

Client money handling for livestock auctioneers

Professional statement, 1st edition

RICS professional statements

Definition and scope

RICS professional statements set out the requirements of practice for RICS members and for firms that are regulated by RICS. A professional statement is a professional or personal standard for the purposes of RICS Rules of Conduct.

Mandatory vs good practice provisions

Sections within professional statements that use the word 'must' set mandatory professional, behavioural, competence and/or technical requirements, from which members must not depart. Sections within professional statements that use the word 'should' constitute areas of good practice. RICS recognises that there may be exceptional circumstances in which it is appropriate for a member to depart from these provisions – in such situations RICS may require the member to justify their decisions and actions.

Application of these provisions in legal or disciplinary proceedings

In regulatory or disciplinary proceedings, RICS will take into account relevant professional statements in deciding whether a member acted professionally, appropriately and with reasonable competence. It is also likely that during any legal proceedings a judge, adjudicator or equivalent will take RICS professional requirements into account.

RICS recognises that there may be legislative requirements or regional, national or international standards that have precedence over an RICS professional statement.

Introduction

RICS-regulated firms sell many different assets at auction. This document provides mandatory requirements and guidance for RICS firms acting as livestock auctioneers.

Background: sale by auction

During an auction, the auctioneer will seek open and competitive bids from prospective purchasers for the livestock entered by the vendors. Once the auctioneer is satisfied that the highest available bid has been made, they mark this with the fall of their hammer, setting the price for the sale. At that point, the highest bidder becomes the purchaser and is contractually bound to pay for the livestock. The auctioneer has a duty to account to the vendor for the price achieved, having taken their own commission and costs due under their terms of business.

It is the terms of the relationships between first the vendor and the auctioneer, and then the purchaser and the auctioneer, with regard to payment for the livestock that will dictate whether the money is received by the auctioneer as an agent or as a principal.

An auction conducted by an auctioneer for a vendor involves three contracts:

- a contract between the vendor and the auctioneer instructing the auctioneer to act as the vendor's agent in arranging and managing the auction process – this can be called the 'instruction contract'
- a contract between the vendor and the highest bidder (who becomes the purchaser on the fall of the hammer) for the sale of the livestock – this can be called the 'supply contract' transferring ownership, and
- a contract between the purchaser and the auctioneer that will govern, among other matters, the payment arrangements under which the auctioneer may be either a principal or an agent according to the terms – this can be called the 'transaction contract' governing payment.

For further analysis, see the Court of Appeal decision in *Chelmsford Auctions v Poole* [1973] 1 All ER 810, CA.

Requirements

RICS firms selling any property at auction for a third party **must** do so as an agent, ensuring that purchase money is handled as client money. There is one exception: where the asset sold is exclusively livestock and it is sold at a sale at the auctioneer's premises (which might also occasionally include an alternative premises), in which instance the firm may contract to act as a principal in the financial transaction.

Where a firm has contracted to act as a principal in the financial transaction, it **must** ensure that its terms of business with the vendor are clear, and include the following information:

- The nature of the contract is not that of an agent, but of a principal in the financial transaction.
- Sale proceeds will not be paid into a client money account.
- The RICS Client Money Protection Scheme will not apply to protect the vendor in the event of the firm's insolvency or any other default.

There **must** be signage on display inside or just outside the auction making clear that monies are not protected by the Client Money Protection Scheme.

For all livestock auctions that are conducted wholly or mainly for one client, whether at the auctioneer's premises or not, and for any deadstock or other machinery auctions, whether for an individual client or a collective sale, the auctioneer **must** act as an agent and ensure that purchase money is handled as client money.

Where the auctioneer receives the payment as an agent

Where the contracts provide that the auctioneer will pay the vendor only once the auctioneer has been paid, the auctioneer is acting as an agent. Generally, the contracts will allow intervening time for funds to clear. In this instance, the vendor is fully exposed to the risk of the purchaser defaulting and cannot ordinarily look to the auctioneer if the auctioneer has not been paid.

Once the payment has been received from the purchaser, the auctioneer holds it in a fiduciary capacity with a duty to protect the money. The auctioneer is then specifically liable to the vendor for that sale price, net of commission and any other costs due under their terms of business.

Money received from the purchaser where the firm receives the payment as an agent is client money and **must** be handled in accordance with the requirements of the [Client money handling](#) RICS professional statement.

If the auctioneer wishes to provide any guarantee of payment to the vendor, the firm **must** take its own legal advice on this. Money from the firm to pay any such guarantee **must not** be paid into the client money account before being paid to the vendor.

