



EXPLANATORY NOTES

# RICS Standard Form of Consultant's Appointment explanatory notes

Scotland  
May 2022

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# 1 Introduction

The RICS Standard Form of Consultant's Appointment (the Standard Appointment) has been revised in response to the various statutory changes made since the previous edition was published in 2008.

The Standard Appointment provides the basis for a contract between a client and a consultant, and is suitable for use where a consultant (generally a chartered surveyor) is engaged on construction project-related commissions. The Standard Appointment is designed to be used with the RICS Services referred to below. The Standard Appointment could be used to engage other professionals in the construction process, or to provide services other than those noted below. Care should be taken by users of the Standard Appointment to ensure the proposed services are appropriate for use with the Standard Appointment.

The RICS Services recommended for use with the Standard Appointment are:

- Quantity Surveyor Services
- Project Manager Services
- Employer's Agent Services (note: where the employer's agent is required to provide pre-contract services, the Project Manager Services should be used in addition to describe the pre-contract services required)
- Contract Administration Services
- Building Surveyor (for projects related to construction/building and measured surveys)
- CDM Compliance Consultant Services and
- Principal Designer Services.

The Standard Appointment, when combined with the appropriate RICS Services, is suitable for use on construction-related projects of any size or value. However, it is most likely to be used where clients or consultants are involved in construction projects of a relatively high value. Where the services required and the construction project in question are more straightforward, the RICS Short Form of Consultant's Appointment may be more appropriate. Where the service required is a more specialist service, the new RICS Short Form of Consultant's Appointment for Designated Services should be considered for use.

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.

If the Standard Appointment 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, where a project relates to very high value residential property), the 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 Standard Appointment may require amendment.

RICS members are obliged to record the terms of their appointments in writing. The Standard Appointment 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 Standard Appointment.

# 2 General

## 2.1 Style

The Standard Appointment has been structured to allow easy completion and quick reference. The terms are set out in the body of the Standard Appointment and optional provisions are included in the Appendix. The Appendix is the primary source of project-specific information and serves as an aid for completing the Standard Appointment.

## 2.2 Allocation of risk

Detailed consideration has been given to the allocation of risk between the Client and the Consultant. In common with other standard forms of appointment used within the construction industry, the Standard Appointment includes limitations of liability, some of which may not always be commercially acceptable to the Client, particularly where the Client has complex funding arrangements. It is suggested the Consultant should seek to limit its liability when a service is 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 service be provided negligently. The optional clauses within the Standard Appointment cater for a limitation of liability being negotiated between the Client and the Consultant, and included in the Appendix to the Standard Appointment.

The default position in each optional clause within the Standard Appointment aims to achieve a balanced apportionment of risk and liability. However, the parties are free to take a different position by choosing a different option. This should help negotiations and avoid the need for specially written bespoke amendments that can render contracts difficult to understand.

## 2.3 Applicable law

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



# 3 Setting up and preparing the Standard Appointment

## 3.1 Parties

It is essential the names and addresses of the parties to the Standard Appointment 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 Standard Appointment. If a different address is preferred for correspondence, this can be set out in the Appendix (see Clause 17).

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.

If the Consultant is a member of a group of companies, it is possible the Client may want to consider whether a guarantee of performance from another company within the group should be provided. If the Client requires a guarantee of performance, the Standard Appointment does not assume this will be the case and a separate form of guarantee would have to be entered into by the Consultant.

## 3.2 Completion of the Appendix

It is vital that the parties complete the Appendix in full. The Appendix sets out the various options available to the parties. Where the Appendix calls for the parties to choose between the options, and no option is chosen, the emboldened option listed will be deemed to have been accepted.

While these default provisions mean the Standard Appointment can continue to operate even if the Appendix is not completed or only partly completed, it is in the interests of both parties to address the various options and complete the Appendix in full prior to the execution of the Standard Appointment.

Where the Appendix requires a description of the Project and the Site, it does not have to be lengthy, just enough to identify the Project and Site with certainty. A two- or three-line description of the Project should be sufficient. In most cases the address of the Project will be enough for the description of the Site, but care should be taken when the Project only encompasses part of a property.

