



Social Housing Newsletter Summer 2020

Welcome to our Summer newsletter

As Clarke Willmott's new joint social housing sector leads, we're delighted to welcome you to our Summer newsletter!

In this edition we look at the what's next for the housing market, the Draft Building Safety Article, the Telecommunications Infrastructure Bill, as well as the Cabinet Office's recently published Procurement Policy Note 04/20 setting out further guidance on making payment to "at risk" suppliers. In addition to our regular articles, we've also introduced a new feature 'In the spotlight'. Each issue we will choose one of our team to be the focus for this piece and explain a little bit more about what they do and how they can help you. This issue it's the turn of specialist procurement expert Rebecca Powell. Do let us know what you think.

As online events become the new norm, we've also updated our 'Dates for your diary' section opposite to include links to recent webinars. So if you weren't able to join us for the live event, you can now access the recording.

Internally, our team continues to be very busy and we're pleased to share that we have been appointed to the Places for People Framework for South Yorkshire Housing Association and re-appointed to the CHIC (Central Housing Investment Consortium) – Legal Services Framework.

As ever, we welcome your feedback and if you would like to see a particular area or topic featured in future issues, please get in touch.

Dates for your diary

Please contact events@clarkewillmott.com for more information or if you are interested in attending any of the below events.

- Clarke Willmott's Planning Law Webinar Series – 8 Sept, 10 Sept and 21 Oct - [find out more >](#)
- Connectivity roundtable webinar - 29 Sept
- CW Housing week (online) – November 2020 (watch this space!)



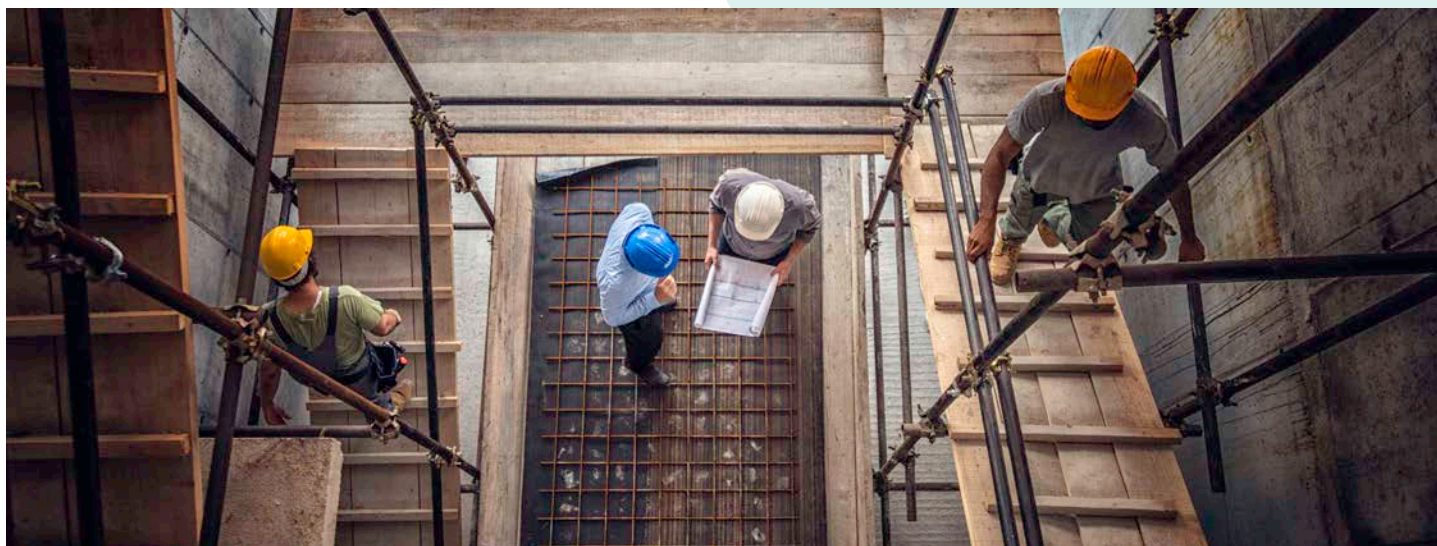
Lindsay Felstead

Partner
0345 209 1804
lindsay.felstead@clarkewillmott.com



Vicky Kells

Partner
0345 209 1459
vicky.kells@clarkewillmott.com



Draft Building Safety Bill: key takeaways for developers, landlords and leaseholders

