

Conditions of Appointment

Referred to in foregoing Memorandum of Agreement between said Architect and said Client.



Definitions

Where the defined terms are used in the SCA/2000 (January 2008 revision) they are distinguished by an initial capital letter.

Appointment

The agreement between the Client and the Architect for the Project.

Architect

The party referred to as Architect in the Memorandum of Agreement or Letter of Appointment.

Budget

The sum (exclusive of VAT) the Client proposes to spend on the Project including:

- professional fees and expenses
- disbursements
- statutory charges
- the Construction Budget;

but excluding;

- site acquisition costs
- the Client's legal and in-house expenses.

CDM Regulations

The Construction (Design and Management) Regulations 2007 (as currently amended) and **CDM Coordinator** and **Principal Contractor** are all as defined in the CDM Regulations.

Client

The party referred to as Client in the Memorandum of Agreement/Letter of Appointment.

Client's Requirements

The objectives which the Client wishes to achieve in the Project including functional requirements, environmental standards, life span, and levels of quality.

Collateral Agreement

An agreement between the Architect and a third party existing in parallel with the agreement between the Architect and the Client. Sometimes known as a collateral warranty or a duty of care agreement.

Construction Budget

The sum, exclusive of VAT, the Client proposes to spend on the construction of the Project.

Contract Documents

The documents forming the building contract between the Client and a Contractor, usually comprising conditions of contract, drawings, specifications and bills of quantities or schedules of works.

Contractor(s)

Any person firm or corporation or all of them (including Specialists) appointed directly or indirectly by the Client to carry out any works in connection with the Project.

Consultant(s)

Any person firm or corporation or all of them (including Site Staff) appointed directly or indirectly by the Client to perform professional services in connection with the Project.

Lead Consultant

The Consultant given the authority and responsibility by the Client to co-ordinate and integrate the services of the other Consultants.

Other Project Team Members

Contractors and Consultants (excluding the Architect).

Procurement Method

The method by which the building of the Project is to be achieved, determining:

- the relations between the Client, Consultants and Contractor(s)
- the method of management, and
- the form of construction contract.

Project

As referred to in the Memorandum of Agreement/Letter of Appointment.

Project Timetable

The period of time which the Client wishes to allow for the completion of the Project.

Services

The Services to be provided by the Architect as specified in the Schedule of Services as varied pursuant to this Appointment.

Services Timetable

The Timetable for the completion of the Services showing *inter alia* any points and/or dates during the carrying out of the Services at which the Architect shall seek the authority of the Client before proceeding further with the Services. Where no timetable agreed Services to be provided within a reasonable time in all the circumstances.

Site

As specified in the Memorandum of Agreement/Letter of Appointment.

Site Staff

Staff appointed by the Client, or the Architect on the Client's behalf, to provide inspection of the Works.

Specialist

A person, firm or corporation other than the Consultants, appointed to provide expertise, skill and care, involving design, in the supply or manufacture of goods, materials or components or in the construction of parts of the Project.

Total Construction Cost

The cost as certified by the Architect of all Works including site works executed under the Architect's direction and control, subject to the following.

The Total Construction Cost shall include:

- the cost of all works designed by Consultants and co-ordinated by the Architect irrespective of whether such work is carried out under separate building contracts for which the Architect may not be responsible. The Architect shall be informed of the cost of any such contract;
- the actual or estimated cost of any work executed which is excluded from the contract and which is otherwise designed by the Architect;
- the cost of built-in furniture and equipment. Where the cost of any special equipment is excluded from the Total Construction Cost the Architect may charge additionally for work in connection with such items;
- the cost estimated by the Architect of any material, labour or carriage supplied by a Client who is not the Contractor.

The Total Construction Cost shall exclude:

- the design fees of any Specialists for work on which otherwise Consultants would have been employed. Where such fees are not known the Architect will estimate a reduction from the Total Construction Cost.

Where the Client is the Contractor, a statement of the ascertained gross cost of the works may be used in calculating the Total Construction Cost of the Works. In the absence of such a statement the Architect's own estimate shall be used. In both a statement of the ascertained gross cost and an Architect's estimate there shall be included an allowance for the Contractor's profit and overheads.