The Standard Appointment 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 Appendix.

## 3.3 Completion of the Schedules

### Schedule 1: The Services

The parties should set out clearly the Services to be performed by the Consultant. Schedule 1 may, where relevant, contain standard services in relation to:

- Principal Designer
- CDM Compliance Consultant
- Employer's Agent
- Project Manager
- Contract Administration
- Building Surveyor (for projects related to construction/building and measured surveys)
- Quantity Surveyor and
- other (if the parties insert their own list of Services, it is important that they are consistent with the terms of the Standard Appointment).

To complete the Services using the standard service templates, the parties should tick the box in Schedule 1 next to the type(s) of services the Consultant is to provide (e.g. Project Manager Services). The relevant Services should be attached to the Standard Appointment. 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.

### Schedule 2: Fees and payment

It is important that Schedule 2 is completed with care. Payment is a fundamental term of the Standard Appointment.

If the parties wish to use a fee structure other than that provided in Schedule 2, they are free to replace the contents of Schedule 2 with a fee arrangement of their choice.

#### Part A

Schedule 2 allows the parties to choose between a lump sum fee for the Services, a fee based on a percentage of the building cost of the Project or any other alternative fee structure they may agree. Part A should be completed accordingly.

#### Part B

In Part B, the parties should set out the instalments in which the Fee will be payable. Instalments may be based on calendar dates or milestones marking the completion of activities or work stages.

#### Part C

Part C sets out the reimbursable costs and expenses. These 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
- fees and advertising costs in connection with applications for local government consents, including planning consents and Building Regulations consents
- statutory fees, e.g. planning and Building Regulation fees
- specialist materials for marketing and selling the Site, e.g. materials for marketing brochures and lease plans and
- other disbursements and expenses authorised in writing by the Client.

If the relevant part of the Appendix is not completed, the default position is that the Consultant can claim reimbursement of such costs and expenses. Although this is the default situation, care should be taken to ensure that this issue is agreed between the Client and the Consultant.

## Part D

In Part D, the parties should set out the hourly/daily rates chargeable for Additional Services. It is recommended that information provided in this part includes the role/position of the individual concerned and the hourly/daily rate at which he/she is charged. All key individuals should be named in the Appendix, as required by Clause 7.

## Schedule 3: Client's Brief

The Client's Brief is an important document. There is no set form, but it might include as a minimum:

- a description of the Site (by plan if possible)
- a description of the Project
- budgets
- the Programme and
- the Client's objectives.

This information can either be inserted into Schedule 3 or incorporated into the Standard Appointment by reference. If incorporated, the separate briefing document should be clearly identified as the Client's Brief, attached to the Standard Appointment and signed by the parties.

## 3.4 Execution provisions

Each party to the Contract (if a body corporate, a director, secretary or authorised signatory; if a partnership a partner) should execute the Appointment where indicated before a witness. It is important that the signatory record, in the relevant space, their full name, preferably in capital letters. The witness should sign where indicated and handwrite in capitals their full name and address in the space provided. The signatures should be dated, and the place of signature inserted in the relevant space. In the event of uncertainty legal advice should be sought.

# 4 Understanding and using the Standard Appointment

## 4.1 Definitions and interpretation (Clause 1)

All capitalised terms used in the Standard Appointment are defined in Clause 1.1. Rules of interpretation are set out in Clause 1.2.

## 4.2 Appointment (Clause 2)

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 Appointment. The terms apply to all Services, even if they were commenced before the Standard Appointment was entered into. The Standard Appointment can, therefore, have retroactive effect.

## 4.3 Consultant's obligations: Requisite Standard (Clause 3.1)

The Consultant is required to exercise the Requisite Standard in performing the Services. This is 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 discipline of the Consultant should be inserted into the Appendix; for example, quantity surveyor, employer's agent, etc. 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.

## 4.4 Performance of the Services (Clauses 3.2 to 3.8)

Clauses 3.2 to 3.8 contain general provisions on how the Consultant will perform the Services.

Clauses 3.4 and 3.5 contain the optional provisions relating to whether the Consultant is Lead Consultant. The Lead Consultant in some cases may also be the principal designer (see section 4.7) but the terms are not synonymous.

