

# NSW Government's Alternative Dispute Resolution - Guidelines

As has been identified in the "No Dispute" report, the earlier report "Strategies for the Reduction of Claims and Disputes in the Construction Industry" and, significantly, The Royal Commission Into Productivity In The Building Industry In New South Wales, efficient, cost-effective dispute resolution is essential for the construction industry.

Consequently, the adoption for all of its departments by a client as significant as the New South Wales Government of uniform dispute resolution procedures, including an expert determination process, is a matter of interest and influence.

These provisions, developed from those used for some time by the NSW Roads and Traffic Authority, are reproduced from the NSW Government's Capital Project Procurement Manual with the kind permission of the Construction Policy Steering Committee.

## 1 Introduction

### 1.1 Nature of disputes

Contractual disputes associated with the construction industry often involve the resolution of complex technical and factual issues. The court room forum is proving to be an increasingly difficult, drawn-out and expensive process for dealing with disputes of this type.

As a consequence judges are increasingly referring such disputes to a court appointed referee who will hear the matter and provide a report and recommendations to the court for judgement.

However, this does little to reduce the time and costs for dispute resolution as most of the procedures are merely removed from the court room environs.

### 1.2 Arbitration

The majority of current contracts contain an arbitration clause for the ultimate resolution of disputes which arise under the contract.

The arbitration clause may be invoked by the contractor following determination of the dispute by a Superintendent/Principal or other designated person nominated in the contract. This would normally follow attempts to resolve the difference between the parties by negotiation.

The presence of an arbitration clause does not prevent either party from pursuing claims by litigation in the courts.

Although arbitration may be seen as an alternative dispute resolution method to litigation, it follows a similar formalised and legalistic process to litigation with extensive definition of the claims through the preparation of points of claim and points of defence.

This is followed by a process of discovery which

allows both parties access to each others records and documents, the preparation and exchange of expert reports, statements of evidence by witnesses and a hearing before an Arbitrator.

Either party may request, and thus commit the other to legal representation, in which case, solicitors are engaged by both parties in the preparation of the case and are assisted by legal counsel as advocate to present the case and carry out cross examination of witnesses before the Arbitrator.

Arbitration has been traditionally included in contracts as a dispute resolution means, as it was seen to be cheaper and less time consuming than to process disputes through litigation.

This is no longer so, as more often than not this is done by lawyers who are briefed by technical specialists and those on either side who were directly involved in the work.

### 1.3 Use of litigation

Litigation may well still be the most effective method of dispute resolution where:

- there are substantial legal questions
- the proceedings are multi-party
- the proceedings are likely to be difficult to control, or
- there are substantial allegations of dishonesty.

### 1.4 The alternative dispute resolution (ADR) option

There are a number of alternative avenues for dispute resolution, some requiring the parties themselves to reach agreement by compromise and others requiring a third

party to impose a decision on the parties. In any case the parties must agree to any process outside litigation or arbitration which are available under most contracts.

The rules of such processes are somewhat flexible in that the parties must make an agreement on what form the process should take, a timetable, and whether the decision of any third party expert or appraiser should be binding on the parties.

## 2 The Government's ADR policy

A 1989 Premier's Memorandum to all Ministers suggested that, wherever possible, settlement of disputes should be achieved by utilising alternative methods of dispute resolution rather than resorting to the court system. This was intended to reduce the high cost to the State of expensive and long court disputes and to relieve the pressure on an already overloaded court system.

There is little doubt that, if successful, alternative methods of dispute resolution represent a more cost effective way of resolving disputes, when compared to arbitration or litigation.

For reasons of cost and expedience the adoption of alternative dispute resolution is now mandatory (where expert determination is selected, the determination shall be binding if the quantum does not exceed \$500,000) and that applies to all Government Contracts for major works, ie. where those contracts contain a standard form general conditions of contract. Specific contract clauses are provided in the Appendices to give effect to this policy requirement.

Arbitration remains the method of ultimate determination if ADR avenues are unsuccessful.

## 3 The ADR processes

### 3.1 Non-intrusive processes

#### Negotiation

Direct negotiation between the parties needs no intervention by a third party. It relies for its success on a willingness of one party to understand and appreciate the other's views, both as to its claimed legal contractual rights and the facts pertaining to the dispute.

Negotiation is quick, cheap and non-binding but requires considerable preparation and an intimate understanding of the legal and factual issues if it is to be successful. Negotiation is unlikely to succeed if the parties have fixed views, and are reluctant to compromise their position. Nevertheless, by far the majority of commercial and contractual disputes are resolved by negotiation.

#### Mediation/conciliation

Mediation/conciliation may be appropriate where the parties want informal discussions of their contractual entitlements; or where, despite the dispute, there is a substantial measure of goodwill on both sides and possibly a continuing business relationship.

There is no legal obligation on the parties that mediation or conciliation must be acted upon in some way. Mediation and conciliation are the same thing, although

some people define them differently. Parties can ask a mediator to make an assessment of their contractual entitlements, but that is not mediation. It is obtaining advice.

