

# Dispute resolution procedure for PFI and long-term contracts



## **Dispute resolution procedure for PFI and long-term contracts**

[To be included as a Schedule to the relevant Contract]

Note: the parties to the contract are referred to here as the "Authority" and the "Provider".

### **1. Definitions**

In this Schedule:

#### **Adjudication Notice**

Notice given by one of the parties to the other in accordance with section 5 of this Schedule.

#### **Adjudicator**

Person appointed to adjudicate a Dispute in accordance with section 5 of this Schedule.

#### **Authority**

[*name of Authority entering into the Contract*].

#### **CEDR**

Centre for Effective Dispute Resolution.

#### **Construction Dispute**

Dispute to which Part II of the Housing Grants, Construction and Regeneration Act 1996 applies.

#### **Contract**

Contract for [*description of Project*] of which this Schedule forms a part.

#### **Dispute**

Any difference or dispute between the Authority and the Provider arising out of or in connection with the Contract (including any question as to the validity or interpretation of the Contract and including any dispute arising before or after termination of the Contract).

#### **Expert**

Person appointed as an expert in accordance with section 7 of this Schedule.

#### **Mediation**

Procedure for resolving disputes through mediation in accordance with section 4 of this Schedule.

**Mediator**

Person appointed to mediate a dispute in accordance with section 4 of this Schedule.

**Project**

Project for [ ] referred to in the Contract.

**Project Neutral**

Independent adviser appointed by the Authority and the Provider for the purposes of section 3 of this Schedule and whose role is to provide guidance in relation to the Contract and/or in the case of a Dispute.

**Provider**

[*name of project company/contractor entering into the Contract*].

**Referring Party**

Party that serves an Adjudication Notice under section 5 of this Schedule.

**Related Dispute**

Dispute arising under another contract entered into by the Provider as described in paragraph 6.1 of this Schedule.

**Senior Executive**

Director or other senior executive of either the Authority or the Provider.

**2. Access to the courts**

- 2.1 This dispute resolution procedure shall not impose any precondition on any party or otherwise prevent or delay any party from commencing proceedings in any court of competent jurisdiction to obtain either:
- (a) an order (whether interlocutory, interim or final) restraining the other party from doing any act or compelling any other party to do any act, or;
  - (b) summary judgment pursuant to CPR Part 24 for a liquidated sum.

**3. Negotiation**

- 3.1 Any Dispute which arises must first be referred to Senior Executives of the parties for resolution. Either party may give [5] days notice to the other requiring that a Dispute be referred to Senior Executives of the parties. The Senior Executives will meet within [5] days of the expiry of the

notice (or earlier if agreed) and will attempt in good faith to resolve the dispute. The notice requesting the meeting of Senior Executives will contain brief details of the Dispute which is to be the subject of discussion at the meeting.

- 3.2 If the Dispute is resolved by the Senior Executives, the resolution will be recorded in writing and signed by duly authorised representatives of each of the parties and that resolution will be final and binding on the parties.
- 3.3 If the Dispute is not resolved at the meeting of Senior Executives, then and only then will one of the dispute resolution procedures set out in the following sections of this Schedule be implemented.
- 3.4 Unless already appointed, the parties may at any time appoint a Project Neutral. The Project Neutral may be requested to:
  - (a) advise on the interpretation of the Contract and/or any sub-contract;
  - (b) assist in resolving problems which may arise in relation to the Project;
  - (c) advise on the avoidance or resolution of any Dispute including making a recommendation as to the form of dispute resolution procedure to be adopted in any particular circumstances.
- 3.5 The Project Neutral will be independent of the parties and act impartially in the provision of all advice and assistance to the parties. Unless otherwise agreed, on each occasion that the Project Neutral is consulted, the Project Neutral's fees and expenses will be borne by the parties in equal shares.
- 3.6 The Project Neutral shall not be appointed as a Mediator, Adjudicator, Expert or Arbitrator in any Dispute.