Where the auctioneer receives the payment as a principal

Where, under the contracts, the auctioneer receives the purchase monies as a principal, their duty to pay the vendor is not linked to their obtaining the payment from the purchaser. In this situation, the contracts require the auctioneer to pay the vendor, usually on a specified timetable, irrespective of whether the purchaser has yet paid the auctioneer – or pays at all. In this situation, the vendor is insulated from any default by the purchaser.

In situations where the auctioneer is a principal in the receipt of the purchase monies, they assume two risks which they would not carry as agent:

- the risk that the purchaser fails to pay for the livestock – the credit risk, and
- the cost of financing the time between paying the net proceeds of the sale to the vendor and being paid by the purchaser.

Common law provides a security for payment for the livestock, linked to the possession of the livestock, known as a 'lien'. The auctioneer's lien under common law and any powers reserved under the conditions of sale are important safeguards against these risks.

As the auctioneer is now not holding the money received from the purchaser in a fiduciary capacity for the vendor, it follows that this is not client money.

There is therefore a risk to the vendor that if the auctioneer becomes insolvent, the vendor will not be able to recover any monies, even if purchase monies have been paid to the firm.

There is a longstanding practice in this industry of auctioneer firms absorbing this risk by contracting as principals in the financial transaction. We believe that this is in the public interest, in that it generally provides more protection for the client.

Where a firm has chosen to act as a principal, money received from the purchaser is not client money as defined in the [Client money handling](#) RICS professional statement.

Because a client money account **must only** hold client money, monies received from a purchaser where the firm is acting as a principal **must not** be placed in a client money account (see paragraph 2.2.1 of the [Client money handling](#) RICS professional statement).

The firm should set up a separate market account for all funds connected to livestock auctioneering when they are receiving the money from a purchaser as a principal, but this account **must not** be referred to as a client money account. The money held in that account is office money.

From the outset, the obligation is placed on the livestock auctioneer to determine in which capacity they are receiving money from a purchaser paying for livestock – i.e. whether they are acting as an agent or as a principal in the financial transaction. The livestock auctioneer **must** make their role abundantly clear to all vendors and purchasers.

Strictly speaking, the auctioneer is acting as an agent in both of the scenarios outlined. The distinction is that, in the second scenario, the terms of the collateral contact with the purchaser enable the auctioneer to take direct enforcement action against the purchaser itself, in the event that the purchaser fails to make payment. In the first scenario, where the agent is simply facilitating the transfer of funds from the purchaser to the vendor, it would be for the vendor to bring any legal action against the purchaser in the event of a default.

The key point that auctioneers need to turn their minds to is whether they have a collateral contract with the purchaser. If they do not, they need to bear in mind that any monies they receive from the purchaser will be held as client monies.

Conclusion

Whether a firm that practices livestock auctioneering acts as an agent or a principal in receiving the purchase price for livestock sold at auction depends on its terms of business and the conditions of sale.

These **must** be transparent and fair. They **must** also make the auctioneer's status in this matter abundantly clear to vendors, outline whether they are acting as a principal or an agent in the financial transaction, and whether that means:

- a. monies will be held in a recognised client money account, or
- b. monies are payable to vendors irrespective of how – or if – the auctioneer recovers the purchase price from the purchaser, so that the money will not be held in a client money account and therefore no cover would be available for it from the RICS Client Money

Protection Scheme in the event of the auctioneer becoming insolvent or as a result of any other loss.

There **must not**, under any circumstances, be potential for any confusion on the part of the vendor as to the role of the auctioneer in receiving the purchase price from the purchaser for livestock sold. The obligation is therefore placed on the auctioneer to ensure vendors are clear on this point, and in particular that vendors understand whether there are client money accounts in operation or not, and the potential ramifications if not.

In addition, while the terms of the contract between the vendor and the auctioneer may well be set out in a separate document (the terms of business), the auction will be governed by the auctioneer's conditions of sale, which will include terms for the contract between the auctioneer and the successful bidder (the purchaser).

Separately, as previously stated, common law provides a security for payment for the livestock, linked to possession of the livestock, known as a 'lien'. Consequently, once the purchaser has taken possession of the livestock, the auctioneer's lien becomes a security over the purchase price. However, this may be of little benefit in the sale of livestock for slaughter, which are likely to be swiftly converted.

The auctioneer can therefore sue the purchaser for that price in their own name. This may be waived or enhanced by the terms of the conditions of sale. These conditions may also expressly provide for retention of the auctioneer's title, as a further basis on which the auctioneer could sue the purchaser where the purchaser has taken the livestock but not paid for it.

Disclaimer: This professional statement does not purport to offer legal advice. Firms are strongly encouraged to take professional advice to determine the terms upon which they contract with vendors and their conditions of sale.