Publication of ACE Professional Services Agreement 2017

The ACE has added a new Professional Services Agreement (“ACE 2017 PSA”) to its suite of standard forms of Agreement.

Much of the text will be familiar to users of ACE Agreements 1 and 3 from the 2009 suite of Agreements, which were last revised in 2011 (“ACE 2009”). However, instead of different versions depending on whether the Client is the project owner or the D&B contractor, ACE 2017 PSA can be used for the appointment of the Consultant either by the owner/authority or the contractor. Furthermore, in another move to unify the form, the ACE has not considered it necessary to publish a separate version for use in Scotland. Instead, ACE 2017 PSA has been drafted for use in England, Wales, Northern Ireland or Scotland, and separate attestation clauses have been included to facilitate this.

The ACE have introduced changes to make ACE 2017 PSA more “user friendly”, to re-order the content in a more logical fashion, to simplify clauses that were seen to be complex and over-lengthy and to reflect best current practice, for example in relation to collaboration and early warning of matters likely to impact on programme or additional costs. The “look” of ACE 2017 PSA is different since unlike ACE 2009 it is not split into separate sections. Furthermore, all the project specific information is to be inserted into schedules which should make ACE 2017 PSA easier to use in practice.

Users of the form will need to familiarise themselves with the numerous changes of drafting detail from ACE 2009. The guidance notes at the back of the form provide useful assistance for this purpose.

A point to note is that the adjustments published by ACE in an amendment sheet dated 9 January 2017 should be incorporated in all ACE 2017 PSA appointments by express reference and annexure.

ACE 2017 PSA retains the essential protections for Consultants found in ACE 2009, for example in relation to limitation of liability. In this connection, consultants will welcome the addition of a mutual exclusion of liability for loss.
of profit, business or indirect and consequential loss. However, the form should be significantly more attractive to developers, authorities and contractors when appointing consultants, since the majority of the changes may be regarded as “Client-friendly”. In this connection, the key changes made in ACE 2017 PSA can be grouped into categories as follows:

1. Provisions which should make ACE 2017 PSA more acceptable to the Client, but which reflect widespread practice and are generally accepted by Consultants and their insurers.

Required standard of skill and care (clause 2.1)(i)): In terms which will be familiar to most Consultants, there is now an “elevated” standard of skill and care by reference to the nature, size and complexity of the Project in question.

Deleterious Materials (clause 2.1)(ii)): Clause 2 also requires the Consultant, using the required standard of care, not to specify or approve for use any materials generally known to be deleterious.

Programme/timeliness (clause 2.2): The Consultant has a clearer obligation to use reasonable endeavours to comply with any programme identified in the Appointment, or which is accepted by the Client if no programme is identified.

Client Instructions (clause 2.3): The Consultant is now obliged (i) to act in accordance with the Client’s reasonable instructions, and (ii) to inform the Client if the Consultant considers that an instruction is outside the scope of the Services and will cause a change to the Programme or to the Consultant’s fees or expenses. The former obligation will not be controversial. The latter obligation is consistent with the philosophy that the Client should have advance notice of any matter which is likely to impact on cost or programme, as now provided by the “early warning” provision in clause 4 (which is commented on below) and should be welcomed by Clients on this basis. Consultants should, however, ensure that they are not in breach of this obligation since otherwise they could prejudice their entitlement to additional fees and in some circumstances may even be liable for additional costs and/or delay incurred by the Client. No timescale is prescribed for the Consultant to inform the Client, although Consultants should assume that they will be in breach of this requirement if they do not provide this information before the changes referred to are incurred.

ACE 2017 PSA follows a modern and balanced approach and compares favourably with the other standard and non-standard forms of appointment which are widely used in today’s market.
Information and instructions (clause 3.2): There are new obligations for the Consultant to review the data and information supplied by the Client, exercising the required standard of care.

Consultant’s Intellectual Property Rights (clause 10.1(i)): The Consultant does not have the right to revoke or suspend the Client’s licence to use the Consultant’s designs in the event of a payment default. The inclusion of such a right was a common ground for clients to object to ACE 2009, but was of doubtful utility in circumstances where the Consultant has the right to suspend performance of all or any of its obligations subject to the relevant provisions of the Construction Act.

