

ACE agreements: Altogether now
Rachel Barnes, 04 December 2009

This summer the Association for Consultancy and Engineering (ACE) published some revised agreements and some new ones. Separate Scottish versions of all of these were launched at the Scottish parliament on 19 November. Previously, optional provisions in the agreements enabled the parties to decide that Scottish rather than English law would apply. Electronic versions of both English and Scottish agreements should be available by the end of the year.

A major change in the English and Scottish agreements has been to provide just one design agreement in place of the historic division into two: one for lead consultants and one for non-lead consultants, which were further subdivided for those consultants providing civil or structural services and those providing M&E services.

Now consultants designing permanent works can complete just one agreement and attach the relevant services from any of the original ACE services schedules, another standard set of services such as those produced by the Construction Industry Council, or their own services schedule. This allows a pick-and-mix approach that should assist multidisciplinary consultants and those whose services do not match these original divisions.

The basis of the consultants' liability under these revised agreements has been altered. The parties are to agree a total aggregate amount for all claims arising under the agreement. There is a default or fall-back provision in the main design agreement so that if nothing is specified, the amount is to be 10 times the fee.

A net contribution clause is still included and the basis of liability for claims arising out of pollution and contamination and asbestos is unchanged from an aggregate basis, with a further limitation on the amount of the insurance available to meet such claims.

However, the proviso that liability for any other claim would also be limited to the amount of the insurance available to the consultant at the time has gone, as has the indemnity from the client to the consultant in respect of any claims arising out of asbestos, which are over and above the agreed limits to the consultant's liability for such claims.

These latter provisions were introduced in the 2004 revisions to the ACE agreements at a time when it was perceived the insurance industry was introducing new restrictions on professional indemnity insurance which would not be covered by these limitations.

There were also concerns that asbestos claims from third parties would be made against consultants who could only obtain limited insurance cover for such claims. In fact, neither seems to have happened to any significant extent and such provisions were often not acceptable to clients.

Otherwise there have been no significant changes to the liabilities or obligations of either the consultant or the client from those in the 2004 agreements, although some of the language has been revised and the format has been changed to make completing the agreements easier.

The new agreements comprise a short Homeowners Agreement in a simple letter format and two agreements for the employment of expert witnesses – one for the direct employment of an individual and one for where a firm provides an individual to act as an expert. In the case of these latter agreements, there were no standard forms available and this should assist members of the ACE who provide such services and who hitherto were adapting the short form agreement.

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As the ACE is now a nominating body for adjudicators, the final new agreement is that for the appointment of an adjudicator.

The main difference in the Scottish agreements, apart, of course, from the application of Scottish law, is to allow for the very different formalities for signing contracts and identifying all the documents which are to form part of the contract that is required in Scotland.

Also, as the Contracts (Rights of Third Parties) Act does not apply in Scotland, different provisions apply in order to exclude all rights of third parties, except for those rights given to the employees of the consultant to protect them from direct claims from clients. These extend to the employees consenting to the registering of the agreement in the Book of Counsel and Session.

Although the time limits for bringing claims are different in Scotland (essentially five years with a long-stop of 20 years), the parties are free to agree the length of time for which the consultant is to be liable as under the English agreements. It is also necessary to refer to "assignation" rather than assignment and to "delict" rather than "tort" in the clauses limiting liability in the Scottish agreements.

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