#### Mediation

Mediation is affected by a third party neutral, who presides over discussions between the parties and who may hold individual discussions with the parties to assist them in their negotiations. A mediator is the least intrusive type of third party who may be involved in dispute resolution. A mediator aims to:

- provide a conducive atmosphere for settlement
- keep the parties talking
- suggest joint benefits and gains to the parties
- listen to each party
- hint at weaknesses in a position
- explain the other side's position in unemotional terms, and
- suggest solutions.

The mediator does not act for either party. A mediator does not protect any individual side's interest or position and a mediator cannot provide legal or other technical advice to the parties. If the parties do not agree, the mediator never gives a determination. The selection of a mediator needs to be carried out very carefully, as it is vital that the mediator understands the concept of mediation.

#### Conciliation

The difference between mediation and conciliation is confused and a number of people use these terms synonymously.

Some people say the function of the conciliator is to act as a third party neutral, to hear both sides and make an informal assessment of the matters in dispute. The important thing is that the labels don't matter, they only highlight the fact that there are a number of ways in which neutral third parties, with experience in the relevant field can be used to assist parties sort out disputes.

### 3.2 Intrusive processes

Both arbitration and litigation are intrusive processes in that the decision of the third party is imposed on the parties to the dispute. Similarly, there are ADR processes where a third party is jointly engaged to give a decision on a dispute which by agreement may or may not be binding on the parties.

#### Expert determination (also called expert appraisal)

In this situation the parties engage an expert in the field of dispute and the decision is final and binding as is the case where rental redetermination and share valuations are carried out by experts.

This mechanism is most suitable for valuation or measurement, but can include the interpretation of a party's rights in terms of the contract. If it is chosen then there must be an agreement between the parties as to precisely

what is to be determined. Each parties' case is usually put to the expert in written submissions as is done for independent appraisal. There may be oral submissions or a meeting to permit the expert to clarify the written submissions. No witnesses are called to give evidence.

**Independent appraisal**

This mechanism involves a similar procedure to the expert determination except that a non-binding ruling is provided on the issues.

Generally, each party makes written submissions to the expert and there may be a limited time in which to make oral submissions. The times and procedures are subject to agreement by the parties. The parties may agree that any evidence or discussions will be "without prejudice" and be unable to be used in further legal proceedings. In other instances, it may be appropriate to agree that such a condition does not apply.

The advantage for such procedure is that a finding made by a well respected expert is, if not binding, persuasive to the parties and a real aid to settlement.

Where there are issues of law and of fact to be appraised, the parties may agree to the engagement of two experts, eg. a lawyer for the law and an engineer/architect for the facts of the matter.

**Mini-trial**

The essence of this method is that the dispute resolution process is kept within the direct control of the parties themselves, and normally involves the most senior executive personnel of the parties, being actively involved in judging the merit of the opposing side's case. It is usual to also have a neutral "umpire" or facilitator.

The parties themselves decide upon the procedure and timing of events. They determine such issues as whether the presentation will be by oral or written evidence or both; whether cross-examination can take place; what time limits are to apply to the presentations by each side; and whether any pre-trial procedures, such as discovery of documents, will occur.

The trial itself is then conducted before a senior executive of each party. If this procedure is to be successful, it is essential that the executives concerned have full authority to reach an agreement. After the presentations of evidence have been given the executives meet and make every effort to come to a settlement in the light of what they have heard. The issues between them may be decided in any manner they like, and they are not bound to come to decisions according to law or any other discipline. They may decide to seek the future option of a third party expert to assist them in their deliberations.

**4 Selection of an ADR process**

All avenues in negotiation should be exhausted before resort is made to any other form of ADR.

The key factors in resolving conflict appear to be the desire to settle, an understanding of the other party's case, a realistic appraisal of the issues, an open approach between the parties and commercial reality.

For mediation or conciliation to have any chance of success there must be a willingness between the parties to make some compromise. It would be rare for these methods to achieve success if either party is firmly entrenched in its position. These processes have best chance of success where it is agreed that a party has a contractual right and the dispute relates merely to quantum.

A criticism of mediation/conciliation is that agreement is reached by "splitting the baby". This may not necessarily be the case, provided that one party is prepared and able to convince the other, with the assistance of the facilitator, that its position is the stronger view.

Another criticism of mediation/conciliation is that a party may enter the process without any commitment to reach settlement, but to gain information that can be used in a following litigation or arbitration.

Intrusive processes are more appropriate for disputes where the parties have fixed and differing views on both liability and quantum and the issues are of a technical nature. Expert determination should be restricted to disputes involving a maximum order of \$0.5m whereas larger disputes, the subject of non-binding independent appraisal, are often resolved by negotiation following a decision of the appraiser.

**5 ADR Contract clauses**

The Roads and Traffic Authority have included in all their major contracts (which include NPWC3-1981 general conditions of contract) since December 1990 a provision for the majority of disputes to be referred to expert appraisal prior to arbitration. This has dramatically reduced the number of disputes resolved by arbitration and also reduced the time and cost of dispute resolution by the Authority.