Work Stages

Stages into which the process of designing building projects and administering building contracts may be divided as set out in the Schedule of Services.

Works

The works to be carried out by the Contractor as described in the Contract Documents.

1.1 Governing law/interpretation

- 1.1.1 The application of the Appointment shall be governed by the laws of Scotland.

Headings and side notes

- 1.1.2 The headings and side notes to these conditions are for convenience only and do not affect the interpretation of the conditions.

- 1.1.3 Words denoting natural persons include corporations and firms and shall be construed interchangeably in that manner.

1.2 Architect's obligations

Duty of Care

- 1.2.1 The Architect shall in providing the Services exercise reasonable skill and care in conformity with the normal standards of the Architect's profession.

Architect's Authority

- 1.2.2 The Architect shall act on behalf of the Client in the matters set out or necessarily implied in the Appointment.

- 1.2.3 The Architect shall at those points and/or dates referred to in the Services Timetable obtain the authority of the Client before proceeding with the Services.

Services impracticable

- 1.2.4 The Architect shall give reasonable notice in writing to the Client of any circumstances which make it impracticable for the Architect to carry out any of the Services in accordance with the Services Timetable.

No alteration to services

- 1.2.5 Subject to the following the parties may by agreement, express or implied, vary the Services. The Architect shall make no material alteration to or addition to or omission from the Services without the knowledge and consent of the Client except in the case of emergency when the Architect shall inform the Client without delay.

Variations

- 1.2.6 The Architect shall inform the Client on its becoming apparent that there is any incompatibility between any of the Client's Requirements; or between the Client's Requirements, the Budget and the Project Timetable; or any need to vary any part of them.

- 1.2.7 The Architect shall inform the Client on its becoming apparent that the Services and/or fees and/or any other part of the Appointment and/or information or approvals need to be varied. The Architect shall confirm in writing any agreement reached.

1.3 Client's obligations

Client's representative

- 1.3.1 The Client shall name the person who shall exercise the powers of the Client under the Appointment and through whom all instructions to the Architect shall be given.

Information

- 1.3.2 The Client shall provide to the Architect information reasonably necessary at the outset.

- 1.3.3 The Client shall provide to the Architect such further information as the Architect shall reasonably and necessarily request for the performance of the Services: all such information to be provided free of charge and at such times as shall permit the Architect to comply with the Services Timetable.

- 1.3.4 The Client accepts that the Architect will rely on the accuracy, sufficiency and consistency of the information supplied by the Client.

- 1.3.5 The Client shall advise the Architect of the relative priorities of the Client's Requirements, the Budget and the Project Timetable and shall inform the Architect of any variations to any of them.

Decisions and approvals

- 1.3.6 The Client shall give such decisions and approvals as necessary for the performance of the Services and at such times as to enable the Architect to comply with the Services Timetable.

Architect does not warrant

- 1.3.7 Subject always to the provisions of condition 1.2.1, the Client acknowledges that the Architect does not warrant the performance, work or the products of others nor that the Services will be completed in accordance with the Project Timetable.

1.4 Assignment and sub-contracting

Assignment

- 1.4.1 Neither the Architect nor the Client shall assign the whole or any part of the benefit or in any way transfer the obligation of the Appointment without the consent in writing of the other.

Sub-contracting

- 1.4.2 The Architect shall not sub-contract any of the Services without the consent of the Client, which consent shall not be unreasonably withheld. The Architect shall confirm such consent in writing.

1.5 Payment

Payment

- 1.5.1 Payment for the Services shall be calculated, charged and made as set out in the Schedule of Project Details.

Percentage Fees

- 1.5.2 Where it is stated in the Schedule of Project Details that fees and or expenses are payable on a percentage basis, then, unless any other basis has been agreed between the Architect and the Client and confirmed by the Architect to the Client in writing, the fees and/or expenses shall be based on the Total Construction Cost of the Works. On the issue of the final certificate under the building contract the fees and/or expenses shall be re-calculated on the actual Total Construction Cost.

