Anthony Collins solicitors

BUILDING A SAFER FUTURE

Response to Ministry of Housing, Communities & Local Government consultation

on

PROPOSALS FOR REFORM OF THE BUILDING SAFETY REGULATORY SYSTEM

RESPONSE

from

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INTRODUCTION

We welcome the Government's desire to overhaul the building safety regime for higher risk residential buildings ("HRRBs") in line with the Hackitt review following the Grenfell Tower fire.

We have been supporting numerous registered providers, local authorities, arm's-length management organisations (ALMO) and registered social landlords (in Wales) with building safety issues following the Grenfell Tower fire. This has included:

- helping clients with urgent procurements of new contracts to remove ACM and other unsafe cladding and to replace defective fire doors;
- supporting clients with regulatory compliance including liaison with regulators;
- drafting bespoke building safety certification provisions in new planned maintenance contracts;
- advising on legal liability to undertake works;
- advising on service charge recovery from leaseholders and tenants paying variable service charges; and
- helping clients recover costs from contractors for defective building works (including cladding and fire doors) due to breaches of contract.

This response to the consultation has been prepared on behalf of Anthony Collins Solicitors LLP by Kieran Binnie, Associate and Andrew Millross, Partner, with input from colleagues. Kieran has been leading our work on building safety, including supporting numerous client on issues concerning cladding, fire doors and the recovery of costs from contractors. Andrew is the lead author and editor of the National Housing Federation (NHF) Contract Management Guide and other NHF procurement and contracting related publications.

Those involved in the technical, building and housing provision professions are (rightly) likely to have more to say in response to this consultation. We have therefore responded just to the questions where we feel we can make a worthwhile contribution from our "legal perspective" as leading legal advisers to landlords in the public and registered provider housing sectors.

Our hope is that this will contribute to improving the safety of residents in future. If it does so, then we will regard the time and effort involved in reviewing the proposals and responding to them to have been well spent.

If there are any questions about our response Kieran and Andrew can be contacted on:

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Our response to the consultation questions

We comment on the following consultation questions:

Question 1.1: Do you agree that the new regime should go beyond Dame Judith's recommendation and initially apply to multi-occupied residential buildings of 18m or more (approximately 6 stories)? Please support your view

Whilst this is mainly a "technical" question rather than a legal one, the issue is at what point special provision needs to be made for building safety beyond that applying to all buildings. There does need to be some justification for selecting a cut-off point at 18m or more. For example, why not 16m or 14m (or 20m) etc?

The consultation sets out a number of principles (for example, relating to planning for safety, better regulation of construction product quality, extended periods to tackle non-compliance with Building Regulations) which it would be beneficial to apply to all buildings irrespective of their height.

Other proposals (for example, registration, gateways for approving works) would be very bureaucratic to apply to all buildings, so should apply only where there is a clear benefit to this.

Question 1.2: How can we provide clarity in the regulatory framework to ensure fire safety risks are managed holistically in multi-occupied residential buildings.

Any reform of the existing regulatory framework must lead to improved clarity and guidance regarding appropriate fire safety measures, how to assess risk and where duties lie. Whilst outcomes-based regulation (as proposed by Dame Judith) has its place, the existing regime is opaque and, in many instances, provides little assistance. We welcome regulatory reform which improves fire safety, but it is essential that dutyholders are not "set up to fail". Clarity in the new legislation, backed up by appropriate guidance will be essential if this is to be avoided. The guidance should include clear recommendations on the use of specific fire safety measures together with worked examples.

In any new regime it is essential to set out clearly which party has the "primary responsibility" for the common parts, for individual flats and for the building as a whole, and how each of these "areas of responsibility" interface with the other. Risks in one part of a HRRB (eg individual flats) will impact on the safety of the whole building as a whole. The person with primary responsibility needs to be given the "tools" (in terms of access rights and the right to carry out works – see later in this response) to be able to discharge that duty.

If duties are placed on more than one person in relation to specific areas, it needs to be clear where the primary duty lies, and the extent of the dutyholder's duties. The duties of any other person in relation to that area then need to be limited to those things within their control, otherwise there will be a "conflict of duties". There should also be a means for other dutyholders to challenge the primary dutyholder if they do not think that they are discharging their duties properly.

