

## 1. Background – sale by tender/ buyer pays fee process

Sale by tender/buyer pays fee is an alternative commercial practice that has developed across the industry with a number of agencies employing it as a way of attracting business. It is not clear as to how many (if any) smaller agencies have adopted it as an alternative approach to the traditional sales practice under which agents charge the seller their commission fee.

Under this approach the agent enters into an agreement with a seller to market a property whereby offers are submitted through a sealed bid/tender process. Prospective buyers submit their offers to the agent having entered into an agreement to meet the fee liability which is over and above the agreed price for the property.

## 2. Why this guidance?

It is becoming increasingly clear that the practice is causing confusion as to who is actually responsible for the fee and whether, if the agent is charging the buyer, there is any potential for a conflict of interest and consumer detriment. The following guidance is to assist the industry in ensuring that where this approach is employed as a commercial decision, it is subject to a degree of control and consistency across those agents using it; and can help agents ensure that they avoid conflicts of interest. This guidance is intended to supplement the TPO Code of Practice for Residential Estate Agents and it is therefore expected that industry will apply it, using it as the accepted approach. Agents need to be aware that deviation from the practice may result in a breach of the Code of Practice rendering the agent ultimately with a disciplinary action through the established TPO Disciplinary and Standards Committee (DSC) process. The DSC has a range of sanctions including expulsion from the scheme.

This guidance focuses on four particular aspects of the Code of Practice and the standards laid out in the Code of Practice in relation to:

- Transparency.
- Disclosure.
- Conflicts of interest.
- Duty of care, fairness of treatment.

## 3. The principles of approach – code of conduct

- i) Transparency and disclosure are the primary drivers for defining a structured and consistent approach to the sale by tender/buyer pays fee practice. **Buyer liability** for the fee must be communicated at the earliest opportunity such that in all forms of media, the property asking price is accompanied by a statement that 'buyer's fees apply'

and that websites allow for a click-through to a tender pack and FAQs. Appropriate arrangements should be made to provide the same information where non-electronic access is present. The tender pack should have 'key features' of the approach as the first page.

- ii) It must be clear to all parties throughout and from the outset of the transaction that the instruction to the agent to market the property is given by the seller and that the agent's primary duty of care is therefore to that individual. **Agents must ensure that any conflict of interest which might compromise that relationship is avoided.**
- iii) **The seller must be advised of all options available to him for the marketing of his property** and in particular he must receive a full explanation of the risks of selling via this approach (for example it should include the buyer not wanting to pay a fee, buyer being frightened off by the thought of signing an agreement and thereby a potential offer for the property would be lost - potentially from a buyer in a strong position).
- iv) It must be made clear to the seller what the position would be in the event of the buyer wanting to buy but not pay the fee and the seller wanting to sell to that buyer.
- v) **The buyer must be advised that by paying the agent's fee, that amount may be considered as part of the chargeable consideration for the property and be included in the calculation for stamp duty liability.**
- vi) **The level of fee charged to the buyer must be representative of the agent's normal fee for residential property sales and should not be exploitative.** A 'health warning' about the fee's relative level with other agency's fees should be given. The buyer should be made aware that the seller will only have been charged a nominal marketing fee or not at all.
- vii) All offers must be passed on regardless of the manner in which they are communicated unless the offer is an amount or type which the seller has specifically instructed you, in writing, not to pass on.
- viii) It must be made clear whether the buyer's agreement with the agent to submit an offer through the sealed bid process and to pay the fee, is specific to that offer or whether it will apply in a situation where further offers are requested on the specific property. If further negotiations take place outside of the tender process the agent's tender documentation should clarify the position regarding payment of the fees.
- ix) In situations where the property has not been sold and the agreed term of the sealed bid agreement has expired, the seller is free to renegotiate a new contract, method of sale and term with any agent.

#### 4. Point of sale script

To ensure agents meet their obligations under the Code of Practice as set out above, agents will need to use a script for dealing with the seller and a script for dealing with the buyers. Agents are allowed their own wording but the script needs to include certain principles notably:

- Who will have the liability for the fee.
- The options for marketing (i.e. sales by tender or traditional sales approach to selling the property) should be explained.
- The risks, advantages and disadvantages about each approach.
- The precise costs for both buyer and seller; implications for stamp duty and any documentation should be shown and explained to the seller/buyer.

#### 5. FAQs

##### Sellers

**i) Do I have to agree to the sale by tender/buyer pays fee approach?**

No – the agent must advise you of the options available to you for marketing your property.

**ii) If the prospective buyer does not agree to pay the fee will I lose the offer?**

The law requires that any offer made to purchase your property must be passed on by the agent unless you have said offers of a particular type are not to be advised to you. If the prospective buyer does not agree to pay the fee the agent should advise you accordingly and seek your instructions.

**iii) If the actual buyer then refuses to pay will I have to meet the agent's fee?**

This will depend on the specifics of your individual contract(s) with the agent. The agent should explain this clearly to you before you sign anything. The actual buyer has entered into an agreement to pay the fee so it is for the agent to pursue the buyer but the agent must make clear to you what will happen in such circumstances.