- 1.5.3 The following bases shall be used for the calculation of percentage fees based on the Total Construction Cost until that cost has been ascertained:

- until tenders are obtained – the cost estimate;
- after tenders have been obtained – the lowest acceptable tender;
- after the contract is let – the contract sum.

Revised rates

- 1.5.4 Unless otherwise stated in the Schedule of Project Details, time rates and mileage rates for vehicles shall be revised annually by the Architect.

Fee variation

- 1.5.5 Where any change is made to the Architect's Services, the Procurement Method, the Client's Requirements, the Budget, or the Project Timetable, or where the Architect consents to enter into any Collateral Agreement the form or beneficiary of which had not been agreed by the Architect at the date of the Appointment, the fees specified in the Schedule of Project Details shall be varied.

Vary lump sum

1.5.6 Where fees and/or expenses are specified in the Schedule of Project Details to be a lump sum, that lump sum shall be varied by agreement or in accordance with these Conditions of Appointment.

Additional fees

1.5.7 Where the Architect is involved in extra work and/or expense for which the Architect is not otherwise remunerated caused by:

- the Client's variations to completed work or services;
- the examination and/or negotiation of notices;
- the default, bankruptcy, insolvency or liquidation of a contractor;
- applications, claims, adjudications and arbitration under a building contract;
- delay or any other reason beyond the Architect's control.

the Architect shall be entitled to additional fees which, unless otherwise agreed, shall be calculated on a time basis.

1.5.8 Where fees and/or expenses are varied under conditions 1.2.7, 1.5.4, 1.5.5 and/or 1.5.6 or where additional fees are payable under condition 1.5.7, the additional or varied fees and/or expenses shall be stated by the Architect in writing.

Services not completed

1.5.9 Where for any reason the Architect provides only part of the Services as specified in the Schedule of Services, the Architect shall be entitled to fees calculated as follows:

- for completed Services, as described for those Services in the Schedule of Project Details;
- for completed Work Stages, as apportioned for those Work Stages in the Schedule of Project Details;
- for Services or Work Stages not completed, a fee proportionate to that described or apportioned in the Schedule of Project Details based on the Architect's estimate of the percentage of completion.

All percentage fees for partial services should be based on the architect's current estimate of the total construction cost of the works. Such estimates may be based on an accepted tender or, subject to the following, on the lowest of the unaccepted tenders. Where partial services are provided in respect of works for which the executed cost is not known and no tender has been accepted, percentage fees should be based either on the architect's estimated total construction cost or on the most recent cost limit agreed with the client, whichever is the lower.

Expenses and disbursements

1.5.10 The Client shall pay the expenses specified in the Schedule of Project Details. Expenses other than those specified shall only be charged with the prior authorisation of the Client.

1.5.11 The Client shall reimburse the Architect as specified in the Schedule of Project Details for any disbursements made on the Client's behalf.

Maintain records

1.5.12 The Architect shall maintain records of time spent on Services performed on a time basis, expenses and disbursements and shall make these available to the Client on reasonable request.

Instalments

1.5.13 All payments due under the Appointment shall be made by instalments specified in the Schedule of Project Details. Where no such basis is specified, payments shall be made monthly on the basis of the Architect's estimate of percentage of completion of the Services.

Payment

1.5.14 Payment of each instalment due in terms of condition 1.5.13 shall become due to the Architect on submission of the Architect's account for that instalment to the Client and shall become finally due 28 days thereafter.

1.5.15 The Client shall, not later than five days after any payment becomes due in terms of condition 1.5.14 hereof, give a written notice to the Architect specifying the amount (if any) of the payment the Client has made or proposes to make and the basis on which that amount is calculated.

No setoff

1.5.16 The Client may not withhold or reduce any sum payable to the Architect under the Appointment by reason of claims or alleged claims against the Architect. All rights of setoff which the Client may otherwise exercise in common law are hereby expressly excluded.

Disputed accounts

1.5.17 If any item or part of an item of any account is disputed or subject to question by the Client, the payment by the Client of the remainder of that account shall not be withheld on those grounds.