There should also be a clear mechanism for resolving any conflicts between duties imposed and the terms of existing occupancy agreements, enabling contractual terms to be overridden where this is necessary to enable a dutyholder to discharge their duty.

For registered providers of social housing, consideration should be had to providing a Code of Practice to accompany the Regulator of Social Housing's Home Standard, to amplify its requirements in relation to health and safety obligations. Amendments to the Code of Practice on the Governance and Financial Viability Standard could also be made, to make specific reference to the requirement to comply with health and safety legislation and guidance in relation to the obligation to "ensure compliance with all relevant law".

Question 2.2: Are there any additional duties we should place on dutyholders? Please list

In recent times, the pressure placed on local authorities and registered providers of social housing to achieve and demonstrate "value for money" has led to too great focus on the "money" aspect of this and not enough emphasis being given to the "value". Local authorities, particularly, who have faced severe budget cuts, have felt the need to place more weight on price than on quality in tender evaluation.

The drive to lowest price has been exacerbated by the leaseholder service charge recovery rules[1]. For procurements not subject to the Procurement Regulations[2], a landlord has to justify to leaseholders any proposal not to accept the lowest priced tender, even where that tender has been demonstrated as representing the best value for money. In addition, the First-tier Tribunal (Property Chamber) in England and the Leasehold Valuation Tribunal in Wales (which are often comprised of lawyers and surveyors without public sector procurement expertise) have the right to reduce service charges where a leaseholder or tenant paying variable service charges claims that they are not "reasonable". Any costs that are not recovered from leaseholders will, in practice, fall on tenants (either under the Housing Revenue Account or from a registered provider's general funds).

[1] Section 19 Landlord & Tenant Act 1985

[2] The Public Contracts Regulations 2015 ("the Procurement Regulations")

These factors can lead to landlords feeling that they have to prioritise price over quality when procuring refurbishment works, particularly to HRRBs where some of the cost of those works is being recovered from leaseholders through service charges.

Rather than just placing additional duties on duty holders, the government should be looking at how to empower duty holders to prioritise quality without having to be concerned about being unable to recover the full price of the works from leaseholders or fearing criticism from auditors and regulators for not having achieved "value for money". This needs to be balanced against the right of leaseholders to challenge costs that are unjustifiable or disproportionate.

Question 2.3: Do you consider that a named individual, where the dutyholder is a legal entity, should be identifiable as responsible for building safety? Please support your view

Having a named individual will certainly focus the mind of the individual concerned and this is the approach taken in some areas such as data protection. However, there could well be a shortage of "volunteers" for such a role and a risk that the person doing it is not appropriately qualified.

Given the potential repercussions of a failure in this area (i.e. personal injury and potentially death) our view is that the responsibility should be owned by the entire legal entity, with ultimate responsibility lying with the Board or Council, rather than with one named individual.

This is consistent with the approach proposed by the Government in its recent consultation about the Modern Slavery Act. Following this consultation, the Government rejected the concept of a named individual being appointed to oversee a legal entity's responsibilities in this area. This was because the Government wished to emphasise that the responsibility for compliance was that of the whole Board and having a named individual took something away from this.

Any individual who is responsible for building safety needs to have the authority to discharge that responsibility, as well as the technical knowledge necessary to understand building safety issues. This authority will need to be wider than just within the accountable body. It will need to include appropriate authority over other occupiers of the building including "owner occupier" leaseholders.

Question 2.4: Do you agree with the approach outlined in paragraph 66, that we should use the Construction (Design and Management) Regulations 2015 (CDM) as a model for developing dutyholder responsibilities under building regulations? Please support your view.

If, as is being proposed, the duties are to commence from the design stage of a HRRB, then CDM provide an existing model for managing health and safety in construction. CDM already impose duties in relation to building safety, which apply during the construction or refurbishment of a HRRB. The interface between these and any further requirements for HRRBs needs to be clearly set out in the legislation.

In particular, the interface between the role of the Health and Safety Executive ("HSE") in enforcing the CDM Regulations and that of any new building safety regulator needs to be clear. Without this the government is in danger of creating a multiplicity of regulators, with no clarity over which one is actually responsible. This was, of course, one of Dame Judith's criticisms.

