

North Yorkshire County Council

Business and Environmental Services

Executive Members

23 August 2019

Review of Developer Funded Works Bonds and Fees

Report of the Assistant Director – Highways and Transportation

1.0 Purpose of Report

- 1.1 To inform the Corporate Director, Business and Environmental Service (BES), in consultation with BES Executive Members of the bonds and fees associated with developer funded highway works.
- 1.2 To seek approval of the Corporate Director, BES in consultation with BES Executive Members for:
- i) An 8.5% reduction in the calculation of the bond associated with Section 38 agreements
 - ii) An increase in the superintendence fee to 10% of the bond value for work associated with both Section 278 and 38 agreements.
 - iii) The introduction of a supervision fee, for 278 works where the NYCC highway design service has been used, set at 8.5% of the bond value.
 - iv) The cost of sewer construction to be removed from the calculation of bond value.
 - v) The Bonds and fees associated with the highways development process to be evaluated annually.

2.0 Background to the report

- 2.1 Developers entering into an agreement with North Yorkshire County Council (NYCC) to deliver developer funded highway works, either through a Section 278 Agreement or a Section 38 Agreement must pay North Yorkshire County Council a fee which is to cover the County's costs for superintendence of the Agreement.
- 2.2 At present the superintendence fee is set at 8.5% of the bond value. This fee primarily covers the supervision of the works together with design checking and administering the agreement.
- 2.3 NYCC has not reviewed its bond calculation and fee charges since 2017. During this time, the number of large planning applications received has significantly increased. Because of the growth agenda, ambitions have raised and inevitably therefore the complexity of enabling Section 278 works has increased. This has meant that the resource required to audit any specific major application involving Section 278 agreement has a more significant resource implication for the county council.
- 2.4 Similarly, the market place has changed significantly since 2017, given that in the case of Section 38 works which take place away from the highway, a lower bond value could be offered to developers, to better reflect framework contract rates.

- 2.5 As the superintendence fee is calculated from the bond value, a reduction in the bond agreed therefore has an impact upon the income achieved to cover the costs of superintendence. The income must remain the same in order for the Council to be able to deliver this necessary service.
- 2.6 It is therefore necessary to review the bond values and superintendence fees to ensure our charges adequately reflect the marketplace and cover the Councils costs.
- 2.7 In May 2019 NYCC began offering a design service, initially for the design of Section 278 works, but with aspirations to extend the service to cover Section 38 works.
- 2.8 This is a commercial venture which will see developers paying the County Council directly for the production of Section 278 designs.
- 2.9 In cases where the NYCC Highway Design Service is used, it will still be necessary to supervise delivery of the works and the council must continue to draw income to cover the costs of this service, however design auditing would not be necessary. A cost of site supervision, distinct from the wider value of superintendence will therefore be required to be introduced.

3.0 Section 38 Bond Review

- 3.1 Section 38 of the HA(1980) stipulates that when planning consent has been granted for a new development developers may ask the Local Highway Authority to adopt the newly constructed roads and any associated infrastructure.
- 3.2 The Superintendence fee for both Section 38 and Section 278 works is currently set at 8.5% of the bond value for the works. The calculation of the bond associated with the delivery of the highway associated with development and the income drawn to enable superintendence of the sites to permit future adoption is therefore intrinsically linked.
- 3.3 The bond value is the cost of NYCC undertaking the works if necessary. It presently represents the works value plus 10% to cover administration of the works. This is calculated based on the schedule of rates offered by NYCC's term contractor.
- 3.4 It has been identified through discussions with developers that the bond value for works is significantly higher than the actual costs of the work they directly contract. This is not surprising, given that developers are able to competitively source work on the open market, and are not subject to the same constraints of North Yorkshire County Council.
- 3.5 Section 38 works are by nature delivered on what is, during the construction phase, private land. As such any problems associated with the work or if work undertaken under Section 38 agreement by contractors on behalf of developers cease, in most circumstances, there would be no need for immediate works to be then undertaken by NYCC, to ensure delivery of the associated highway. There is therefore potentially time available to the authority in such circumstances to procure works through a framework, potentially at a more competitive price than offered by the rates of the NYCC term contractor.
- 3.6 Whilst there is more flexibility with Section 38 bonds to better reflect the market value, it is clearly imperative that calculation of both Section 278 and Section 38 bonds adequately reflects any potentially required recovery of costs, to remove any risk to NYCC of entering into such an agreement.