Interest on outstanding accounts

1.5.18 Any sums remaining unpaid at the expiry of twenty-eight days from the date of submission of an account shall bear interest thereafter, such interest to be at the rate for statutory interest under the Late Payment of Commercial Debts (Interest) Act 1998 to accrue from day to day and compounded over the period for which interest is due.

Payment on suspension or termination

1.5.19 On suspension or termination of the Appointment the Architect shall be entitled to, and shall be paid, fees for all Services provided to that time calculated as partial Services under condition 1.5.9 hereof, and to expenses and disbursements reasonably incurred to that time.

1.5.20 During any period of suspension the Architect shall be reimbursed by the Client for expenses, disbursements and other costs reasonably incurred as a result of the suspension.

1.5.21 On the resumption of a suspended Service within six months, fees paid prior to resumption shall be regarded solely as payments on account of the total fee.

1.5.22 Where the Appointment is suspended or terminated by the Client or suspended or terminated by the Architect on account of a breach of the Appointment by the Client, the Architect shall be paid by the Client for all expenses and other costs necessarily incurred as a result of any suspension and any resumption or termination.

VAT

1.5.23 Fees, expenses and disbursements arising under the Appointment do not include Value Added Tax. Any Value Added Tax chargeable on the Architect's fees and expenses shall be paid by the Client.

1.6 Suspension, resumption and termination

Suspension

1.6.1 The Client may suspend the performance of any or all of the Services by giving reasonable notice in writing to the Architect.

1.6.2 In the event of the Client being in default of payment of any fees, expenses and/or disbursements, the Architect may, throughout such default, suspend the performance of any or all of the Services on giving, after such payment becomes finally due, seven days notice in writing to the Client stating the ground or grounds for such suspension.

Resumption

1.6.3 If the Architect has not been given instructions to resume any suspended Service within six months from the date of suspension, the Architect shall request in writing such instructions. If written instructions have not been received within twenty-eight days of the date of such request the Architect shall have the right to treat the Appointment as terminated.

Termination

1.6.4 The Appointment may be terminated by either party on the expiry of reasonable notice in writing.

Architect's death or incapacity

1.6.5 Should the Architect through death or incapacity be unable to provide the Services, the Appointment shall thereby be terminated.

Accrued rights

1.6.6 Termination of the Appointment shall be without prejudice to the accrued rights and remedies of either party.

1.7 Copyright

Copyright

1.7 Copyright in all documents and drawings prepared by the Architect and in any work executed from those documents and drawings shall remain the property of the Architect.

1.8 Dispute resolution

Arbitration

1.8.1 Subject to the provisions of conditions 1.8.2 and 1.8.3, any difference or dispute arising out of, or in connection with, the Appointment shall be referred to arbitration by a person to be agreed between the parties or, failing agreement within fourteen days after either party has given the other a written request to concur in the appointment of an arbiter, a person to be nominated at the request of either party by the President, or, where the President is unable to act, the Chief Executive, for the time being, of the Royal Incorporation of Architects in Scotland, provided that in a difference or dispute arising out of the conditions relating to copyright the arbiter shall, unless otherwise agreed, be an architect.

Such arbitration shall be conducted under the rules set out in the current edition of the Scottish Arbitration Code 2007 ("The Arbitration Code") prepared by the Chartered Institute of Arbitrators (Scottish Branch) except that the provisions set out above for the appointment of the arbiter shall apply to the exclusion of the equivalent provisions set out in the Arbitration Code.

Adjudication

1.8.2 In the event of any dispute or difference arising between the parties hereto touching or concerning any matter or thing arising out of this Agreement either party may, at any time, refer such dispute or difference whether arising before or after the determination of this Agreement to some independent and fit person to be nominated by the President, or, where the President is unable to act, the Chief Executive, for the time being of the Royal Incorporation of Architects in Scotland within seven days of the application of either of the parties hereto and any fees and expenses which may become payable to the person so appointed shall be within the award of that person.

