

# CONSULTATION

*For Private Landlords, Resident Management Companies and their Agents*

## ***Introduction to the procedures***

The law requires that leaseholders paying variable service charges must be consulted before a landlord carries out qualifying works or enters into a long-term agreement for the provision of services. Detailed regulations have been produced under section 20 of the Landlord and Tenant Act 1985 (as amended by S151 of the Commonhold and Leasehold Reform Act 2002) which set out the precise procedures Landlords must follow; these are the Service Charges (Consultation Requirements) (England) Regulations 2003 ('the Regulations') Similar regulations have been enacted in Wales.

The Regulations separate the consultation procedures into four schedules, each covering different contracts. This booklet explains only schedule 1, 3 and 4 (part 2). As set out above it does not explain the schedules relevant to councils and other social housing landlords.

The format of the notices required by the Regulations has not been prescribed in legislation, but suggested examples of what these may look like are contained in the Appendices to this booklet.

The requirements in the Regulations are defined under three headings.

- Qualifying works
- Qualifying long-term agreements
- Qualifying works under long-term agreements.

### ***Qualifying works***

These are ‘works on a building or any other premises’ - that is, works of repair, maintenance or improvement. The inclusion of improvement in the definition of qualifying works does NOT allow a landlord to recover costs for improvements unless a liability for costs of improvements is included in the lease. When calculating the estimated cost, VAT on works must be included. It had been thought that landlords must consult if these works will cost over £250 for any one leaseholder. Thus, in a property with unequal service charge contributions, the landlord must consult all leaseholders if any one of them would have to pay more than £250. If consultation is not undertaken, the landlord may not be able to recover costs over £250 per leaseholder.

### ***Some general rules about the procedures***

#### ***Who must be consulted?***

Consultation notices must be sent both to individual leaseholders and to any RTA.

### ***Nomination of contractors from Leaseholders and RTAs***

Landlords must invite leaseholders to nominate possible contractors in respect of consultations that are carried out under Schedule 1 and Schedule 4 (Part 2) of the Regulations.

The Act does not require that contractors nominated by leaseholders or RTAs should be wholly unconnected with the leaseholder or RTA concerned, or that the landlord must be made aware of any relationship that exists. However, where such a relationship is or becomes known to the landlord that may be a factor taken into account when determining which contractor to use.

### ***Nominated Contractors***

- If a single nomination is made by an RTA (whether or not a nomination is also made by any leaseholder), the landlord must try to obtain an estimate from the nominated contractor;

- If a single nomination is made by only one leaseholder (whether or not a nomination is also made by an RTA), the landlord must try to obtain an estimate from the nominated contractor.
- If single nominations are made by more than one leasehold (whether or not a nomination is made by an RTA), the landlord must try to obtain an estimate:
  1. from the contractor who received the most nominations; or S20 Private Landlords.
  2. if there is no such person but two (or more) receive the same number of nominations from one of those; or
  3. if there are a number of nominations from more than one leaseholder, but no contractor has more than one nomination, from any nominated contractor;
  4. if multiple nominations are made by one leaseholder and by an RTA, the landlord must try to obtain an estimate from at least one person nominated by the tenant and from at least one (different) person nominated by the RTA

***Nomination of contractors and acceptable criteria for their appointment***

The Act does not lay down the terms within which the landlord approaches leaseholders' nominees when seeking to obtain estimates for works or services. Most landlords will require certain fundamental criteria from their contractors (for example, public liability insurance, valid tax exemption certificate, confirmation of VAT status, copies of health and safety policy and confirmation of company status).

Landlords will have to justify their selection procedures to the Tribunal, if challenged. If they fail to convince the Tribunal in a particular case - for example, if the Tribunal considers the selection criteria to be too restrictive or anti-competitive - there is a risk that the consultation procedure could be adjudicated as invalid.

It is suggested that landlords make their criteria part of their requests for tenders from nominated contractors, to make clear that meeting the criteria is a necessary condition of any contract which may be awarded. Alternatively, there may be some merit in including a brief statement on the selection criteria with the Notice of Intention to the leaseholders when inviting nominees; this can make clear to the tenant that any nominated contractor will need to satisfy the requirements in order to be seriously considered for the contract.

The widening of the ability to nominate contractors is intended to provide a greater openness and encourage competition in order to deliver what can be seen as fair and reasonable charges to the leaseholders.

Therefore a degree of caution may be appropriate in the initial packaging of contracts, say for a number of estates, which might preclude nomination of smaller contractors.

### ***How many notices must be served?***

Landlords may have to serve consultation notices on leaseholders at the following three stages in the process of awarding a contract:

- the pre-tender stage - notice of intention; and
- the tender stage - notification of landlords' proposal (estimates); and
- in some cases, notice of reasons for awarding the contract.

### ***Inspection of Notices and Estimates***

Where the landlord specifies the place and hours at which documents can be inspected the place and hours specified must be reasonable.

The documents must be made available for inspection free of charge at that place and during the hours specified. Facilities for copying of the documents by leaseholders should be made available if possible. If copies cannot be taken at that time copies shall be provided on request and free of charge, it may be the case that the costs of the administration and management incurred in providing these facilities can be recovered through the service charges.

### ***The duty to have regard***

In any case where a landlord receives written observations during the consultation process they have a duty to have regard to them. There is no statutory definition of 'have regard to', although in some instances the landlord must provide a response to the observations within a period of 21 days.