The attached contractual provision whereby all contractual disputes are to be considered by an independent expert is provided for inclusion in all major government contracts, ie. those containing either NPWC3 or AS2124-1986 standard general conditions of contract.

These clauses make:

- in the case of NPWC3, the expert's decision binding upon the parties involving payments by the Principal to the Contractor for amounts up to \$0.5m
- in the case of AS2124-1986, the expert's decision binding on both parties for amounts up to \$0.5m.

Arbitration would remain available for disputes not resolved by this alternative dispute resolution process.

At Annexure A are the dispute resolution clauses for use in conjunction with NPWC3 1981 general conditions of contract.

At Annexure B are the dispute resolution clauses to be used in conjunction with the AS2124-1986 general conditions of contract.

**Annexure A**  
**Dispute resolution clauses for use in conjunction with NPWC3 1981 General Conditions of Contract**

Delete clause 45 and substitute the following:

**45 Settlement of disputes**

45.1 Notwithstanding the succeeding provisions of this clause, the Contractor shall, if the work under the Contract has not been completed, at all times (subject as otherwise provided for in the Contract) proceed without delay to continue to execute the work under the Contract and perform the obligations under the Contract and in so doing shall comply with all directions as defined in clause 23 issued or given to or served or made upon the Contractor under or pursuant to the provisions of the Contract either by the Principal in writing or by the Superintendent in accordance with clause 23.

All disputes or differences arising out of the Contract or concerning the performance or non-performance by either party of the obligations under the Contract, shall be decided as follows:

- (a) Where the dispute or difference:
  - (i) arises out of, relates to or concerns a determination or direction of the Superintendent or the Principal which is given to the Contractor and the Contractor is dissatisfied with such determination or direction and desires to challenge it; or
  - (ii) arises out of, relates to or concerns any failure or refusal by the Superintendent or the Principal to give any determination or direction to the Contractor, or any other matter whatsoever referred to in this sub-clause excluding however the matters referred to in sub-paragraph (a) (i) of this sub-clause;

the Contractor shall, within the time specified below, submit the dispute or difference in writing, specifying with detailed particulars the matter at issue including the contractual basis of the claim, to the Superintendent for decision and the Superintendent shall, as soon as practicable thereafter, give the decision to the Contractor.

In the case of sub-paragraph (a) (i) of this sub-clause, the Contractor shall submit the dispute or difference to the Superintendent not later than fourteen days after the determination or direction is given to the Contractor.

In the case of sub-paragraph (a) (ii) of this sub-clause, the Contractor shall submit the dispute or difference to the Superintendent not later

than fourteen days after the dispute or difference arises.

The Superintendent may consult with or take advice from consultants, experts or legal advisers (whether or not they are also engaged or employed by the Principal in connection with the work under the Contract) in considering the dispute or difference.

- (b) If the Contractor is dissatisfied with the decision given by the Superintendent under subparagraph (a) of this sub-clause and desires to challenge the decision, the Contractor shall, not later than fourteen days after the decision of the Superintendent is given to the Contractor, give written notice (signed personally by a director of the Contractor) to the Principal of that fact and thereupon the dispute or difference shall be determined by an expert in accordance with the expert determination process ("Process") set out in the Contract.

The appointment of an expert shall be conclusive evidence that the particular dispute or difference relates to matters properly the subject of expert determination as referred to in this clause.

The decision of the expert shall be made as an expert and not as an arbitrator and shall be final and binding on the parties, except where the expert's decision relating to a dispute or difference is that the Principal shall pay the Contractor an amount in excess of \$500,000, then such decision shall not be final and binding but the Principal or the Contractor may give notice requiring the dispute or difference to be referred to arbitration in accordance with the provisions of sub-clause 45.4.

45.2 Where this clause requires the determination of a dispute or difference by an expert in accordance with the Process:

- (a) The Process shall be effected by an expert in the relevant field agreed upon and appointed jointly by the parties or in the event that no agreement on such appointment is reached, appointed upon the application of either party by the Chair, Sydney Division, Institution of Engineers Australia or the Chair's nominee.
- (b) The independent expert shall be appointed by letter of appointment in the form set out in Annexure SC2 hereto.
- (c) The parties shall be bound by the Rules of the Expert Determination Process set out in Annexure SC3 hereto.
- (d) The parties agree that the expert shall be bound by the Code of Conduct for an Expert

set out in Annexure SC4 hereto.

- (e) The expert shall be deemed not to act as an arbitrator and the determination of the dispute or difference in accordance with the Process set out in the Rules for the Expert Determination Process is not a process of arbitration within the meaning of the Commercial Arbitration Act 1984 (NSW).
- (f) Monies that are or become due and payable by the Principal in respect of work carried out under the Contract and which are not subject to a dispute or difference shall not be withheld because of the Process but the Principal may, at the Principal's discretion, and pending determination by the expert withhold payment of monies in respect of the matter that is the subject of the Process.

