



EXPLANATORY NOTES

RICS Short Form of Consultant's Appointment for Designated Services explanatory notes

Scotland
May 2022

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1 Introduction

The RICS Standard Form of Consultant's Appointment and the RICS Short Form of Consultant's Appointment provide the basis for a contract between a client and a consultant. They are suitable for use where a consultant (generally a chartered surveyor) is engaged on construction project related commissions. The RICS Short Form of Consultant's Appointment for Designated Services (the Designated Form) has been developed to provide an appointment that is better suited for services of a 'specialist nature', i.e. for services that are not directly related to the works being carried out.

The Designated Form is designed to be used with the RICS Services noted below. The Designated Form could be used to engage other professionals in providing specialist services, or to provide services other than those noted below, such as surveys for maintenance purposes. Care should be taken by users to ensure the proposed Services are appropriate for use with the Designated Form.

The RICS Services recommended for use with the Designated Form are:

- Reinstatement Cost Assessment Services
- Technical Due Diligence Services
- Dilapidations Services
- Lender's Independent Monitoring Services
- Building Surveyor Services (for projects relating to asset management/insurance/miscellaneous)
- Corporate Restructuring and Recovery Services
- Expert Witness and Single Joint Expert Witness Services and
- Neighbourly Matters Services.

If the Designated Form is proposed for use with a client who is a 'consumer', i.e. a person who is not acting in the course of a business (for example, a home survey), a consultant must be aware of the requirements of the *Consumer Rights Act 2015*, the *Unfair Contract Terms Act 1977* and other legal requirements governing consumer contracts. In such cases, the Designated Form may require amendment.

Appendix A sets out a glossary of terms relevant to the appropriate RICS Services. Appendix B sets out a table illustrating the RICS Services recommended for use with the appropriate RICS Form of Consultant's Appointment.

RICS members are obliged to record the terms of their appointments in writing. The Designated Form has been published to facilitate this as, generally, written contracts – where properly considered – provide more certainty and lessen the potential for dispute between parties than purely verbal agreements.

These explanatory notes are for guidance only and do not form part of the Designated Form.

2 General

2.1 Style

The Designated Form has been structured to allow easy completion and quick reference. The terms are set out in the body of the Designated Form and the Appointment Particulars (the Particulars). The Particulars are the primary source of project-specific information.

2.2 Apportionment of risk

Detailed consideration has been given to the apportionment of risk between the Client and the Consultant. In common with other standard forms of appointment used within the construction industry, the Designated Form includes limitations of liability, some of which may not always be commercially acceptable to the Client. It is suggested the Consultant should seek to limit its liability when services are provided.

However, the amount to which liability is limited should be reasonable and take into account the insurance available to the Consultant and the likely cost to the Client should the services be provided negligently. The Designated Form assumes that a limitation of liability will be negotiated between the Consultant and the Client and included in the Particulars. To provide for unlimited liability within the Designated Form, the parties should insert 'Unlimited' in the appropriate section of the Particulars.

2.3 Applicable law

The Designated Form is governed by the law of Scotland. The Designated Form is suitable for projects in Scotland only and should not be used on projects in any other jurisdiction.

2.4 Reliance by third parties

It may be that, if the Consultant produces a report or reports as part of the Services, the Client would want the Consultant to allow a third party to rely on such reports. This may be achieved by a letter of reliance by the Consultant to the third party (allowing the third party to place reliance on the reports as if it were the Client) or by the Consultant readdressing the report to the third party. Any such requirement of the Client would need to be considered carefully as such a letter of reliance or re-addressing of any report would potentially expose the Consultant to additional liability to that third party.

3 Setting up and preparing the Designated Form

3.1 Parties

It is essential that the names and addresses of the parties to the Designated Form are correctly recorded.

In relation to limited companies or limited liability partnerships, the address of their registered office should be recorded in this part of the Designated Form.

It is also advisable to record the company registration number alongside the address. This will avoid confusion if one or more of the parties change their name or move their registered address.

3.2 Completion of the Particulars

It is vital that the parties complete the Particulars in full. The Particulars set out information required and the various options available to the parties. It is in the interests of both parties to complete the Particulars in full prior to the execution of the Designated Form.

