The calculation of surveyors’ fees relating to the exercise of statutory powers in connection with land and property

RICS guidance note, Scotland

1st edition
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This is a guidance note. It provides advice to RICS members in Scotland on the appropriate procedures to follow to calculate fees relating to the exercise of statutory powers in connection with land and property. *RICS Valuation – Professional Standards January 2014* defines a guidance note as:

‘Further material and information on good practice appropriate for particular types of circumstances. Where procedures are recommended for specific professional tasks they are intended to embody ‘best practice’ and are procedures which, in the opinion of RICS and IRRV, members should normally adopt in order to demonstrate the required level of professional competence.’

Where recommendations are made for specific professional tasks, these are intended to represent ‘best practice’, i.e. recommendations which in the opinion of RICS meet a high standard of professional and ethical competence.

Although members are not required to follow the recommendations contained in this guidance note, they should take into account the following points.

Where an allegation of professional negligence is made against a member, a court or tribunal may take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the member had acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each member to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this note, they should do so only for good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice. Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect.

This guidance note seeks to establish a robust framework that chartered surveyors, in both the public and private sectors, can work within for many years to come and so any revisions will be limited. Equally, the aims of the guidance note incorporate being widely accepted by members, being sufficiently flexible to cope with atypical cases, avoid delay and associated costs, and recognising that members require to be properly rewarded for the quality of the advice sought and time taken (and thus to retain and attract high-quality members for the future). It also recognises that, uniquely, there is a third party involved, not just in the agreement of the fee, but also its payment and that that third party, i.e. the acquiring authority, is itself subject to strict auditable standards and so has to ensure that it is fully accountable for all expenditure on surveyors’ fees.
Document status defined

RICS produces a range of professional guidance and standards products. These have been defined in the table below. This document is a guidance note.

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<tr>
<td>Standard</td>
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<tr>
<td>International Standard</td>
<td>An international high level principle based standard developed in collaboration with other relevant bodies</td>
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<td>Practice Statement</td>
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<tr>
<td>RICS Practice Statement</td>
<td>Document that provides members with mandatory requirements under Rule 4 of the Rules of Conduct for members</td>
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<tr>
<td>RICS Code of Practice</td>
<td>Document approved by RICS, and endorsed by another professional body / stakeholder that provides users with recommendations for accepted good practice as followed by conscientious practitioners</td>
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1 Introduction and scope

1.1 Until the issue of this guidance note, Ryde’s Scale has been used in Scotland as the main basis for the calculation of appropriate reimbursement to a claimant by an acquiring authority for the surveyor’s fee incurred in respect of handling a claim for compensation following the use of compulsory purchase order (CPO) powers. However, the Scale was formally abandoned outside Scotland in c.2002 and an RICS guidance note was issued shortly thereafter.

1.2 This guidance note offers updated guidance to RICS members working in Scotland on the options now available regarding the agreement of an appropriate basis of charge.

Transitional arrangements

1.3 This guidance note is effective from 1 May 2014. Any new CPO/compensation instructions accepted after this date are subject to this guidance note. Cases up to this date should be completed under any previously-agreed fee basis.
2 Fee guidance

2.1 The initiative to agree fees should come from the member at the commencement of the commission. As with the acceptance of most types of instructions, it is good practice to agree the fee, or the basis of the fee, at the outset and accordingly this should be undertaken both verbally and in writing in conjunction with the client and ideally the relevant acquiring authority. This action should remove or, at least minimise, any scope for misunderstanding or dispute at a later time.

2.2 The member should demonstrate to the acquiring authority that the proposed fee basis is reasonable and proportionate relative to the complexity of the claim. Equally, it should be borne in mind that while all compensation cases are complex some are more complex than others. Therefore, the member should ensure that the work is undertaken by a surveyor with experience commensurate to the instruction in hand. While a variety of fee bases are possible (see section 3), it is likely that an hourly charge basis, exclusive of reasonable expenses and VAT, will be appropriate in most cases. It is recognised that members undertaking work in this niche and highly complex area require a host of professional, technical and ‘soft’ skills and, as a consequence, it would be reasonable to have regard to the following:

- The fee should in all cases be proportionate to the size and complexity of the claim and be commensurate with the time, effort, and expertise required to deal with the case. For schemes involving a number of similar claims (e.g. Part 1 claims) a quantum reduction or cap may be appropriate.
- If travelling costs (including the time spent) of a surveyor travelling long distances to undertake the case are claimed, it will be necessary to demonstrate that reimbursement is appropriate. If a claimant proposes to use an out of area member, it would be wise to agree the reimbursement of travel expenses with the acquiring authority before they are incurred. The member will also be expected to make every effort to minimise those expenses in compliance with the general duty of claimants to mitigate costs.
- Where the claimant chooses to use a team of advisers, or has changed advisers, it should be recognised that the ultimate fee amount may not fully cover the claimant’s full outlay. Equally, members require to ensure that their fee allocation from the total fee is clear from the outset of the instruction.

2.3 In compensation cases, the method of agreeing and the payment of professional fees is unusual. Normally, at the outset of a commission the member will agree the fee basis with the client and at the completion of the instruction a fee will be issued to the client and paid thereafter. However, with compensation cases, while the member has a client, i.e. the claimant, the fee is payable by the acquiring authority as part of the client’s claim by way of rule (6) of section 12 of the Land Compensation (Scotland) Act 1963. Thus, ideally, the fee basis needs to be agreed with two parties – the client and the acquiring authority.