The CDM Regulations currently apply, of course, only when a construction project is being undertaken. In relation to ongoing responsibility for building safety, there will only be a "designer" when refurbishment or repair works are being designed and there will only be a "contractor" when works are being undertaken. It may not be that simple just to "import" CDM Regulations concepts into a new set of duties dealing with ongoing responsibility for building safety (in relation to which see also our response to question 3.3 below).

Question 2.5: Do you agree that the fire and rescue authorities should become statutory consultees for buildings in scope at the planning permission stage? If yes, how can we ensure that their views are adequately considered? If no, what alternative mechanism could be used to ensure that fire service access issues are considered before designs are finalised?

This is likely to depend on the role and expertise of the single "building safety regulator" and whether that expertise includes fire safety access (which presumably it will need to if the government is looking to create a single regulator with overarching responsibility for building safety). If the building safety regulator has this expertise, we wonder what consultation with local fire services will add to the process, other than just bureaucracy. If the building safety regulator does not have this expertise, then clearly it is essential for the fire and rescue authority to be consulted.

Question 2.9: Should the planning applicant be given the status of a Client at gateway one? If yes, should they be responsible for the Fire statement? Please support your view?

In relation to this we would simply point out that under CDM where there is more than one "client" for a construction project, it is possible to elect that one of them will treated as the "sole client".

If this is retained, but there is no equivalent rights under HRRB building safety legislation, there is a risk that a client may be faced with duties under that legislation that they are unable to discharge because they are no longer a "client" for the construction (and therefore have their views overridden by those responsible for construction safety under CDM).

Question 2.15: Do you agree that there should be "hard stop" where construction cannot begin without permission to proceed? Please support your view.

This seems to make sense in relation to new build, although there may be aspects of "construction" (for example, the demolition of existing structures and certain ground condition works) which could be allowed to proceed without this. However, if this is implemented in relation to repairs or refurbishment projects, there will need to be a procedure to authorise urgent health and safety works where any delay could prejudice the safety of residents. There will need to be clear exceptions for urgent health and safety works and/or some process for approving those works quickly.

Question 3.3: Do you agree that this is a reasonable approach for assessing the risks on an ongoing basis? If not, please support your view or suggest a better approach

Ongoing building safety is not just about construction, it is also about how a building is used. Compliant fire doors may be installed, but if they are propped open by residents they will be ineffective. Issues of hoarding can create areas where fire can spread very quickly. Belongings left in common areas without authority can lead to fire exit issues. Unsafe domestic appliances could be installed in any flat without the accountable person being aware of this.

The Safety Case will therefore have both "construction" and "housing management" aspects. The proposed dutyholder approach based on CDM does not seem to fit well with the housing management side of this, so further thought is needed in relation to this.

Question 3.4: Which options should be explored, and why, to mitigate the costs to residents of crucial safety works?

Where the need for fire safety works is due to a breach of contract by a contractor (for example, a contractor required to install FD30s fire doors that has installed doors that do not meet the FD30s standard) and this was done within the contractual limitation period under that contract, the landlord may be able to recover the costs of replacing those doors from the contractor. This should be the first option a landlord should consider in relation to recovering the costs of their replacement.

Many property owners have been encouraged by government to buy their properties through significant discounts under the "right to buy". The need meet repair costs is part of the consequence of home ownership. Some of these owners now feel let down by government for having encouraged them to buy their own properties, only to discover that they are having to meet large bills to deal with fire safety issues that eat into a large part of that discount.

If the costs have to be met by local authorities and social landlords, those costs will inevitably fall on current social housing tenants, either through a local authority's housing revenue account, or through their having to be financed through a registered providers general funds. These tenants will either have chosen not to exercise a right to buy or have not been able to do so. It would be unfair to require these tenants to subsidise the costs of works for which property owners are responsible.