45.3 Without limiting the Principal's rights under any other provision in the Contract, the Principal may deduct from monies payable to the Contractor as a result of a determination of an expert, any monies payable to the Principal from the Contractor under or in connection with the Contract including, without limitation, liquidated damages.

45.4 Where the Principal or the Contractor is entitled, pursuant to sub-paragraph (b) of subclause 45.1, to give notice requiring the dispute or difference to be referred to arbitration, such notice shall:

- (a) be given in writing to the other party not later than twenty eight days after the expert has given the decision; and
- (b) if given by the Contractor, be signed personally by a director of the Contractor; and
- (c) if given by the Principal, be signed personally by the Principal's Director, Corporate Services; and
- (d) specify with detailed particulars the matter at issue, including the contractual basis of the claim;

("Notice") and thereupon the dispute or difference shall be determined by arbitration.

If, however, a party does not, within the said period of twenty eight days, give the Notice to the other party, the decision given by the expert shall not be subject to arbitration.

Arbitration shall be effected:

- (a) by an arbitrator agreed upon in writing by the parties within twenty eight days after the Notice is received by the party to whom it is directed; or
- (b) in the absence of that agreement, by one of at least three persons, none of whom shall be an employee of the Principal or of the Contractor or have had any association with the work

under the Contract or with the Process, whose names are submitted in writing by the party who received the Notice for selection by the other party within a further period of twenty eight days after expiry of that last mentioned period, being the person whose selection as arbitrator is, within twenty eight days after the names are so submitted, notified in writing to the other party by the party who gave the Notice; or

- (c) in the absence of that selection, by an arbitrator appointed in accordance with the provisions of the laws relating to arbitration in force in the State or Territory named in the Annexure hereto.

The parties shall be entitled to be represented in any arbitration by a duly qualified legal practitioner.

The party who received the Notice may raise any matter by way of claim or counter claim in any such arbitration where such matter arises out of the Contract or concerns the performance or the non-performance by the other party of their obligations under the Contract.

A reference to arbitration under this sub-clause shall be deemed to be a reference to arbitration within the meaning of the laws relating to arbitration in force in the State or Territory named in the Annexure hereto and the arbitration proceedings shall be conducted in that State or Territory. The arbitrator shall have all the powers conferred by those laws and it shall be competent for the Arbitrator to enter upon the reference without any further or more formal submission than is contained in this sub-clause.

Monies that are or become due and payable by the Principal in respect of work carried out under the Contract and which are not subject to a dispute or difference shall not be withheld because of arbitration proceedings but the Principal may, at the Principal's discretion, and pending the award of the arbitrator, withhold payment of monies in respect of any matter that is the subject of arbitration proceedings.

**Annexure SC2**

To \_\_\_\_\_

By Deed dated \_\_\_\_\_

("the Contract"), between \_\_\_\_\_ of \_\_\_\_\_

and \_\_\_\_\_ of \_\_\_\_\_

(collectively called "the parties"),

the parties agreed to submit disputes that might arise between them to an expert for determination through an expert determination process ("the Process"), as established by the Contract, the Rules for Expert Determination ("the Rules") and the Code of Conduct for an Expert ("the Code of Conduct"), annexures to the Contract as contained in Attachment 1 to this letter.

A dispute to be determined by the Process has arisen between the parties. A short summary of the dispute is contained in Attachment 2 to this letter. The parties agree to appoint you

\_\_\_\_\_ of \_\_\_\_\_

to be the sole expert to determine the dispute in accordance with the Process, the Rules and the Code of Conduct.

The parties agree to pay you for your services at the rate of \$ \_\_\_\_\_ per hour.

The determination of the dispute must be completed within three months of the date of the commencement of the Process, which is the date of your acceptance of the appointment, unless the time is extended by agreement of the parties.

The parties agree that you shall not be liable for any act or omission done bona fide in the exercise or purported exercise of your functions as expert in accordance with the Rules and the Code of Conduct.

Dated \_\_\_\_\_

For and on behalf of the Principal

\_\_\_\_\_

For and on behalf of the Contractor

\_\_\_\_\_

For and on behalf of the Expert

\_\_\_\_\_

**Annexure SC3  
Rules for the Expert Determination Process  
("the Rules")**

**1 Commencement**

The expert determination process ("the Process") shall commence with the acceptance by the Expert of the appointment to act to determine the dispute in accordance with these Rules and the Code of Conduct for an Expert ("the Code of Conduct").

