



Legal update — March 2017

Projects and construction Key issues for Asset Management professionals



In an ever increasingly regulated environment, housing providers need to ensure that they are compliant with all legislation when it comes to managing their housing stock.

Here are some key compliance issues to consider:

Procurement

In September 2016, the Crown Commercial Service (CCS) published a Standard Selection Questionnaire (SQ) which amalgamates the CCS's standard Pre-Qualification Questionnaire (PQQ) and the European Single Procurement Document (ESPD). Procurement and Asset Management Directors must use this document for all works, services and supplies procurements and must inform the CCS if they wish to deviate from the wording. In February 2017, the CCS issued a revised version of the SQ, provided further guidance on standard questions that may be asked and when deviations from the standard drafting need to be reported.

The SQ focusses on mandatory and discretionary grounds for excluding tenderers in line with the Public Contracts Regulations 2015 (PCR 2015) to ensure that the selected bidder meets the underlying principles of EU procurement law. Tenderers should be excluded if they are culpable in the last 5 years of participating in a criminal organisation, corruption, fraud, terrorist offences, money laundering or child labour or human trafficking. Procurement and Asset Management Directors are advised to incorporate these questions into sub-threshold procurement exercises, to ensure 360 degree adoption of the social objectives underlying the SQ's questions.

Use of Dynamic Purchasing Systems

Many social landlords are taking advantage of changes to the rules around Dynamic Purchasing Systems (DPS) made in PCR 2015. DPS operate similarly to frameworks, whereby suppliers are invited to join a panel after passing criteria set by the client. DPS provide more flexibility than frameworks as new suppliers can join the DPS after it is set up or reapply for membership if they have been previously

unsuccessful. When a Contracting Authority wants to award work under the DPS, it must invite all current DPS members to bid for the work. For this reason, DPS are perhaps best for works or services where there are a limited number of suppliers in the marketplace. Nonetheless, DPS are becoming increasingly popular in asset management procurements. For social landlords who are required to consult with leaseholders prior to letting a contract, DPS provide further flexibility, as suppliers nominated by leaseholders may join the DPS provided they meet the joining criteria.

New Framework Alliance Contract (FAC-1)

The Association of Consultant Architects, who publish PPC2000 and TPC2005, have recently published FAC-1, the first standard form contract that combines a framework agreement with a strategic alliancing document. FAC-1 therefore provides for collaborative working at all levels of the contract documentation which can improve value and provide savings for all the parties. FAC-1 has been trialled by social landlords including Futures Housing Group and Amicus Horizon, and is ideally suited for procurements of multi-supplier frameworks.



Source: Fotolia

Measuring performance via KPIs

Many asset management contracts provide for Key Performance Indicators (KPIs) to measure the service

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provider's performance, with non-performance allowing the Employer to trigger a formal review process, or in some cases to terminate the contract or reduce the term or scope of works. There have been a number of recent disputes where parties have failed to measure or keep accurate records of KPI reviews, which limits the Employer's right to exercise their contractual remedies. It is important to agree a comprehensive set of KPIs before the start of the term so that they have a material impact on the delivery of the contract and also to ensure that KPIs are being regularly measured in accordance with the contract.

Payment of contractors and supply chain

One of the less well-known changes made by PCR 2015 was a requirement for Contracting Authorities to include terms in all their contracts ensuring that all valid and undisputed invoices were paid within 30 days. Most contracts based on standard forms of contract (JCT, PPC, etc) will comply with this timetable, but Employers must take care with bespoke payment terms. PCR 2015 also requires Contracting Authorities to ensure that their contractors impose equivalent 30 day payment terms in any sub-contracts, and that those sub-contractors must also have equivalent terms in their sub-contracts.

Modern Slavery Act

The Modern Slavery Act 2015 (MSA) came into force on 29 October 2015 and requires any business operating in the UK with a total annual turnover in the excess of £36m to publish a slavery and human trafficking statement each financial year which needs to be done within 6 months of meeting this qualification. For Procurement and Asset Management Directors, the MSA statement needs to outline the relevant steps a business has taken in order to ensure slavery and human trafficking is not taking place in the supply chain of their reactive maintenance programmes. Registered Providers which fail to comply with the requirements of the MSA could face an injunction which if defied would place them in contempt of court and subject to an unlimited fine. Potential reputational damage and the achievement of social value aims make this important legislation to comply with.

Regulatory and compliance obligations

- The HCA through its governance and liability standards requires all Registered Providers to produce an Asset and Liability Register. Failure to do so may lead to a potential regulatory downgrade so it is of paramount importance for Registered Provider to put one in place. However, keeping the list up to date does present an opportunity to Asset Management Directors to survey the contracts they have in place. The Asset and Liability Register is therefore not just a box to tick for compliance with the HCA but also a value-adding exercise for Asset Management Directors

which may allow them to reduce risk, costs and delays across a broad spectrum of projects.

- Contracting Authorities must publish data annually on their websites setting out the percentage of contracts where suppliers were paid within 30 days of an undisputed invoice, as required by PCR 2015.
- Social landlords must publish an annual Value for Money report.
- Social landlords must make annual declarations that they comply with all current law, including their procurement obligations under PCR 2015, the health and safety regulations and environmental legislation.

The above are just some of the areas of concern for Asset Management Directors. Proactive steps need to be taken to ensure asset management programmes are procured and administered in compliance with all statutory obligations.

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