#### **4. Mediation**

- 4.1 If the Senior Executives are unable to resolve a Dispute in accordance with section 3 of this Schedule, the parties may agree to refer the Dispute to Mediation. Moreover, the parties may, by agreement, refer a Dispute to Mediation at any time, whether before or after the Dispute is referred to Adjudication, to an Expert or to the courts, or after the reference but before the issue of the decision of the Adjudicator or Expert or the judgment of the court.
- 4.2 Whenever the parties wish to have a Dispute resolved by Mediation, if they are unable to agree on the appointment of the Mediator, either party may apply to CEDR to nominate the Mediator. Each of the parties will ensure that it is represented in the Mediation by an individual with authority to settle the Dispute and to sign any settlement agreement that may be agreed.
- 4.3 The Mediator shall, in consultation with the parties, determine the timetable and procedure for Mediation. Unless otherwise agreed, the CEDR Mediation Rules in force at the commencement of the Mediation will apply.

- 4.4 The Mediation will be conducted on a without prejudice basis and in strict confidence.
- 4.5 The Mediator shall incur no legal liability to the parties in respect of his or her role in relation to the Mediation, except in the case of proven fraudulent conduct on the part of the Mediator.
- 4.6 If a Dispute is settled through Mediation, the terms of the settlement will be recorded in writing in a legally binding form signed by a duly authorised representative of each of the parties. If a settlement is reached while proceedings are pending, the parties acknowledge that an appropriate application must be made to the court or other relevant tribunal to render the terms of the settlement as a consent order or award.
- 4.7 If, within 45 calendar days of the Mediator being appointed, the Mediation has not resulted in the settlement of the Dispute being reached, then the Mediation procedure shall, unless otherwise agreed, be terminated. In that event, any proceedings which have been stayed will resume.
- 4.8 If either party withdraws from the Mediation at any time, the Mediation procedure will be terminated and either party will be free to refer the Dispute to another dispute resolution procedure in accordance with this Schedule, unless proceedings have already been commenced but stayed pending the outcome of the Mediation, in which case those proceedings will resume.
- 4.9 No-one appointed to act as a Mediator shall be called to give evidence in any subsequent proceedings between the parties, nor shall any Mediator be entitled to act as an adviser to either party in any subsequent proceedings whether as counsel, solicitor or independent expert without the prior written consent of the other party. The Mediator shall not act as an Adjudicator or Expert in any subsequent Dispute.

## **5. Adjudication**

- 5.1 If Senior Executives fail to resolve the Dispute in accordance with section 3 of this Schedule then, unless the parties agree to refer the Dispute to Mediation, the provisions of this section 5 will apply when the Dispute is a Construction Dispute. In the case of a non-Construction Dispute, the provisions of this Section will only apply if both parties agree that the Dispute should be referred to Adjudication.
- 5.2 Either party may refer the Dispute to Adjudication by serving an Adjudication Notice in writing to the other party. The Adjudication Notice shall set out sufficient details to allow the Adjudicator and the other party to understand the nature of the Dispute and the redress which the referring party is seeking.
- 5.3 It is the intention of the parties that the Adjudicator is appointed and the Dispute referred to the Adjudicator within 7 days of the service of the Adjudication Notice.
- 5.4 In the case of a Construction Dispute the Adjudicator shall be appointed from the list of persons named in Part 1 of the Appendix to this Schedule or, if none of those persons is available, the

Adjudicator shall be nominated by the Adjudicator Nominating Body referred to in Part 1 of the Appendix.