20 July 2020 saw the publication of the draft Building Safety Bill which the government describes as “*biggest improvements to building safety in nearly 40 years*”.

The draft Bill sets out radical changes affecting the construction and management of all new “higher risk” residential buildings in England — defined as multi-residential buildings taller than 18 metres or more than six stories — with existing buildings being brought within the system on a phased basis. If and when the Bill is enacted, developers, landlords, and leaseholders will need to quickly adapt to ensure they are prepared.

The Building Safety Regulator

The new Building Safety Regulator (BSR), established as part of the Health and Safety Executive, will be at the heart of the new regime. The BSR will introduce an improved safety system and it will be responsible for imposing regulations to ensure this happens. The BSR will, for example, oversee the performance of local authority building control and approved inspectors, advise on changes to the building regulations, and improve the competence of all involved in the building industry, including building inspectors.

In addition, the BSR will have powers to ensure that the new regulations are adhered to. For example, the BSR will have powers to issue stop notices on construction projects it considers to be in breach of the regulations with failure to comply with such notices potentially resulting in unlimited fines or two years in prison. Developers and contractors will need to swiftly adjust to the new rules in order to avoid these potentially harsh consequences.

Dutyholders

One of the key changes which will affect those involved in the construction and management of higher risk buildings is the new dutyholder regime. This aims to ensure that during each phase of the building’s life, those who create a building safety risk are responsible for its management. For example, the dutyholder for the design phase of the build will be the principal designer and for the construction phase, it will be the principal contractor. At each stage of the building cycle, the dutyholder will have to demonstrate compliance with the new regulatory regime and the BSR will be allowed to step in and stop progress when it feels building safety aims are not being met.

Dutyholders will further be required to collate and maintain what is described as the “golden thread” of information which, upon the occupation phase, will need to be handed over to the Accountable Person. The Accountable Person will usually be the building owner, who, alongside the Building Safety Manager — whom the Accountable Person will have to appoint — will be responsible for the fire and structural safety of the building and for ensuring that the building is on top of any advice or non-statutory guidance put in place by the BSR. The BSR will further be able to issue compliance notices, which will oblige Accountable Persons to remedy certain issues by a fixed date with failure to do so potentially resulting in an unlimited fine or two years in prison.

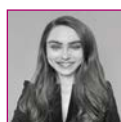
Costs to leaseholders

The provisions of the draft Bill clarify where responsibility for building safety lies but also who should bear the costs of repair. The draft Bill proposes a new “building safety charge” under which leaseholders will be required to cover the costs of some of the new measures brought in under the Bill, such as paying for a Building Safety Manager and the day-to-day management of the building.

Leaseholders will be required to pay the building safety charge within 28 days of when the bill was issued and they will only be allowed to refuse payment if the charge is deemed “unreasonable” or if the freeholder has not provided a clear breakdown of costs.

The building safety charge will be separate to the service charge and it is likely to have huge and negative implications for leaseholders who could be held financially liable for building defects.

For more information please contact:



Alicia Barczak

Paralegal

0345 209 1805

alicia.barczak@clarkewillmott.com

Telecommunications Infrastructure (Leasehold Property) Bill: What it means for you

The Telecommunications Infrastructure (Leasehold Property) Bill is part of the Government's wider strategy to 'level up' the country through the roll out of superfast broadband.

The bill is designed to make it quicker and easier for operators of electronic communications equipment to install and operate their equipment in large residential buildings.

The legislation is currently awaiting its third reading in the House of Lords and is set to be passed in the next few months.