Where the Particulars require a description of the Project, it does not have to be lengthy, just enough to identify the Project with certainty. In most cases the address of the Project will be sufficient for the description, but care should be taken when the Project only encompasses part of a property.

The Designated Form contains marginal notes that are intended to provide brief instructions on how to complete the Appointment. The notes do not form part of the Contract. The parties should refer to these notes when completing the Particulars.

3.3 Fees and payment

It is important that the Fee section of the Particulars is completed with care. Payment is a fundamental term of the Designated Form.

The Particulars enable the parties to insert a lump sum fee for the Basic Services or an hourly/daily rate for a role/position or any other alternative fee structure the parties may agree. The fee for Additional Services may be calculated using the hourly/daily rates included in the 'Payment for Additional Services' section of the Particulars.

Where expenses are intended to be reimbursed to the Consultant, they should be inserted in the 'Reimbursable Expenses' section of the Particulars. Typical Reimbursable Expenses include:

- the cost of producing or reproducing typed or printed tender and other documents, drawings, maps, photographic and other records and presentation materials
- travel, hotel and subsistence expenses (including mileage for car travel)
- courier expenses and

- other disbursements and expenses authorised in writing by the Client.

The parties should set out the instalments in which the Fee will be payable in the 'Payment Terms' section of the Particulars. Instalments may be based on calendar dates or milestones marking the completion of activities or work stages. Where instalment information has not been written into the 'Payment Terms' section of the Particulars, the default position is that payments should be made at least monthly, provided the Consultant submits a VAT invoice.

3.4 Client Team

In those situations where the Client employs other consultants who have a role in the Project the parties should record the other consultants in the 'Client Team' section of the Particulars. For the Consultant, this increases the effectiveness of the net contribution clause (Clause 9.2). If there are no other consultants involved in the Project, this section should be completed as 'Not appropriate'.

3.5 Completion of the Services

The parties should set out clearly in the Schedule the Services to be performed by the Consultant. The Schedule may, where relevant, contain standard services in relation to:

- Reinstatement Cost Assessment
- Technical Due Diligence
- Dilapidations
- Project Manager
- Corporate Restructuring and Recovery
- Building Surveyor Services (for projects relating to asset management/insurance/miscellaneous)
- Expert Witness and Single Joint Expert Witness
- Neighbourly Matters and
- Other (if the parties insert their own list of Services, it is important that they are consistent with the terms of the Designated Form).

To complete the Services using the standard service templates, the parties should tick the box in the Schedule next to the type(s) of Services that the Consultant is to provide (e.g. RICS Reinstatement Cost Assessment Services). The relevant Services should be attached to the Designated Form. Within the attached Schedules, the parties should identify the 'Basic Services' by placing a tick or other indication in the box next to the service the Consultant is required to provide. Services that have not been ticked will be 'Additional Services' should they later be required to be provided by the Consultant on and for the Project.

4 Understanding and using the Designated Form

4.1 Appointment (Clause 1)

The Client formally engages the Consultant to carry out the Services (including any Additional Services that may be necessary) in compliance with the terms of the Designated Form. The terms apply to all Services, even if they were commenced before the Designated Form was entered into. The Designated Form can, therefore, have retroactive effect.

4.2 Standard of care (Clause 2)

The Consultant is required to exercise the standard of reasonable skill and care to be expected of a professional of the same discipline as the Consultant carrying out the same Services. The scope of the standard of care is set by reference to the Project itself. What constitutes an adequate level of care in one project may not be sufficient in another larger or more complex project.

4.3 Statutory Requirements (Clause 3)

The Consultant is obliged to comply with all Statutory Requirements. The Consultant needs to be aware of all relevant legislation that may affect its services at the time they are provided.

4.4 Fee (Clause 4)

The Designated Form allows for the Fee paid to the Consultant to be a lump sum amount, a charge on an hourly basis or to be calculated by reference to some other mechanism agreed between the parties. The options are set out in the Particulars.

4.5 Additional Services (Clause 5)

Additional Services are all the services listed in the Schedule, but which are not ticked or selected as Basic Services.

This definition emphasises the importance of the description of the Services in the schedule. It is critical that the parties address the question at the outset and are clear between them as to exactly what the Consultant will do for the Fee. The ticked or selected Services must accurately reflect the understanding reached. Users of the Designated Form should pay particular attention to this in cases where unusual services are required or where the Client is inexperienced in instructing consultants and may not be able to express fully its own needs.

