

## Construction focus: The Building Safety Fund - Procuring remedial works

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The BSF sets out a seven-stage process for registering with, and securing funding from, the BSF, as follows:

1. Registering with the fund.
2. Decision on eligibility.
3. The first-stage funding application.
4. The second-stage funding application.
5. Funding agreement.
6. Commencement of remedial works - at the time of writing, the deadline for remedial works to have commenced on site is 30 September 2021.
7. Completion of remedial works.

## How are payments made?

Funding will typically be made available to building owners in two instalments:

- 80% following the second-stage funding application process, ie the scope of works and detailed costs have been established and a building contract has been signed; and
- 20% at practical completion.

Where pre-contract funding is required to fund initial cost outlay, up to 10% of the total eligible costs may be paid over at registration stage, subject to satisfying certain criteria.

## Stages 1 and 2: Registration and eligibility

As we highlighted last month, BSF funds are only available to building owners where the buildings meet certain eligibility criteria. Following the initial expressions of interest in the fund and once basic information as to likely eligibility has been established, claims will progress to stages 3 and 4.

## Stage 3: First-stage application

This stage involves completion of an application form and consideration by MHCLG of the information provided. As part of the application/eligibility process, building owners will be required to submit full details of the building, including location, plans and building footprint. MHCLG will also require details of service charge provisions and leases to establish that the costs to be covered by the BSF would otherwise be borne by leaseholders.

## Stage 4: Second-stage funding requirements

As part of a second-stage application, building owners are required to present MHCLG with a firm proposal for remedial works, with detailed costs and supporting substantiating information.

MHCLG requires that all professionals appointed in relation to remedial works are 'competent professionals'. In order to satisfy this requirement, the relevant professional must:

- be qualified in their field;
- be a member of a professional body (such as RIBA or the RICS);
- hold appropriate professional indemnity insurance;
- be knowledgeable, with significant experience relevant to the remedial works; and
- have sufficient experience to be recognised as having a successful track record in delivering similar projects.

It is vital that building owners familiarise themselves with the detailed requirements of MHCLG and ensure that they (and their appointed competent professionals) keep records of all of the information required to be made available to MHCLG. The BSF application guidance sets out in detail the information which must be collated and retained or disclosed during the pre-construction and construction phases such as:

- Evidence that a competent professional has certified in writing that the design of the remediation works complies with the BSF's technical requirements.
- The specification or employer's requirements, together with written sign-off by a competent professional, including information on the fire safety classification of any replacement cladding material, any replacement or existing (if retained) insulation and any replacement or existing (if retained) sheathing board. Confirmation from a competent professional that the remedial works are sufficient and that there are no 'scope gaps'.

- A project directory of existing and proposed professional team members.
- Appointment documentation including scopes of service and fees.
- Written evidence of competence for all professional team members, signed off by the building owner or by the appointed competent professional. Evidence of membership of relevant professional bodies (such as the RICS) and relevant track records or experience must also be retained.
- Confirmation that appropriate levels of professional indemnity insurance are maintained. Evidence of PI certificates and policy terms must be kept. Notably, all members of the professional team must have insurance with a minimum limit of £1m or of no less than the total cost of the works (whichever is higher). BSF guidance also states that the insurance must not have any exclusions for fire safety or cladding, which is a particularly onerous requirement in the current insurance market, where many insurances are being renewed with such exclusions. If cover cannot be obtained at the required levels or without these exclusions, MHCLG must be notified.
- Records of any limitations on liability agreed with any professional involved in the remedial works.
- Evidence:
  - that planning permission for the works is not required; or
  - evidence of the approval, or a plan which includes timelines for obtaining approval.
- Evidence of statutory approvals must be kept on file including any approvals of highways authorities, Network Rail, utilities providers, etc.
- An explanation of the procurement strategy is required to be submitted, along with an explanation on how the works are being tendered, ie whether there is to be a competitive tender or whether the works will be negotiated with a particular contractor.
- Detailed costs information must be prepared and submitted to confirm the total costs associated with the remedial costs, as well as details on eligible versus ineligible costs, ie the total costs which the BSF will cover and those that it will not. A competent professional must confirm that the contract sum for the remedial works is reasonable given the scope of works and market conditions.
- A competent professional must provide confirmation to MHCLG of the programme for the works.

A requirement of the funding that can sometimes be overlooked is the need for each leaseholder or any commercial occupier deemed to be an 'economic actor' to declare that they have not exceeded the limit of funding that can be received on their behalf from the government.

