
ICE Mediation/Conciliation Procedure

Institution of Civil Engineers

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A copy of the appropriate form for applying for the appointment by the ICE is available on the ICE Dispute Resolution Services webpage:

www.ice.org.uk/disputeresolution

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Introduction

- i. Mediation and conciliation are methods of resolving disputes. The main difference between mediation and conciliation is that, if conciliation is unsuccessful, the Conciliator typically issues a non-binding recommendation to try to resolve the dispute. By contrast, a Mediator does not do so.
- ii. Mediation and conciliation proceedings are conducted in confidence and on a 'Without Prejudice' basis. This means that nothing disclosed during the proceedings may be used as evidence in any subsequent proceedings, whether in adjudication, arbitration or litigation.
- iii. The main difference between mediation and conciliation on the one hand, and adjudication or arbitration on the other hand, is that the outcome of mediation or conciliation is not imposed and only becomes binding with the consent of both parties. Mediation/conciliation therefore allows the parties to the dispute the freedom to explore ways of settling the dispute with the assistance of an independent impartial person, the Mediator/Conciliator.
- iv. Mediation or conciliation is essentially an assisted negotiation. They are voluntary processes and are available, at any time, regardless of the statutory right to adjudication which was introduced by the Housing Grants, Construction and Regeneration Act 1996.
- v. This Procedure permits the Mediator/Conciliator to communicate privately and separately with each Party without subsequently revealing to the other Party what he has been told; this is something not permitted to an adjudicator, arbitrator or judge.
- vi. The Mediator or Conciliator explores with the Parties their interests, strengths and weaknesses, and perceived needs; to identify possible areas of accommodation or compromise; and searches for possible alternative solutions. Anything can be explored which could lead the Parties to an agreed settlement. Where the mediation/conciliation follows an Engineer's or a Project Manager's decision, the Parties are wholly free to explore options that were not available to the Engineer or the Project Manager.
- vii. The information given to the Mediator/Conciliator is not comprehensive, is not given under oath or affirmation, and there is no cross-examination. The Mediator/Conciliator is not bound by the rules of natural justice or the rules of evidence and can be guided only by what the Parties choose to tell him and his own professional knowledge and experience.
- viii. If the Parties can reach a commercial settlement, the Mediator/Conciliator will be available to assist the Parties to ensure that any such agreement is recorded in writing in a form that is enforceable.
- ix. As there are different requirements for mediation/conciliation between various contracting parties, it should be noted that this Procedure is for use in construction and engineering contracts.

This Procedure has been prepared by The Institution of Civil Engineers for use under any construction and engineering contracts where its use is appropriate or on an ad hoc basis.

Institution of Civil Engineers Mediation/Conciliation Procedure

Part A. General Principles

Rule 1. General Principles

- 1.1 This Procedure shall apply whenever
 - (a) the Parties have entered into a contract which provides for mediation for any dispute which may arise between the Parties in accordance with The Institution of Civil Engineers' Mediation/Conciliation Procedure
 - (b) the Parties have agreed that The Institution of Civil Engineers Mediation/Conciliation Procedure shall apply.
- 1.2 This Procedure shall be interpreted and applied in the manner most conducive to the efficient conduct of the proceedings with the primary objective of achieving a settlement of the dispute by agreement between the Parties as quickly as possible.
- 1.3 The Mediator/Conciliator shall observe and maintain the confidentiality of all information, which he is given by any Party privately, and may only disclose it with the express permission of that Party. He will try to assist the Parties to resolve the dispute in any way which is acceptable to them. The Parties and the Mediator/Conciliator shall at all times maintain the confidentiality of the mediation/conciliation and shall endeavour to ensure that anyone acting on their behalf or through them will do likewise.
- 1.4 The parties undertake that
 - (a) except where disclosure is required by law or a court, all documents prepared for the mediation/conciliation shall be confidential and shall not be admissible in evidence in any subsequent adjudication, arbitration or litigation
 - (b) except where disclosure is required by law or a court, everything stated during the mediation/conciliation meeting shall be confidential and shall not be mentioned or referred to in any subsequent proceedings
 - (c) the entire mediation/conciliation shall be without prejudice to all rights of the Parties, whether under the contract or otherwise.

Part B. Notice of Mediation/Conciliation

Rule 2. The Notice of Mediation/ Conciliation

- 2.1 Subject to the provisions of the contract relating to mediation/conciliation, any Party to the contract may by giving to the other Party a written notice, hereafter called a Notice of Mediation (or Notice of Conciliation), request that any dispute in connection with or arising out of the contract or the carrying out of the works shall be referred to a Mediator/Conciliator. Such Notice of Mediation (or Notice of Conciliation), shall be accompanied by a brief statement of the matter or matters to be referred and the redress sought.
- 2.2 If the other Party agrees to proceed with the mediation/conciliation it notifies the other Party within 14 days of the date of the Notice of Mediation/Conciliation and the matter or matters are referred to the Mediator/Conciliator.