One aim of the Designated Form is to allow Additional Services to be considered and ordered with the least amount of inconvenience to the parties and as little disruption as possible. The Consultant should give the Client advance warning if it realises Additional Services are likely to be required. If

the Client does decide to order Additional Services, it must communicate its decision in writing to the Consultant so there can be no misunderstanding as to exactly what is required.

Agreement as to the amount of the fee for Additional Services is left to the parties in the first instance. However, where the parties are unable to agree the amount, it will be calculated by reference to the rates set out in the Particulars.

4.6 Payment (Clause 6)

The Fee is payable in instalments as agreed and set out in the Particulars. If no instalment dates are agreed by the parties, the Fee will be payable in instalments at intervals of not less than one month, beginning one month after the Basic Services are commenced.

The Particulars enable the parties to agree whether disbursements and expenses will be reimbursed or included in the Fee/Additional Services Fee. Where the Particulars are not completed, the default position is that disbursements and expenses will not be reimbursed.

4.6.1 Invoicing

The Consultant must submit a VAT invoice to the Client, accompanied by supporting documentation. The invoice and any supporting documents must specify the amount that the Consultant considers is due on the payment due date and the basis on which this amount is calculated. This avoids the risk of the final date for payment being delayed. The Client is liable to pay the proper amount of VAT chargeable on the Services. It is essential the Consultant keeps proper records so that it is able to provide suitable evidence to support its invoices.

4.6.2 Due date

The payment due date under the Designated Form is the date of receipt by the Client of the invoice. The submission of invoices, therefore, starts the payment process.

Not later than five days after the payment due date, notice must be given by the Client specifying the sum the Client considers to be or have been due on the payment due date and the basis on which that sum has been calculated.

4.7 Final date for payment (Clause 7)

The final date for the Client to make payment is 14 days after the due date for payment.

Where the Client is not going to pay the sum specified in its payment notice (or the amount specified in the Consultant's invoice where the Client does not issue a notice in accordance with Clause 6.2), it must give a notice to the Consultant indicating its intention to pay less than that amount not later than seven days before the final date for payment (the 'Pay Less Notice').

The Pay Less Notice must specify the sum the Client considers to be due to the Consultant at the date the Pay Less Notice is given and the basis on which that sum is calculated. Where a Pay Less Notice is given, the payment to be made on or before the final date for payment is not to be less than the amount stated as due. If a Pay Less Notice is not given properly or at all, the Client is obliged to pay the 'notified sum' (i.e. the sum specified in the Client's payment notice or the amount specified in the Consultant's invoice where the Client does not issue such a payment notice).

4.8 Default, interest and suspension (Clause 8)

If the Client fails to pay any sum properly due by the final date for payment, it is liable to pay the Consultant interest at 4% above Base Rate until payment is actually made.

4.9 Limitations of liability (Clause 9)

Both parties should note that the Designated Form contains no exclusion or limitation of liability in respect of loss of profit or consequential or indirect loss. However, the Consultant should be protected against this risk by the caps on liability and net contribution clauses.

4.9.1 Aggregate cap on liability

The parties should agree an overall financial cap on the Consultant's liability arising under or in connection with the Designated Form. Clients may be reluctant to agree financial caps on liability and, on certain occasions, a third party (such as a bank or purchaser) might insist the Client does not agree such financial caps. It is, however, common for parties to agree some form of financial cap on liability, although the level of that financial cap is generally subject to commercial negotiation.

The Particulars should be completed to state whether a financial cap on liability is agreed and, if so, what that financial cap is.

Scottish law prohibits any limitation on a party's liability arising from death or personal injury caused by negligence and, therefore, this is specifically excluded from the financial cap, meaning that liability for death or personal injury will be unlimited.

It is common for the amount the Client is able to recover from the Consultant to be limited to the level of professional indemnity insurance (PII) maintained by the Consultant because the Consultant may not have the funds to pay the Client except from its insurance. Therefore, one method by which the amount of a financial cap on liability could be calculated would be by reference to the amount of PII that has been agreed will be held by the Consultant, as this could directly affect the amount the Client is likely to recover as damages from the Consultant. The Services being provided and the likely consequence of negligent delivery, together with the amount of agreed Fee for the Services can also provide context as to what a reasonable financial cap on liability should be.