3.7 Similarly it is vital that any amendments to the calculation of the bond do not impact upon the income to NYCC to permit it to deliver its vital development management superintendence services.

3.8 It is clear however, that the calculation of Section 38 bonds could be re-evaluated to better reflect the market.

4.0 Sewer construction charges

4.1 It has also been accepted that the charges NYCC has been applying to the bond calculation relating to the sewer construction are superfluous, given that the developer is also obliged to enter into agreement with the water company which duplicates this obligation. It is therefore imperative that in the future this element is removed from the calculation of the bond.

4.2 Compared to the present bond value, this will represent a reduction of 6.5%.

5.0 Section 38 Superintendence Fee Review

5.1 By reducing the bond value by 8.5% for Section 38 works the County Council can better reflect the actual risk to the authority should the developer not be in a position to fulfil the stipulations of the Section 38 agreement.

5.2 As superintendence fee is calculated as a percentage of the bond value this amendment to the bond value would have an adverse implication on the income received by the County Council to permit it to undertake superintendence.

5.3 It is therefore proposed to raise the superintendence fee to 10% of the bond value. This would permit the income received to remain static and would ensure that the Council's costs were covered.

5.4 Table 1 below demonstrates the bond value secured over the past five financial years, and the superintendence income.

Table 1: s38 bonds and fees received over past five financial years

Year	S38 Total Bond Value (£)	S38 Total Superintendence fees (£)
14-15	£3,462,748.00	£294,333.58
15-16	£3,907,672.00	£332,152.12
16-17	£9,194,465.00	£781,529.53
17-18	£7,674,022.00	£652,291.87
18-19	£10,716,800.90	£910,928.08
TOTAL	£34,955,707.90	£2,971,235.17

5.5 Table 2 demonstrates a hypothetical bond value for Section 38s over the same period, with a 6.5% reduction to account for the removal of the sewer from the calculation, and reduced by an additional 8.5% to reflect framework rates, and the income received from superintendence should it remain at 8.5%.

Table 2: Hypothetical bond and fee values over past 5 years, applying 6.5% + 8.5% reduction in bond and with 8.5% superintendence fee.

Year	Total hypothetical Bond Value – 6.5% and 8.5%(£)	S38 Hypothetical Total Superintendence fees at 8.5% of bond value(£)
14-15	2,962,467.48	251,809.73
15-16	3,343,111.09	284,164.44
16-17	7,866,094.67	668,618.05
17-18	6,565,317.67	558,052.00
18-19	9,168,491.09	779,321.74
TOTAL	29,905,482.00	2,541,965.96

- 5.6 This demonstrates that by reducing the bond value a rise in superintendence fee is required, because a £429,269.21 deficit would have been created over the five year period analysed. This represents an average loss of income of £85,853k per financial year.
- 5.7 Table 3 therefore demonstrates the same hypothetical bond value over the five year period as table 2, but with a raised superintendence fee of 10% of the new bond value. This would permit the income for superintendence to remain static. (+£15,313.10 over five years).

Table 3: Hypothetical bond and fee values over past five years applying 6.5% + 8.5% reduction in bond, and demonstrating increase in superintendence fee to 10%

Year	Total hypothetical Bond Value – 6.5% and 8.5%(£)	S38 Hypothetical Total Superintendence fees at 10% of bond value(£)
14-15	2,962,467.48	296,246.75
15-16	3,343,111.09	334,311.11
16-17	7,866,094.67	786,609.47
17-18	6,565,317.67	656,531.77
18-19	9,168,491.09	916,849.11
TOTAL	29,905,482.00	2,990,548.20

6.0 Section 278 Bond Review

- 6.1 Section 278 of the highway act (1980) (HA) allows developers to undertake works to the public highway to enable development. This generally results from a condition imposed by the local planning authority, in consultation with the local highway authority during the planning process.
- 6.2 In the case of Section 278, the work is, by nature, undertaken within the curtilage of the existing highway maintainable at public expense. It is therefore imperative that NYCC secures a bond that permits its term contractor to undertake any necessary works, should delivery by the developer be aborted or should essential and immediate works be required to be undertaken by NYCC in the interests of the safety of the travelling public.
- 6.3 It would therefore pose a significant risk to the authority if the bond value was reduced.