Many registered providers of social housing are charitable organisations. They are prevented by law from granting a “private benefit” to people who are not proper charitable beneficiaries. Residents who have been able to buy their own homes through the right to buy scheme may no longer be charitable beneficiaries. If the costs of fire safety works cannot be recovered from a contractor following a breach of contract, then the only practicable alternative is government subsidy towards those costs. Without this, the costs would have to be met from the provider’s general financial resources, leading to a risk of the registered provider acting outside its legitimate charitable objectives.

Currently, Financial Conduct Authority (“FCA”) rules prevent loans being given to leaseholders to help with the costs of the works unless a registered provider is registered with the FCA. If registered providers could provide such loans and charge appropriate interest (which they would need to do to comply with their obligations as charities) without needing FCA authorisation, they might be able to help leaseholders meet the costs of these necessary works if the Government is not prepared to do so.

In relation to transparency, leaseholders (which includes tenants paying variable service charges – we just use the term “leaseholders” here) are already consulted on service charges through an extensive consultation process under the Service Charges Regulations[3]. This involves three stages of consultation for “qualifying works” done under a “qualifying long term agreement” before the works can start on site.

The interface between the Service Charges Regulations and the Procurement Regulations[4] has been problematic for some time. For example, the requirement to serve the first notice on leaseholders before the OJEU (or, post a no-deal Brexit, UK notification service) Contract Notice is placed means that it is not possible to use a pre-existing framework agreement for works where the cost is to be recharged to leaseholders.

The requirement to disclose “unit costs or hourly rates” under the Service Charges Regulations can lead to a large volume of (mostly irrelevant) pricing information having to be made available to leaseholders which registered providers and local authorities would otherwise properly regard as confidential under Regulation 21 of the Procurement Regulations. Although this information is being disclosed after the tender submission deadline, it has to be disclosed before contract award, otherwise consulting leaseholders would be a pointless exercise. In procurement terms, disclosing pricing information before the announcement of contract award is not ideal.

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[3] The Service Charges (Consultation Requirements) (England) Regulations 2003 or in Wales The Service Charges (Consultation Requirements) (Wales) Regulations 2004 ("the Service Charges Regulations”)

[4] See note 2

For procurements subject to the Procurement Regulations, the requirement to award contracts to the tenderer submitting the "most economic advantageous tender" coupled with the fact that service charges must be "reasonable" ought to be regarded as sufficient protection for leaseholders. Where a landlord has followed a procurement process, there is very little discretion over which contractor to appoint. The only thing the landlord can do in response to leaseholder concerns over the identity of the contractor is to discontinue the procurement and start again. Even then, a landlord risks challenge if this is not done for "legitimate procurement reasons".

Leaseholders and tenants paying variable service charges should, of course, be consulted on the specific works to be undertaken to their property, once the scope extent and price of those works has been determined. However, there seems to be little benefit to consulting leaseholders on a procurement process under the Procurement Regulations where the process to select the most economically advantageous tender is one in which, once designed, public sector and register provider sector landlords have very little discretion.

In order for consultation to be meaningful, it would need to be at stage when the procurement is being designed and would need to cover things such as:

- whether to use a framework, and if so which one;
- where a framework is not being used, the weighting between price and non-price elements in the award criteria;
- the procurement process to be used (open, restricted or CPN/competitive dialogue) and the number of tenders to invite;
- the composition of the evaluation panel; and
- the actual award criteria themselves.

This would involve explaining to leaseholders the implications of each of these decisions. In practice, many registered provider and local authority landlords do consult representatives of "stakeholders" including leaseholders about these issues when designing a procurement. This is certainly best practice that we would support. However, we are not sure that there is any benefit in the first two stages of the statutory consultation process (Notice of Intention and Notice of Proposal and Landlord's Proposal), as currently required under the Service Charge Regulations for a procurement under the Procurement Regulations.

Question 3.8: Do you agree that only the building safety regulator should be able to transfer the building safety certificates from one person/entity to another? Please support your view

There are a couple of practical issues that are relevant to this. A business sale could be by either a transfer of assets or a transfer of shares. With a transfer of shares, the "legal owner" of the building will not change.

If the objective of this provision is to limit de facto changes of ownership, is also necessary to prohibit changes of control of the legal entity that is the accountable person.

