

**IN THE FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

REF:

RE: SECTION 20ZA OF THE LANDLORD AND TENANT ACT 1985

**AND RE: [ALL] RESIDENTIAL LONG LEASEHOLDERS OF PROPERTIES OF
WHICH THE LONDON BOROUGH OF BARKING AND DAGENHAM ARE THE
REVERTIONERS**

B E T W E E N:

LONDON BOROUGH OF BARKING AND DAGENHAM

Applicant

- and -

**LONG RESIDENTIAL LEASEHOLDERS OF THE
LONDON BOROUGH OF BARKING AND DAGENHAM SUBJECT TO
COMMUNAL ELECTRICITY AND GAS SUPPLIES**

Respondents

STATEMENT OF CASE

Application

1. This is an application by the London Borough of Barking and Dagenham ("Barking and Dagenham") for dispensation in relation to agreements that Barking and Dagenham intend to enter into for:

- The supply of electricity to blocks and estates and street properties for landlords' lighting, staircase lighting, lifts, estate lighting, boiler rooms, heating and communal services such as door entry systems and fire alarms serving the residential leasehold properties set out in Appendix 1.

- The supply of gas to the central boiler room on estates, communal block boilers and communal supplies on smaller blocks serving the residential leasehold properties set out in Appendix 2.
2. The Respondents to this application are the lessees noted in Appendices 1 and 2. A sample lease of 11A Braintree Road, Dagenham, Essex, RM10 7EA as attached at Appendix 3.

Background

3. The Applicant currently purchases its gas and electricity through LASER (a Company owned by Kent County Council), which procures energy on behalf of local authorities. The Applicant's current contract expires on 30 September 2024. The Applicant intends to enter into a new agreement for the supply of gas and electricity with a specialist energy procurement broker, like LASER, to take effect once the Section 20 process has completed, to allow them to purchase energy supplies ready for use from October 2024 which will offer the best available prices over the next 2 years.

The Framework Agreement

4. The Applicant intends to enter into a new framework agreement with LASER as the Council's energy broker for the energy supply contracts under that framework. The central purchasing authority with whom the Applicant would enter a contract will be responsible for purchasing energy from energy companies and managing energy contracts on behalf of the Applicant from 1 October 2024.
5. LASER will be the contracting party in terms of the Framework Agreement and Barking and Dagenham would be a participating authority. Once Barking and Dagenham confirms that it will access supplies through the

framework agreement and confirms its buying strategy, the central purchasing authority instructs the supplier when to purchase energy on forward markets and short-term markets for Barking and Dagenham and other participating organisations in advance of the October 2024 supply date to better manage risk or take advantage of downward price movements also during the supply period. This becomes the "energy commodity" price that Barking and Dagenham pays within invoices for gas or electricity in October 2024 and subsequent years, which is the weighted average of the forward and short-term purchases made.

6. The energy supply company invoices LASER for the supply of energy and then LASER invoice Barking and Dagenham for their supply, together with its own fees for fully managing the energy supply.
7. The tender for the framework agreement for the energy suppliers complies with the Public Contract Regulations 2015 and Public Procurement (Amendment etc.)(EU Exit) Regulations 2020 SI 1319 and will be awarded on a Most Economically Advantageous Basis, which includes a rigorous evaluation of non-energy commodity price elements, financial standing and terms and conditions.

The benefits of using a buying organisation

8. Energy markets are complex and volatile, making them liable to sudden price fluctuations which are often linked to real or perceived threats to supply and demand that can significantly vary prices on a daily basis. A significant part of the energy price payable is market-related, a key variant and influencing factor is the wholesale commodity price. Due to its volatility, the energy market cannot be index linked and true cost savings accrue directly from a lower absolute outlay. Given the nature of the

energy market and influencing factors such as the increasing move to renewables, carbon reduction measures, taxation, reduction in generating capacity and increased reliance on energy imports, it is unlikely that the opportunity for any absolute cost reduction will occur on a consistent basis.

9. The effectiveness of the framework agreement methodology is derived from the ability of public sector authorities to, in effect, work together and collectively buy energy on the wholesale market through a central purchasing body that aggregates and purchases gas and electricity commodities when market conditions are favourable. The ability to purchase 'chunks' of energy over longer periods of time avoids the high-risk strategy of single day purchasing typically associated with fixed price, fixed period tendering.
10. Using a public sector buying organisation such as LASER allows Barking and Dagenham to aggregate the Council's and residents' required energy consumption with the buying organisation's other customers to secure energy in a cost effective and risk managed way. It is cost effective because through aggregation at scale an organisation like LASER can secure lower prices from the wholesale energy markets than Barking and Dagenham could secure on its own; the options in relation to energy are more attractive as contracts can be shaped differently than Barking and Dagenham can do on its own, for example street lights can be aggregated into the agreement, using energy at night-time when generators wish to sell and helping Suppliers balance their day and night time shape. It is risk managed it enables central purchasing authority to forward buy energy from a supplier in the run up to the supply start date, thus hedging against energy market volatility at the contract start date and due to the

aggregated volume, these purchases may be done more frequently than Barking and Dagenham could do on its own.