7.0 Section 278 Fee Review

- 7.1 Since the charges were last reviewed in 2017, the scale and complexity of major planning applications has increased. It therefore requires significantly more resource to audit designs and monitor the delivery of Section 278 works.
- 7.2 Because of the increase in the work involved, a realignment of teams within network strategy has occurred, which is intended to offer additional contingency to the development management process and has introduced more dedicated staff into the structure. The net increase in staff costs in the new structure is £107k pa. This has been accounted for by reducing the budget for consultancy fees associated with the team.
- 7.3 It is therefore considered appropriate that the superintendence fee for Section 278 works is raised to 10% of the bond value.
- 7.4 Table 4 demonstrates the value of bonds and fees associated with Section 278 agreements over the past five financial years and the projected income that would have been received if the fee was raised to 10% of the bond value.

Table 4: Section278 bonds and fees received over past five financial years and projected fee income if raised to 10% of bond value

Financial Year	S278 total bond value (£)	Total superintendence fee (£)	Hypothetical total superintendence fee if set at 10% bond value (£)
14-15	1,987,520.00	168,939.20	198,752.00
15-16	1,265,974.00	107,607.79	126,597.40
16-17	7,541,348.64	641,014.63	754,134.86
17-18	2,023,184.72	171,970.70	202,318.47
18-19	3,931,430.00	334,171.55	393,143.00
TOTAL	16,749,457.36	1,423,703.87	1,674,945.73

- 7.6 By raising the superintendence fee to 10% an additional income of £251,241.86 would have been achieved over the five year period. This equates to an average annual additional income of £50,248.37 over this period.
- 7.7 Of course, this is hypothetical based on previous year's figures. In the future, the highway design service will alter the model by which developer funded works are delivered by the county council. Notwithstanding this, it demonstrates that the increase would offer additional resource to bolster the superintendence provided and would provide a bridge to some of the loss of income from the budget for consultancy which has been necessary to reduce to permit additional staff resource in the team.

8.0 Highway Design Service

- 8.1 In May 2019 NYCC introduced its Highway Design Service. This will offer developers the opportunity to pay NYCC for the production of Section 278 designs.
- 8.2 In such cases, the supervision of on-site delivery would still be required, however as the county council was undertaking the design, the cost of auditing would not be required.

- 8.3 It is therefore proposed to make a distinction between the superintendence offered presently, and the supervision required for sites where the NYCC Highway Design Service has delivered the design. In the latter cases, it is proposed that a supervision fee of 8.5% is charged to cover the cost of supervision.
- 8.4 This will mean the actual level of superintendence drawn at the proposed 10% level will not be reflective of table 5, because the proportion of Section 278 agreements using the traditional superintendence approach would be diminished.
- 8.6 The target surplus for the Highway Design Service to achieve in its first year is, however, £31k which will offset any reduction.
- 8.5 Notwithstanding this, as the supervision will be set at the present superintendence value of 8.5% there will certainly not be a fall in the proportional income received. The value of the overall increase is however an unknown.
- 8.6 For this reason, it is proposed to closely monitor the income over the next six months and report back to the Corporate Director, BES and BES Executive Members in April 2020.

9.0 Conclusions

- 9.1 It is clear from the investigation in this report that it is necessary to remove the sewer construction rates from the calculation of bonds associated with Section 38 agreements, given the agreements which developers enter into with water companies. This would amount to a 6.5% reduction in the present bond value.
- 9.2 In addition, given that Section 38 works are delivered away from the existing highway, it is accepted that the council would have more flexibility to use framework options to deliver the work it is therefore also recommended that once the Section 38 bond is calculated, based on the term contractors rates, that a reduction of 8.5% is included in calculations and this is the value from which the superintendence fee is calculated.
- 9.3 In order to maintain the income required to permit the council to undertake its superintendence of Section 38 works, the fee would be required to be raised to 10%. When this approach has been adopted using the previous five years figures, it has demonstrated that this would permit the council to retain the level of income it requires.
- 9.4 It is not proposed to reduce the value of bonds associated with Section 278 works.
- 9.5 It is proposed to raise the superintendence fee charged for Section 278 works to 10% of the bond value to reflect the increased resource required to deliver this.
- 9.6 It is proposed to introduce a supervision fee of 8.5% of the bond value for works where the NYCC Highways Design Service has been used.
- 9.7 It is proposed to introduce the new calculation and charging on the 1 September 2019.
- 9.8 To demonstrate how NYCC fees sit in the regional and national context, a demonstration of regional and comparator council bonds and fees is offered in Appendix B of this report. The proposed changes are in line with regional and national charges.