In the registered provider sector, mergers and group consolidations are common through the statutory transfer of engagements or amalgamation routes under the Co-operative and Community Benefit Societies Act 2014. A transfer of engagements automatically transfers all the property of the transferor society to the transferee. These transfers can now take place freely without requiring consent from the Regulator of Social Housing. Any restrictions on such transfers, including a requirement for regulatory consent from the building safety regulator, would need to be considered against the declassification of registered providers as public bodies by the ONS.

For registered providers with plc funding vehicles in their group and in the commercial sector, change of control provisions may impact on stock exchange requirements for listed entities. This would also need to be considered.

The answer may be simply to require the new building owner following one of these transfers to "re-register" the building within a limited period after the transfer.

Question 5.2: Do you agree with the approach proposed for the culture of openness and exemptions the openness of building information to residents? If not, do you think different information should be provided? Please provide examples.

The Green Paper published on 14 August 2018 included a key theme of "empowering residents". Residents of social housing providers have been understandably concerned about fire safety issues following the Grenfell tragedy.

We believe that residents wish to be reassured that their homes are "safe" and that government bears a high level of responsibility in this. Many residents are suspicious of the motives of a government which, pre-Grenfell, pursued a deregulation agenda to reduce the burdens on business. Government delays in implementing the recommendations of Coroner Francis Kirkham following the Lakanal House fire and in clarifying the ambiguities in Building Regulations Approved Document B are indefensible. If residents are to be given greater powers, then the government must also listen to residents' concerns and assist social housing providers in responding to them.

The lack of visibility on MHCLG's fire door testing programme in particular has caused significant difficulties for social housing providers. This is both in terms of identifying whether GRP doorsets installed at their properties were amongst those which failed testing by MHCLG and seeking to implement door replacement programmes. MHCLG's failure to publish the door test results (other than the report dated 14 February 2019, which offers little practical assistance or clarity) means that social housing providers have had to undertake their own testing programmes (at significant cost). This has also delayed the delivery of works which are necessary for resident safety.

We would therefore encourage full publication of the actual test results of the fire door testing programme undertaken by MHCLG and early publication of the full test results into non-ACM cladding materials.

Question 5.6: Do you think that there should be a new requirement on residents of buildings in scope to cooperate with the accountable person (in the building safety manager) to allow them to fulfil their duties in the new regime? Please support your view.

Whilst it is very easy to suggest imposing a duty on residents to cooperate, it is a much harder question to decide how that duty should be enforced.

The consultation does not make it clear whether this requirement would be part of the health and safety regime, and therefore leading to the risk of criminal sanctions for breach, or whether it would be simply a civil duty.

If it is a criminal sanction and the only penalty is a fine then it is difficult to see how this would be effective, especially where a resident is receiving welfare benefits. Is the government really suggesting that residents should go to prison for failing to cooperate with their landlord? Perhaps this might be appropriate, given the risks involved, but it is not going to be conducive to good relationships between residents and their landlord where the landlord has reported a resident to the building safety regulator for possible prosecution.

If the proposal is simply to create civil rights, then landlords are going to be very reluctant to bring proceedings against individual residents. A duty might be "normative" in the sense of encouraging residents to collaborate voluntarily, but it is difficult to see how it would be enforceable.

Many of our clients experience significant difficulties in gaining access to properties to carry out LGSR gas safety checks and are forced to seek injunctions to enable them do so. One option may be to introduce a similar ground for an injunction, linked to a lack of co-operation in relation to building safety. However, this will have costs consequences for local authorities and registered providers. Additional resources will need to be provided to discharge these additional responsibilities. If they are not, then the only place registered providers will be able to take them from is the new build development "pot".

It may also be appropriate to allow "non-cooperation" to be at least a partial defence for the accountable person or building safety manager. If it is not, then we would be concerned that this is another example of dutyholders being "set up to fail". However, if cannot be a complete defence otherwise the building would continue to be unsafe, with the dutyholder being absolved completely of the responsibility for making it safe.

If a duty is to be created, though, much more consideration needs to be given as to what are the appropriate remedies for breach of that duty, whether criminal, civil or both and how the enforcement of that duty will "play out" in reality.

Question 5.7: What specific requirements, if any do you think would be appropriate? Please support your view.