If the Consultant is not the Lead Consultant, the Consultant is obliged to cooperate with the Lead Consultant and to comply with any instructions given by the Lead Consultant in relation to the coordination of activities, provided this does not cause the Consultant to be in breach of the Standard Appointment or to be prevented from doing so by circumstances outside its control.

## 4.5 Instructions and approvals (Clauses 3.9 and 3.10)

The Consultant must comply with instructions given by the Client. However, where the Consultant is required to assess certain matters between the Client and the Contractor, the Consultant must act fairly and impartially. Such a situation may arise where, for example, the Consultant assesses claims for extensions of time, loss and expense or applications for payment by the Contractor.

## 4.6 Building information modelling (BIM) (Clause 3.11)

Since the last issue of the Standard Appointment, the use of BIM on construction projects has increased. The UK government mandates the use of BIM technology where possible on public sector construction projects. The Standard Appointment recognises a Consultant may be asked to provide services within a BIM environment. It may also in some cases be appointed as the BIM Information Manager, and required to comply with a BIM Protocol, which is a document to be appended to the Standard Appointment setting out the Consultant's obligations in relation to BIM. Consultants with little in-house or other experience of BIM should consider carefully whether they should accept the role of BIM Information Manager.

## 4.7 Health and safety (Clauses 4.1 and 4.2)

The *Construction (Design and Management) Regulations 2015* (CDM Regulations) seek to ensure safety in construction projects. The Standard Appointment confirms the statutory duty of the Consultant to comply with the CDM Regulations, if and to the extent they apply. The CDM Regulations impose obligations on clients as well as consultants and it is important that both parties are aware of their respective obligations in relation to the Project.

In certain circumstances, the Services provided by the Consultant will have the effect that the Consultant is deemed to be a 'designer' for the purposes of the CDM Regulations, i.e. a person who in the course or furtherance of a business prepares or modifies a design, or who arranges for or instructs any person under their control to do so relating to a structure, product or mechanical or electrical system intended for a particular structure. A 'design' includes drawings, specifications, and bills of quantities. Where the Consultant is a designer for the purposes of the CDM Regulations, the Standard Appointment allows the parties to make provision for this in the Appendix.

The default position is that the Consultant is not a designer for the purposes of the CDM Regulations. However, it is important to recognise that, whichever option is chosen, the Consultant may still be a designer under the CDM Regulations if its Services fall within those referred to above. Therefore, the parties must consider the point carefully and complete the Appendix appropriately.

## 4.8 Statutory Requirements (Clause 4.3)

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.

## 4.9 Design responsibility (Clause 4.4)

Most appointments for the provision of surveying services do not require the Consultant to carry out design work. In this context, 'design' may be a different concept from that discussed previously in relation to the CDM Regulations. For example, preparing a bill of quantities may not constitute design in the broader sense; it is a question of fact and degree in each case. RICS members do sometimes provide design services. The Standard Appointment allows the parties to confirm whether the Consultant is to be responsible for design and/or for specifying or approving materials. The Appendix should be completed appropriately and, where the Consultant's responsibility relates only to limited aspects of design/specification, this should be made clear, if necessary by reference to

other documents. If the Appendix is not completed, the default position is that the Consultant is not responsible for the design or specification/approval of materials.

#### 4.10 Prohibited materials (Clause 4.5)

Where the Appendix is completed to state that this Clause applies, the Consultant must exercise the Requisite Standard to ensure it does not specify for use any materials that contravene British Standards or their EU equivalents. Having regard to the extent of the Services it is providing, the Consultant must also see that such materials are not used in the construction of that part of the Project to which its Services relate.

#### 4.11 Limitations of liability (Clause 5)

Both parties should note that the Standard Appointment 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. These are explained in sections 4.12 and 4.13.

#### 4.12 Aggregate cap on liability (Clause 5.1)

The parties should agree an overall financial cap on the Consultant's liability arising under or in connection with the Standard Appointment. 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 Appendix should be completed to state whether a financial cap on liability is agreed and, if so, what that financial cap is. English 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 that the Client is able to recover from the Consultant to be limited to the level of 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 Appendix. 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 Appendix is completed.