9.9 The proposed changes to fees and charges are summarised in table 4 below:

Table 4 Proposed fees and charges from 1 September 2019

Type of work	Bond Value	Superintendence/supervision fee
Section 38 works	Calculated on term contractor schedule of rates, with 8.5% reduction applied.	10% of reduced bond value
Section 278 – using Highway Development Service	Calculated on term contractor’s schedule of rates.	8.5% of bond value supervision fee
Section 278 – not utilising the Highway Development Service	As above	10% of bond value superintendence fee

10.0 Financial Implications

- 10.1 It is essential that the costs to the County Council for the provision of superintendence is met by the fees charged to developers entering into Section 38 and 278 agreements.
- 10.2 The value of the bond associated with Section 38 works could be reduced by 8.5% to reflect framework procurement options, without causing risk to the authority. It is however critical that this does not impact upon the income that the council receives to provide superintendence.
- 10.3 It is therefore necessary to raise the superintendence fee to 10% of the bond value, to ensure this is not impacted. The proposed rise in superintendence to 10% of the bond fee, will mean that the income that is drawn will be retained. (Table 3 demonstrates this difference to be +£15,313.10 additional surplus over a five year period).
- 10.4 It is not considered appropriate to reduce the value of the bond associated with Section 278 agreements.
- 10.5 It is however considered necessary to increase the fee to 10% to reflect the increase in resource required to provide superintendence to any specific site.
- 10.6 It is also proposed to introduce a supervision fee for works where the NYCC Highway Design Service has been utilised. Because this will be set at the present 8.5% of the bond value, which is not to change, there is no risk that the base level of proportional income received would reduce as a result of these amendments.
- 10.7 Income from fees and bonds will however continue to be monitored and reported to Members through the annual review process.

11.0 Legal Implications

- 11.1 NYCC applies bonds and fees to developer funded highway works under Section 38 and 278 of the Highway Act (1980).

12.0 Equalities Implications

12.1 There are no equalities implications arising from this report. The initial equality impact assessment screening form is included as appendix one accordingly.

13.0 Recommendations

13.1 It is recommended that the Corporate Director, BES, in consultation with BES Executive Members approve:

- i) An 8.5% reduction applied to the calculation of the bond associated with Section 38 agreements
- ii) An increase in the superintendence fee, to 10% of the bond value for work associated with both Section 278 and Section 38 agreements.
- iii) The introduction of a supervision fee, for Section 278 works where the NYCC Highway Design Service has been used, set at 8.5% of the bond value.
- iv) The removal of the cost of sewer construction from the calculation of bond value.
- v) An annual review of the Bonds and fees associated with developer funded highway works.

BARRIE MASON
Assistant Director – Highways and Transportation

Author of Report: Emily Mellalieu

Background Documents:

Business Case to support the introduction of a Development Management Team

Initial equality impact assessment screening form

Initial equality impact assessment screening form (As of October 2015 this form replaces 'Record of decision not to carry out an EIA')			
This form records an equality screening process to determine the relevance of equality to a proposal, and a decision whether or not a full EIA would be appropriate or proportionate.			
Directorate	Business and Environmental Services		
Service area	Highways and Transportation		
Proposal being screened	Amendments to fees and bonds associated with developer funded highway works		
Officer(s) carrying out screening	Emily Mellalieu		
What are you proposing to do?	Amend the bonds and superintendence fees associated with developer funded highway works		
Why are you proposing this? What are the desired outcomes?	To reduce bond values for section 38 works To retain present bond values for section 278 works To Increase superintendence fee for section 38 works to 10% To increased superintendence fee for section 278 works to 10% To introduce a supervision charge fee of 8.5% for 278 works where the NYCC Highway Development Service is used.		
Does the proposal involve a significant commitment or removal of resources? Please give details.	No		
Impact on people with any of the following protected characteristics as defined by the Equality Act 2010, or NYCC's additional agreed characteristic As part of this assessment, please consider the following questions:			
<ul style="list-style-type: none"> To what extent is this service used by particular groups of people with protected characteristics? Does the proposal relate to functions that previous consultation has identified as important? Do different groups have different needs or experiences in the area the proposal relates to? 			
If for any characteristic it is considered that there is likely to be a significant adverse impact or you have ticked 'Don't know/no info available', then a full EIA should be carried out where this is proportionate. You are advised to speak to your Equality rep for advice if you are in any doubt.			
Protected characteristic	Yes	No	Don't know/No info available
Age		No	
Disability		No	
Sex (Gender)		No	
Race		No	
Sexual orientation		No	
Gender reassignment		No	
Religion or belief		No	
Pregnancy or maternity		No	
Marriage or civil partnership		No	
NYCC additional characteristic			
People in rural areas		No	