Consultation issues

11. It would not be practical for leaseholders to be consulted on every occasion that LASER instructs a supplier to forward buy energy on Barking and Dagenham's behalf as by the time the consultation process has been concluded, the prices would no longer be available. Indeed a requirement to consult would render participation with a buying organisation led procurement process unworkable.
12. Furthermore, the prices received during the forward purchasing process would not necessarily be the same as the final contract price to Barking and Dagenham residents but rather components of the final price, which, as noted above, would be a product of the forward buying decisions taken in the run up to the contract start date. Other aspects of pricing are regulated by government, such as distribution and use of network costs (pipes, wires and metering).
13. In such circumstances, the process of providing a detailed proposal, inviting observations and responding to those observations as required by paragraphs 4, 5(2) and 7 of Schedule 2 of the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) ("the Regulations") respectively, would render the whole energy supply contract process unworkable. Neither estimates received nor contract offers would be held for the length of time taken to consult.

14. Barking and Dagenham intends to enter into a new framework agreement with LASER or to take effect from 1 October 2022 in respect of which a Find a Tender (FTS) will have already been served and therefore there is no need to serve a further FTS in respect of Barking and Dagenham's intended new contract.

QUALIFYING LONG TERM AGREEMENTS ("QLTAs")

15. Section 20 of the Act provides that:

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either –
 - (a) complied with in relation to the works or agreement, or
 - (b) dispensed with in relation to the works or agreement by (or an appeal from) the appropriate tribunal."

16. Qualifying long term agreements are defined in section 20ZA as follows:

- (2) ... "qualifying long term agreement" means ... an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

17. Section 20 imposes a limit on the amount of service charges recoverable where the requirements have been neither complied with nor dispensed with.

18. Regulation 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) ("the Regulations") applies section 20 to qualifying long term agreements (QLTAs) if:

(1) relevant costs incurred under the agreement in any accounting period exceed an amount which results in the relevant contribution of any tenant, in respect of that period, being more than £100."

19. The Procurement policy note PPN 08/20 and the Public Procurement (EU Exit) Regulations 2020 SI 1319 provides that:

(1) (2) Where an FTS is required to be given of the relevant matters to which a qualifying long term agreement relates, the consultation requirements for the purposes of section 20 and 20ZA as regards the agreement, are the requirements specified in schedule 2.

Consultation - The relevant regime

1. The energy supply contracts Barking and Dagenham intend to enter into are of a sufficient value that it would require FTS and accordingly the relevant consultation is Schedule 2 of the Regulations. However, Barking and Dagenham will not be giving FTS for the contracts it enters into because it will rely on the public notices served by the central purchasing authority when they set up the framework agreements which Barking and Dagenham will access to obtain their own contract.

Dispensation - Schedule 2

Notice of Intention

2. Barking and Dagenham will be serving Notice of Intentions relating, inter alia, to the energy supply contracts. Barking and Dagenham will be able to comply with all of the consultation requirements as set out in paragraph 1 of Schedule 2 other than the requirement to explain why Barking and Dagenham cannot invite nominations. This is because the consultation

provisions anticipate that a FTS will be given whereas for the reasons set out at paragraph 19 above, Barking and Dagenham will be relying on notices that have already been given by LASER

3. Barking and Dagenham therefore seeks dispensation from paragraph 1(2)(d) of Schedule 2 to the Regulations.

Landlord's Proposal

4. Barking and Dagenham will prepare proposals in respect of the proposed agreement. At that time the identity of the central purchasing authority will be known but for the reasons set out above, the costs of the gas and electricity supplies will not be known.
5. Barking and Dagenham therefore seeks dispensation paragraphs 4 to 8 of Schedule 2 of consultation requirements for qualifying long term agreements on the basis the landlord cannot reasonably prepare a proposal.
6. Barking and Dagenham seeks dispensation as set out above in respect of their proposed contracts because the tender process for energy procurement is incompatible with elements of the consultation process.
7. It is respectfully submitted that in these particular circumstances that dispensation be granted unconditionally as the lessees will not suffer any prejudice if dispensation is granted.

Dated this day of 24 August 2022

Judge & Priestley

JUDGE & PRIESTLEY LLP