

ACE Agreements

GUIDANCE NOTE



ace
agreements

scotland

www.aceagreements.co.uk

About ACE

ACE represents the business interests of the consultancy and engineering industry in the UK. We are the leading business association in this field, counting around 800 firms – large and small, operating across many different disciplines - as our members.

There are two key strands to ACE's work. First, through powerful representation and dialogue with government, major clients, the media and other key stakeholders, we promote the critical contribution that consultants and engineers make to the nation's developing infrastructure.

Second, through direct contact, publications, events, our website and our sector and regional networks, we provide a cohesive approach and direction for our members and the wider industry. ACE listens to its members, understands the issues affecting them and their clients and takes the lead in representing their interests to decision makers and opinion formers in government, client organisations and the media.

ACE Agreements are the industry standard contract documents for consultancy appointments. To further promote best practice and better ways of working in the industry, ACE also publishes a range of briefing notes and policy statements for both clients and consultants. Full details can be found on the ACE website at www.acenet.co.uk

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Scottish Legal Advice Line

The construction and engineering team at Brodies provide 15 minutes of free legal advice to ACE members on a range of issues from standard forms of contract assistance to alternative dispute resolution in relation to Scottish law. To access the service please call the team on 0141 245 6730 quoting your ACE membership number.

Acknowledgement

ACE would like to thank the construction and engineering team at Brodies LLP for their expertise and assistance in producing the ACE Agreements (Scotland) 2009 editions.

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The Association for Consultancy and Engineering has prepared these notes for general guidance only and does not accept any responsibility for any loss arising from reliance on them. Specific advice should be sought for particular queries.

ACE AGREEMENTS 2009 - SCOTLAND

ACE Agreements are the industry-standard documents for the appointment of consultancy and engineering professionals. In these new 2009 editions of the agreements, the original principles of the ACE Agreements are maintained but the documents have been updated and simplified. This means more user-friendly Agreements, offering greater versatility for both clients and consultants.

NEW FEATURES

- Both client & consultant can tailor-make the services to match the requirements of a project
- Sold in packs of five, the Agreements are intended to be working documents rather than separate sources of reference
- The Services are now separate from the other parts of the Agreement. This allows client and consultant to tailor the services to match the requirements of a project, offering even more flexibility and versatility when using ACE Agreements
- The Memorandum has been made self-explanatory and is easier to complete
- Agreements can accommodate any size of consultancy commission
- Agreements are now multi-functional and able to accommodate the presence of a project manager and/or a lead consultant in the team
- Both client and consultant are able to introduce personnel with delegated powers to run a project whilst at the same time leaving overall responsibility at senior managerial level

UPDATED FEATURES

- A default limit of liability of ten times the fee has been introduced
- The client's brief has been introduced into the Agreements
- A programme for undertaking the services has been introduced
- The schedule of fees has been expanded and clarified to accommodate
 - Time charges
 - Lump sums
 - Percentage fees
 - Fees for additional work
 - Fees for arranging work to be undertaken by others
 - Payment of expenses
 - Payment for collateral warranties

EASY TO USE

All the ACE Agreements and Services are sold in handy tear-off packs of five to make the documents easier to use. The separate Services documents mean that both client & consultant can tailor-make the services to match the requirements of a project, offering even more flexibility and versatility when using ACE Agreements.

HOW TO USE THE 2009 EDITIONS (SCOTTISH VERSION)

1 Choose the right Agreement

- 1.1 ACE Agreements were previously selected on the basis of discipline e.g. Civil & Structural or M&E, and whether the engineer was lead consultant or not. The Agreements should now be selected according to the type of procurement – see Table 1.
- 1.2 In the usual way, all blanks in the document should be completed and selections made between various alternative options. Please refer to the side-notes in the Agreement for guidance on how to deal with these.
- 1.3 The previous A, B and C agreements are all now absorbed into Agreement 1 or Agreement 3. The 2009 suite has new agreements – nos. 5 – 8.
- 1.4 The old Short Form is now replaced by Agreement 2: Advise & Report. The old Short Form was recommended for advisory & reporting work for small straightforward projects, which is one of the intended uses for the new agreement.
- 1.5 There is no longer a Planning Supervisor/CDM Co-ordinator form. The duties under the CDM Regulations and the guidance in the Approved Code of Practice encompass what is required.
- 1.6 The 2002 suite (revised) 2004) is no longer for sale.