The default position is that the Consultant's liability is capped at its level of PII as specified elsewhere in the Particulars. For a different level of cap to apply, or for the Consultant's liability to be uncapped, it is essential that the appropriate section of the Particulars is completed accordingly.

4.9.2 Net contribution

In the absence of a net contribution clause, all members of the Client Team are usually jointly and severally liable for errors or defects arising from their Services. This means the Client may be able to recover all of its losses from one consultant rather than others who were also at fault (and it may be impossible to recover from the other consultants because they may have become Insolvent or ceased trading).

The purpose of a net contribution clause is to introduce a concept of fairness from the perspective of the Consultant where the Consultant should only be liable to the extent it is actually at fault. With an

effective net contribution clause in place, the Client would not be able to recover from the Consultant losses that were the fault of another member of the Client Team.

Accordingly, net contribution clauses expose the Client to the risk it may not be able to recover the full amount of its loss if other members of the Client Team who were at fault do not pay. For this reason, such clauses are often resisted by clients.

4.9.3 Expiry and limitation of liability

In general terms, any potential liability of the Consultant to the Client will expire six years after completion of the Services, if the liability has not been notified before then.

4.10 Insurance (Clause 10)

It is clearly in the interests of both the Consultant and the Client that the levels of insurance required in the Designated Form reflect those maintained by, or are reasonably available to, the Consultant.

4.10.1 Professional indemnity insurance

Professional indemnity insurance (PII) covers the Consultant against liability arising from errors in the provision of its professional services, including the giving of advice.

The Particulars should be completed to specify the level of insurance required. It must be specified whether the insurance is on an each and every claim basis or on some other basis. Further, some PII policies exclude or set aggregate limits for certain types of risk, such as contamination and pollution, and this should also be made clear in the Particulars. In addition to the amount of cover held, consultants must take care generally to understand any exclusion from or conditions of their cover.

Most professional bodies, including RICS, require their members to maintain PII as a condition of their affiliation to the body.

4.10.2 Availability of insurance

It is important that insurance is maintained throughout the period of the Consultant's liability under the Designated Form because PII usually operates on an annual 'claims made' basis.

This means any claim by the Consultant will be covered by the insurance policy in place at the time the claim is made, not by the policy in place when the event giving rise to the claim occurred.

The availability (and cost) of insurance varies according to the state of the insurance market. This means a consultant can sometimes find itself unable to secure the level of insurance required of it by its appointment.

4.11 Copyright (Clause 11)

The Designated Form recognises that (if applicable) both the Consultant and the Client have a legitimate need for access to and use of copyright material (including designs, if any) created by the Consultant during the performance of the Services.

The Designated Form provides that copyright in all Documents prepared by or on behalf of the Consultant belongs to the Consultant. While maintaining ownership of copyright, the Consultant grants the Client, without additional charge, an irrevocable licence to use the Documents for any purposes relating to the Project.

The Consultant has no liability to the Client for use of the Documents for any purpose except that for which they were originally created.

4.12 Suspension of the Services (Clause 12)

The Client is entitled to suspend the Services for any reason after giving the Consultant seven days' notice in writing of the intention to suspend. The Consultant is entitled to suspend provision of the Services if the Client fails to make the payments due to the Consultant by the final date for payment but only after providing the Client with seven days' notice of the intention to suspend and the ground(s) for doing so. If a suspension continues for more than three months, either party may terminate the Consultant's engagement.

4.13 Termination of engagement (Clause 13)

Termination of the Consultant's engagement is permitted in the following circumstances:

- unilaterally by the Client on 14 days' notice to the Consultant
- by either party if the other is in material breach of its obligations under the Appointment and fails to remedy that breach within seven days of being asked to do so
- by either party if the other becomes Insolvent under sections 123 or 268 of the *Insolvency Act 1986* or
- by either party if the Client orders a suspension of the Services and the suspension continues for more than three months.