- 5.5 In the case of a non-Construction Dispute the party to whom the Adjudication Notice is served shall have the right to refuse to have the Dispute referred to Adjudication by giving notice to that effect to the Referring Party within 5 days of the date of the Adjudication Notice. If it fails to do so, it shall be deemed to have agreed to refer the Dispute to Adjudication. The Adjudicator shall be selected from the list of adjudicators named in Part 2 of the Appendix, being one of the adjudicators with the qualifications most appropriate to adjudicate the dispute. If no suitably qualified person named in the Appendix is available, the Adjudicator shall be appointed by the Adjudicator Nominating Body named in Part 2 of the Appendix.
- 5.6 If the Authority and the Provider are unable to agree on the identity of the person to be appointed as Adjudicator in any Dispute within 5 days of service of an Adjudication Notice, the Adjudicator shall be nominated by the Adjudicator Nomination Body referred to in Part 1 or Part 2 of the Appendix, whichever is applicable.
- 5.7 The Adjudication shall be conducted in accordance with the following paragraphs of this section 5. However, if the Appendix specifies Adjudication Rules under which the Adjudication will be conducted, those Adjudication Rules will take precedence over the provisions of this section 5.
- 5.8 Within 3 days of the appointment of an Adjudicator, the party that served the Adjudication Notice shall send to the Adjudicator, copied at the same time and by the same method to the other party, a concise statement of case which shall include:
- a copy of the Adjudication Notice
  - a copy of the Contract and other key documents on which the Referring Party intends to rely
  - details of the circumstances giving rise to the Dispute
  - the reasons for entitlement to the remedy sought
  - the evidence, including relevant documentation, in support of its case.
- 5.9 The date of referral to Adjudication is the date on which both the Adjudicator and the other party receive the concise statement of case from the Referring Party.
- 5.10 The Adjudicator shall reach a decision on the Dispute within 28 days of the date of referral. Subject to the Adjudicator's agreement, this period may be extended by 14 days with the consent of the Referring Party or longer if agreed by the parties.
- 5.11 The Adjudicator may take the initiative in ascertaining the facts and the law.
- 5.12 The Adjudicator shall establish the timetable and procedure for the Adjudication which may include the consideration of:
- the extent, form and time limits applying to any documentary or oral submission of the parties
  - site visits or inspections

- meeting the parties
  - issuing particular directions
  - the appointment of an expert subject to paragraph 5.16.
- 5.13 Copies of all documents submitted by a party to the Adjudicator shall be sent at the same time and by the same method to the other party. Similarly, all documents issued by the Adjudicator shall be sent to both parties at the same time.
- 5.14 The Adjudicator shall not take into consideration any document or statement, whether of a party or a witness, that has not been made available to the other party for comment.
- 5.15 Any failure by a party to respond to any request or direction by the Adjudicator shall not invalidate the Adjudication or the Adjudicator's decision.
- 5.16 The Adjudicator may, at any time, with the consent of the parties, obtain legal or technical advice on any matter provided that the parties, acting reasonably, agree the level of fees to be incurred in obtaining such advice.
- 5.17 The Adjudicator shall decide the Dispute acting impartially and in good faith. The Adjudicator shall have the power to open up, review and revise any certificate, decision, direction, instruction, notice, requirement or valuation made under the Contract except where the Contract expressly prohibits this.
- 5.18 The Adjudicator shall reach a decision and communicate the decision in writing to the parties in accordance with the time limits calculated in accordance with Paragraph 5.10. The Adjudicator shall give reasons with the decision unless the parties agree to the contrary.
- 5.19 The Adjudicator may, on his or her own initiative or at the request of a party made within 5 days of the date that the decision is communicated to the parties, correct the decision in respect of any typographical or arithmetical error as a result of an accidental slip or omission.
- 5.20 The Adjudicator's decision shall be final and binding on the parties if it is a Dispute to which paragraph 8.1 applies. In all other cases, the Adjudicator's decision shall be binding unless or until the dispute is finally determined by agreement, court proceedings or by reference to arbitration in accordance with this Schedule.
- 5.21 The Adjudicator shall not be called as a witness in any subsequent proceedings concerning the dispute, nor shall the Adjudicator be entitled to act as an adviser to either party in any subsequent proceedings, whether as solicitor, counsel or independent expert without the other party's prior written consent.
- 5.22 Subject to paragraph 5.19, the parties shall implement the Adjudicator's decision without delay and shall be entitled to the relief or remedies which are set out in the decision.
- 5.23 The Adjudicator's fees and expenses and the fees and expenses of any expert appointed by the Adjudicator, shall be borne by the parties as the Adjudicator shall specify in his decision or, in

default, equally by the parties. Each party shall be solely responsible for bearing its own legal and other costs arising out of the reference to Adjudication.

