

Blacklisting in the Construction Industry

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1. Introduction

This note has been produced as a guide to the issue of blacklisting / use of prohibited lists concerning individuals within the construction industry (or any other industry). This note details the background to blacklisting / use of prohibited lists, outlines the relevant legislation that applies in this area and provides an update on the current situation, specifically in relation to those involved in the procurement and delivery of construction contracts.

2. 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'.

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.

Blacklisting can be very damaging to the careers and livelihoods of individuals who have been denied employment opportunities.

The blacklisting of individuals is an unlawful practice and legislation has been put in place to prohibit its use. It is important therefore that public sector organisations are aware of the relevant legislation and how it is applied.

Background to 'blacklisting'

In 2009, the issue of blacklisting in the construction industry came to national prominence. The media widely reported that the Information Commissioner's Office (ICO) had carried out an investigation into a private business called The Consulting Association (TCA).

The ICO found that TCA had been providing a service to over 40 construction companies, many of them major companies in the construction sector, appraising the suitability for employment of individuals. It found a blacklist and files containing extensive information on more than 3300 individuals across the UK, which was used to vet individuals and deny people employment for reasons including being a member of a trade union or having raised health and safety concerns.

An individual who ran TCA was subsequently prosecuted and fined for failing to comply with the Data Protection Act 1998 and register as a data controller.

3. Legislative Framework

UK Legislative Framework relevant to blacklisting

The issue of blacklisting cuts across several areas of legislation (shown below) but following the TCA investigation, the UK Government deemed these existing provisions insufficient to effectively address the issue. As a result specific Blacklist regulations were built into the Employment Rights Act in 2010. The regulations encourage employers to re-examine whether their data and vetting practices when recruiting are consistent with the law and respect the privacy of individuals.

The Data Protection Act 1998

The Data Protection Act controls how personal information is used by organisations, businesses or the government. The ICO has powers to bring about compliance with the Data Protection Act 1998 and related laws. These include criminal prosecution, non-criminal enforcement and audit.

Anyone who processes personal information must notify and register with the ICO as a data controller and comply with the eight principles of the Data Protection Act. The ICO will update the register of data controllers, which is available to the public for inspection.

If an individual has been operating a blacklist, it will have no legitimate reason for processing an individual's information in this way. By operating such a list, individuals can be prosecuted for failure to comply with the Act and failure to register as a data controller, as was the case with an individual in the TCA.

Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)

The Act, amongst other things, defines trade unions and states that they are the subjects of legal rights and duties. It protects the rights of workers to organise into, or leave, a union without suffering discrimination or detriment.

Section 137 of this Act made it unlawful for employment to be denied on trade union grounds or non-trade union grounds. The blacklisting of workers therefore gives rise to potential claims under Section 137 of the Act.

The Employment Relations Act 1999 (Blacklists) Regulations 2010

The Employment Relations Act 1999 (Blacklists) Regulations 2010 amongst other things:

- Define a prohibited list (e.g. 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

4. Government Policy and Approach

The Government is strongly opposed to the use of blacklists and has considered the options available to establish the strongest possible approaches that can be taken through public procurement to address the issues raised by blacklisting in a way that complies with the legal obligations. Guidance is contained within this document.

The House of Commons Scottish Affairs Select Committee is holding an inquiry into blacklisting in employment and is taking evidence. The Inquiry has been informed that companies have used blacklists in relation to a series of high profile public projects recently. There is widespread pressure for the UK Government to hold a public inquiry.

The Committee will make recommendations to the UK Government in due course on a number of issues, including whether companies that have been involved in blacklisting be prevented from tendering for public sector contracts in the future and whether existing legislation is sufficient.

Further updated guidance may be released following the conclusion and findings of the Scottish Affairs Select Committee Inquiry and any subsequent actions taken by the UK Government.

5. Addressing Blacklisting through Procurement

Below is an overview of the key legal issues relating to addressing blacklisting through procurement. This information is intended as a guide only and is not a substitute for appropriate legal advice.

Can contracting authorities exclude blacklisters?

In principle, yes, blacklisting can amount to an act of grave misconduct and so could justify exclusion of an economic operator pursuant to Reg. 23(4) of the Public Contracts Regulations 2006. However:-

- Exclusion must be proportionate (see below) and 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 wrong doing, but rather a means of putting right past wrongdoing and ensuring that it does not re-occur (self-cleaning, see below).

When will exclusion be proportionate? The concept of self-cleaning.