2.4 Accordingly, members undertaking this type of work should ensure that in all cases the basis on which they propose to charge fees, the arrangements for payment and any subsequent changes are agreed in writing not only with the client but also with the acquiring authority. Further, if members wish to avoid or reduce the possibility of a dispute at a later stage, they should adopt the contents of this guidance note and ensure that these steps are taken at the outset.
3 Bases for calculating fees

3.1 For most cases, it is anticipated that one of the following fee bases will usually be used to calculate the member’s fee, always subject to agreement between the parties involved:

- time spent multiplied by an hourly rate
- percentage of the compensation received (provided that the matter is settled by negotiation and is not determined through legal proceedings where the surveyor involved is acting as an expert witness, and where relevant RICS requirements are in force)
- a predetermined ‘fixed fee’ arrangement where the scope of the work can be clearly defined or
- on the basis of the charging arrangements agreed from time to time with the utility companies.

3.2 The above bases are not meant to be proscriptive or exhaustive but indicative of the main fee base options available. Thus, not all of the above bases will be appropriate for every type of claim. Therefore, it is of the utmost importance that, whatever it may be, the basis for calculating the fee is agreed at the outset of the commission with both the client/claimant and the acquiring authority. However, it is strongly recommended that the hourly rate option is adopted, whenever possible.

3.3 The hourly rate adopted and agreed by the parties will normally comprise the surveyor’s normal rate for valuation and negotiation instructions with the work being undertaken by a surveyor having the appropriate experience commensurate to the commission and will be inclusive of secretarial and other support services and overheads but exclusive of reasonable expenses and VAT. Further, the member should recognise the length of time required (which quite often will be months if not years) to complete the instruction and thus may wish to consider agreeing a means of regularly reviewing the hourly rates in the agreement where cases are likely to be lengthy. In addition, the use of making applications for Advance Payments of Compensation should also be considered, as any such payment would include 90% of the surveyor’s fee.
4. The member’s fee is part of a much wider claim in which the statutory onus is on a claimant to prove actual loss. Thus, it will be necessary for members to take great care in every case to accurately record the time fairly and reasonably incurred and the nature of the work carried out in relation to a compulsory purchase claim. In many cases, the time spent working on a claim is likely to form a significant factor in the assessment of the fee. It will also be necessary for members to be required to verify and justify the time spent working on a claim. The acquiring authority may well wish to audit the documentation as:

(a) transparency in this process is required and
(b) the acquiring authority itself is subject to audit and thus requires to be satisfied that it is fully accountable for all expenditure incurred.

4.2 By agreeing a clear and comprehensive justification for the fee basis, and thus the fee itself, members will assist in the timeous resolution of the claim or, if the claim is disputed, then the member can provide robust documentation for the relevant arbitration body to consider.
5 Disputes

5.1 Surveyor’s fees are an item that should be included in a compensation claim and for that reason CPO law provides that if the parties are unable to reach agreement, having exhausted all other avenues, the dispute should be referred to the Lands Tribunal for Scotland. However, it is hoped that by adopting the practices described in this guidance note such disputes will be rare. Members may be reluctant to advise clients to instigate a Lands Tribunal application if the only disputed item of the claim is the amount of the surveyor’s fee, which the acquiring authority should reimburse. Thus, consideration is being given to investigating more suitable alternative dispute resolution mechanisms including use of the RICS Dispute Resolution Service and the appointment of a suitable and independent auditor.

Scope of works

5.2 Existing legislation/case law currently lags behind the more advanced acquisition and procurement procedures that many acquiring authorities in Scotland now adopt. This is especially so with regard to pre-scheme investigation works, which allow the acquiring authority to reach its justification(s) for its preferred scheme. In addition, design and build contracts now involve the contractor much more so in directly dealing with accommodation works at an early stage.

5.3 Accordingly, defining the scope of the member’s work (and its commencement) is important and this is directly related to the instigation of ‘The Scheme’. Thus, members need to recognise that while clients/potential claimants may wish to engage an agent at an early stage as a consequence of preliminary investigation works (and there are many good reasons for doing so), acquiring authorities in Scotland are of the view that they are under no legal obligation to pay such fees incurred to the landowner – that obligation only comes into force once vesting has occurred and gives rise to a valid claim. However, case law in certain circumstances does provide for the recovery of reasonable ‘disturbance’ costs that were incurred prior to vesting. In such cases, the trigger point for claiming fees remains the date of vesting, but if compensation is agreed for such disturbance costs incurred prior to vesting, then fees in respect of such items can then be included in the compensation. Thus, on accepting a CPO/compensation instruction, the member is advised to enter into early engagement with the acquiring authority to agree all aspects of the fee bases/arrangements.

5.4 Equally, it would be unusual for objectors to CPOs to be able to recover the costs of objection and, in any event, fees incurred in connection with an objection are governed by separate rules. Nevertheless, it is recognised that material to the compensation negotiations would be, among other things, discussions regarding accommodation works.

5.5 RICS Scotland considers that this blurring of pre-scheme and post-scheme activity potentially creates situations where affected property owners may incur non-compensatable fee expenses. This is in conflict with the compensation ethos that, as far as money can provide, the party should be left no better nor no worse off after the scheme than before the scheme. Accordingly, it is considered that a significant flaw exists in the current regime. This needs to be resolved for the benefit of the general public in accordance with the RICS Royal Charter. RICS Scotland will continue to press all authorities in Scotland that possess compulsory purchase powers, particularly Scottish Government, Transport Scotland and the Utility Companies, to that end.
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