4.14 Payment upon suspension or termination (Clause 14)

Upon termination or suspension, the Client must pay the Consultant its Fee (which includes, where applicable, any Fee for the Additional Services), which has accrued due and a fair proportion of the next instalment of the fee and any fee for Additional Services reflecting the value of the Services already performed. The Client must also pay the Consultant any reasonable direct costs, disbursements and expenses arising from termination or suspension, save where such termination or suspension is due to the Consultant being in breach. This is subject, in each case, to any right of non-payment the Client may have because of a prior breach by the Consultant of its obligations under the Designated Form.

Upon resumption of the Services following a suspension, the Consultant is entitled to claim the reasonable cost and expense of resuming the Services. As stated above, if the suspension period exceeds three months in length, the Consultant is entitled to terminate.

On termination, the Consultant discontinues performance of the Services as soon as notified. The Consultant must also, if requested by the Client, after due payment, hand over to the Client any documents or other information relating to the Project that it holds or has prepared. This is subject to the payment of the Consultant's reasonable copying charges and any outstanding fees due.

These provisions do not entitle the Client to demand copies of the Consultant's internal notes or memoranda.

4.15 Assignment and subcontracting (Clause 15)

The Designated Form prohibits the Consultant from assigning the Designated Form without the prior written consent of the Client (such consent not to be unreasonably withheld or delayed). The Client may assign the Designated Form to an assignee, and that assignee is, in turn, allowed to assign the Designated Form to a second assignee. Further assignments are prohibited without the Consultant's permission unless the assignee is financing the Project.

If the Consultant wishes to subcontract the performance of the Services, it can only do so with the prior written consent of the Client, but such consent cannot be unreasonably withheld or delayed. Regardless of any subcontracting by the Consultant, the Consultant will remain wholly responsible to the Client for the proper performance of the Services and any Additional Services by its subconsultant.

4.16 Disputes (Clause 16)

Compliance with the terms of this Appointment does not absolve the Consultant of any duties it may have as an RICS member or any other professional body. In addition to its contractual responsibilities under the Designated Form, the Consultant must have regard to the duties imposed on it by its professional governing body, including to maintain PII. This may also include a duty to inform the Client of its right to make complaints in accordance with a written complaints handling process.

RICS requires all its members who are sole principals, partners or directors of firms that offer surveying services to the public, to have a complaints-handling procedure that meets an agreed minimum standard. Members should be able to provide to Clients a written copy of that procedure on request. If the Client finds that the Consultant is an RICS member but does not have a complaints procedure in place, it should contact [RICS Regulation](#).

The Client should be aware there may be circumstances in which it is appropriate to pursue a grievance through the Consultant's internal complaints handling procedure. Such complaints may be made alongside or as an alternative to any measures that are permitted by the Designated Form.

4.16.1 Adjudication

The *Housing Grants, Construction and Regeneration Act 1996* (as amended) entitles any party to a 'construction contract' (as defined in the 1996 Act) to refer a dispute to adjudication at any time. The Designated Form reflects this Statutory Requirement even though the contract may not fulfil the definition of a construction contract.

The procedure for any adjudication commenced under the Appointment is that set out in the *Scheme for Construction Contracts (Scotland) Regulations 1998* (as amended) (the 'statutory scheme'). The Adjudicator must be independent of both parties to the dispute. This relates not only to the possibility of a challenge to the enforceability of the decision of the Adjudicator; a lack of independence of the Adjudicator may also have a prejudicial effect on any claim under a PII policy.

Any dispute arising in connection with the enforcement of an adjudicator's decision will be resolved by way of litigation rather than arbitration.

4.17 General (Clause 17)

4.17.1 Entire agreement

To avoid confusion as to the terms agreed between the parties, the Designated Form makes it clear that it supersedes any previous agreements or arrangements between the parties in respect of the Project and it can only be varied by the written consent of both parties.

4.17.2 Third Party Rights

It is confirmed that third parties, with the exception of the Client's permitted assignees, have no rights under the Designated Form.

4.17.3 Dates

Periods of time calculated under the Designated Form exclude bank holidays.

4.18 Notices (Clause 18)

To avoid any confusion as to the service of notices, the Designated Form provides that all notices must be given in writing and be delivered by hand or sent by pre-paid, recorded or special delivery post. If sent by hand, a notice is deemed to have been received upon actual receipt by the party to whom it is addressed. If sent by a postal method, a notice is deemed to have been received 48 hours after it was posted.