The concept of self-cleaning originates from competition law and encompasses circumstances in which an economic operator has taken measures to put right its earlier wrongdoing and to prevent it from re-occurring. Where an economic operator has self-cleaned, exclusion would generally be disproportionate.

Self-cleaning entails a four stage process:-

1. Clarification of the relevant facts and circumstances: What are the facts and circumstances of the wrongdoing? When did the wrongdoing take place? Has there been any subsequent wrongdoing?
2. Effective repair of the damage caused: What has the economic operator done to repair the damage caused by its wrongdoing? This could take the form of compensation to the victims of blacklisting but does not entitle the contracting authority to require an apology.
3. Personnel measures: Have any staffing/personnel measures been put in place to avoid reoccurrence?
4. Structural and organisational measures: What structural and organisational measures have been put in place to avoid a re-occurrence?

If, on the basis of this 4 stage assessment, an economic operator demonstrates that they have effectively self-cleaned, then exclusion from a public contract is likely to be disproportionate.

It is not possible to exclude an economic operator solely on the basis that they have not apologised for blacklisting. There may be some scope to consider whether a lack of apology or statement of regret indicates insufficient self-cleaning, but this must be considered carefully on a case-by-case basis.

What type of information can Contracting Authorities request?

The 2006 Regulations allow a contracting authority to request confirmation from an economic operator that there has not been any complaint of blacklisting. Furthermore, the 2006 Regulations also allow the contracting authority to request details of those complaints, and the economic operator's handling of them.

In the event that there has been an adverse finding by a court or tribunal, it would also be reasonable to request details of the judgement and level of damages awarded.

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. A contracting authority's ability to take action will depend on the precise wording of the contract terms and the materiality of the blacklisting to the contract. In respect of new public contracts, contracting authorities may wish to consider whether to revise their current contract terms and conditions to include a right to terminate the contract where an economic operator engages in blacklisting.

Action taken under contract terms should be considered on a case by case basis and legal advice obtained.

Updates to the information contained in this note flowing from updates to the Public Contract Regulations in 2013/14 will be made as these are known and approved.

6. Guidance and Tools

Below are some of the policy guidance documents and supporting tools that are available to you for use in your procurement activity (in alphabetical order):-

Department for Business, Innovation and Skills - BIS Guidance on Blacklisting (March 2010)

Value Wales - Blacklisting in the Construction Industry, PAN

7. Acknowledgements

County Council A is pleased to acknowledge that it has drawn upon the following publications and organisations to supplement its own research to produce this note:-

- Value Wales
- Department for Business, Innovation and Skills
- The Data Protection Act 1998
- Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)
- The Employment Relations Act 1999 (Blacklists) Regulations 2010

Good Standing – Mandatory Grounds for Exclusion: Pass/Fail

Descriptions

Conspiracy:	(a) conspiracy within the meaning of section 1 or 1A of the Criminal Law Act 1977 or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA;
Corruption:	(b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889 or section 1 of the Prevention of Corruption Act 1906, where the offence relates to active corruption
Bribery:	(c) (i) the offence of bribery, where the offence relates to active corruption;
	(ii) bribery within the meaning of section 1 or 6 of the Bribery Act 2010;
Fraud:	(d) fraud, where the offence relates to fraud affecting the financial interests of the European Communities as defined by Article 1 of the Convention relating to the protection of the financial interests of the European Union, within the meaning of:
	(i) the offence of cheating the Revenue;
	(ii) the offence of conspiracy to defraud;
	(iii) fraud or theft within the meaning of the Theft Act 1968, the Theft Act (Northern Ireland) 1969, the Theft Act 1978 or the Theft (Northern Ireland) Order 1978;
	(iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985, article 451 of the Companies (Northern Ireland) Order 1986 or section 993 of the Companies Act 2006;"
	(v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979 or section 72 of the Value Added Tax Act 1994;"
	(vi) an offence in connection with taxation in the European Community within the meaning of section 71 of the Criminal Justice Act 1993; or
	(vii) destroying, defacing or concealing of documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968 or section 19 of the Theft Act (Northern Ireland) 1969;"
	(viii) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006; or (ix) making, adapting, supplying or offering to supply articles for use in frauds within the meaning of section 7 of the Fraud Act 2006;"
Money Laundering:	(e) money laundering within the meaning of section 340(11) of the Proceeds of Crime Act 2002; or
Any other offence:	(f) an offence in connection with the proceeds of criminal conduct within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988 or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996;
	(g) an offence in connection with the proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994
	(h) any other offence within the meaning of Article 45(1) of the Public Sector Directive.