Once in force, the legislation will allow operators to apply to the Tribunal for temporary rights to install and operate equipment (such as fibre optic cabling) in large residential buildings for the benefit of individual leaseholders.

An operator's right to apply to the Tribunal is engaged only where the operator has requested consent for the relevant works from the freeholder of the building, but the freeholder has not responded to that request promptly.

Notice procedure

In order to make an application to the Tribunal, the operator will first have to serve a series of four notices on the relevant freeholder.

Firstly, the operator must serve a request notice under Paragraph 20 of the New Telecommunications Code seeking the right to install and operate the desired equipment.

If the freeholder does not respond to the request notice, the operator must serve three further notices, in accordance with the table below:

Notice	Timescale for service
First Warning Notice	Seven days after request notice.
Second Warning Notice	Seven days after First Warning Notice.
Final Warning Notice	At any time between 7 and 28 days from the service of the Second Warning Notice provided that it is not served less than 28 days from the service of the request notice.

Only if the operator has served the request notice and all three warning notices, and the freeholder has not provided any response, can the operator apply to the Tribunal. A response for these purposes includes any written communication which acknowledges, agrees to or rejects the request for consent.

It is only a complete lack of response over the (minimum) 28-day period which entitles the operator to apply to the Tribunal.

Effect of an Order

The Tribunal can grant the operator temporary rights to install and operate the equipment for the benefit of the leaseholder that requested it. The operator can also extend the services to neighbouring leaseholders provided that this does not have an adverse impact on the freeholder.

The temporary rights will last for 18 months or until a permanent agreement is put in place between the freeholder and the operator.

Practical tips

We would recommend taking a number of steps to avoid being caught out by the new legislation and having rights awarded against you by the Tribunal:

- You should ensure that requests for consent from operators are dealt with centrally though a dedicated person or team. This should enable you to respond to requests quickly and consistently. A holding response should be sent immediately in response to every request stating that you are considering the request and will respond substantively in due course.
- We recommend that it is made clear on your website that you will only accept service of notices at your registered office. The legislation does not provide that notices have to be served at registered office addresses. We have previously seen attempts by operators to deliberately serve notices at smaller local offices to increase the chances of no response being received.
- It may be prudent to ask your residents to communicate with you first before requesting additional services from operators.

For more information, please contact:



Kary Withers
Managing Director
0345 209 1469
kary.withers@clarkewillmott.com



Henry Russell
Solicitor
0345 209 1575
henry.russell@clarkewillmott.com





Does the Chancellor's green energy fund go far enough?

During the Summer Economic Statement, Chancellor Rishi Sunak announced £1bn of funding to improve the energy efficiency of public-sector buildings and a £50m fund to pilot the decarbonisation of social housing through interventions such as insulation and heat pumps.

This is a welcome announcement in many ways for housing associations, tenants and the wider industry. Energy efficiency improvements have been on housing associations' agendas for some time now, and a subsidy from the government to support this will almost certainly be appreciated.

The funding will also provide a boost for local, regional and national economies through trades and supply chains during a time of economic uncertainty. Lower energy bills for tenants should also mean more money in people's pockets, which will have indirect economic benefits.

Also announced during the statement was a £2bn Green Homes Grant which will allow homeowners and landlords to apply for vouchers to spend on making their homes more energy efficient. The funding is likely to cover retrofitting insulation, double or triple glazing and modern heating systems in existing stock.

The grants will cover at least two thirds of the cost, up to £5,000 per household – and for low-income households the full cost up to £10,000.

The Chancellor claimed measures would see up to 650,000 homes retrofitted, create 140,000 green jobs and save households up to £300 per year on energy bills.

While again this is a welcome announcement, it is yet to be confirmed if the programme is open to both social and private landlords and the Government is yet to define 'low-income'.