#### 4.13 Net contribution (Clause 5.2)

In the absence of a net contribution clause, all members of the Professional Team are usually jointly and severally liable for errors or defects arising from their services. This means that 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 Professional Team. Accordingly, net contribution clauses expose the Client to the risk that it may not be able to recover the full amount of its loss if other members of the Professional Team who were at fault do not pay. For this reason, such clauses are often resisted by clients.

The net contribution clause in the Standard Appointment includes, in its final paragraph, provisions that cater for design and build forms of contract as the Contractor is likely to be fully responsible for design under a design and build contract arrangement.

The Standard Appointment allows the parties to agree whether to include a net contribution clause. If the Clause is to apply, the parties should complete the Appendix by listing the other professionals/contractors whose fault is to be taken into account in considering the extent of the Consultant's liability.

The Appendix must be completed to show whether the net contribution clause applies to the Standard Appointment. If this part of the Appendix is not completed, the default position is that the net contribution clause will apply.

#### 4.14 Expiry and limitation of liability (Clause 5.3)

In general terms, if the Standard Appointment is executed as a deed, the liability of the Consultant under the Standard Appointment will expire 12 years after Practical Completion of the Project. If the Standard Appointment is signed under hand (i.e. not as a deed), the liability of the Consultant will expire six years after Practical Completion.

#### 4.15 Collateral Warranties or Third Party Rights (Clause 6.1)

The Standard Appointment allows the parties to choose whether the Consultant will be required to provide Collateral Warranties in favour of third parties or to confer rights on third parties under the *Contract (Third Party Rights) (Scotland) Act 2017* (the Act). The choice between these options must be indicated in the Appendix. The default position is that neither Collateral Warranties nor the granting of Third Party Rights will be required by the Client or provided by the Consultant.

#### 4.16 Collateral Warranties (Clause 6.2)

The purpose of a collateral warranty is, therefore, to create a contractual link where none would otherwise exist between the Consultant and the beneficiary of the warranty. This allows the beneficiary to take legal action against the Consultant for breach of contract if the Consultant breaches the terms of the warranty.

Warranties are often given by Consultants in favour of funders, purchasers and tenants. However, the number and scope of these warranties depends on the nature and scale of the Project and

the bargaining strength of the beneficiaries. The Appendix allows the parties to choose whether warranties are required and, if so, to whom they should be given. If warranties are required, the default position is that they will be provided to any Purchaser, Tenant and Funder.

It is for the parties to agree the appropriate form of warranty in each case, which should be appended to the Standard Appointment and initialed by the parties. It is important that the forms of warranty are consistent with the terms of the Standard Appointment and that the terms of the warranty do not place any obligations or liabilities on the Consultant that are greater or more onerous than under the Standard Appointment itself. Further, it is important that consideration is given to the relevant terms of the professional indemnity insurance (PII) cover that the Consultant has; for example, on the number of permissible assignments under a warranty.

#### 4.17 Third Party Rights (Clause 6.3)

The Act makes it possible to confer rights on intended classes of beneficiary such as funders, purchasers and tenants without the need to execute Collateral Warranties. The Standard Appointment allows the parties to use this method of conferring rights on third parties. Again, as with the provision for Collateral Warranties, the Appendix allows the parties to specify who should benefit from such Third Party Rights. The default position is that Third Party Rights, if required, will be vested in any first Purchaser, any Tenant and any Funder.

The parties should agree the clauses in the Standard Appointment on which third parties will be able to rely. These should be set out in a separate document, which should be appended to the Standard Appointment and initialled by the parties. As with the forms of Collateral Warranties, the forms of Third Party Rights must be consistent with the terms of the Standard Appointment and must not place any obligations or liabilities on the Consultant that are greater or more onerous than under the Standard Appointment. Further, it is important that consideration is given to the relevant terms of the PII cover that the Consultant has; for example, on the number of permissible assignments of the Third Party Rights.

#### 4.18 Consultant's personnel (Clause 7)

It is important for the successful performance of the Services that the Consultant's key personnel on the Project are able to devote sufficient time to them. The Standard Appointment provides that the Consultant must list the key personnel who will be responsible for carrying out the Services (for as long as they remain employed by the Consultant). The Consultant must ensure these people devote sufficient time and attention to the provision of the Services and the Consultant may only replace them with the written agreement of both parties.