Part C. Appointment of the Mediator/Conciliator

Rule 3. The Appointment of the Mediator/ Conciliator

- 3.1 If the parties have not agreed a Mediator/Conciliator within 14 days of agreement under Rule 2.2 either party may request that the Institution of Civil Engineers appoint a Mediator/Conciliator not later than 21 days after agreement in 2.2.
- 3.2 If, for any reason whatsoever, the Mediator/Conciliator is unable, or fails, to complete the mediation/conciliation in accordance with this Procedure, then any

Party may require the appointment of a replacement Mediator/Conciliator in accordance with Rule 3.1.

Part D. Conduct and Conclusion of the Mediation/Conciliation

Rule 4. The Conduct of the Mediation/ Conciliation

- 4.1 Unless otherwise agreed by the Parties, the Party requesting mediation/conciliation shall deliver to the Mediator/Conciliator, immediately on his appointment, with a copy to the other Party, a copy of the Notice of Mediation (or Notice of Conciliation) together with copies of all relevant Notices of Dispute and of any other notice or decision which is a condition precedent to mediation/conciliation.
- 4.2 The Mediator/Conciliator shall start the mediation/conciliation as soon as possible after his appointment and shall use his best endeavours to conclude the mediation/conciliation as soon as possible and in any event within any time limit stated in the contract, or, if no time limit is so stated, within two months from the date of his appointment, unless the Parties and the Mediator/Conciliator otherwise agree.
- 4.3 Any Party may, immediately after the Mediator's (or Conciliator's) appointment or within such period as the Mediator/Conciliator may direct, send to the Mediator/Conciliator and to the other Party a statement of its views on the dispute and any issues that it considers to be of relevance to the dispute, and any financial consequences.
- 4.4 As soon as possible after his appointment, the Mediator/Conciliator shall, after consultation with the Parties notify them of the date of and location for the mediation/conciliation meeting with the Parties. Each Party shall, in advance of the meeting, inform the Mediator/Conciliator and the other Party in writing of the name of its representative for the mediation/conciliation, who shall have full authority to act on behalf of that Party, together with the names of any other persons who will attend the mediation/conciliation meeting.
- 4.5 The Mediator/Conciliator conducts the mediation/conciliation in any way that he considers appropriate and may with the agreement of all Parties
 - (a) meet and question the Parties and their representatives, together or separately
 - (b) investigate the facts and circumstances of the dispute
 - (c) visit the site
 - (d) request the production of documents or the attendance of people whom he considers could assist in any way
 - (e) issue such other requests as he considers appropriate
 - (f) consider and discuss such solutions to the dispute as are suggested by either Party.
- 4.6 Any Party may, at any time, ask that additional claims or disputes, or additional Parties, shall be joined in the mediation/conciliation. Such requests shall be accompanied by details of the relevant contractual facts, notices and decisions. Such joinder shall be subject to the agreement of the Mediator/Conciliator and all Parties. Any additional Party shall, unless otherwise agreed by the Parties, have the same rights and obligations as the other Parties to the mediation/conciliation. All additional Parties shall sign the Mediator's/Conciliator's agreement.
- 4.7 If, in the opinion of the Mediator/Conciliator, the resolution of the dispute would be assisted by further investigation by either Party or by the Mediator/Conciliator, or by an interim agreement, including some action by any Party, then the Mediator/Conciliator may, with the agreement of the Parties, give particulars thereof and/or adjourn the proceedings as may be appropriate.
- 4.8 When a settlement has been achieved of the whole or any part of the matters in dispute, the Parties shall enter into an agreement incorporating the terms of the settlement. The Mediator/Conciliator shall, if so requested by all the Parties, assist

them to prepare this Agreement. The Mediator/Conciliator shall not sign this agreement as a party thereto, but may sign as a witness.

**Rule 5.
The Conclusion of
Mediation**

- 5.1 The mediation is deemed to have been concluded
- (a) if a settlement is reached
 - (b) if a settlement of the whole of the matters in dispute has not been achieved by the conclusion of each day of the mediation meeting and the Parties and the Mediator do not agree a date on which to continue the mediation meeting in a further attempt at settlement
 - (c) if the Mediator informs the Parties that, in his opinion, any further attempts at settlement seem unlikely to be successful
 - (d) if a Party informs the Mediator that it withdraws from the mediation.

**Rule 6.
The Conclusion of
Conciliation**

- 6.1 The conciliation is deemed to have been concluded
- (a) if a settlement is reached
 - (b) if a settlement of the whole of the matters in dispute has not been achieved by the conclusion of each day of the conciliation meeting and the Parties and the Conciliator do not agree a date on which to continue the conciliation meeting in a further attempt at settlement
 - (c) if the Conciliator informs the Parties that, in his opinion, any further attempts at settlement seem unlikely to be successful
 - (d) if a Party informs the Conciliator that it withdraws from the conciliation
 - (e) if no settlement is reached and either party has requested the conciliator to produce a recommendation and that recommendation is issued.

