



## **SECTION 20 CONSULTATION FOR PRIVATE LANDLORDS, RESIDENT MANAGEMENT COMPANIES AND THEIR AGENTS**

### **Consultation for qualifying works to a building and qualifying long-term agreements.**

#### **PURPOSE OF THIS BOOKLET**

This guide outlines the protocols for landlords, resident management companies, and their managing agents operating in the private sector in England and Wales to consult their lessees and tenants before undertaking certain types of expenditure funded by service charges. Throughout this guide, we use the term 'leaseholder' to encompass both leaseholders and tenants.

It's important to note that this guide does not detail the procedures for landlords in the social housing sector, where public notice may be necessary before entering into contracts.

Furthermore, this guide does not aim to provide a comprehensive interpretation of the law; only the courts can offer that. Additionally, it does not address every possible scenario. If you have any uncertainties regarding your rights and responsibilities, it is advisable to seek tailored advice. There exists a significant body of court and tribunal rulings on these matters.

#### **DEFINITIONS AND ABBREVIATIONS USED**

**Landlord:** The term "landlord" in the context of consultation encompasses "any individual vested with the authority to enforce payment of a service charge" (Section 30, Landlord and Tenant Act 1985). Consequently, depending on the arrangement of leases and property titles, a landlord could take on various forms, including:

- Freeholder
- Head lessee
- Resident Management Company
- Right to Manage Company

The definition also encompasses "superior landlords," extending to planned expenditures by the overarching freeholder of mixed residential and commercial developments, where residential leaseholders are obliged by their leases to contribute, either directly or indirectly. Such expenditures are subject to consultation if they meet the qualifying criteria.

**Regulations:** The Service Charges (Consultation Requirements) (England) Regulations 2003.

**Leaseholder:** Refers to long leaseholders and tenants of properties within the private sector.

**Tribunal:** Either the First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

**The Act:** The Landlord and Tenant Act 1985, which contains the primary legislation regarding consultation in Section 20.

**RTA:** Recognized Tenants Association. An RTA is an association acknowledged by the landlord or by a Rent Assessment Committee under Section 29 of the Landlord and Tenant Act 1985.

## **INTRODUCTION TO THE PROCEDURES**

The law mandates that leaseholders who pay variable service charges must be consulted by landlords before undertaking qualifying works or entering into long-term agreements for service provision. Detailed regulations, established under section 20 of the Landlord and Tenant Act 1985 (amended by S151 of the Commonhold and Leasehold Reform Act 2002), outline the specific procedures landlords must adhere to. These regulations, known as the Service Charges (Consultation Requirements) (England) Regulations 2003, have similar counterparts in Wales.

The Regulations organize consultation procedures into four schedules, each pertaining to different contracts. This document explains only schedules 1, 3, and 4 (part 2), excluding those relevant to councils and other social housing landlords.

The Regulations outline requirements under three main headings:

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

## **QUALIFYING WORKS**

These are 'activities conducted on a building or any other premises,' encompassing repairs, maintenance, or enhancements. The inclusion of enhancements in the definition of qualifying activities does NOT permit a landlord to charge for enhancements unless the lease specifies a liability for enhancement costs. VAT on activities must be factored into the estimated cost.

Landlords are obligated to seek input if these activities will exceed £250 for any single contributing leaseholder. Therefore, in properties where service charge contributions vary, the landlord must consult all leaseholders if any one of them would be responsible for over £250. Failure to consult may prevent the landlord from recovering costs exceeding £250 per leaseholder.

A 2012 High Court case (Phillips and others v Francis) raised questions about whether there exists a cost threshold below which landlords are exempt from consulting on qualifying activities. However, in October 2014, the Court of Appeal overturned this ruling, reinstating the "sets approach," meaning section 20 consultation should be conducted for individual sets of qualifying activities without regard to time periods or service charge years.

The Court of Appeal also provided guidance on identifying a single set of qualifying activities. This determination relies on factual assessment and consideration of all relevant circumstances. The following factors, though not exhaustive, are likely to be relevant:

1. Location of the work;
2. Whether the work falls under the same contract;
3. Timing of the work;
4. Whether the work is related or disparate in nature;
5. Whether all work is covered by one contract;
6. The planning process and rationale behind the implementation of the work are also pertinent.

## **QUALIFYING LONG-TERM AGREEMENTS**

A qualifying long-term agreement refers to a contract established by the landlord with an entirely independent entity or contractor for a duration surpassing 12 months. (Agreements predating October 31st, 2003, are exempt.) The pivotal criterion is the minimum duration of the commitment. Put differently, it denotes an agreement that extends beyond a 12-month period.