2 Choose the right Schedule of Services

- 2.1 The Schedule of Services was previously included in the Appointment Booklet. Schedules of services for Agreement 1: Design, and Agreement 3: Design & Construct are now sold separately (see Table 2).
- 2.2 The new Agreements can now also be used with a bespoke schedule of services. The agreed bespoke document should simply be annexed to the Agreement in place of the ACE Part G services.
- 2.3 In some cases, the services can simply be written into the Agreement itself e.g. see Part F of Agreement 2: Advise & Report.
- 2.4 For M&E Appointments, there is a choice between performance design and detailed design. Performance design occurs when the consultant simply sets the design parameters within which the works or plant are to operate. It is then up to the contractor to arrange for detailed design, manufacture & installation. Detailed design occurs when the consultant undertakes all design leaving the contractor simply to arrange for manufacture & installation.

3 Make sure the documents are properly signed

- 3.1 The requirements of Scots law about who can sign documents depend on whether the person signing is an individual, a firm or a corporate body (which includes public sector organisations as well as limited companies). In all cases, it is sufficient if one appropriate (i.e. duly authorised) person signs with their signature then being witnessed.
- 3.2 Each Agreement is set up so that having it signed properly should be easy. There is a block with spaces for signatures on the last page of each Memorandum of Agreement. The appropriate signatures should be added. The witness must know the signatory and see them sign (or at least hear them acknowledge the signature as theirs) but not have any interest in the Agreement.
- 3.3 Each Agreement has what in Scots law is known as a “testing clause”. This gives details of who signed it, where & when. It always starts with the words “IN WITNESS WHEREOF”. When the document is signed, the details should be written in to it.
- 3.4 A couple of other things also need done. The testing clause should state the number of pages in the document preceding the page with signatures. This should be written into the testing clause when the document is signed. So for example in Agreement 1, the testing clause appears on page 4, so there are three preceding pages (including the front cover).
- 3.5 Although the other Parts of the Agreement do not need to be signed, it is important to ensure that they are properly identified & incorporated in it. This has already been done for Parts B – G as they are each labelled at the top of the first page e.g. “This is Part C referred to in the foregoing Part A: Memorandum of Agreement”.
- 3.6 However, the relevant version of Part G (the Schedule of Services) must be specified in the testing clause. Simply stapling a copy to the back might not be sufficient. So if Part G (a) is used, the letter “a” should be written into the space in the testing clause. This might seem a very small point, but significant legal consequences could flow from referring to the wrong services, so it is important to refer to the correct version.

- 3.7 If a bespoke schedule of services is used instead of one of the ACE schedules, it should be described in the space for Part G in the testing clause as Part G (i). The document setting out the services should be labelled at the top of the first page as “This is Part G (i) (Schedule of Services) referred to in the foregoing Part A: Memorandum of Agreement” and attached to the remaining parts of the Agreement.
- 3.8 In addition, if any other annexures are attached to the Agreement, they must be specified in the blank space in the testing clause appearing after the reference to Parts B – G. To ensure that the annexure is properly identified as referring to the particular appointment, it should state at the top:-
This is the [] [insert description of annexure] referred to in the foregoing Part A: Memorandum of Agreement
- 3.9 Agreement 2: Advise & Report does not have Part G because the services are to be written into the document at Part F. If however Part F refers to a separate document which is attached as an annexure, that annexure should be identified in the same way as any other in accordance with paragraph 3.9 above.
- 3.10 Agreement 5: Homeowner is different as it is in the form of a letter to be sent by the Consultant to the Homeowner. It would be good practice to issue the letter in duplicate and to invite the Client to return one copy duly signed and dated by them. In these circumstances, witnessing is not essential. It would be prudent however to point out to the client in a covering letter that signing the duplicate would create legal obligations and that they should therefore take independent advice on it.
- 3.11 It is not necessary for the filled-in blanks in the documents or the deletion of pre-printed material (e.g. the options/alternatives in the Particulars in Part B) to be initialled where that has been done before signature of the document.
- 3.12 Under Scots law, the period of time within which claims can be brought is not affected by the way the document is signed. Scots law does not make the distinction that English law makes between execution “under hand” or “under seal” (i.e. as a deed).