Further support aimed at the housing sector includes increasing the Stamp Duty Land Tax threshold in England and Northern Ireland to £500,000. Whilst this could be an attractive benefit for potential purchasers, saving them up to £4,500, it is yet to be seen whether the impact will have the desired effect of reviving the flagging housing market, when conditions such as rising unemployment and the availability of mortgage funding are likely to be more decisive factors.

The property sales tax system in Wales is a devolved power. Having replaced Stamp Duty Land Tax in 2018, Welsh homebuyers will see the starting threshold increase for the Welsh Government's Land Transaction Tax rise from £180,000 to £250,000 from 27 July. To further support jobs and house building in Wales, the Welsh Government also announced the allocation of £30m to the Social Housing Programme to provide additional support to boost construction within the Welsh social housing sector.

It is likely that planning applications for new developments will need to focus on the availability of more affordable housing during these economically uncertain times. There is a clear opportunity here to emphasise the importance of carbon savings – both during the development phase and for new housing when it is up and running, bringing sustainable housing and development into the mainstream rather than viewing it as being different from the norm.

In Summer 2020, the government will launch a policy paper setting out its plan for comprehensive reforms of England's planning system to better support the economy and release more land for housing in areas that need it most.

These measures are a positive first step towards helping the country meet its net-zero carbon goals, but will they be enough to keep the housing market on track? The industry will look forward to hearing more details on the plans which are to be announced nearer the launch of the schemes and the impact they will have locally, as well as their sustainability credentials.

For more information please contact:



Bethan Evans

Partner

0345 209 1448

bethan.evans@clarkewillmott.com

COVID-19 recovery: getting public contracts back on track

The Cabinet Office recently published a new Procurement Policy Note 04/20 setting out further guidance on making payment to at risk suppliers for the period 1 July to 31 October 2020.

What did housing associations have to do in response to COVID-19?

Issued in March 2020, PPN 02/20 required housing associations to:

- Urgently review their existing contracts and inform suppliers who they believed were “at risk” that they would continue to be paid as normal (even if service delivery was disrupted or temporarily suspended);
- Arrange the most appropriate payment measures to support supplier cash flow; and
- Pay on the basis of previous invoices, where the contract involved payment by results.

In turn, suppliers had to agree to act on an open book basis and make cost data available to the instructing housing association, as well as agreeing to continue to pay employees and sub-contractors.

What does PPN 04/20 require housing associations to do now?

The PPN makes clear that the Cabinet Office does not view COVID-19 as a short-term crisis and that the supplier relief provisions of PPN 02/20 detailed above could remain appropriate. However, the focus in PPN 04/20 is on recovery and weaning suppliers off this relief to move to a new sustainable operating model. Housing associations are also directed to the Government’s updated **Outsourcing Playbook**, which sets out how housing associations and their suppliers should work together.

PPN 04/20 builds on the earlier PPN 02/20 and requires housing associations to:

- Review their contract portfolio, including where they are providing any contractual relief due to COVID-19 and, if appropriate to maintain delivery of critical services, continue or commence measures in line with PPN 02/20;
- Work in partnership with their suppliers and develop transition plans to exit from any relief as soon as reasonably possible;

- Work in partnership with their suppliers, openly and pragmatically, during this transition to ensure contracts are still relevant and sustainable and deliver value for money over the medium to long term; and
- Continue to pay suppliers as quickly as possible, on receipt of invoices or in accordance with pre-agreed milestone dates to maintain cash flow and protect jobs.

As with PPN 02/20, PPN 04/20 does not automatically entitle a supplier to be paid or otherwise oblige a housing association to offer relief from the terms of the contract. Many housing associations felt that either their charitable objectives prevented them from paying out under PPN 02/20 for services not received or that suppliers were not “at risk”. Nevertheless PPN 04/20 does require housing associations to go through the contract review exercise once more before arriving at any decision. It will be important to ensure there is an audit trail of this exercise for each contract.

Legal advice should be sought before making variations to existing contracts, as making payments to “at risk” suppliers carries risks if the supplier becomes insolvent. Housing associations will also need to ensure that they comply with the provisions of regulation 72 of the Public Contracts Regulations 2015 when making any variations to existing contracts, which may include publishing a modification notice.