#### 4.19 Client's obligations (Clauses 8.1 to 8.8)

These Clauses contain self-explanatory provisions setting out the Client's obligations to the Consultant.

Clause 8.4 lists the information the Client is deemed to warrant as being accurate. These are the Client's Brief and specialist reports provided by the Client on which it is reasonable for the Consultant to rely. Where there is any doubt as to whether surveys and reports may be relied on, written clarification should be sought by the Consultant as soon as possible.



It is common for clients to appoint a representative to whom it delegates its authority to carry out its functions under the Standard Appointment. Clause 8.6 enables the Client to name such a representative.

Clause 8.8 makes it clear that, where the Consultant is required to issue certificates or statements under the Building Contract or any other Client Contract, the Client must provide the Consultant with sufficient information for the Consultant to carry out this task.

## 4.20 Payment (Clause 9)

The payment provisions in the Standard Appointment reflect the requirements of the *Housing Grants, Construction and Regeneration Act 1996* (as amended by the *Local Democracy Economic Development and Construction Act 2009*). These provisions came into effect in Scotland on 1 November 2011.

## 4.21 Remuneration (Clauses 9.1 to 9.5)

The Standard Appointment allows for the Fee to be a lump sum amount, a percentage of the building costs or to be calculated by reference to some other mechanism agreed between the parties. The options are set out in Part A of Schedule 2.

Where a Project is likely to extend over a long period of time, the parties may wish to agree indexation provisions so that the Fee, or part of it, increases in line with an inflation index. Where such provisions are agreed they should be inserted in Schedule 2.

The Fee is payable in instalments as agreed and set out in Part B of Schedule 2. 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 Appendix allows the parties to agree whether disbursements and expenses will be reimbursed or included in the Fee/Additional Services Fee. Where the Appendix is not completed, the default position is that disbursements and expenses will be reimbursed in accordance with Part C of Schedule 2.

## 4.22 Payment (Clauses 9.6 to 9.7)

### 4.22.1 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 the Consultant considers is due on the payment due date and the basis on which this amount is calculated. This avoids the need for the Consultant to issue a separate notification to the Client where the Client fails to issue a payment notice under Clause 9.7, and 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 that the Consultant keeps proper records so it is able to provide suitable evidence to support its invoices.

### 4.22.2 Due date

The payment due date under the Standard Appointment 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 due or have been due on the due date and the basis on which that sum has been calculated.

### 4.23 Payment dates (Clauses 9.8 to 9.10)

The final date for making payment is 28 days after the due date for payment. However, the parties can agree a different period, which should be inserted into the Appendix.

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 9.7), 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).

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.

### 4.24 Adjustments to the Fee (Clauses 9.11 to 9.14)

The Fee can be adjusted if the performance of the Services by the Consultant is materially delayed and/or disrupted as a result of a change in the scope, size, complexity or duration of the Project, or for any cause outside the Consultant's reasonable control.

In these circumstances, the Consultant should give notice of its intention to make a claim for an adjustment of the Fee as soon as reasonably possible. The Consultant should also give a written estimate of the proposed adjustment to the Fee and of the likely effect on the performance by the Consultant of the Services and on the Programme.

### 4.25 Additional Services (Clause 10)

Additional Services are all the services listed in Schedule 1, but which are not ticked or selected as Basic Services.

This definition emphasises the importance of the description of the Services in Schedule 1. 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 Standard Appointment should pay particular attention to this in cases where the Project is likely to involve unusual services or where the Client is inexperienced in instructing consultants and may not be able to express fully its own needs.

One aim of the Standard Appointment is to allow Additional Services to be considered and ordered with the least amount of inconvenience to the parties and as little disruption to the Project as

possible. The Consultant should give the Client advance warning if it realises Additional Services are likely to be required (see section 4.24). 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 Additional Services Fee 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 Part D of Schedule 2 to the appointment.

As with the Fee, the Additional Services Fee may be adjusted if the performance of the Additional Services is materially delayed and/or disrupted as a result of a change in the scope, size, complexity or duration of the Project or for any cause outside the Consultant's reasonable control.