- 5.24 The Adjudicator is not an arbitrator and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Adjudicator, the decision or the procedure by which the Adjudicator reaches the decision.
- 5.25 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. Any employee or agent of the Adjudicator shall be similarly protected from liability.
- 5.26 All matters arising in connection with the adjudication shall be kept confidential by the parties except insofar as necessary to implement or enforce any decision of the Adjudicator or as may be required for any subsequent proceedings.

## **6. Adjudication of related disputes**

- 6.1 Where a dispute to be referred to Adjudication in accordance with the Contract raises issues which are substantially the same as or connected with a dispute under another contract entered into by the Provider relating to the Project (a "Related Dispute") then the following provisions shall apply:
- (a) When a reference to adjudication has already been made in the Related Dispute, the Provider shall be entitled, by giving notice to the Authority, to require that the Dispute under this Contract is referred to the adjudicator already appointed in relation to the Related Dispute. The adjudicator shall conduct separate adjudications in respect of the Dispute and the Related Dispute.
- (b) If the adjudicator under the Related Dispute has a conflict of interest or is unwilling or unable to act as Adjudicator in relation to the Dispute under this Contract, only the provisions of section 4 shall apply to the Dispute under the Contract.
- (c) If the Related Dispute has not been referred to adjudication and Notice of Adjudication is given under this Contract, the Provider will be entitled to require that the Adjudicator appointed under this Contract shall also be appointed as adjudicator for the Related Dispute, unless the Adjudicator has a conflict of interest or is unable or unwilling to act as adjudicator in relation to the Related Dispute.

## **7. Expert determination**

- 7.1 The parties may at any time agree to refer a Dispute to an Expert for determination in which case the provisions of this section 7 shall apply.
- 7.2 A party wishing to have a Dispute referred to an Expert for determination shall give notice to that effect to the other party. The notice shall contain sufficient details of the Dispute to be referred

to the Expert to allow the other party to understand the nature of the Dispute and the profession or discipline of the Expert who is to be appointed.

- 7.3 The party to whom the notice is addressed shall within [7] days respond to the notice stating whether or not it agrees that the Dispute should be referred to an Expert for determination. If it does not agree that the dispute should be referred to an Expert, or it fails to respond to the notice, no Expert shall be appointed.
- 7.4 If the parties agree that the Dispute should be referred to an Expert and they do not agree on the identity of the Expert to be appointed within [14] days from the date of the original notice, the Expert shall be appointed by the Chairman for the time being of the Appointing Body named in Part 3 of the Appendix on the application of either party. Either party may make a written representation to the Appointing Body with respect to the preferred identity and characteristics of the proposed Expert and a copy of any such representation shall be supplied simultaneously to the other party. The Appointing Body shall have absolute discretion as to the identity of the Expert to be appointed.
- 7.5 Within seven days of his appointment, the Expert will establish the procedural rules to be applied to the determination which must accord with the following:
- (a) Each party will be entitled to make submissions to the Expert and supply the Expert with relevant data and information.
  - (b) Communications from a party to the Expert or from the Expert to a party shall be copied to the other party at the same time and by the same method.
  - (c) The Expert will be entitled to make site visits or inspections as he considers is necessary or appropriate.
  - (d) The Expert shall not take into consideration any document or statement which has not been made available to the other party for comment.
  - (e) Any failure by a party to respond to any request or direction by the Expert shall not invalidate the Expert's determination.
  - (f) The Expert must give his determination in writing with reasons within [42] days of his appointment. He may, but will not be bound to, give the parties a draft of his determination in which case he will allow time for the parties to make comments on the draft before the determination is finally issued.
- 7.6 The Expert shall determine the dispute acting impartially and in good faith. The Expert shall have the power to open up, review and revise any certificate, decision, direction, instruction, notice, requirement or valuation made under the Contract, except where the Contract expressly prohibits this.
- 7.7 The Expert's determination shall be binding on the parties unless or until the Dispute is finally determined by agreement or by proceedings in accordance section 8 of this Schedule.
- 7.8 The Expert may be called as a witness in any subsequent proceedings concerning the Dispute.