4.19 Governing law and jurisdiction (Clause 19)

The Designated Form makes it clear that its terms are subject to the law of Scotland. The Designated Form also provides that the Courts of Scotland will have exclusive jurisdiction should a dispute arise.

Appendix A: Glossary of terms

Base Rate	The rate set from time to time by the Bank of England's Monetary Policy Committee or any successor to it.
BIM	Building information modelling.
BIM Protocol	Written procedural method for the implementation of BIM on the Project.
COBie	Construction Operations Building information exchange.
Counsel	A solicitor, legal adviser, advocate or barrister conducting a case.
Decision	The written determination made by and published by the Expert, which is binding upon the parties to the dispute.
Dilapidations	Breaches of lease covenants that relate to the condition of a property during the term of the tenancy or when the lease ends.
EIR	Employer's Information Requirements. A document setting out the information to be delivered by consultants/suppliers as part of the Project delivery process to the Client.
Expert	A person with specialised knowledge gained through experience and/or research selected by the parties to determine the dispute.
Expert Determination	A dispute resolution procedure in which an independent expert in the subject matter of the dispute is appointed by the parties to resolve a matter by formulating a binding decision from the evidence.
Expert Witness	A person with specialised knowledge who expresses an independent expert opinion based on the information provided as evidence to a tribunal or court.
FRA	Fire Risk Assessment.
Group Companies	A collection of companies linked and related by common ownership including the holding company and all of the subsidiaries.
Guarantor	A person, partnership or company that promises to assume the debt obligation for the Client should the Client default.
Landlord	A person or organisation that owns a property or an area of land and leases that property or area of land to another in exchange for rent or another benefit.
Named Company	The company identified in the Corporate Restructuring and Recovery Services particulars.
Quantified Demand	A document setting out further details of the allegations. It is prepared by, or on behalf of, the Landlord and is issued after the end of the lease. It will include details of what the Landlord considers to be its likely loss as a consequence of the alleged breaches.
RCA	Reinstated cost assessment.
Repairs Notice	A record of items of disrepair that have occurred during a tenancy provided to a Tenant or a Landlord.

Response	The reply from the Tenant (or their surveyor) to the Quantified Demand and/or the Schedule of Dilapidations. This is usually a letter/email and a Scott Schedule.
Schedule of Dilapidations	The document prepared by the Landlord (or their surveyor) listing outstanding reinstatement, repair, legal compliance and decoration items to the property, suggesting remedial works and, in some cases, estimating the cost of the remedial works.
Scott Schedule	A document to be prepared to the Court listing the outstanding issues of a case. In respect of Dilapidations, a Scott Schedule is an extended version of the Schedule of Dilapidations that enables the Tenant (or their surveyor) to respond to the content of the Quantified Demand and/or the Schedule of Dilapidations.
Seller	A person, partnership or company selling a property to the Client.
Single Joint Expert	An Expert Witness instructed to prepare a report for the Court on behalf of both parties in the proceedings.

Appendix B: A guide to using the Services with the RICS Forms of Consultant's Appointment

This table illustrates the RICS Services recommended for use with the appropriate RICS Form of Consultant's Appointment.

	Standard Form	Short Form	Designated Form
Dilapidations Services			
Technical Due Diligence Services			
Contract Administration Services			
Reinstatement Cost Assessment Services			
Quantity Surveyor Services			
Employer's Agent Services			
Project Manager Services			
Lender's Independent Monitoring Services			
Corporate Restructuring and Recovery Services			
Principal Designer Services			
CDM Compliance Services			
Building Surveyor Services			
Expert Witness Services			
Neighbourly Matters Services			

***Please note:** For Building Surveyor Services, the RICS Standard or Short Form of Consultant's Appointment should be used in projects relating to construction/building and measured surveys. The RICS Short Form for Designated Services should be used in projects relating to asset management/ insurance/miscellaneous.

Delivering confidence

We are RICS. Everything we do is designed to effect positive change in the built and natural environments. Through our respected global standards, leading professional progression and our trusted data and insight, we promote and enforce the highest professional standards in the development and management of land, real estate, construction and infrastructure. Our work with others provides a foundation for confident markets, pioneers better places to live and work and is a force for positive social impact.

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