**2 Written Submissions**

- 2.1 Within fourteen (14) days of the date of the commencement of the Process, the Contractor shall provide to the Principal or the Principal's nominee and the Expert a statement detailing the nature of the dispute, any agreed statement of facts and a written submission on the dispute in support of the Contractor's contention.
- 2.2 Within twenty-one (21) days thereafter the Principal or the Principal's nominee shall provide to the Contractor and the Expert a written response to the written submission of the Contractor.
- 2.3 If, upon the application of the Contractor, the Expert considers it appropriate, the Contractor may make a written response to the response of the Principal under paragraph 2.2 above within the time allowed by the Expert and a copy of such written response shall be provided by the Contractor to the Principal.
- 2.4 If, upon the application of the Principal, the Expert considers it appropriate, the Principal may make a written response to the response of the Contractor under paragraph 2.3 above within the time allowed by the Expert and a copy of such written response shall be provided by the Principal to the Contractor.
- 2.5 If the Expert decides further information or documentation is required for the determination of the dispute the Expert may:
  - (a) require a further written submission or documents from either or both parties, giving each party a reasonable opportunity to make a written response to the other's submission; and
  - (b) call a conference between the parties and the Expert in accordance with paragraph 3 below.

**3 Conference**

- 3.1 When the Expert determines that a conference between the parties is necessary the Expert shall be responsible for arranging the conference at a venue and time convenient for the parties and shall notify them accordingly.
- 3.2 At least seven (7) days prior to the conference the Expert shall inform the parties of the matters to be addressed at it.
- 3.3 At the time and place notified for any conference the parties shall appear before the Expert to make representations on the matters the subject of the conference.
- 3.4 The Expert in conducting the conference is not bound by the rules of evidence.
- 3.5 At a conference either party may have legal or other

representation.

- 3.6 The conference shall be held in private.
- 3.7 Transcripts of the conference proceedings will be taken and be available to the Expert and the parties if so required by either party.
- 3.8 All proceedings and submissions relating to the Process shall be kept confidential between the parties and the Expert. No information shall be divulged to any other party, at any time or in any circumstances except with the prior written consent of the parties or as may be required by law or in order to enforce the determination of the Expert.

**4 The Determination**

- 4.1 As expeditiously as possible after the receipt of the submissions or after any conference and, in any event not later than three months after the commencement of the Process unless the time has been extended by agreement between the parties, the Expert shall determine the dispute between the parties and notify such determination in writing to the parties. The Expert shall give a brief statement of the reasons for the determination to the parties.
- 4.2 Where the determination made by the Expert contains
  - (a) a clerical mistake;
  - (b) an error arising from an accidental slip or omission;
  - (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
  - (d) a defect of form;

the Expert shall correct the determination.

**5 Termination**

- 5.1 Subject to paragraph 4.2, the Process shall conclude when the Expert has notified the determination to the parties.
- 5.2 The Process shall be terminated in the event of the Expert being unable to conclude the Process by reason of the Expert's illness, death, being of unsound mind or failure to act and in any such event the provisions of the Contract relating to the determination of disputes by an expert shall apply.

**6 Costs**

- 6.1 Each party shall bear its own costs of the Process and shall share equally the costs of the Expert and the Process.
- 6.2 Security for costs shall be deposited by both parties at the commencement of the Process at the direction of the Expert.
- 6.3 Where the Process is terminated prior to the determination of the dispute each party shall bear its own costs of the Process so far. The costs of the Expert and of the Process shall be borne equally by the parties.
- 6.4 Modification  
Unless otherwise stated these Rules shall be modified only by agreement of the parties and of the Expert.

**Annexure SC4****Code of Conduct for an Expert "the Code of Conduct"**

- 1 The function of the Expert is to make a determination on the dispute in accordance with the Rules, this Code of Conduct, and the letter of appointment of the Expert.
- 2 The Expert shall receive the written submissions and responses of the parties in accordance with the procedures specified in the Rules and may require such further information or documentation from the parties as the Expert thinks is necessary for the determination of the dispute in accordance with the procedures specified in the Rules.
- 3 The Expert shall decide whether a conference between the parties and the Expert is necessary for receiving further information on any specified matter(s). If such a conference is thought to be necessary the Expert shall inform the parties of the precise subject matter(s) of the hearing and shall hear representations only on these matter(s).
- 4 The Expert is not bound by the rules of evidence and may receive information at any conference in any manner the Expert thinks fit, providing that, at all times, the requirements of procedural fairness are met.
- 5 The Expert shall disclose all information and documents received from either party to the other party. Where a party fails to make a written submission or appear at any conference after having received due notice, the Expert may proceed with the Process. Save as provided above, no consultation shall take place other than in the presence of both parties.
- 6 The Expert shall reach the determination on the basis of the information received from the parties and on the basis of the Expert's own expertise. The decision shall be reached as an expert and not as an arbitrator. The Expert's determination shall be made as expeditiously as possible and in any event no later than three months after the commencement of the Process, unless the time is extended by agreement between the parties. The determination and a brief statement of the reasons for the determination, signed by the Expert, shall be notified to the parties in writing forthwith.
- 7 The Expert shall respect the confidentiality of all information received either through written submissions or oral proceedings. No information acquired through the Process shall be divulged to any other body except with the prior written consent of the parties.
- 8 If the Expert becomes aware of any circumstances that might reasonably be considered to affect adversely the Expert's capacity to act independently or impartially the Expert must inform the parties immediately. The Expert must in such circumstances terminate the proceedings, unless the parties agree otherwise.