Landlords are obligated to engage in consultation if the sum payable by any individual contributing leaseholder under the agreement within a fiscal period exceeds £100. Consequently, in properties with disparate service charges, the landlord must consult all leaseholders if any of them would be liable for over £100 in any given year. This sum is computed based on the leaseholder's comprehensive contribution stemming from the agreement, inclusive of VAT.

Failure to conduct consultation may result in the landlord being unable to recoup more than £100 per leaseholder in any fiscal period towards the expenses incurred under the agreement.

Examples of potentially qualifying long-term agreements encompass:

- Agreements impacting the entirety of the building (e.g., elevator maintenance, entry-phone systems, waste management, or upkeep contracts).
- Janitorial and landscaping services.
- Insurance.
- Utilities.
- Management agency contracts.

Some of these services may have only one realistically feasible provider. Nevertheless, consultation is imperative unless dispensation from compliance has

been granted by the Tribunal. Contracts not classified as qualifying long-term agreements include:

- Employment contracts.
- Agreements between a parent company and its subsidiary, or among subsidiaries of the same parent company (defined as per the Companies Act 2006).
- Contracts with a duration of less than five years that were established when there were no leaseholders or occupants at the property (for instance, in a new development).
- Agreements exceeding twelve months that were executed before October 31st, 2003.

## **QUALIFYING WORKS UNDER A LONG-TERM AGREEMENT**

If the long-term agreement involves the execution of property-related works, such as general maintenance outlined in a schedule of rates agreement, and these works will cost any individual leaseholder over £250, a distinct consultation process must be conducted as outlined in Schedule 3. The initial consultation under Schedule 1 regarding the agreement itself does not exempt the works from consultation. This obligation for consultation regarding works also extends to cases where long-term agreements were made before October 31, 2003, without the requirement for consultation at that time.

## **SOME GENERAL RULES ABOUT THE PROCEDURES**

### **Who should be consulted?**

Consultation notifications must be sent to individual leaseholders as well as any Resident Tenants' Association (RTA).

### **Nomination of Contractors by Leaseholders and RTAs**

Landlords are required to invite leaseholders to nominate potential contractors for consultations conducted under Schedule 1 and Schedule 4 (Part 2) of the Regulations. The Act does not mandate that nominated contractors be completely unrelated to the leaseholder or RTA, nor does it require landlords to be informed of any existing relationships. However, if such a relationship becomes known, it may influence the selection of contractors.

### **Nominated Contractors**

- If an RTA makes a single nomination (regardless of whether a leaseholder also nominates), the landlord must attempt to obtain an estimate from the nominated contractor.
- If a single nomination comes from only one leaseholder (regardless of RTA nomination), the landlord must seek an estimate from that nominated contractor.
- If multiple nominations come from different leaseholders (regardless of RTA nomination), the landlord must try to obtain an estimate from:

1. The contractor with the most nominations, or
  2. If no contractor receives the most nominations but two or more receive the same number, from any of those contractors, or
  3. If there are multiple nominations from various leaseholders but no contractor has more than one nomination, from any nominated contractor.
- If multiple nominations come from both a leaseholder and an RTA, the landlord must seek estimates from at least one nominee from each.

## **Nomination of Contractors and Criteria for Appointment**

The Act does not specify the terms under which landlords approach nominees for estimates. However, landlords typically require certain fundamental criteria from contractors, such as public liability insurance, tax exemption certificates, VAT status confirmation, copies of health and safety policies, and proof of company status. Landlords must justify their selection procedures to the Tribunal, and failure to do so may result in the consultation procedure being deemed invalid.

The expansion of contractor nomination aims to enhance transparency and competition to ensure fair and reasonable charges to leaseholders. Therefore, landlords should exercise caution in initially structuring contracts, such as those covering multiple estates, which might limit the nomination of smaller contractors.

## **How Many Notices Must Be Served?**

Landlords may need to serve consultation notices on leaseholders at three stages:

- Pre-tender stage: Notice of intention
- Tender stage: Notification of landlord's proposals (estimates)
- In some cases, notice of reasons for awarding the contract.

## **Inspection of Documents**

Landlords must provide reasonable places and hours for document inspection, free of charge, and allow copying if possible. If copies cannot be made onsite, landlords must provide them free of charge upon request. While certain facilities must be provided free of charge, administrative costs may be recoverable through service charges.

## **Duty to Consider**

Landlords must consider written observations received during the consultation process, with no statutory definition provided for "having regard to." In some cases, landlords must respond to observations within 21 days. If a contract is awarded to a contractor not submitting the lowest estimate nor nominated by a leaseholder or RTA, the landlord must provide written reasons or specify where reasons can be inspected.