Collateral warranties (clause 14): In certain circumstances, the Consultant may be required to provide collateral warranties for the benefit of third parties. A prescribed form of warranty is annexed to ACE 2017 PSA and includes essential protections for the Consultant, including a net contribution clause and a “single project cap” limitation of liability reflecting clause 10.1(i) of ACE 2017 PSA (see below).

Joint obligations (clause 4): Clause 4 sets out obligations

+ to collaborate in a spirit of trust and mutual support in the interests of the timely, economic and successful completion of the Project; and

+ to give early warning of any matters likely to affect provision of the Services, including delay or additional costs, and to agree steps to mitigate the consequences.

These obligations are consistent with the Government’s endorsement of more collaborative contracting arrangements and will be familiar to those who are regularly appointed under the NEC3 Professional Services Contract.

Given the primary interest of the Client in the timely, economic and successful completion of the Project, the new joint obligations should be regarded as being of greater potential benefit to the Client than to the Consultant.

2. Provisions to improve the position of the Consultant

Limitation of Liability (clause 10.1(i)): The cap on the Consultant’s liability is now expressed to cover its liability under any warranties it provides as well as under ACE 2017 PSA, i.e. it is intended to work as a “single project cap”.

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This should be welcomed by Consultants and their insurers, since although there is no obligation under ACE 2009 for the Consultant to enter into collateral warranties in favour third parties, they are very commonly requested by Clients and given by Consultants even where they have been appointed under that form.

**Exclusion of liability for loss of profit, loss of business etc (clause 10.1(ii))**: There is now a mutual exclusion of liability for direct or indirect loss of profit, loss of business, or special, indirect or consequential loss. Given the greater risk exposure of the Consultant to the Client if it is in breach of its appointment, this should be regarded as being of greater potential benefit to the Consultant than to the Client.

3. **Provision reflecting best current practice and potentially of benefit to both parties**

**Building Information Modelling (clause 17)**: Reflecting the increasing practice of BIM, the parties are now obliged to comply with the provisions of any BIM protocol referred to in the Schedule. The choice of Protocol is not specified, but our recommendation is to specify the CIC BIM Protocol (in the drafting of which Beale & Company collaborated with the CIC) rather than a “Client bespoke” protocol.

There is no express order of priorities dealing with conflicts or discrepancies between the selected BIM Protocol and ACE 2017 PSA. Where a BIM protocol is to apply, this makes it even more important for the parties to review the selected protocol carefully and to ensure that there are no inconsistencies with the terms of ACE 2017 PSA before entering into the appointment.

**New Schedules of Services and Professional Services Sub-Consultancy Agreement**

The ACE has also published two new Schedules of Services, for a Lead Consultant and an Individual / Non-Lead Consultant, and a new Professional Services Sub-Consultancy Agreement (“ACE PSSA 2017”).

ACE PSSA 2017 is similar in content and layout to ACE PSA 2017, subject to a number of differences of detail which can be easily explained as a consequence of the different considerations which apply to a Tier 2 professional appointment as opposed to a Tier 1 appointment. For example ACE PSSA 2017 does not include an equivalent of clause 6 of the ACE PSA
2017 (site staff) since it is not anticipated that the Sub-Consultant will need to contribute site staff.

Conclusion

ACE 2017 PSA follows a modern and balanced approach and compares favourably with the other standard and non-standard forms of appointment which are widely used in today’s market. While retaining essential protections from ACE 2009, the aim is that it should be easier to “sell” the form to Clients since it now reflects up to date “best practice” from the Client’s perspective. It follows that consultants will need to manage carefully the new obligations introduced into the ACE 2017 PSA and make due allowance in their fees for any additional work required in consequence.

Note

This briefing note is not an exhaustive summary of the Consultant’s obligations under ACE 2017 PSA and consultants should familiarise themselves with the form and consider taking legal advice before entering into appointments based on the new form.

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