**Annexure B**  
**Dispute resolution clauses to be used in conjunction with the AS2124-1986 General Conditions of Contract**

**46 Disputes**

Delete clause 46 and substitute the following:

**46.1 Submission to the Superintendent**

If a dispute between the Contractor and the Principal arises out of or in connection with the Contract including a dispute concerning rectification or frustration of the Contract

- (a) The Claimant shall furnish in writing to the Superintendent and the Respondent details of its claim within 28 days of the facts or circumstances giving rise to the dispute first occurring and shall request the Superintendent to make a decision under Clause 46.
- (b) The Respondent shall furnish in writing to the Superintendent a response to the claim within 28 days after receipt of the claim.
- (c) Within:
  - i) 28 days after receipt of the information referred to in Clause 46.1(b), or
  - ii) if the Respondent fails to furnish the information referred to in Clause 46.1(b) 28 days after the expiration of the period referred to in Clause 46.1(b),

the Superintendent shall give each party a written decision on the dispute.

Notwithstanding the existence of a dispute, each party shall continue to perform the Contract. In particular, the Contractor shall continue with the work and the Principal shall continue, subject to the provisions of Clauses 46.3 and 46.4, to comply with Clause 42.1.

**46.2 Submission to Expert Determination**

- (a) If either party is dissatisfied with a decision of the Superintendent made pursuant to Clause 46.1 it may within 14 days after the decision of the Superintendent is given to it, give written notice to the other party of its dissatisfaction and upon giving this notice the dispute shall be determined by an Expert in accordance with the expert determination process set out in the Contract ("Process").

If either party fails to give notice to the other pursuant to paragraph (a) of Clause 46.2 within the period allowed by that paragraph the decision of the Superintendent shall be final and binding.

- (b) If the Superintendent fails to give a written decision pursuant to Clause 46.1(c) either

party may within 14 days after the expiration of the period allowed in Clause 46.1(c) give written notice to the other of that fact and upon giving this notice the dispute shall be determined by an Expert in accordance with the Process.

The Respondent shall not be liable on the claim if the Claimant fails to give notice to the Respondent pursuant to paragraph (b) of Clause 46.2 within the period allowed by that paragraph.

The appointment of an Expert shall be conclusive evidence that the particular dispute relates to matters properly the subject of expert determination as referred to in this clause.

The determination of the Expert shall be made as an Expert and not as an Arbitrator and shall be final and binding on the parties except where the Expert's determination relating to a dispute is that one party shall pay the other an amount in excess of \$500,000 then such determination shall not be final and binding but the Principal or the Contractor may give notice requiring the dispute to be referred to arbitration in accordance with the provisions of Clause 46.4.

**46.3 Expert Determination**

Where, pursuant to Clause 46.2, a dispute is to be determined by an Expert in accordance with the Process:

- (a) The Process shall be effected by an Expert in the relevant field agreed upon and appointed jointly by the parties.
- (b) In the absence of agreement as to the appointment of an Expert either party may request the person specified in the Annexure to nominate an Expert. If a person is not specified in the Annexure, the person to nominate an Expert shall be the Secretary General of the Australian Commercial Disputes Centre Limited at Sydney. The request shall indicate that the nominee shall not be an employee of the Principal or the Contractor, a person who has been connected with the work under the Contract or a person in respect of whom there has been a failure to agree by the Principal and the Contractor.
- (c) The Expert shall be appointed by letter of appointment in the form set out in Annexure SC2 hereto.
- (d) The parties shall be bound by the Rules of the Expert Determination.
- (e) Process set out in Annexure SC3 hereto.
- (f) The parties agree that the Expert shall be bound by the Code of Conduct for an Expert set out in Annexure SC4 hereto.
- (g) The Expert shall be deemed not to act as an

Arbitrator and the determination of the dispute in accordance with the Process set out in the Rules for the Expert Determination Process is not a process of arbitration within the meaning of the Commercial Arbitration Act 1984 (NSW).

Monies that are or become due and payable by the Principal in respect of work carried out under the Contract and which are not subject to a dispute shall not be withheld because of the Process but the Principal may, at the Principal's discretion, and pending determination by the Expert withhold payment of monies in respect of the matter that is the subject of the Process.

Without limiting the Principal's rights under any other provision in the Contract, the Principal may deduct from monies payable to the Contractor as a result of a determination of an Expert, any monies payable to the Principal from the Contractor under or in connection with the Contract including, without limitation, liquidated damages.

Notwithstanding Clause 42.9, the Expert may determine whatever interest the Expert considers reasonable.

If one party has overpaid the other, whether pursuant to a Superintendent's certificate or not and whether under a mistake of law or fact, the Expert may determine that repayment together with interest shall be made.