Any leaseholder who uses their property for financial gain - for example, letting it out or using it solely or primarily to operate a business, will be classed as an economic actor and will have to make a formal declaration that they have not reached the (approximately) €335,000 maximum allowance allowed under the *de minimis* subsidy control rules. This sum is calculated taking account of any other government funding received by that entity over the current and two previous financial years. It can take time for leaseholders to respond to a declaration request and, if any have exceeded the limit, then the amount of funding available will be reduced accordingly.

## Stage 5: the grant funding agreement

Once all of the above information has been provided and reviewed by MHCLG, and costs have been substantiated against the MHCLG's benchmark costs, a formal decision will be made on funding and, where the application is successful, the building owner will be required to sign a grant funding agreement. In addition, the building owner will be required to procure that certain of its professionals, including the cost consultant, provide a duty of care warranty to MHCLG.

Following the signature of the grant funding agreement, the building contract can be concluded.

Any building contract for remedial works for which a BSF funding application has been made must include the following:

1. Where the contract sum is £1m+, a cost consultant must be named within the contract as being the party responsible for administering valuations and monitoring costs. The cost consultant must be a competent professional.
2. The defects liability period must be a minimum of 12 months.
3. The building contract must include a retention of at least 5% until practical completion, and at least 2.5% until the end of the defects rectification period. This is an important point to note when using certain forms of JCT contract (such as the JCT Design and Build Contract), where the default retention percentage is only 3% unless stipulated otherwise.
4. The contractor must maintain adequate professional indemnity insurance cover if they have any design responsibility (a minimum of £1m or a level equivalent to the value of the remedial works, whichever is higher). Building owners should also ask contractors to confirm that their professional indemnity insurance policies do not contain exclusions related to cladding or fire safety.
5. There must be an arbitration or adjudication procedure for dispute resolution in the contract.
6. The contract must be executed as a deed.

## Stage 6: Commencement of remedial works

As noted above, the current deadline for the commencement of remedial works on site is 30 September 2021.

All residents and leaseholders must be informed of the proposed commencement date for the works at least two weeks before commencement. Evidence of communication of the start date must be provided to MHCLG.

During the construction phase, MHCLG requires monthly reporting, with reports to be submitted no later than seven working days after the end of every month. It is almost inevitable that the scope of works will need to be varied during a remedial works project, as said works are uncovered on site. Central to the monthly reporting will be the process for establishing, and costing, variations to the agreed scope of works. MHCLG will consider funding variations through the BSF provided that the contract does not require the cost of such variations to be borne by the contractor. A formal application for costs associated

with a variation must be made to MHCLG, together with substantiation by the cost consultant, who will be expected to interrogate the contractor's costings before applying to the BSF for additional funds.

The cost consultant will also be required to keep detailed records of the proportion of the contract sum which is attributable to eligible costs and those costs which are ineligible. It is for these reasons that MHCLG requires the cost consultant to provide a warranty to MHCLG.

## **Stage 7: Completion of remediation works**

The duration of the remedial works will, of course, depend on the extent of works required. In the usual way, once works are complete, they will be certified as having reached practical completion and building control will need to satisfy themselves as to compliance with building regulations. Evidence of compliance with building regulations must be provided to MHCLG prior to the final payment being released.

Building owners must notify leaseholders when remedial works are complete.

### **Key pointers when acting for building owners who are undertaking remedial works for a project in respect of which a BSF application has been made**

- Read the small print: building owners and professionals appointed by building owners to manage and coordinate remedial works need to make themselves familiar with the BSF and its various annexures. As set out above, the BSF includes detailed and specific requirements for successful applications.
- Assemble a professional team which meets the competency and other requirements of the BSF.
- Seek legal advice on the contract documentation to be used to appoint the contractor and associated professionals, to ensure that the requirements of the BSF are properly reflected in legal terms and scopes of service.
- Make sure that the cost consultant in particular is clear on its responsibilities under the grand funding agreement and the BSF, in terms of record keeping and reporting.
- Keep records of all of the information requested by MHCLG to ensure an audit trail and report regularly to MHCLG.
- If MHCLG requirements cannot be met, communicate this to MHCLG as early as possible to check that it will not prejudice the application.
- Communicate with leaseholders. Not only is this a requirement of the BSF, it is also the responsible thing to do.

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