Appendix A

People on a low income		No	
Carer (unpaid family or friend)		No	
Does the proposal relate to an area where there are known inequalities/probable impacts (e.g. disabled people's access to public transport)? Please give details.	No.		
Will the proposal have a significant effect on how other organisations operate? (e.g. partners, funding criteria, etc.). Do any of these organisations support people with protected characteristics? Please explain why you have reached this conclusion.	No		
Decision (Please tick one option)	EIA not relevant or proportionate:	X	Continue to full EIA:
Reason for decision	The proposed charges are related to developer funded highway works. There are therefore no equalities issues arising.		
Signed (Assistant Director or equivalent)	<i>David Bowe</i>		
Date	<i>16.08.2019</i>		

Review of regional and national local authority fees for developer funded highway works

Table 1 below demonstrates regional fees applied to developer funded highway works associated with Section 38 and Section 278 agreements. Table 2 demonstrates the same data for a selection of authorities from The Chartered Institute of Public Finance and Accountancy (CIPFA) “nearest neighbour” group of which NYCC is part.

Table 1

Authority	38 Fee	278 Fee	Other information provided
East Riding of Yorkshire Council	7.5%	Not available	n/a
Hull CC	10%	Not available	n/a
City of York Council	10%	10%	38 - 8% + 2% Technical approval fee (10%) Includes a caveat that additional fees/costs may be charged when additional works are incurred by the council, such as a protracted development and/or requiring unexpected remediation, additional checking and superintendence.
Wakefield City Council	10%	8% (intention to align to 38 fee)	(Increased in 2016 from 8%)
Tees Valley Authorities	6%	Sum paid to council for its delivery of 278 work.	Sec 38 - up to works value of £10,000, £1000 flat fee, £10,000+ 6%
Leeds City Council	Bond calculated on SOR +20% calculate 7.5% for superintendence from this. Final bond value is offered at 60% of full bond.	3 types – standard – LCC delivers, with 20% supervision fee Medium – contractor procures. 10% off full SOR+20% +10% costs Minor – Sec 62 <£10k	N/a

Table 2

Authority	38 Fee	278 Fee	Other information provided
Derbyshire County Council	8.5%	11%	All Section 38 Agreement anticipate that developer works will be completed within 2 years. <ul style="list-style-type: none"> •in the event that works associated with a Section 38 Agreement have not been completed within 2 years then a further fee of 4.25% should be levied to cover inspection and administration between years 2 and 4 •if incomplete after 4 years – levy a further charge of 4.25% •if incomplete after 6 years – call in the bond and complete the works using the bond sum •where agreements have not previously been extended at the end of 2 years we will seek the reasonable reimbursement of any additional costs we may have incurred with reference to the council schedule of fees and charges
Cumbria	8% OR 10%	Variable	Sec 38 - (a) The sum of £1500 or 8% (10% if works have already commenced on site resulting in additional inspections) of the Estimated Cost (Greenfield Cost), being (£><) (whichever is the greater) in respect of the costs incurred by the Council in inspecting the works. (b) The sum of £>< in respect of the actual design/plan checking costs incurred by the Council. (c) The actual administrative and legal costs incurred in connection with this Agreement subject to a minimum of £ 500. 278 – Varies depending on the complexity of works. Distinct costs for supervision and design check.
Devon County Council	6%	7%	Based on term contract rates
Warwickshire County Council	-	n/a	278 Works delivered by the council. Bond set at either 200% estimated cost of works or 150% based on point of 278 signing.
Leicestershire	7%	10% of the first £100,000 of the cost of the highway works; plus <ul style="list-style-type: none"> • 6% of the cost over £100,000 	-no data available