1.8.3 Any such adjudicator appointed in terms of condition 1.8.2 hereof shall have twenty eight days from the date of referral within which to reach a decision on the dispute, or such longer period as is agreed between the parties after the dispute has been referred, but without prejudice to the foregoing the adjudicator shall be permitted to extend the said period of twenty eight days by up to fourteen days, with the consent of the party by whom the dispute was referred. The adjudicator shall act impartially and shall be entitled to take the initiative in ascertaining the facts and the law relating to the dispute. The decision of the adjudicator shall be binding on both parties until the dispute is finally determined by arbitration pursuant to condition 1.8.1 hereof. The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and all employees or agents of the adjudicator are similarly protected from liability subject to the same proviso.

1.8.4 Periods of time under conditions 1.5.15, 1.6.2, 1.8.2 and 1.8.3 shall be reckoned in accordance with section 116 of the Housing Grants Construction and Regeneration Act 1996.

1.8.5 Nothing herein shall prevent the parties agreeing to settle any difference or dispute arising out of the Appointment without recourse to adjudication or arbitration.

Mediation

(The Mediation process is a useful way of resolving disputes by bringing the parties together to find a solution acceptable to both. A solution is not imposed by the mediator. Mediation is normally possible only where both parties agree to engage in the process)

1.8.6 Any dispute or difference between the parties arising out of, or in connection with, this Appointment may be referred to a mediation process conducted by a suitably qualified mediator. The mediator shall be selected from a list maintained by the Royal Incorporation of Architects in Scotland. Where both parties agree to the process, the cost of the service shall be shared equally or otherwise as agreed by the parties.

1.9 Net Contribution

Net Contribution

1.9 The Architect's liability for loss or damage arising in connection with the Appointment shall be limited to the lesser of: (1) the sum set out in clause 7 of the Memorandum of Agreement; and (2) such sums as the Architect ought reasonably to pay, having regard to the extent of his responsibility for the same and on the basis that there are deemed to be no exclusions or limitations of liability nor joint or co-insurance provisions between the Client and any of the Other Project Team Members and that all Other Project Team Members shall be deemed to have provided to the Client contractual undertakings equivalent to the Architect's undertakings hereunder in respect of their works and services for the Project and shall be deemed to have paid to the Client such contributions as may be appropriate having regard to the extent of their responsibility for such loss or damage.

2.1 Architect's obligations

Architect's authority

2.1.1 The Architect shall, where specified in the Services Timetable, obtain the authority of the Client before initiating any Work Stage and shall confirm that authority in writing.

CDM Regulations

2.1.2 The Architect shall, where the Client is required by CDM Regulations to appoint a CDM Coordinator, co-operate with and pass relevant information to the CDM Coordinator.

Procurement Method

2.1.3 The Architect shall advise on the options for the Procurement Method for the Project.

No alteration to design

2.1.4 The Architect shall make no material alteration, addition to or omission from the approved design without the knowledge and consent of the Client and shall confirm such consent in writing.

2.2 Client's obligations

CDM Regulations

2.2.1 The Client shall, where required by CDM Regulations, appoint as soon as reasonably practicable a competent CDM Coordinator. The Client shall procure that the appointment remains filled at all times until construction is completed.

Statutory requirements

2.2.2 The Client shall instruct the making of applications for planning permission and approval under building acts, regulations and other statutory requirements and applications for consents by heritable proprietors and all others having an interest in the Project and shall pay any statutory charges and any fees, expenses and disbursements in respect of such applications.

No warranty of planning permission

2.2.3 The Client acknowledges that the Architect does not warrant that planning permission will be granted.

Third Party Interest

2.2.4 The Client shall have informed the Architect prior to the date of the Appointment whether any third party will acquire or is likely to acquire an interest in the whole or any part of the Project.

Collateral Agreements

2.2.5 The Client shall not require the Architect to enter into any Collateral Agreement with a third party which imposes greater obligations or liabilities on the Architect than does the Appointment.

Procurement Method

2.2.6 The Client shall confirm the Procurement Method for the Project.

2.3 Copyright

2.3.1 Notwithstanding the provisions of condition 1.7.1, the Client shall be entitled to reproduce the Architect's design by proceeding to execute the Project provided that:

- the entitlement applies only to the Site or part of the Site to which the design relates, and
- the Architect has completed a scheme design or
- has provided detail design and production information, and
- any fees, expenses and disbursements due to the Architect have been paid.