Again, the Consultant should give notice of its intention to make a claim for an adjustment of the Additional Services Fee as soon as reasonably possible. The Consultant should also give a written estimate of the proposed adjustment to the Additional Services Fee and of the likely effect on the performance by the Consultant of the Services and on the Programme.

## 4.26 Consultant's authority (Clause 11)

While the Consultant has a general discretion as to how it performs the Services, this does not extend to:

- varying the works described in the Building Contract
- taking any step that will delay the Project or increase its cost by more than an amount agreed between the parties and recorded in the Appendix. In completing the Appendix, the parties are free to set limits for each aspect of the works. For example, the parties may agree one amount for piling works and a different amount for strip-out works. Where no amount is recorded in the Appendix, any instruction given by the Consultant to increase cost is prohibited or
- terminating or varying the Building Contract/appointment of any member of the Professional Team or waiving compliance with the Building Contract/appointment of any member of the Professional Team or a Client Contract.

Such steps can only be taken with the prior written approval of the Client, although the Appointment does give the Consultant freedom to issue reasonable instructions in an emergency.

## 4.27 Insurance (Clause 12)

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

### 4.27.1 Professional indemnity insurance (PII)

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

The Appendix 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 Appendix. In addition to the amount of cover held, consultants must take care to understand any exclusion from or conditions of their cover.

Where the Appendix is not completed to specify the amount of insurance required, the default position is that the Consultant will be required to maintain the level of PII it has on the date of the Appointment. This may be later than the date when the Consultant first began to perform the Services. Most professional bodies, including RICS, require their members to maintain PII as a condition of their affiliation to the body. The default provision takes advantage of that requirement, so that a client who omits to complete this section of the Appendix may gain some protection as long as it appoints a consultant that is affiliated to a recognised professional body, such as RICS. The position of the Consultant is in turn protected by the provisions that allow the parties to renegotiate the required level of insurance if market conditions change. This is discussed in more detail in section 4.27.2.

The length of time for which insurance must be maintained depends on whether the Appointment is executed as a deed. If the Standard Appointment is executed as a deed, insurance should be maintained for 12 years from Practical Completion of the Project. If it is not executed as a deed, insurance should be maintained for six years following Practical Completion.

#### 4.27.2 Availability of insurance

It is important that insurance is maintained throughout the period of the Consultant's liability under the Standard Appointment 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. In such cases, the Standard Appointment recognises it is in the interests of both parties that the situation is resolved as quickly as possible. The Standard Appointment requires that, where insurance is no longer available on reasonable terms and rates, the Consultant will inform the Client and they will discuss how best to deal with the situation.

### 4.28 Copyright (Clauses 13.1 to 13.5)

The Standard Appointment recognises that 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 Standard Appointment 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, including a future extension of the Project. However, this does not include a licence to reproduce the designs for any such extension.

The licence includes a right to grant sub-licences to third parties.

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

If the Client fails to pay any fees properly due to the Consultant, the Consultant may, if it wishes, suspend the Client's copyright licence provided it gives the Client seven days' notice. This is not a permanent revocation and the suspension is lifted upon payment being made.

In granting this licence to the Client, the Consultant warrants that the Documents do not infringe the intellectual property rights of any third party. The Client is entitled to expect that the Documents and any designs supplied by the Consultant do not infringe the rights of third parties or expose it to claims from third parties. It is extremely important, therefore, that the Consultant takes care in this respect when producing Documents, or procuring them from third parties, as the Client may pursue the Consultant for any losses it suffers as a result of such infringement.

The *Copyright, Design and Patents Act 1988* grants the author of copyright material certain 'moral rights', including the right to be identified as the author of the copyright in certain circumstances, and the right of objection to 'derogatory treatment'. In certain circumstances, the parties may wish to agree that the Consultant will waive these rights. The Standard Appointment provides an optional waiver that can be selected when completing the Appendix. The default position is that the Consultant retains such rights.

#### 4.29 Confidentiality (Clauses 13.6 to 13.7)

The Consultant has a general duty of confidentiality in relation to information and documents relating to the Project. However, disclosure is allowed with the permission of the Client and in certain other circumstances, e.g. if it is required by law.

