation committed an act of grave misconduct in the course of its business or profession?

New question: Has your organisation ever compiled, used, sold or supplied 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 purposes of discrimination in relation to recruitment or in relation to the treatment of workers

within the meaning of The Employment Relations Act of 1999 (Blacklists) Regulations 2010?

If you have answered 'Yes' to any of the above discretionary exclusions, please provide details and state any remedial action you have taken.

New Question: Has your organisation ever refused a person employment

a) because he is, or is not a member of a trade union, or

b) because he is unwilling to accept a requirement

(i) to take steps to become or cease to be, or to remain or not to become, a member of a trade union, or

(ii) to make payments or suffer deductions in the event of his not being a member of a trade union

within the meaning of Section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992?

If you have answered 'Yes' to any of the above discretionary exclusions, please provide details and state any remedial action you have taken.

New Question: Has your organisation breached The Data Protection Act 1998 or been served with an enforcement notice in relation to unlawfully processing personal data in connection with any blacklisting activities?

If you have answered 'Yes' to the above discretionary exclusion, please provide details and state any remedial action you have taken.

New contract clause

The Service Provider must not commit any breach of the Employment Relations 1999 Act (Blacklists) Regulations 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992, 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 Purchaser to terminate the Contract with immediate effect.