- 7.9 The Expert shall not be entitled to act as an adviser to either party in any subsequent proceedings without the other party's prior written consent.
- 7.10 The Expert is not an arbitrator within the provisions of the Arbitration Act 1996 and the law relating to the arbitration shall not apply to the Expert, the determination or the procedure by which the Expert reaches the determination.
- 7.11 The fees and expenses of the Expert will be shared equally between the parties unless the Expert determines otherwise in his decision.

## **8. Reference to the courts/arbitration**

- 8.1 In the case of any Dispute, the value or potential financial impact of which is agreed by the parties to be less than [£50,000], which is referred to Adjudication or to an Expert for determination, the decision of the Adjudicator or the Expert shall be final and binding on the parties, and shall not be subject to any further dispute resolution procedure.
- 8.2 In the case of a dispute with an agreed value or potential financial impact of [£50,000] or more, the decision of the Adjudicator or the Expert shall be final and binding, unless, within [90] days of the decision, either party gives notice to the other that it is dissatisfied with that decision and reserves the right to commence proceedings.
- 8.3 Any dispute in respect of which a notice of dissatisfaction is given shall be finally determined by the courts of England and Wales ("the Courts").

Or

Any dispute in respect of which a notice of dissatisfaction is given shall be finally determined by arbitration. The number of arbitrators shall be as stated in the Appendix. A sole arbitrator, if not appointed by agreement between the parties shall be appointed on the application of either party by the Arbitrator Nominating Body named in Part 4 of the Appendix. Where there are to be three arbitrators, each party shall nominate one arbitrator and those arbitrators shall agree on the third arbitrator who shall be Chairman of the Arbitration Tribunal. The arbitration shall be conducted in accordance with the rules (if any) stipulated in Part 4 of the Appendix. The place of arbitration is stated in Part 4 of the Appendix.

- 8.4 The Courts/arbitrator(s) shall have power to open up, review and revise any opinion, certificate, instruction, determination or decision given or made under the Contract and to vary or cancel the decision of an Adjudicator.

## **9. Confidentiality**

- 9.1 Any Mediator, Adjudicator, Expert, Project Neutral or Arbitrator appointed pursuant to this Schedule will be appointed on terms that all information and documents provided to him will be kept confidential and will not be disclosed by him to any third party and that all such information and documents will remain the property of the party which provided it.

## Appendix

### Part 1 – Construction disputes

List of persons who may be appointed as Adjudicator

Name: \_\_\_\_\_ specialism/profession: \_\_\_\_\_

Adjudicator nominating body: \_\_\_\_\_

Adjudication rules to be applied: \_\_\_\_\_

### Part 2 – Non-construction disputes

List of persons who may be appointed as Adjudicator

Name \_\_\_\_\_ specialism/profession: \_\_\_\_\_

Adjudicator nominating bodies:

For financial disputes: \_\_\_\_\_

For technical disputes: \_\_\_\_\_

For legal disputes: \_\_\_\_\_

Adjudication rules to be applied: \_\_\_\_\_

### Part 3 – Expert Determination

Name of appointing body

For financial disputes: \_\_\_\_\_

For technical disputes: \_\_\_\_\_

For legal disputes: \_\_\_\_\_

**Part 4 – Arbitration**

Arbitrator nominating body: \_\_\_\_\_

Arbitration rules: \_\_\_\_\_

Number of Arbitrators [1] or [3]

Place of arbitration: \_\_\_\_\_