## **Connections Between Landlords and Contractors**

Regulations require at least one estimate from a contractor "wholly unconnected" to the landlord. Various connections are defined, including familial relationships and business associations.

## **Timing of Notices**

Notices should allow a clear period for leaseholder response, with additional days recommended to account for postal delays.

## **Duration of Consultation**

The entire process may take several months due to various factors, including response times for notices, tender invitations, contractor vetting, consideration of observations, and additional response periods for leaseholders.

## **THE ROLE OF THE TRIBUNAL AND DISPENSATION**

The Tribunal possesses authority to address matters outlined in Section 20, which encompasses the ability, as per S20ZA (I), to waive consultation requirements in specific instances "if satisfied that it is reasonable to dispense with the requirements."

In a 2013 case (*Daejan v Benson*), the Supreme Court delineated its stance on how Tribunals should handle requests for dispensation from landlords. The objective of the Regulations is to safeguard lessees from (a) financing inappropriate works or (b) overpaying. When evaluating dispensation requests, the Tribunal should concentrate on whether the lessees suffered prejudice in either aspect due to the landlord's failure to adhere to the Regulations (relevant prejudice).

When a landlord fails to comply with the Regulations, disputes often arise regarding whether lessees would experience relevant prejudice if unconditional dispensation were granted. While the legal burden rests with the landlord throughout, the factual burden of demonstrating some relevant prejudice lies with the lessees. They are obligated to articulate what they would have stated, considering their complaint is that they were deprived of the opportunity to do so. Once the lessees present a credible case of prejudice, the Tribunal should expect the landlord to refute it and should be sympathetic to the lessees' position.

To the extent that the lessees will suffer relevant prejudice, absent compelling reasons to the contrary, the Tribunal should essentially require the landlord to reduce the amount claimed to fully compensate the lessees for that prejudice.

The authority to grant dispensation isn't absolute. The Tribunal can provide dispensation on suitable terms and may impose conditions, such as requiring the landlord to cover the lessees' reasonable costs associated with the dispensation application.

## WHAT IS THE PENALTY FOR NON-COMPLIANCE?

Although the primary aim of the consultation process is to solicit the opinions of leaseholders regarding the landlord's proposals, the provisions effectively constrain the landlord's ability to recoup costs if they fail to adhere to the requirements.

Should the landlord fail to conduct the consultation procedures correctly, they may be unable to recover service charges beyond the statutory minimum amounts—£100 per leaseholder annually for long-term contracts, or £250 per leaseholder for building works.

Consequently, the landlord would be responsible for covering the shortfall themselves, which could have severe ramifications for an RMC or RTM company, potentially leading to insolvency and an inability to meet their obligations to leaseholders.

## SCHEDULE 1 TO THE REGULATIONS CONSULTATION FOR QUALIFYING LONG-TERM AGREEMENTS

Failure by landlords to adhere to these procedures may result in limiting each leaseholder's contribution towards the expenses of supplied goods, services, or completed works under the agreement to £100 annually. Leaseholders and, if applicable, Resident Tenants' Associations (RTAs) must be consulted regarding the selection of contractors. The consultation process comprises three stages:

### 1. Pre-tender Stage:

- Notice of intention (Section 20 notice) initiates a 30-day consultation period, requiring landlords to inform leaseholders and RTAs about:
  - The nature of works or services to be provided.
  - Reasons justifying the necessity of the agreement.
  - Reasons for carrying out qualifying works, if applicable.
  - Deadline for submitting written observations.
  - Leaseholders' right to nominate contractors within 30 days.
- If description copies aren't accessible during inspection times, landlords must provide them free upon request.
- Duty to consider submitted observations.
- Landlords seek estimates from their chosen contractors and endeavour to obtain estimates from leaseholder- or RTA-nominated contractors.

### 2. Tender Stage – Preparation of Landlord's Proposals:

- Landlords prepare at least two proposals, one from an independent contractor.
- If nominations are received, proposals must include estimates from leaseholder- and RTA-nominated contractors.
- Notification of Landlord's Proposals: A 30-day consultation period follows, during which landlords must notify leaseholders and RTAs, providing:
  - Statements of relevant matters.
  - Information on proposed parties, costs, duration, and agent details.
  - Copies or inspection details of proposals.

- Duty to consider observations.
- 3. Award of Contract Notification:**
- Within 21 days of agreement, landlords must inform leaseholders and RTAs about:
  - Reasons for contract award or inspection details.
  - Summary of received observations and responses.
- Duty to consider observations.

This notice isn't required if the contract is awarded to a nominated contractor or the lowest tender. If statements and responses aren't readily available, landlords must provide copies upon request.