A key issue that landlords are currently facing is how to gain access to individual properties. either to carry out inspections or to put right things that are creating risk for other residents. This is particularly where flats are "owner occupied", often through having been brought under the right to buy.

People who have "bought" their flats sometimes change their front door, irrespective of whether they are legally entitled to or not. This can compromise fire safety.

For properties with gas, the gas safety legislation[5] does not require a gas safety check to be undertaken on properties occupied by tenants under a long lease (over 7 years). The presence of faulty gas appliances clearly compromises the fire safety of the block as a whole.

A duty should be placed on all residents of HRRBs to arrange for safety checks equivalent to LGSRs (Landlords Gas Safety Records), with the right for the landlord to gain access and carry out a check that the cost of the resident if the resident fails to do so.

Accountable persons, and contractors acting on their behalf should be given an express right to enter onto any part of an HRRB for which they are responsible. This should apply both where it is necessary to investigate whether there are any health and safety issues in a flat and where it is necessary to resolve any that have been identified. The resident should, of course, be given a reasonable opportunity to arrange a convenient time for this (which may need to be, at the resident's option, either a weekend or evening). However, if the resident does not arrange this, the accountable person will need to be given the right to force access in certain circumstances, potentially after obtaining an injunction.

Unless accountable persons are given these kinds of rights, then it would be inappropriate to give them duties in relation to safety which they are unable to fulfil. This would just be setting them up to fail. As set out in our answer to question 5.6, the only option would be to exempt accountable persons from duties in relation to individually owned properties within a HRRB. This would fundamentally undermine most of the benefit of having a single accountable person responsible all aspects of safety within a HRRB, though.

[5] The Gas Safety (Installation and Use) Regulations 1998 (as amended)

Question 6.2: Do you agree that the regulatory and oversight functions at paragraph 315 are the right functions for a new building safety regulator to undertake to enable us to achieve our aim of ensuring buildings are safe? If not, please support your view on what changes should be made

The consultation paper is not very clear as to the exact point at which the building safety regulator should take on responsibility for the construction of a new HRRB. The references to them being involved in the "gateway" stages suggest that they will have oversight of the design and construction process from the outset. If so, this begs the question as to what the role of the Health and Safety Executive (HSE), which is currently responsible for oversight of the CDM Regulations, will be going forward and how this will interface with the role of the building safety regulator.

One option would be to combine the role of the HSE and the building safety regulator so that the HSE is actually the building safety regulator.

Reform of the regulatory regime also offers an opportunity to reconsider the duty of care owed by building control inspectors to building owners and occupiers. Since the House of Lords decision in *Murphy v Brentwood DC*[6], building control inspectors have owed no duty of care to building owners or residents. If a building control certificate is issued negligently, a building owner or resident cannot recover the costs of putting it right from the inspector (or their insurers).

The consequence of this is that building control sign-off can be seen as a "box-tick" exercise (see for instance the 2019 Technology and Construction Court judgment in *Zagora Management*[7]).

The quality of approved inspectors varies greatly. The option of using alternatives to local authority building control officers introduced by the government in 2000 encourages the "race to the bottom" that Dame Judith criticised. Aside from the question as to whether people should be able to "choose their regulator", the "market economy" approach can encourage some inspectors to take a less diligent approach than others in order to "remain competitive".

Establishing a statutory duty of care and enabling recovery of the rectification costs from approved inspectors, where certificates have been issued negligently, should encourage inspectors to take a more diligent approach to issuing building control certificates. This will lead to increased costs, but it is a price worth paying in the interests of keeping residents safe.

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[6] *Murphy v Brentwood District Council* [1991] UKHL 2

[7] *Zagora Management Limited v Zurich Insurance Plc and Others [2019] EWHC 257 (TCC),*

Question 6.3: Do you agree that some or all of the national safety regulator functions should be delivered ahead of legislation, either by the Joint Regulators Group or by an existing national regulator? Please support your view.

Whilst we recognise the urgency of taking action to improve safety in HRRBs, we believe that the importance of this issue means that it needs to be underpinned by legislation. We would therefore urge the government to prioritise legislation so that the new regime is given a statutory basis from the outset.