4 Why use ACE Agreements?

- 4.1 If an appointment is not recorded in writing, disputes can easily arise over fees, the scope of the services, and the conditions under which the services are to be performed. There is simply too much scope for getting these wrong or not covering an important issue if some other appointment agreement is used or if informal contracts by exchange of letters incorporating ACE conditions are used.
- 4.2 The dangers are clearly illustrated in the recent case of Langstane Housing Association –v- Riverside Construction Ltd & Others (124 Con. L.R. 211; 2009 G.W.D. 27-429). In that case, ACE Agreements were not used as the appointment was constituted by informal correspondence, but there was confusion over which version of the ACE conditions had been incorporated, resulting in uncertainty over whether the net contribution clause was part of the conditions. Significant financial consequences can arise from such uncertainties.
- 4.3 ACE Agreements are good value for money as they are inexpensive, easy to use, and comprehensive, and will help minimise the scope for dispute. Why leave things to chance or increase the potential for disputes by not using ACE Agreements?
- 4.4 For further information and to purchase agreements or schedules of services, see www.aceagreements.co.uk

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TABLE 1 - ACE AGREEMENTS 2009 EDITIONS – SCOTTISH VERSIONS

No.	Title	Purpose
1	ACE Agreement 1: Design	For the appointment of a Consultant by a Client to undertake detailed design and/or specification of permanent Works to be undertaken or installed by a Contractor including any studies, appraisals, investigations, contract administration or construction monitoring leading to or resulting from such detailed design and/or specification
2	ACE Agreement 2: Advise & Report	For the appointment of a Consultant by a Client to provide any type of advisory, research, checking, reviewing, investigatory, monitoring, reporting or technical services in the built and natural environments where such services do not consist of detailed design or specification of permanent Works to be constructed or installed by a contractor.
3	ACE Agreement 3: Design & Construct	For the appointment of a Consultant by a Contractor in circumstances where the Contractor is to construct permanent Works designed by the Consultant
4	ACE Agreement 4: Sub-Consultancy	For the appointment of a Sub-Consultant by a Consultant in circumstances where the Consultant is appointed on the terms of an ACE Agreement by its Client.
5	ACE Agreement 5: Homeowner	Model letter of the appointment of a Consultant by a homeowner.
6	ACE Agreement 6: Expert Witness (Sole Practitioner)	For the appointment of an individual to act as an expert witness.
7	ACE Agreement 7: Expert Witness (Firm)	For the appointment of a firm to provide an expert witness.
8	ACE Agreement 8: Adjudicator	For the appointment of an adjudicator

TABLE 2 - ACE SCHEDULES OF SERVICES 2009 EDITIONS – SCOTTISH VERSIONS

Part G	Discipline	Single/Lead	For use with
(a)	Civil & structural engineering	Single consultant or non-lead	Agreement 1 - Design
(b)	M&E engineering (detailed design in buildings)	Single consultant or non-lead	Agreement 1 – Design
(c)	M&E engineering (performance design in buildings)	Single consultant or non-lead	Agreement 1 – Design
(d)	Civil & structural engineering	Lead consultant	Agreement 1 – Design
(e)	M&E engineering design in buildings	Lead consultant	Agreement 1 – Design
(f)	Civil & structural engineering	Appointment by Contractor	Agreement 3 – Design & Construct
(g)	M&E engineering (detailed design in buildings)	Appointment by Contractor	Agreement 3 – Design & Construct
(h)	M&E engineering (performance design in buildings)	Appointment by Contractor	Agreement 3 – Design & Construct

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