#### 4.30 Anti-Bribery (Clause 13.8)

The Standard Appointment includes a requirement for the Consultant to ensure compliance with anti-bribery and anti-corruption legislation. The requirement includes that the Consultant:

- is prohibited from committing an offence under the *Bribery Act 2010*
- must maintain adequate anti-bribery and anti-corrupt procedures and
- must report any request or demand for undue financial or other advantages to the Client.

It should be noted that the *Bribery Act 2010* includes an offence for failing to prevent bribery. Breach of the Consultant's anti-bribery and anti-corruption obligations constitutes a material breach.

#### 4.31 Assignment and transfer of rights and obligations (Clauses 14.1 to 14.4)

The Standard Appointment prohibits the Consultant from assigning the Standard Appointment without the prior written consent of the Client (such consent not to be unreasonably withheld or delayed). The Client may assign the Standard Appointment as specified in the Appendix. If the Appendix is not completed, the default position is that the benefit of the Standard Appointment may be assigned by the Client to any person taking the Client's interest in the Project, but on no more than two occasions.

In addition, the Client is entitled to assign the Standard Appointment to any associated company in its group of companies or to a Funder. In relation to transfers to a group company, the group company

must first establish to the Consultant's reasonable satisfaction that it is as able as the Client to carry out the obligations of the Client under the Standard Appointment.

Where there is doubt, and it is reasonable to do so, the original Client can be required to act as guarantor of the transferee group company, subject to agreement between the parties.

## 4.32 Subcontracting (Clauses 14.5 and 14.6)

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.

## 4.33 Termination and suspension (Clause 15)

### 4.33.1 When is suspension of the services possible?

The Client is entitled to suspend the Services for any reason after giving the Consultant seven days' notice of the intention to suspend. The Consultant is entitled to suspend provision of the Services if the Client fails to make the payments that are 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.

### 4.33.2 When is termination possible?

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

- unilaterally by the Client on 28 days' notice to the Consultant
- by either party if the Project is cancelled by the Client or cannot proceed for any reason outside the reasonable control of the Client
- by either party if the other is in material breach of its obligations under the Appointment and fails to remedy that breach within 14 days of being asked to do so
- by either party if the other becomes Insolvent or
- by either party if the Client orders a suspension of the Services and the suspension continues beyond the period stated in the Appendix. If no period is stated, the default position is six months.

### 4.33.3 What payments are due on termination or suspension?

Upon termination or suspension, the Client must pay the Consultant its Fee (which includes, where appropriate, the Additional Services Fee), which has accrued due and a fair proportion of the next instalment of the Fee and any Additional Services Fee 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 Standard Appointment.

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 is prolonged, the Consultant is entitled to terminate.

On termination, the Consultant discontinues performance of the Services as soon as possible and with minimal disruption to the Project. The Consultant must also, if requested by the Client, 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.

### 4.34 Dispute resolution (Clause 16)

Compliance with the terms of the Standard Appointment does not absolve the Consultant of any duties it may have as an RICS member or a member of any other professional body. In addition to its contractual responsibilities under the Standard Appointment, 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 permitted by the Standard Appointment.

### 4.35 Negotiation and mediation (Clauses 16.1 and 16.2)

It is in the interests of both parties that any dispute is resolved as quickly as possible through negotiation. To this end, the Standard Appointment requires the parties to attempt to resolve any dispute by negotiation or mediation in accordance with the Model Mediation Procedure published by the Centre for Effective Dispute Resolution.

### 4.36 Adjudication (Clauses 16.3 to 16.6)

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 Standard Appointment reflects this Statutory Requirement. The right to adjudicate can be exercised at any time, regardless of any requirement to negotiate or mediate.

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 parties are free to agree in advance the individual who will act as Adjudicator under the Standard Appointment and the Appendix allows for this. Alternatively, the parties may rely on an adjudicator-

nominating body, such as RICS, which will propose a suitable adjudicator when requested to by one of the parties. In the absence of agreement between the parties, the default position is that the Adjudicator will be nominated by the President or Vice-President of RICS. 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.