Each contract should therefore be looked at on a case by case basis. A comprehensive record of all decisions, the reasoning behind key decisions and actions taken should be kept. Part of this review should also include looking at the impact of a second wave of COVID-19 on the delivery of each contract.

For more information, please contact:



Rebecca Powell

Solicitor

0345 209 1616

rebecca.powell@clarkewillmott.com



What next for the housing market?

LOCKDOWN. A word which has brought a multitude of challenges for so many for us.

For housing associations and local authorities, restrictions issued by the government resulted in construction on new developments coming to a stop, and on-site sales offices closing. But, how does the housing market look now, as restrictions are easing?

The Regulator of Social Housing's (RSH) quarterly survey (covering Jan-Mar 2020) found the pandemic has caused 'unprecedented challenges' for registered providers (RPs), leading to decreased development and housing market exposure. Inside Housing noted in May that economic uncertainty has caused RPs to revise downwards their forecast expenditure on development, while the number of unsold market and shared ownership homes has increased by 21% to 3,072 – the highest level recorded since data was first collected in 2014. However, Fiona MacGregor, Chief Executive of RSH, stated that "the RSH's quarterly survey (based on responses from 215 private RPs which own/manage more than 1,000 homes) shows that the social housing sector has started from a strong financial position to face the current crisis. In the months ahead, providers will need to keep a continuous watch on the risks to their viability and be prepared to take prompt action, particularly their liquidity and exposure to the housing market. We will continue to monitor the financial impacts, including on income collection, and support providers as needed".

Being an avid 'Rightmove' follower, I have to say that there were some days, following lockdown, where no properties were put on the market. But it is encouraging to see more properties (new build open market and shared ownership and second hand) being put on the market daily.

On 13 May, the first day of reopening, the number of home-movers visiting Rightmove returned to pre-lockdown daily levels and was up 4% on the same Wednesday in 2019. Rightmove property expert Miles Shipside commented that, "whilst the market is gearing up for a recovery, it will take time, as safety needs to be the priority".

Demand for housing has been recorded as being high; Rightmove saw numerous records broken in terms of people looking on their site, and people contacting estate agents. It has been reported that property sales in England's housing market are almost back to normal, with 40,000 new sales agreed for the period 13 May to 17 June. However, supply has not increased at the same rate as demand, which has pushed prices up by 1.9% compared with prices just before lockdown. Given we are now receiving an increase in new reservations from our housing association and developer clients alike, it is definitely a seller's market!

Savills reiterate that demand is surging but remain cautious as to whether this demand will be sustained.

Its forecasts envisage a sharp, short economic contraction in 2020, particularly in Q2, followed by a rebound in late 2020/early 2021. If this is the case, it is noted that housing associations and local authorities may be able to offset short-term reductions in rent or sales income with the savings made from delays to new construction and maintenance programmes.

As always, employment and mortgage availability are two key elements that will play a big part in how the housing market will unfold.

So, what is going to help the housing market, particularly the social housing market, keep strong?

Housing associations are re-considering the tenure of properties on new developments. They are also easing any concerns buyers may have, by agreeing to contract riders, allowing either party to rescind the contract if a lender withdraws funding between exchange and completion for a Covid-19 linked reason.

The government has also put in place various schemes to help:

- Stamp Duty 'holiday' in England and Northern Ireland until 31 March 2021 – the threshold at which people start paying stamp duty on their main residence has increased from £125,000 to £500,000. The surcharge payable on second properties has also reduced, starting at 3%, rather than 5%;
- Interest rates are expected to remain lower for longer, which will support mortgage affordability;
- Planning Permissions extended by up to a year (construction sites with planning permission expiry dates between the start of lockdown and the end of the year will have these permissions extended to April 2021), to save developments being 'mothballed';
- Housing associations will get an extra year to build homes funded through the £9bn Shared Ownership and Affordable Homes Programme (they now have until March 2023), in a bid to save thousands of new homes that have stalled;
- Additional grant funding to housing associations and local authorities, with the aim of boosting housebuilding as a much-needed economic stimulus to prevent too deep a recession after the Covid-19 pandemic;
- £1 billion Public Energy Fund
- New Help to Buy scheme announced, which will run from April 2021 to March 2023. As with the current scheme, the government will lend buyers up to 20% of the cost of a newly built home and up to 40% in London;
- 'Eating Out to Help Out' scheme – in order to try and prevent unemployment, 50% off eating out Monday to Wednesday (up to a maximum of £10 p/h);
- £1,000 bonus for employers who take an employee back after the furlough scheme is over, and remain employed through to January 2021; and
- Tax cut for certain businesses from 20% to 5%.

The pandemic has created a shock to both the housing market and the wider economy. The underlying strength of the market and the measures that have been put in place, give hope that it can rebound and continue its previous growth. However, this will remain dependent on the factors that support housing demand, in particular employment levels and the availability of mortgage funding.



Hayley Holland

Social Housing Conveyancing Manager

0345 209 1727

hayley.holland@clarkewillmott.com

Housing law update: It's run out of gas...

Trecarrell House Ltd v Rouncefield [2020] EWCA Civ 760

Court of Appeal - 18 June 2020

In an eagerly awaited decision for landlords, the Court of Appeal have held in the case of that failure to provide a gas safety certificate to a tenant at the tenancy commencement does not preclude the landlord from serving a notice under s.21 of the Housing Act 1988, so long as a valid gas safety certificate had been obtained for the property, and that the certificate was provided to the tenant prior to the s.21 notice being served.

Background

In February 2017, Trecarrell House Limited granted Ms Rouncefield an assured shorthold tenancy agreement. The landlord failed to provide her with a valid gas safety certificate prior to her taking occupation of the property. However, a copy of a gas safety certificate, dated January 2017, was provided to the tenant 9 months later in November 2017.

The landlord served a notice under s.21 Housing Act 1988 in May 2018, and subsequently issued possession proceedings. The proceedings were defended and it was argued that as no gas safety certificate was provided to her before she took occupation of the property, the landlord could not serve a s.21 notice rendering the notice served invalid. This defence was dismissed at first instance in the County Court and an order for possession was made.

Ms Rouncefield appealed the decision, and a Circuit Judge held that the landlord's failure to provide a valid gas safety certificate prior to the tenant taking occupation of the property was not capable of being remedied by providing the certificate at a later date, and therefore the s.21 notice served was invalid.

On appeal to the Court of Appeal, it was held that the correct construction of s.21A and the 2015 Regulations was that the time period for compliance with the relevant regulations was disapplied, meaning that a s.21 notice could be served as long as, at any time before service of the s.21 notice, the tenant was provided with a copy of the certificate that was in force before they entered into occupation, as well as copies of any further certificates from subsequent inspections.

Implications for Landlords

This will be a welcomed decision for landlords, which has resolved a much-debated topic over the last few years.

Failure to provide a gas safety certificate prior to the tenant taking occupation, will **not** permanently preclude a landlord from being able to rely upon section 21 of the Housing Act 1988, so long as:

1. A valid gas safety certificate was in force at the time of the tenancy commencement, and;
2. A copy of this certificate, and any subsequent certificates, are provided to the tenant prior to a s.21 notice being served.

However, despite the welcome news this decision offers for landlords, landlords must still ensure that they comply with their obligations under the Gas Safety (Installation and Use) Regulations 1988 as not only is not having a valid gas safety certificate at the start of the tenancy an irremediable breach, but failure to comply with these obligations is punishable as a criminal offence.

A copy of the relevant gas safety certificate should therefore, insofar as possible, be provided to the tenant at the tenancy commencement, along with a copy of a valid Energy Performance Certificate, which must also be provided prior to a section 21 notice being served.