**46.4 Arbitration**

Where the Principal or the Contractor is entitled, pursuant to Clause 46.2, to give notice requiring a dispute to be referred to arbitration, such notice shall:

- (a) be given in writing to the other party not later than twenty eight days after the expert has given the decision; and
- (b) if given by the Contractor, be signed by a director of the Contractor;
- (c) if given by the Principal, be signed by the authorised delegate of the Principal; and
- (d) specify with detailed particulars the matter at issue, including the contractual basis of the claim;

("Notice") and thereupon the dispute shall be determined by arbitration.

If, however, a party does not, within the said period of twenty eight days, give the Notice to the other party, the determination of the Expert shall not be subject to arbitration. Arbitration shall be effected:

- (a) by an Arbitrator agreed upon in writing by the parties within twenty eight days after the Notice is received by the party to whom it is

directed; or

- (b) in the absence of that agreement, either party may request the person specified in the Annexure to nominate a single Arbitrator. If a person is not specified in the Annexure, the person to nominate an Arbitrator shall be the Secretary General of the Australian Commercial Disputes Centre Limited at Sydney. The request shall indicate that the nominee shall not be an employee of the Principal or the Contractor, a person who has been connected with the work under the Contract or a person in respect of whom there has been a failure to agree by the Principal and the Contractor; or
- (c) in the absence of that selection, by an Arbitrator appointed in accordance with the provisions of the laws relating to arbitration in force in the State or Territory named in the Annexure hereto.

The parties shall be entitled to be represented in any arbitration by a duly qualified legal practitioner.

The party who received the Notice may raise any matter by way of claim or counter claim in any such arbitration where such matter arises out of the Contract or concerns the performance or the non-performance by the other party of their obligations under the Contract.

A reference to arbitration under this Clause shall be deemed to be a reference to arbitration within the meaning of the laws relating to arbitration in force in the State or Territory named in the Annexure hereto and the arbitration proceedings shall be conducted in that State or Territory. The Arbitrator shall have all the powers conferred by those laws and it shall be competent for the Arbitrator to enter upon the reference without any further or more formal submission than is contained in this Clause.

Notwithstanding Clause 42.9, the Arbitrator may award whatever interest the Arbitrator considers reasonable.

If one party has overpaid the other, whether pursuant to a Superintendent's certificate or not and whether under a mistake or law or fact, the Arbitrator may order repayment together with interest.

Monies that are or become due and payable by the Principal in respect of work carried out under the Contract and which are not subject to a dispute shall not be withheld because of arbitration proceedings but the Principal may, at the Principal's discretion, and pending the award of the arbitrator, withhold payment of monies in respect of any matter that is the subject of arbitration proceedings.

**Annexure SC2**

To \_\_\_\_\_

By Deed dated \_\_\_\_\_

("the Contract"), between \_\_\_\_\_ of \_\_\_\_\_

and \_\_\_\_\_ of \_\_\_\_\_

(collectively called "the parties"),

the parties agreed to submit disputes that might arise between them to an expert for determination through an expert determination process ("the Process"), as established by the Contract, the Rules for Expert Determination ("the Rules") and the Code of Conduct for an Expert ("the Code of Conduct"), annexures to the Contract as contained in Attachment 1 to this letter.

A dispute to be determined by the Process has arisen between the parties. A short summary of the dispute is contained in Attachment 2 to this letter. The parties agree to appoint you

\_\_\_\_\_ of \_\_\_\_\_

to be the sole expert to determine the dispute in accordance with the Process, the Rules and the Code of Conduct. The parties agree to pay you for your services at the rate of \$ \_\_\_\_\_ per hour.

The determination of the dispute must be completed within three months of the date of the commencement of the Process, which is the date of your acceptance of the appointment, unless the time is extended by agreement of the parties.

The parties agree that you shall not be liable for any act or omission done bona fide in the exercise or purported exercise of your functions as expert in accordance with the Rules and the Code of Conduct.

Dated \_\_\_\_\_

For and on behalf of the Principal

\_\_\_\_\_

For and on behalf of the Contractor

\_\_\_\_\_

For and on behalf of the Expert

\_\_\_\_\_

**Annexure SC3  
Rules for the Expert Determination Process  
("the Rules")**

**1 Commencement**

The expert determination process ("the Process") shall commence with the acceptance by the Expert of the appointment to act to determine the dispute in accordance with these Rules and the Code of Conduct for an Expert ("the Code of Conduct").