Part E. Conciliator's Recommendation (only applicable to conciliation)

**Rule 7.
Conciliator's
recommendation**

- 7.1 The Conciliator shall issue a recommendation where requested to do so by either party in accordance with Rule 6.1. The recommendation will be issued within 14 days of the request.
- 7.2 The Conciliator's recommendation shall state his solution to the dispute which has been referred for conciliation. The recommendation shall not disclose any information which any Party has provided privately to the Conciliator. It shall be based on his opinion as to how the Parties can best dispose of the dispute between them and need not necessarily be based on any principles of the contract, law or equity.
- 7.3 The Conciliator shall not be required to give reasons for his recommendation unless requested to do so by either Party.
- 7.4 The Conciliator may be recalled, by written agreement of the Parties and upon agreement of an additional fee, to clarify, amplify or give further consideration to any provision of the recommendation.

Part F. Miscellaneous Provisions

**Rule 8.
Miscellaneous
Provisions**

- 8.1 No Party shall be entitled to call the Mediator/Conciliator as a witness in any subsequent proceedings concerning the subject matter of the mediation/conciliation.
- 8.2 The Mediator/Conciliator shall not be appointed adjudicator, arbitrator, expert or as other form of tribunal in any subsequent proceedings between the Parties, whether arising out of the dispute, difference or other matter or otherwise arising out of the same contract unless all the Parties and the Mediator/Conciliator otherwise agree in writing.
- 8.3 Each Party shall meet its own costs and expenses. Each Party shall, within fourteen days of the date of the Mediator's/Conciliator's invoice, pay an equal share of the

Mediator's/Conciliator's fees and expenses. The Parties shall be jointly and severally liable to the Mediator/Conciliator for the whole of his fees and expenses. If any Party fails to make the payment due from him, another Party may pay the sum to the Mediator/Conciliator and recover the amount from the defaulting Party as a debt due.

8.4 The Mediator/Conciliator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Mediator/Conciliator unless the act or omission is in bad faith, and any employee or agent of the Mediator/Conciliator is similarly protected from liability. The Parties shall save harmless and indemnify the Mediator/Conciliator and any employee or agent of the Mediator/Conciliator against all claims by third parties and in respect of this shall be jointly and severally liable.

8.5 Any notice or other document under this Procedure may be served on a person by any effective means.

If a notice or other document is addressed, pre-paid and delivered by post

- (a) to the addressee's last known principal residence or, if he is or has been carrying on trade, profession or business, his last known principal business address
- (b) where the addressee is a body corporate, to the body's registered or principal office

it shall be effectively served.

8.6 In this Procedure where the context so requires 'Party' shall include 'Parties'.

Sample documents

MEDIATOR'S/CONCILIATOR'S* AGREEMENT

THIS AGREEMENT is made on day of year

between (the first Party):

of:

and (the second Party):

of:

and (the third Party if any):

of:

(hereinafter called 'the Parties') of the one part and:

of:

(hereinafter called 'the Mediator'/'Conciliator'* of the other part.

Disputes or differences have arisen between the Parties in connection with certain construction works known as:

.....

IT IS NOW AGREED as follows.

1. The rights and obligations of the Mediator/Conciliator* and the Parties shall be as set out in the Procedure.
2. The Mediator/Conciliator* hereby accepts the appointment and agrees to conduct the mediation in accordance with the Procedure.
3. The Parties bind themselves jointly and severally to pay the Mediator's/Conciliator's* fees and expenses in accordance with Rule 8.3 as appropriate of the Procedure in the manner set out in the attached Schedule.

Mediator's/Conciliator's Agreement

Signed on behalf of:

First Party:

Name:

Signature:

Date:

Second Party:

Name:

Signature:

Date:

Third Party (if any):

Name:

Signature:

Date:

Mediator/Conciliator*:

Name:

Signature: Date:

*Delete as necessary

SCHEDULE to the MEDIATOR'S/CONCILIATOR'S* AGREEMENT

1. The Mediator/Conciliator* shall be paid at the hourly rate of £ in respect of all time spent upon, or in connection with, the mediation including time spent travelling.
2. The Mediator/Conciliator* shall be reimbursed in respect of all expenses properly made including, but not restricted to
 - printing, reproduction and purchase of all documents, drawings, maps, records and photographs
 - telegrams, telex, faxes, emails and telephone calls
 - postage and similar delivery charges
 - travelling, hotel expenses and other similar expenses
 - room charges.
3. The Mediator/Conciliator* is/is not* currently registered for VAT.
4. When the Mediator/Conciliator* is registered for VAT, VAT (where applicable) shall be charged in accordance with HMRC regulations.
5. All payments, other than the appointment fee (item 3) shall become due fourteen days after receipt of invoice, thereafter interest shall be payable at 10% per annum above the Bank of England base rate for every day the amount remains outstanding.

* Delete as necessary