Landlords should also be aware that despite the current COVID-19 pandemic, the Regulator is clear that gas safety inspections should still be carried out as usual, and if for any reason you will be in breach of your regulatory duties, you will need to advise them immediately.

For further information, please contact:



Lauren Pond

Trainee Legal Executive
0345 209 1708

lauren.pond@clarkewillmott.com



Other news from our team

Recent deals

United Welsh

Despite uncertainty due to coronavirus in May, United Welsh agreed a new £50m loan with Scottish Widows enabling them to fund 700 new homes in South Wales. Banking and finance specialists Fraser MacRae and Danielle Bowen completed the loan documentation within a tight timescale and Vicky Kells, Hannah MacAulay and Christopher Matthews dealt with the charging of 342 properties as the first tranche of security required on completion of the loan agreement.

"We met the loan facility completion date which was a wonderful result. The securitisation was done quickly and efficiently. We also achieved the best values we could for the properties. The pre-charging reviews paid off."

Sara Davies, Loan Security Officer, United Welsh

Tender wins

CHIC (Central Housing Investment Consortium) – Legal Services Framework

- Lot 1 – Corporate, Governance and Finance
- Lot 2 – Housing Management

Contract start – 1 July 2020

Places for People Framework (for South Yorkshire Housing Association)

- Lot 1 – Property
- Lot 3 – Corporate Finance

Contract start – 1st July 2020

Rhondda Housing Association

Legal support to RHA in respect of your Term and Revolving Credit Facility (RCF) agreements with Barclays Bank plc.

Latest webinars

Landlord's repair obligation during COVID-19

Speakers: Danny Dedman and Muz Mian

Date: 22 June 2020

Link: <https://youtu.be/sinlixScU2E>

Housing issues during COVID-19

Speaker: Lindsay Felstead

Date: 24 June 2020

Link: <https://youtu.be/IAhc8t6Sj6Q>

How to get the best energy pricing for your residents

Speakers: Clakre Willmott's Tara Moseley & Kary Withers, and Arjan Dosanjh from The Monarch Partnership

Date: 27 July 2020

Link: <https://youtu.be/W0LJD0d1aUs>

Profile

Name: Rebecca Powell

Job title: Partner

Area of expertise: Procurement

Has worked at CW for (Length of time): One year

How did you end up specialising in procurement law?

I trained at a law firm in the City and one of my seats was in non-contentious construction procurement. I qualified into that department and never looked back!

What do you help clients with?

I help contracting authorities and bidders comply with public procurement law. This can be anything from reviewing procurement strategies and advising on exemptions through to advising on end to end procurement procedures.

What is your top tip for your contacts at the moment?

The pandemic has thrown up a whole host of issues and will affect contracts and procurements for a long time to come. Now is a good time to review procurements you have in the pipeline to make sure there's adequate time to get new contracts in place. As we move towards autumn, urgent procurements can still be undertaken in accordance with the provisions of the procurement regulations, but not every contract will qualify to be able to be put in place urgently. We are also still waiting to find out how procurement will look post 31 December 2020, so it's important to know what contracts are coming up for re-tender in the next year or two and have plans in place to deal with post-pandemic and post-transition issues.

Has the pandemic raised any particular issues for you and your clients?

The Cabinet Office's Procurement Policy Notes requiring contracting authorities to review their contracts to determine whether they should be making payments to at risk suppliers has thrown up some tricky issues. For example, there have been a lot of questions about future proofing existing contracts and contracts due to be re-procured in case of a second wave. In addition, contracting authorities are also asking to what extent they need to reassess their force majeure, business continuity and contingency plans and abandonment and termination provisions. This involves working closely with clients to understand what issues they faced during lockdown and working with them to design future procurements to take account of these issues.



Rebecca Powell

Solicitor

0345 209 1616

rebecca.powell@clarkewillmott.com

If you would like to receive future editions of our **Social Housing Newsletter** or if you have any comments or suggestions for the newsletter please contact: news@clarkewillmott.com