



under the spotlight

How green is your valley?

"With potential areas of interest ranging from contaminated land to renewable energy – via waste and landfill - the construction sector is at the heart of the drive to clean-up contamination and pollution, reduce greenhouse gas emissions and improve energy efficiency, as well as the moves to greener energy and sustainability" comments David Rayner, the Head of Birkett Long's Environment and Energy team.

When David started practising environmental law towards the end of the 1980s, his work concentrated on what might be called the 'traditional' and 'heavy' environmental issues of contamination, water pollution, waste, nuisance and the permits that were needed for certain operations. Today, although those aspects of the work are still relevant, the emphasis is much more on sustainability, energy efficiency and renewable energy.

The Birkett Long Environment and Energy team is a cross-discipline body of lawyers who can assist with construction matters, corporate transactions, terms and conditions, employment, property, waste and recycling and dispute resolution as well as the permitting regime. The obvious areas that affect those involved in construction include:

- waste disposal/recycling/landfill
- energy efficiency and sustainability
- contamination and pollution
- green energy installations and infrastructure
- nuisance

We have yet to see what the impact of the Government's 'Green Deal' will be on those who wish to carry out energy efficiency improvements to their premises – whether residential or business – but we can be fairly certain that regulations, and building regulations in particular, are likely to get tougher and that energy prices are likely to continue to rise.

There are good costs-saving reasons for going 'green', even for those who are sceptical about climate change. With its dedicated Environment and Energy team, Birkett Long is ideally placed to advise the construction sector.



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Construction Law

NEWS AND ADVICE FROM BIRKETT LONG

Are you getting your retention money?



Many construction contracts contain retention clauses but it is not always easy to recover the cash once the contract is complete.

Retention clauses offer a form of security that the works carried out have been completed properly. The retention monies may be deducted by the employer from amounts due to a contractor and by contractors on amounts due to sub-contractors.

Retention monies are usually between 3% and 5% of the total value of the work. Half is usually released on practical completion of the construction works, the remaining half is usually paid when the defect liability period has ended and all defects have been made good, or at the time of the final account

payment. The difficulty in obtaining payment tends to be with the second half of the retention monies. This is because the date when the payment becomes due is often a long time after the works have been completed. The defect liability period would be at least one year and if you are a sub-contractor involved in the early works, your works may be completed a year before practical completion. We have seen several instances where retention monies are treated as discounts, especially by main contractors, who will often only pay up if they are presented with a claim.

Sub-contractors should be wary of this because retention monies can add up to significant amounts. They are not always aware that if not paid on the due date, interest becomes payable. If all matters with regard to the contract have been resolved, then it is unlikely that retention monies can be disputed.

If a simple request to the contractor does not meet with payment, then adjudication proceedings can be commenced. However, court proceedings or insolvency proceedings, by way of the service of a statutory demand, can sometimes be more effective. At Birkett Long we offer a fixed fee service for court proceedings and the service of statutory demands to recover retention monies. Contact us if you would like assistance with collecting retention monies or to discuss when they may be due.



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Forthcoming Birkett Long events

- **26 February 2013**
The financial jigsaw - putting the pieces together
A free seminar with expert investment, tax planning and wealth management advice
- **7 March 2013**
Green breakfasts
Preparing for the green economy and climate change

- **12 March 2013**
Paying care home fees?
If so, you may be entitled to reclaim them

For more details on any of these seminars or to register your free place, email seminars@birkettlong.co.uk or visit www.birkettlong.co.uk/events

Public procurement explained

There has been widespread publicity of the recent decision by the Government to cancel the West Coast Main Line public procurement process. As a result of the cancellation and the need to re-run the process, considerable costs will be incurred.

However, many people are still unaware of the public procurement process and how it affects them. This is relevant to the construction industry because many major construction projects are carried out for public authorities where a public procurement process needs to be followed.

Public procurement is the process used by public authorities to purchase goods, works or services. The definition of a public authority is sometimes in doubt, for example, recently it was held that Eurotunnel was not a public authority and therefore was not subject to the process.

The regulations apply to the supply of goods, carrying out works, contracts for services and other specific types of contracts, such as framework agreements. Some contracts for services do not have to follow the full procedure. The regulations apply to many construction contracts and often cover professional services such as design, structural engineering and surveying, depending upon the value of the work involved.

There are two categories of contracting authorities. The first includes central and local government authorities, and police and fire authorities. The second includes other bodies which are financed, or managed by, a body falling within the first category. The following value thresholds apply. This means that the regulations only apply to contracts where the value is over these amounts, net of VAT.

● Schedule 1 - Authorities	
Supply contracts:	£113,057
Services:	£113,057
Works:	£4,348,350
● Schedule 2 - Other contracting authorities	
Supplies:	£173,934
Services:	£173,934
Works:	£4,348,350

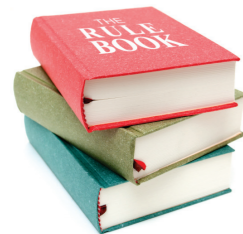
If the full regulations apply, then a notice of the intended contract must be published in the Official Journal of the European Union. The contracting authority must also follow one of four procedures: the open procedure, the restricted procedure, the competitive dialogue procedure or the negotiated procedure. There are minimum time limits which have to apply to the procedures and considerable regulations governing them. Following the procedure, there are other regulations governing the reporting and de-briefing of the process that led to the award of a contract. All tenderers are provided with a notice setting out the decision and relevant information. A

standstill period follows, where the contract cannot be entered into; this allows unsuccessful tenderers an opportunity to take action if they believe regulations have been breached. If there has been a breach, or it is believed that there has, ultimately it is possible to bring proceedings in the High Court to challenge the decision. The High Court can suspend a procedure if a decision has not been made, set aside a contract award or simply award damages. However, any such proceedings have very short time limits within which to take action.

This is a very brief outline of this complex area of law but hopefully provides an overview of the process that has to be followed, its applicability and the contracts to which it applies.



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Our experience

in public procurement

The public procurement process can raise many legal issues for construction companies, professional services providers and others who are involved in tenders and contracts. The following are just some of the examples of the work we've undertaken at Birkett Long in this complex area of law.

- We advised a contracting authority on the documentation required and process for inviting bids for a public contract
- We issued proceedings for a client who was removed from a tender process in breach of the regulations. The local authority accepted liability and agreed to

commence the procedure again and pay our client's costs

- We helped a client to calculate the value of services to be provided and advised on whether the services fell within the regulations
- We gave advice to a client with regard to the possible remedy where an error had occurred in the understanding of a tender document

For more advice on any aspect of the law surrounding procurement, please contact Peter Allen from our construction law team. Peter's contact details are shown above.

Meet the team

Claire Wiles

Claire principally deals with commercial contract disputes, which include construction disputes as well as property litigation and injunctions.

Claire studied for a BA Hons in Law and Marketing (1990 - 1993) at DeMontfort University, Leicester and for the LPC at Westminster University, London in 1998 - 1999.

Prior to joining Birkett Long in April 2006 Claire worked as an account manager for an IT and Telecommunications company. She left to study on the LPC in 1998 and in 1999 joined a City firm as a paralegal.

She commenced her training contract with that firm in 2000, qualifying two years later. Claire worked as a solicitor at the same City firm until joining Birkett Long in 2006.

She has experience both of the High Court and the County Court, as well as alternative dispute resolution forums and a large public inquiry. Claire's clients include businesses and private individuals.

Claire was recently appointed as a Governor at the Chelmsford County High School for Girls.



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