Good Standing – Discretionary Grounds for Exclusion: Pass/Fail

Descriptions

Bankruptcy / Insolvency:	(a) being an individual is bankrupt or has had a receiving order or administration order or bankruptcy restrictions order made against him or has made any composition or arrangement with or for the benefit of his creditors or has made any conveyance or assignment for the benefit of his creditors or appears unable to pay or to have no reasonable prospect of being able to pay, a debt within the meaning of section 268 of the Insolvency Act 1986 (h), or article 242 of the Insolvency (Northern Ireland) Order 1989(i), or in Scotland has granted a trust deed for creditors or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of his estate, or is the subject of any similar procedure under the law of any other state;
	(b) being a partnership constituted under Scots law has granted a trust deed or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of its estate;
	(c) being a company or any other entity within the meaning of section 255 of the Enterprise Act 2002 (a) has passed a resolution or is the subject of an order by the court for the company's winding up otherwise than for the purpose of bona fide reconstruction or amalgamation, or has had a receiver, manager or administrator on behalf of a creditor appointed in respect of the company's business or any part thereof or is the subject of similar procedures under the law of any other state;
Business Conduct:	(d) has been convicted of a criminal offence relating to the conduct of his business or profession;
Misconduct:	(e) has committed an act of grave misconduct in the course of his business or profession;
Payment of social security contributions:	(f) has not fulfilled obligations relating to the payment of social security contributions under the law of any part of the United Kingdom or of the relevant State in which the organisation is established;
Payment of taxes:	(g) has not fulfilled obligations relating to the payment of taxes under the law of any part of the United Kingdom or of the relevant State in which the economic operator is established; or from 1st April 2013 onwards, the tax affairs have given rise to a criminal conviction for tax related offences which is unspent, or to a penalty for civil fraud or evasion; and/or any of its tax returns submitted on or after 1 October 2012 has been found to be incorrect as a result of either HMRC successfully challenging it under the General Anti-Abuse Rule (GAAR) or the "Halifax" abuse principle; or the failure of an avoidance scheme which the supplier was involved in and which was, or should have been, notified under the Disclosure of Tax Avoidance Scheme (DOTAS)
Misrepresentation	(h) is guilty of serious misrepresentation in providing any information required of him under this section;
Procedures for the award of a public services contract:	(i) in relation to procedures for the award of a public services contract, is not licensed in the relevant State in which he is established or is not a member of an organisation in that relevant State when the law of that relevant State prohibits the provision of the services to be provided under the contract by a person who is not so licensed or who is not such a member

Good Standing Qualification

This section relates to the reputable nature of organisations with which we do business.

The Contracting Authority is entitled and reserves the right to exclude from any further involvement in the tender process, any organisation for if any of the following areas apply. If you are unable to answer 'no' to every question your tender submission may not be accepted. If you answer 'yes' to any of the following, please set out in the last question full details of the relevant incident and any remedial action taken subsequently.

The information provided will be taken into account by the Contracting Authority in considering whether or not you will be able to proceed any further in respect of this procurement exercise.

Please note: yellow denotes mandatory question

Has your organisation or any directors or partner or any other person who has powers of representation, decision or control been convicted of any of the following offences?

Please refer to the Good Standing guidance document for a detailed description of each section provided in the documents area.

1. (a) Conspiracy;
Yes No

2. (b) Corruption;
Yes No

3. (c) Bribery;
Yes No

4. (d) Fraud;
Yes No

5. (e) Money Laundering;
Yes No

6. (f) Any other offence;
Yes No

7. (g) Bankruptcy / Insolvency;
Yes No

8. (h) Business Conduct;
Yes No

9. (i) Misconduct;
Yes No

10. (j) Payment of social security contributions;

Yes No

11. (k) Payment of taxes;

Yes No

12. (l) Misrepresentation;

Yes No

13. (m) Procedures for the award of a public services contract.

Yes No

14. (n) In the last 2 years has your company:

- Had a contract terminated in respect of the failure to perform
- Withdrawn from a contract prior to the agreed end date
- Been successfully sued for breach of contract conditions?

Yes No

15. If any answer to (a) to (n) above is "yes" please provide full summary of the details of the occasion(s) [who was involved, their position within the organisation then and now] and describe what action has been taken to avoid such occurrences in the future? (Note - 4000 character response limit)