

The ACE Agreements 2009

The ACE has published the following Agreements:

- ACE Agreement 1: Design
- ACE Agreement 2: Advise and Report
- ACE Agreement 3: Design and Construct
- ACE Agreement 4: Sub-Consultancy
- ACE Agreement 5: Homeowner
- ACE Agreement 6: Expert Witness (Sole Practitioner)
- ACE Agreement 7: Expert Witness (Firm)
- ACE Agreement 8: Adjudicator

They have also published eight Services Schedules, G(a) to G(h).

Agreements 5 to 8 are new.

THE REVISED AGREEMENTS

Agreements 1 to 4 and the Services Schedules replace existing Agreements and Services Schedules as set out below.

Current Agreement/Services	Replaced by
Memorandum and Conditions A(1) 2004	ACE Agreement 1: Design
Memorandum and Conditions A(2) 2004	ACE Agreement 1: Design
Memorandum and Conditions B(1) 2004	ACE Agreement 1: Design
Memorandum and Conditions B(2) 2004	ACE Agreement 1: Design
A(1) Services (civil and structural)	Schedule of Services Part G(d)
A(2) Services (mechanical and electrical)	Schedule of Services Part G(e)
B(1) Services (civil and structural)	Schedule of Services Part G(a)
B(2) Services (mechanical and electrical – detailed design)	Services Schedule Part G(b)

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B(2) Services (mechanical and electrical – performance design)	Services Schedule Part G(c)
Memorandum and Conditions C(1) 2002	ACE Agreement 3: Design and Construct
C(1) Services (civil and structural)	Schedule of Services Part G(f)
C(2) Services (mechanical and electrical – detailed design)	Schedule of Services Part G(g)
C(2) Services (mechanical and electrical – performance design)	Schedule of Services Part G(h)
Short Form 2004	ACE Agreement 2: Advise and Report
Sub-Consultancy Agreement 2002	ACE Agreement 4: Sub-Consultancy

There have been no fundamental changes to the obligations and liabilities contained in the 2004 editions of the Agreements, nor have there been any major changes to the Services Schedules attached to those Agreements.

Agreement 1: Design

The main changes are as follows:

- 1 This can be used where the Consultant is the Lead Consultant and where he is not so appointed, doing away with the division into Agreements A(1) and A(2) for Lead Consultants and Agreements B(1) and B(2) for non-Lead Consultants.
- 2 The list of "*The Works*" no longer appears but "*the Works*" can still be defined if appropriate and the Consultant can of course still use the earlier lists, if these are suitable, or provide his own.
- 3 There is now an overall aggregate cap on liability with a default provision of ten times the total fees. The overall limit to the amount of the Consultant's professional indemnity insurance and the indemnity from the Client in respect of asbestos claims have gone.
- 4 There is a fuller Schedule of Fees to assist Consultants in setting out the details of the instalments, hourly rates etc.
- 5 Assignment by the Client of the rights under the Agreement is permitted at any time up to twelve weeks after the Services have been completed, provided all the fees have been paid.
- 6 The Services Schedule to be attached can now be one or more of the ACE Schedule of Services, which should help multi-disciplinary practices, or the Consultant can attach his own. The Additional Services in the earlier Schedules are now "*Other Services*" and there are no additional services as such. It is anticipated that the Consultant will now set out those Services which he will perform for the fee.
- 7 The adjudicator is to be nominated by the ACE in default of agreement, and there are some restrictions on the size of statement of case in an adjudication.

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- 8 There is a distinction between the parties' delegated representatives, who have full authority, and principal representatives, who are to receive notices.

Agreement 2: Advise and Report

The main differences are:

- 1 The Memorandum, Particulars, Programme and Fees are all now to be completed at the front of the Agreement. The Services Schedule is still at the back.
- 2 The aggregate basis for limiting liability and the net contribution clause remain but there are new provisions to limit or exclude liability for pollution, contamination, asbestos and terrorism claims, as in Agreement 1.
- 3 The Client now has a right to suspend for up to three months in aggregate.
- 4 Payment on suspension or termination now includes payments to which the Consultant is irrevocably committed.
- 5 The adjudication provisions are extended in the same manner as for Agreement 1.

Agreement 3: Design and Construct

Agreements C(1) and C(2) were not revised in 2004.

Agreement 3 follows the format of Agreement 1 and has the same limitation of liability provisions.

Other points to note are:

- 1 As before, the Consultant is either to perform the pre-tender services and then is retained for the remainder of the project if the tender is successful, or he is to perform agreed services.
- 2 The fee schedule provides for time-based fees or lump sum fees only.
- 3 The Terms are now substantially the same as Agreement 1 except there is, as before, no reference to site staff.

Agreement 4: Sub-Consultancy

The Sub-Consultant's Agreement was not revised in 2004.

Agreement 4 also follows the format of Agreement 1 and, as before, it is designed to be used when the Consultant has been employed by his Client on the basis of ACE Agreement 1.

The Particulars provide for details of the Main Agreement to be attached, and the basis for limiting liability is the same as for Agreement 1 but fewer particulars are to be provided. The details for the fees are simpler.

Save for the limitation of liability section, the Terms are substantially the same as in the 2002 version but there had been added:

- 1 an obligation in relation to the programme;
- 2 more detailed publishing and confidentiality obligations; and

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3 the extended adjudication provisions.

THE NEW AGREEMENTS

Agreement 5: Homeowner

This is provided in the form of a letter for the Consultant to complete and send to his Client. It is in straightforward language and in simple terms, concentrating on clarifying the services and the fees. Additional payment will only be made if the alteration to the fees has been agreed before the changed or additional services are commenced. An aggregate total liability is to apply and the amount is to be inserted in the letter.

Agreements 6 and 7: Expert Witness (Sole Practitioner and Firm)

These are short Agreements whereby Clients can appoint either an individual or a firm who in turn will provide an individual to carry out expert witness work. It is anticipated that the solicitors will prepare this agreement and provide details of the proceedings in connection with which the expert is instructed. The expert's duties to the court are recognised, as are the solicitors' needs for compliance with the court's timetable and estimates of fees. The expert may only employ other personnel to assist with the Client's consent.

Agreement 8: Adjudicator

The ACE has produced this Agreement so that parties using the ACE as a nominating body have available an agreement whereby they can appoint an adjudicator. The relevant adjudication procedure is to be specified and the adjudicator's obligations take account of the fact that these procedures may differ. Provisions are made for the adjudicator to appoint third party experts etc if the relevant procedure so provides and to give notice of any conflict. There are fairly detailed provisions concerning the payment of the adjudicator's fees and the adjudicator is permitted to destroy all his documents after six months provided he gives notice of his intention to do so.

For further information on any aspect of the ACE Agreement's or to comment on this article please contact Rachel Barnes on 020 7240 3474 or r.barnes@beale-law.com.

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