Where the landlord places a contract with a contractor that neither submitted the lowest estimate nor was nominated by a leaseholder or RTA then he is under a duty to state in writing the reasons for awarding the contract or specify the place and hours where the reasons may be

inspected. Failure to follow the correct procedures may be a consideration of the Tribunal in any application before it in connection with the consultation process.

### ***Connections between landlord and contractors***

Schedule 1 and part 2 of Schedule 4 of the Regulations require that at least one of the estimates provided must be from a contractor 'wholly unconnected' with the landlord.

The 'connection' for these purposes is as follows:

- where the landlord is a company, if the person/party is, or is to be, a director or manager of the company or is a close relative of any such director or manager;
- where the landlord is a company, and the person/party is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;
- where both the landlord and the person/party are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;
- where the person/party is a company, if the landlord is a director or manager of the company or is to a close relative of any such director or manager; or

- where the person/party is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager

A 'close relative' for this purpose means a spouse or cohabitee, a parent, parent-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister, sister-in-law, step-parent, step-son or step-daughter of that person.

### ***The Timing of Notices***

It is important that leaseholders are given a clear period of time to respond to notices. So, if notices require 30 days within which a leaseholder can comment it is recommended that the notice

gives 30 days but add on an extra 2-3 days to allow for the time taken in posting notices.

### ***How long will the consultation take?***

The whole process may take a number of months for the following reasons:

- leaseholders have 30 days to respond to a notice of intention served at the pre-tender stage;
- if a contractor is nominated by leaseholder(s) or RTA, the contractor may need to be invited to tender;
- if contractors nominated by leaseholders or an RTA submit a tender, landlords will need to check whether the contractor meets the necessary criteria;
- time spent having regard to observations from leaseholders;
- landlords must make a summary of the observations and responses to the notice of intention (first notice), which must be sent to leaseholders with the notice of landlord's proposals or statement of estimates (second notice);
- leaseholders have a further 30 days to respond to the notice of landlords' proposals served at the tender stage.

Schedule 4 (Part 2)

### ***Consultation for qualifying works***

Leaseholders and the RTA (if one exists) must be invited to nominate a contractor.

There are three stages of consultation.

#### **1. *Pre-tender stage***

Notice of intention (Section 20 notice Appendix 4) - 30-day consultation period.

A notice that the landlord intends to carry out works must be sent to each leaseholder and the RTA (if there is one).

This notice must:

- describe, in general terms, the works proposed to be carried out, or specify a (reasonable) place and hours at which a description of the works may be inspected;

- give the landlord's reasons why it is necessary to carry out the proposed works;
  - invite observations in writing;
  - give the address to which such observations must be sent;
- 
- state that they must be delivered by the due date;
  - give the date on which the consultation period ends (30 days);
  - inform leaseholders and RTA (if there is one) that they have the right to nominate a contractor from whom the landlord should try to obtain an estimate.

If facilities to provide copies of the documents referred to in the notice are not available at the place specified then copies must be provided to any leaseholder free on request.

#### **Duty to have regard to observations**

The landlord must have regard to any observations received by the due date.

#### **Estimates**

The landlord will then seek estimates from its chosen contractors but must also try to obtain estimates from contractors nominated by leaseholders and RTAs.

(Criteria on which contractors nominated by tenant and/or a RTA should be invited to tender are set out in the previous section relating to Nomination of Contractors from leaseholders and RTAs.)

## **2. *Tender Stage Consultation***

### **Preparation of landlord's estimates**

- the landlord shall obtain at least two estimates for the carrying out of the proposed works;
- at least one of the estimates must be from a contractor wholly unconnected with the landlord;
- the landlord must make all of the estimates available for inspection.

## Notification of the estimate (Section 20 notice Appendix 5) - 30-day consultation period

1. The notice must be sent free of charge to each leaseholder and the RTA (if there is one).
2. It must include a statement (the 'paragraph b statement) containing:
  - i. for at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works (*note, this does not need to be a copy of the estimates, simply a statement of the amount*);  
And
    - at least one of these estimates must be from a contractor wholly unconnected to the landlord;
    - and where an estimate(s) has been obtained from a nominated contractor, then one of these estimates must be from a nominated contractor;
  - ii. where leaseholders have made observations by the due date, the landlord must provide a summary of them and his responses to them.
3. The notice must:
  - i. specify a (reasonable) place and hours at which all the estimates may be inspected (note, this is an obligation to make all of the estimates received available for inspection, not just the estimates on which the landlord's statement is based);
  - ii. invite observations in writing regarding the estimates;
  - iii. give the address and the date by which observations must be sent;
  - iv. state that they must be delivered by the due date;
  - v. if facilities to provide copies of the estimates are not available at the place specified there, then copies must be provided to any tenant free on request.

### **Duty to have regard to observations**

The landlord must have regard to any observations received by the due date.

### ***3 Award of contracts***

Notification of the award of contracts (Section 20 Notice no. 3) - 21 days response period.

Within 21 days the landlord must send a notice to each tenant and the RTA, which:

- states the reasons for awarding the contract, or giving the place and hours where those reasons may be inspected; and
- give a summary of tenants' observations on the estimates and the responses to them.

This notice is not required where the contract has been awarded to:

- a nominated contractor; or
- the lowest tender.