### 4.37 Arbitration or litigation (Clause 16.7)

The Standard Appointment allows the parties to choose whether arbitration or litigation should be the ultimate dispute resolution procedure in respect of disputes arising under the Standard Appointment. The default position is that disputes will be finally resolved by litigation in the Courts and not arbitration.

### 4.38 Arbitration (Clauses 16.8 to 16.10)

If parties agree arbitration as the ultimate dispute resolution mechanism the *Arbitration (Scotland) Act 2010* and Scottish Arbitration Rules apply. The Scottish Arbitration Rules contain Rules that are classed as mandatory and default. In the absence of any agreement to the contrary all default and mandatory rules apply. Parties should consider carefully whether all the default rules are appropriate in the particular circumstances and disapply any which parties agree ought not to apply. In the event of uncertainty legal advice should be sought.

The Standard Appointment allows the parties to agree the identity of the Arbitrator in advance by completing the Appendix. As with the adjudication provisions the parties may prefer to name an arbitrator-nominating body, such as RICS, rather than an individual and the Appendix allows for this. In the absence of any agreement between the parties, the default position under the Standard Appointment is that the Arbitrator will be nominated by the President or Vice-President of RICS.

### 4.39 Litigation (Clause 16.11)

If the parties agree litigation as the ultimate dispute resolution mechanism, the Standard Appointment provides that the Courts of Scotland will have exclusive jurisdiction.

### 4.40 Notices (Clause 17)

To avoid any confusion as to the service of notices, the Standard Appointment 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.

The address to which such notices should be sent is, by default, the address of the relevant party as set out at the head of the Standard Appointment. However, the parties are free to set out in the Appendix any alternative address they prefer. A party may wish to use an alternative address where



its registered office is not its usual business address, or it may want notices to be sent to its Site office. In such cases, the parties should consider naming an individual for whose attention notices must be marked.

Physical delivery of documents by hand or by post was traditionally regarded as the most reliable method for giving notices. However, this can be cumbersome and the Standard Appointment allows the parties to agree other methods of delivery as they see fit. For example, the parties may wish to allow communication by fax or email. In such circumstances, it is important that the Appendix records all the relevant information. This should include:

- the precise contact details to be used, including whether the notice needs to be marked for the attention of any particular individual and
- where appropriate, wording setting out when a notice sent by a particular method will be deemed to have been received by the party to whom it is addressed.

The inclusion of such detail is advisable to avoid misunderstandings over the calculation of notice periods.

#### 4.41 Entire agreement (Clause 18)

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

#### 4.42 Governing law (Clause 19)

The Standard Appointment makes it clear that its terms are subject to the law of Scotland.

# Appendix A: Consolidated glossary of terms

This table contains a consolidated list of the terms used in the Schedule of Services recommended for use with the Standard Form, as applicable (see Appendix B).

<b>5D</b>	BIM model that incorporates three spatial dimensions (length, width, height or thickness), scheduling information and cost related information.
<b>Building Contract</b>	The contract or contracts between the Client and the Contractor for the construction of the Project, a copy of which (or a copy of relevant extracts) the Client provides to the Consultant.
<b>CDM Regulations</b>	<i>Construction (Design and Management) Regulations 2015.</i>
<b>COBie</b>	Construction Operations Building information exchange.
<b>Earned value analysis</b>	A method of measuring a property's development progress at any given point in time, forecasting its completion date and final cost, and analysing variances in the Property's development programme and budget, as the property's development proceeds.
<b>EIR</b>	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.
<b>FRA</b>	Fire Risk Assessment.
<b>NRM 1</b>	<i>New Rules of Measurement: Order of Cost Estimating and Cost Planning for Capital Building Works.</i>
<b>NRM 2</b>	<i>New Rules of Measurement: Detailed Measurement for Building Works.</i>

# 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 for projects relating to construction/building and measured surveys. The RICS Short Form for Designated Services should be used for 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.

Americas, Europe, Middle East & Africa  
**[aemea@rics.org](mailto:aemea@rics.org)**

Asia Pacific  
**[apac@rics.org](mailto:apac@rics.org)**

United Kingdom & Ireland  
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