Question 8.1: Do you agree with the approach of an "inventory list" to identify relevant construction projects to be captured by the proposed new regulatory regime? The support your view

Whilst we are not technical specialists, we suspect that the distinction between "products that are essential to fire safety" and other products "used in construction" is not as clear-cut as the consultation paper presumes.

Whilst there is clearly a priority order, with cladding and fire doors being towards the top of the list, we would think that this is more of a continuum that needs to be tackled until all products used in construction have been properly assessed and certified.

Question 8.4: Do you agree with the proposed approach to requirements for construction products caught within the new regulatory regime? Please support your view

Having publicly available and independent performance specifications which procurers of construction works can use is certainly something that we would support.

For organisations subject to the Procurement Regulations[8], the use of restrictive specifications which limit the number of possible tenderers could be challenged under Regulations 18(2) and (3) of the Procurement Regulations. This prevents a procurement being designed in a way that artificially narrows competition by disadvantaging or favouring particular suppliers.

Requiring products to meet a high performance specification is likely to limit the number of potential tenderers for products that meet that specification. This is also addressed in question 8.5 below.

[8] See note 2

Question 8.5: Are there further requirements you think should be included? If yes, please provide examples?

One of the issues local authority and registered provider procurers face is the prohibition in Regulation 42(12) of the Procurement Regulations[9] on specifying particular products for use in construction. Even where this can be done on an "exceptional" basis, it is necessary to state that "equivalent" products will be accepted.

In practice this means that contractors have to be given significant freedom over the precise products to be used in any construction or refurbishment project where a local authority or registered provider is the client. In some circumstances, this has led to contractors and building materials suppliers proposing lower priced products they claim are "equivalent".

Regulation 42(11) of the Procurement Regulations sets out a hierarchy of technical standards. National standards, including national technical specifications, are some way down this list, and must, again, be accompanied with the words "or equivalent".

These are "single market" provisions designed to maximise competition. They also appear in the GPA[10]. However, they are not concerned with ensuring construction materials used are high quality.

The government's current proposal, even in a no deal Brexit situation, is to retain the Procurement Regulations unamended (other than in relation to the minor amendments necessary to "make them work" after Brexit).

We would encourage the Government to use whatever influence it has with the World Trade Organisation to encourage a review of these provisions so as to enable the specification of particular high quality products, as long as this is done on quality grounds.

Question 9.5: Do you agree that formal enforcement powers to correct non-compliant work should start from the time the serious defect was discovered? Please support your view?

One issue with this suggestion is that the limitation period under the contract under which the non-compliant work was carried out could well have expired by the time the defect is discovered. Whilst there may be a right of action against the contractor in tort, this would not enable the building owner to recover the costs of rectifying the defect, because this would be pure economic loss (see the *Murphy* case referred to in our response to question 6.2 above).

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[9] See note 2

[10] World Trade Organisation Government Purchasing Agreement, which the UK Government is proposing to sign up to post-Brexit.

If government is planning to extend the period within which a building owner can be required to correct defective work, we would also encourage the government to change contract law so that the limitation period under the contract under which that defective work was undertaken is long enough to include that extended period. This will ensure that (subject to the contractor remaining solvent) the costs of rectifying the non-compliant work fall on the contractor who has undertaken that work, rather than on the building owner who may be completely "innocent" in the process.

Question 9.6: Do you agree that we should extend the time limits in the Building Act 1984 for taking enforcement action (including prosecution)? If you agree, should the limits be six or ten years?

A number of building contracts are still entered into just as "contracts" with a 6 year limitation period rather than "executed as deeds" with a 12 year limitation period. Whilst most new build contracts and high value refurbishment contracts will be executed as deeds, contracts for lower value works may not be.

This leads to the possibility that if a 10 year limitation period is adopted, both the building owner and contractor could be prosecuted, but the building owner would not have any remedy against the contractor under the contract for having undertaken that defective work. Whilst the creation of such a remedy would not stop the building owner from being prosecuted, it would give them the means to get the contractor to meet the costs of the works. This could be achieved by extending the limitation period for contract claims, rather than by adopting the shorter 6 year limitation period under the Building Act 1984.

Anthony Collins Solicitors LLP

July 2019