
Appendix 9

ICE Conditions of Contract 7th Edition

AVOIDANCE AND SETTLEMENT OF DISPUTES

Avoidance
of disputes 66

(1) In order to overcome where possible the causes of disputes and in those cases where disputes are likely still to arise to facilitate their clear definition and early resolution (whether by agreement or otherwise) the following procedure shall apply for the avoidance and settlement of disputes.

Matters of
dissatisfaction

(2) If at any time

(a) the Contractor is dissatisfied with any act or instruction of the Engineer's Representative or any other person responsible to the Engineer or

(b) the Employer or the Contractor is dissatisfied with any decision opinion instruction direction certificate or valuation of the Engineer or with any other matter arising under or in connection with the Contract or the carrying out of the Works

the matter of dissatisfaction shall be referred to the Engineer who shall notify his written decision to the Employer and the Contractor within one month of the reference to him.

Disputes

(3) The Employer and the Contractor agree that no matter shall constitute nor be said to give rise to a dispute unless and until in respect of that matter

(a) the time for the giving of a decision by the Engineer on a matter of dissatisfaction under Clause 66(2) has expired or the decision given is unacceptable or has not been implemented and in consequence the Employer or the Contractor has served on the other and on the Engineer a notice in writing (hereinafter called the Notice of Dispute)

(b) an adjudicator has given a decision on a dispute under Clause 66(6) and the Employer or the Contractor is not giving effect to the decision, and in consequence the other has served on him and the Engineer a Notice of Dispute

and the dispute shall be that stated in the Notice of Dispute. For the purposes of all matters arising under or in connection with the Contract or the carrying out of the Works the word "dispute" shall be construed accordingly and shall include any difference.

(4) (a) Notwithstanding the existence of a dispute following the service of a Notice under Clause 66(3) and unless the Contract has already been determined or abandoned the Employer and the Contractor shall continue to perform their obligations.

(b) The Employer and the Contractor shall give effect forthwith to every decision of

- (i) the Engineer on a matter of dissatisfaction given under Clause 66(2) and
- (ii) the adjudicator on a dispute given under Clause 66(6)

unless and until that decision is revised by agreement of the Employer and Contractor or pursuant to Clause 66.

- (5) (a) The Employer or the Contractor may at any time before service of a Notice to Refer to arbitration under Clause 66(9) by notice in writing seek the agreement of the other for the dispute to be considered under "The Institution of Civil Engineers' Conciliation Procedure 1999" or any amendment or modification thereof being in force at the date of such notice. **Conciliation**
- (b) If the other party agrees to this procedure any recommendations of the conciliator shall be deemed to have been accepted as finally determining the dispute by agreement so that the matter is no longer in dispute unless a Notice of Adjudication under Clause 66(6) or a Notice to Refer to arbitration under Clause 66(9) has been served in respect of that dispute not later than one month after receipt of the recommendation by the dissenting party.
- (6) (a) The Employer and the Contractor each has the right to refer a dispute as to a matter under the Contract for adjudication and either party may give notice in writing (hereinafter called the Notice of Adjudication) to the other at any time of his intention so to do. The adjudication shall be conducted under "The Institution of Civil Engineers' Adjudication Procedure 1997" or any amendment or modification thereof being in force at the time of the said Notice. **Adjudication**
- (b) Unless the adjudicator has already been appointed he is to be appointed by a timetable with the object of securing his appointment and referral of the dispute to him within 7 days of such notice.
- (c) The adjudicator shall reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred.
- (d) The adjudicator may extend the period of 28 days by up to 14 days with the consent of the party by whom the dispute was referred.
- (e) The adjudicator shall act impartially.
- (f) The adjudicator may take the initiative in ascertaining the facts and the law.
- (7) The decision of the adjudicator shall be binding until the dispute is finally determined by legal proceedings or by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
- (8) The adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith and any employee or agent of the adjudicator is similarly not liable.
- (9) (a) All disputes arising under or in connection with the Contract or the carrying out of the Works other than failure to give effect to a decision of an adjudicator shall be finally determined by reference to arbitration. The party seeking arbitration shall serve on the other party a notice in writing (called the Notice to Refer) to refer the dispute to arbitration. **Arbitration**

(b) Where an adjudicator has given a decision under Clause 66(6) in respect of the particular dispute the Notice to Refer must be served within three months of the giving of the decision otherwise it shall be final as well as binding.

Appointment of arbitrator President or Vice-President to act

- (10) (a) The arbitrator shall be a person appointed by agreement of the parties.
- (b) If the parties fail to appoint an arbitrator within one month of either party serving on the other party a notice in writing (hereinafter called the Notice to Concur) to concur in the appointment of an arbitrator the dispute shall be referred to a person to be appointed on the application of either party by the President for the time being of the Institution of Civil Engineers.
- (c) If an arbitrator declines the appointment or after appointment is removed by order of a competent court or is incapable of acting or dies and the parties do not within one month of the vacancy arising fill the vacancy then either party may apply to the President for the time being of the Institution of Civil Engineers to appoint another arbitrator to fill the vacancy.
- (d) In any case where the President for the time being of the Institution of Civil Engineers is not able to exercise the functions conferred on him by this Clause the said functions shall be exercised on his behalf by a Vice-President for the time being of the said Institution.

Arbitration - procedure and powers

- (11) (a) Any reference to arbitration under this Clause shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1996 or any statutory re-enactment or amendment thereof for the time being in force. The reference shall be conducted in accordance with the procedure set out in the Appendix to the Form of Tender or any amendment or modification thereof being in force at the time of the appointment of the arbitrator. Such arbitrator shall have full power to open up review and revise any decision opinion instruction direction certificate or valuation of the Engineer or an adjudicator.
- (b) Neither party shall be limited in the arbitration to the evidence or arguments put to the Engineer or to any adjudicator pursuant to Clause 66(2) or 66(6) respectively.
- (c) The award of the arbitrator shall be binding on all parties.
- (d) Unless the parties otherwise agree in writing any reference to arbitration may proceed notwithstanding that the Works are not then complete or alleged to be complete.

Witnesses

- (12) (a) No decision opinion instruction direction certificate or valuation given by the Engineer shall disqualify him from being called as a witness and giving evidence before a conciliator adjudicator or arbitrator on any matter whatsoever relevant to the dispute.
- (b) All matters and information placed before a conciliator pursuant to a reference under sub-clause (5) of this Clause shall be deemed to be submitted to him without prejudice and the conciliator shall not be called as witness by the parties or anyone claiming through them in connection with any adjudication arbitration or other legal proceedings arising out of or connected with any matter so referred to him.