This entitlement shall also apply to the maintenance repair and/or renewal of the Works.

2.3.2 Where the Architect has not completed a scheme design, the Client shall not reproduce the design by proceeding to execute the Project without the consent of the Architect, which consent shall not be unreasonably withheld.

2.3.3 Where the Services are limited to making and negotiating planning applications, the Client may not reproduce the Architect's design without the Architect's consent, which consent shall not be unreasonably withheld, and payment of any additional fees.

2.3.4 The Architect shall not be liable for the consequences of any use of any information or designs prepared by the Architect except for the purposes for which they were provided.

2.3.5 Confidentiality

Neither the Client nor the Architect shall disclose to any other person information identified in writing as confidential unless reasonably necessary for performance of the Services or because of disputes arising out of or in connection with the Appointment or as required by law

3.1 Architect's obligations

Visits to the Works

3.1.1 The Architect shall in providing the Services specified make such visits to the Works as the Architect at the date of the Appointment reasonably expected to be necessary. The Architect shall confirm such expectation in writing.

Variations to visits to the Works

3.1.2 The Architect shall, on its becoming apparent that the expectation of the visits to the Works needs to be varied, inform the Client in writing of his recommendations and any consequential variation in fees.

More frequent visits to the Works

3.1.3 The Architect shall, where the Client requires more frequent visits to the Works than that specified by the Architect in condition 3.1.1, inform the Client of any consequential variation in fees. The Architect shall confirm in writing any agreement reached.

Alteration to design

3.1.4 Except in an emergency the Architect shall make no material alteration or addition to or omission from the approved design during construction without the knowledge and consent of the Client; the Architect shall confirm such consent in writing. In an emergency the Architect may make such alteration, addition or omission without the knowledge and consent of the Client but shall inform the Client without delay and subsequently confirm in writing.

CDM Regulations

3.1.5 The Architect shall, where the Client is required by CDM Regulations to have appointed a CDM Coordinator and where after the design information is complete the Client orders design changes necessitating re-work, continue to co-operate with and pass relevant information to the CDM Coordinator

3.2 Client's obligations

Contractor

3.2.1 The Client shall employ Contractors under separate agreements to undertake construction or other works relating to the Project.

Responsibilities of contractor

3.2.2 The Client shall hold such Contractors and not the Architect responsible for the Contractor's management and operational methods and for the proper carrying out and completion of the Works and for health and safety provisions on the Site.

CDM Regulations

3.2.3 The Client shall, where required by CDM Regulations, appoint as soon as reasonably practicable a competent Principal Contractor.

Products and Materials

3.2.4 The Client shall hold the Contractor(s) and not the Architect responsible for the proper installation and incorporation of all products and materials into the Works.

Collateral Agreements

3.2.5 The Client shall, where the Architect consents to enter into a Collateral Agreement with a third party in respect of the Project, procure that the Contractor(s) is/are equally bound by reference to its/their contractual obligations to the Client.

Instruction

3.2.6 The Architect shall act as 'contract administrator' except where another Consultant is named as such in the Schedule of Project Details. The Client shall only issue instructions to the Contractor(s) through the contract administrator, and the Client shall not hold the contract administrator responsible for any instructions issued other than through the contract administrator.

3.3 Site Staff

3.3.1 The Architect shall recommend the appointment of Site Staff to the Client if in his opinion such appointments are necessary for the more detailed inspection of the carrying out of that part of the Works designed by the Architect.

3.3.2 The Architect, where appointing and paying such Site Staff on behalf of the Client, shall confirm in writing to the Client the Site Staff to be appointed by the Client, their disciplines, the expected duration of their employment, their fee, and the method of recovery of payments made by the Architect on behalf of the Client. The Client, where appointing and paying such Site Staff direct shall confirm the same details, except for the payment provisions, in writing to the Architect and shall ensure that provisions covering condition 3.3.3 hereof are included in their appointments.

3.3.3 All Site Staff shall be under the direction and control of the Architect.

Responsibilities of Site Staff

3.3.4 The Client shall not hold the Architect responsible for the competence, proper execution and performance of the services provided by the Site Staff.