**iv) Do I have to accept the highest offer?**

It is entirely your choice as to what price you sell your house at and it is recognised that sellers will sometimes sell to someone who has not offered the highest amount because that person has, for example, cash or is ready to proceed straightaway.

##### Buyers

**i) If I don't get the property do I still pay?**

If you do not succeed in your purchase of the property no fee will be payable.

**ii) When do I have to hand money over?**

The agent's fee becomes due on exchange of contracts but will not be collected until completion stage. In some circumstances the agent may charge interest on late payments.

**iii) Does the fee include VAT?**

The fee may be displayed as a VAT inclusive price or as a figure plus VAT. This should be made clear to you but always read the statement and ask the agent to confirm how the fee will be made up.

**iv) Will it increase stamp duty liability?**

Current HMRC policy is that the chargeable consideration (monies or monies worth) for a land transaction is what has been given (either directly or indirectly) in order to acquire the subject – matter of the transaction, by the purchaser or a person connected with him. This includes fees which have to be paid in order to acquire the property. This means that whatever the buyer pays, it will form part of the purchase price for the property and it will be included in his liability for stamp duty.

**v) Can it be included in my mortgage application?**

You should seek advice from your proposed mortgage provider but it is unlikely that it will be considered as part of the value of the property for the mortgage calculation.

**vi) Does it go to the seller or the agent?**

The money goes to the agent.

**vii) If I do not agree to pay the fee can I still make an offer?**

Yes and the agent will be under an obligation to pass on all offers, unless the seller has instructed the agent in writing that offers of a particular type are not to be advised to them. It will be for the agent to arrange payment of the fee with the seller.

**viii) If my offer is accepted does that mean no one else can buy the property?**

You should clarify the exact position with the agent if your offer is accepted. The agent should provide a clear statement as to whether or not the property will continue to be marketed or whether it has been withdrawn from the market. Note that the agent is under a legal obligation to pass on offers he receives unless he has been specifically instructed by the seller in writing not to do so.

## 6. Key features documents specifically for sale by tender/buyer pays fee approach (included in the tender pack)

### Seller

- i) The agreement you have entered into is a legally binding document and gives [the agent] sole selling rights/a sole agency to market your property. The definition of the type of agency is contained in the agency agreement.
- ii) You will pay [the agent] an administration fee of [£ ] for the marketing of the property. After [the agent] has started marketing the property this fee is non-refundable unless you cancel within 14 days of signing the agreement in which case the separate cancellation agreement will apply.
- iii) You have chosen the option whereby the successful buyer of the property will meet the fee liability. You should be aware that:
  - Current HMRC policy is that the chargeable consideration (monies or monies worth) for a land transaction is what has been given (either directly or indirectly) in order to acquire the subject-matter of the transaction, by the purchaser or a person connected with him. This includes fees which have to be paid in order to acquire the property. This means that whatever the buyer pays, it will form part of the purchase price for the property and it will be included in his liability for stamp duty.
  - The prospective buyer may decline to pay the commission in which case you may lose an offer on your property. Where the prospective buyer does decline to pay [the agent] will seek advice from you as to whether you will be prepared to pay the fee and this can be subject to negotiation.
  - [The agent] will charge the successful buyer x% +VAT of the achieved sale price.
  - Your solicitor/conveyancer will be advised of the arrangement through the memorandum of sale.
- iv) You have chosen the sale by tender basis which means that:
  - All offers will be submitted on a standard tender document (see tender pack).
  - Each offer will be submitted in a sealed envelope and will be opened by the agent's branch manager on an agreed date. You are entitled to be present when the bids are opened.
  - In cases where a subsequent offer process is needed such offers may be submitted verbally.

### Buyer

- i) The fee you have agreed to pay will become due on exchange of contracts but will be payable on completion of the sales transaction.
- ii) You will pay x% +VAT of the purchase price of the property, for example on a £200,000 property that would mean you will pay including VAT [£ ].
- iii) You must be aware that HMRC have indicated that the commission fee will be considered as part of the 'chargeable' consideration for the property and may therefore be included in the calculation for any stamp duty liability which you will pay on transfer of the property to your ownership. For example under the new stamp duty reforms, if you purchase the property for £200,000 plus a buyers fee of 1% plus VAT = £2400, you will pay £1,548.00 in stamp duty.
- iv) Your solicitor/conveyancer will be advised of this arrangement through the memorandum of sale.
- v) You will submit your offer for the property through the sealed bid process as referred to in the tender pack. All offers for the property will be opened by the agent's branch manager and possibly in the presence of the seller on a set date. Note that it is the seller's choice which offer to accept and he may not necessarily choose the highest offer if for example a particular prospective buyer is in a better position to proceed more quickly.
- vi) If your offer is unsuccessful you will not incur a fee.

## 7. Tender pack

Must include:

- Sales particulars
- Agreement to submit by tender/pay agents commission
- Bid form
- FAQ's
- Key features document