**2 Written Submissions**

- 2.1 Within fourteen (14) days of the date of the commencement of the Process, the Claimant shall provide to the Respondent or his nominee and the Expert a statement detailing the nature of the dispute, any agreed statement of facts and a written submission on the dispute in support of the Claimant's contention.
- 2.2 Within twenty-one (21) days thereafter the Respondent or the Respondent's nominee shall provide to the Claimant and the Expert a written response to the written submission of the Claimant.
- 2.3 If, upon the application of the Claimant, the Expert considers it appropriate, the Claimant may make a written response to the response of the Respondent under paragraph 2.2. above within the time allowed by the Expert and a copy of such written response shall be provided by the Claimant to the Respondent.
- 2.4 If, upon the application of the Respondent, the Expert considers it appropriate, the Respondent may make a written response to the response of the Claimant under paragraph 2.3 above within the time allowed by the Expert and a copy of such written response shall be provided by the Respondent to the Claimant.
- 2.5 If the Expert decides further information or documentation is required for the determination of the dispute the Expert may:
  - (a) require a further written submission or documents from either or both parties, giving each party a reasonable opportunity to make a written response to the other's submission; and
  - (b) he may call a conference between the parties and the Expert in accordance with paragraph 3 below.

**3 Conference**

- 3.1 When the Expert determines that a conference between the parties is necessary the Expert shall be responsible for arranging the conference at a venue and time convenient for the parties and shall notify them accordingly.
- 3.2 At least seven (7) days prior to the conference the Expert shall inform the parties of the matters to be addressed at it.
- 3.3 At the time and place notified for any conference

the parties shall appear before the Expert to make representations on the matters the subject of the conference.

- 3.4 The Expert in conducting the conference is not bound by the rules of evidence.
- 3.5 At a conference either party may have legal or other representation.
- 3.6 The conference shall be held in private.
- 3.7 Transcripts of the conference proceedings will be taken and be available to the Expert and the parties if so required by either party.
- 3.8 All proceedings and submissions relating to the Process shall be kept confidential between the parties and the Expert. No information shall be divulged to any other party, at any time or in any circumstances except with the prior written consent of the parties or as may be required by law or in order to enforce the determination of the Expert.

**4 The Determination**

- 4.1 As expeditiously as possible after the receipt of the submissions or after any conference and, in any event not later than three months after the commencement of the Process unless the time has been extended by agreement between the parties, the Expert shall determine the dispute between the parties and notify such determination in writing to the parties. The Expert shall give a brief statement of the reasons for the determination to the parties.
- 4.2 Where the determination made by the Expert contains
  - (a) a clerical mistake;
  - (b) an error arising from an accidental slip or omission;
  - (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
  - (d) a defect of form,

the Expert shall correct the determination.

**5 Termination**

- 5.1 Subject to paragraph 4.2, the Process shall conclude when the Expert has notified the determination to the parties.
- 5.2 The Process shall be terminated in the event of the Expert being unable to conclude the Process by reason of the Expert's illness, death, being of unsound mind or failure to act and in any such event the provisions of the Contract relating to the determination of disputes by an expert shall apply.

**6 Costs**

- 6.1 Each party shall bear its own costs of the Process and shall share equally the costs of the Expert and the Process.
- 6.2 Security for costs shall be deposited by both parties at the commencement of the Process at the direction of the Expert.

6.3 Where the Process is terminated prior to the determination of the dispute each party shall bear its own costs of the Process so far. The costs of the Expert and of the Process shall be borne equally by the parties.

**7 Modification**

Unless otherwise stated these Rules shall be modified only by agreement of the parties and of the Expert.

**Annexure SC4**

**Code of Conduct for an Expert "the Code of Conduct"**

- 1 The function of the Expert is to make a determination on the dispute in accordance with the Rules, this Code of Conduct, and the letter of appointment of the Expert.
- 2 The Expert shall receive the written submissions and responses of the parties in accordance with the procedures specified in the Rules and may require such further information or documentation from the parties as the Expert thinks is necessary for the determination of the dispute in accordance with the procedures specified in the Rules.
- 3 The Expert shall decide whether a conference between the parties and the Expert is necessary for receiving further information on any specified matter(s). If such a conference is thought to be necessary the Expert shall inform the parties of the precise subject matter(s) of the hearing and shall hear representations only on these matter(s).
- 4 The Expert is not bound by the rules of evidence and may receive information at any conference in any manner the Expert thinks fit, providing that, at all times, the requirements of procedural fairness are met.
- 5 The Expert shall disclose all information and documents received from either party to the other party. Where a party fails to make a written submission or appear at any conference after having received due notice, the Expert may proceed with the Process. Save as provided above, no consultation shall take place other than in the presence of both parties.
- 6 The Expert shall reach the determination on the basis of the information received from the parties and on the basis of the Expert's own expertise. The decision shall be reached as an expert and not as an arbitrator. The Expert's determination shall be made as expeditiously as possible and in any event no later than three months after the commencement of the Process, unless the time is extended by agreement between the parties. The determination and a brief statement of the reasons for the determination, signed by the Expert, shall be notified to the parties in writing forthwith.
- 7 The Expert shall respect the confidentiality of all information received either through written submissions or oral proceedings. No information acquired through the Process shall be divulged to any other body except with the prior written consent of the parties.
- 8 If the Expert becomes aware of any circumstances that might reasonably be considered to affect adversely the Expert's capacity to act independently or impartially the Expert must inform the parties immediately. The Expert must in such circumstances terminate the proceedings, unless the parties agree otherwise.

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