
Appendix 17

Institution of Chemical Engineers Red Book

45. Disputes

See Guide Note Q (Dispute resolution)

- 45.1 The **Purchaser** and the **Contractor** shall use all reasonable endeavours to avoid disputes both between themselves and with third parties including, but not limited to, **Subcontractors**.
- 45.2 In order to avoid the development of disputes and to facilitate their clear definition and early resolution, the procedures set out in Clauses 45 (Disputes), 46 (Adjudication), 47 (Reference to an Expert) and 48 (Arbitration) shall be applied as appropriate. The **Purchaser** and the **Contractor** undertake that they shall use reasonable endeavours to avoid the escalation of problems into 'disputes' as defined in Sub-clause 45.4. However the parties acknowledge and agree that this undertaking shall not prejudice either party's rights under Clause 46 to refer any dispute or difference to adjudication at any time, if that party so wishes, notwithstanding the definition of 'dispute' in Sub-clause 45.4.
- 45.3 If the **Contractor** is dissatisfied with any **Decision** or valuation of the **Project Manager**, or of any person to whom the **Project Manager** may have delegated any of his authority or responsibility, or if the **Purchaser** or the **Contractor** is dissatisfied with any other matter arising under or in connection with the **Contract**, either party may at any time refer such dissatisfaction to the **Project Manager** giving full details of the nature of the matter. The **Project Manager** shall give a written decision on the matter (giving the reasons for such decision) to the **Purchaser**, the **Contractor** and the **Contract Manager** within twenty-eight days of such reference to him.
- 45.4 The **Purchaser** and the **Contractor** agree that no matter shall constitute, nor be said to give rise to, a dispute, which shall include any difference, unless the same has been referred to the **Project Manager** under Sub-clause 45.3 and:
- (a) the **Project Manager** has failed to give his decision on the said matter within the prescribed time; or
 - (b) a decision given within the prescribed time is either unacceptable to the **Purchaser** and/or the **Contractor** or has not been implemented within twenty-one days of the said decision;
- and, as a consequence, either the **Purchaser** or the **Contractor** has served notice setting out the nature of the dispute (hereinafter called a 'Notice of Dispute') on the other (and on the **Project Manager**). For the purposes of the performance of the **Works** and all matters arising out of or in connection with the **Contract**, the word 'dispute' shall be construed in accordance with this Sub-clause 45.4.
- 45.5 Notwithstanding the existence of any dispute or any reference to the **Project Manager** under Sub-clause 45.3, the **Purchaser** and the **Contractor** shall continue to perform their obligations under the **Contract**.
- 45.6 Subject to any other provisions of the **Contract** the parties shall attempt to negotiate a settlement of any dispute in good faith.

- 45.7 If a dispute cannot be resolved by negotiation the parties may by agreement refer it to mediation in accordance with the procedures of the Centre for Dispute Resolution (CEDR) or some other body.
- 45.8 No **Decision**, opinion, direction or valuation given by the **Project Manager** shall disqualify him from being called as a witness and giving evidence before a third party, an **Expert**, adjudicator or arbitrator on any matter whatsoever relating to a dispute.

46. Adjudication

See Guide Note Q (Dispute resolution)

- 46.1 This Clause 46 shall only apply to disputes under a construction contract as defined in the Housing Grants, Construction and Regeneration Act 1996, or any amendment or re-enactment thereof.
- 46.2 Notwithstanding any provision in these General Conditions for a dispute to be referred to an **Expert** in accordance with Clause 47 (Reference to an Expert) or to Arbitration in accordance with Clause 48 (Arbitration), either party shall have the right to refer any dispute or difference (including any matter not referred to the **Project Manager** in accordance with Sub-clause 45.3) as to a matter under or in connection with the **Contract** to adjudication and either party may, at any time, give notice in writing to the other of his intention to do so (hereinafter called a 'Notice of Adjudication'). The ensuing adjudication shall be conducted in accordance with the edition of the 'Adjudication Rules' (the 'Rules') published by IChemE current at the time of service of the Notice of Adjudication.
- 46.3 Unless the adjudicator has already been appointed, he is to be appointed to a timetable with the object of securing his appointment within seven days of the service of the Notice of Adjudication. The appointment of the adjudicator shall be effected in accordance with the Rules.
- 46.4 The adjudicator shall reach his **Decision** within twenty-eight days of referral or such other longer period as may be agreed between the parties after the dispute has been referred.
- 46.5 The adjudicator may extend the period of twenty-eight days by up to fourteen days with the consent of the party by whom the dispute was referred.
- 46.6 The adjudicator shall act impartially.
- 46.7 The adjudicator may take the initiative in ascertaining the facts and the law.
- 46.8 The decision of the adjudicator shall be binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement.
- 46.9 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. Furthermore, any employee or agent of the adjudicator acting in connection with the carrying out of the adjudication shall be similarly protected from liability.

Guide Note Q (Dispute resolution)

Adjudication

If a review of the Works and the Plant leads to the conclusion that the Contractor will be required under the Contract to undertake activities which are defined as construction operations by the Housing Grants, Construction and Regeneration Act 1996 Part II, Clause 46 will apply to disputes arising from those activities, as will the IChemE Adjudication Rules. Whilst it is hoped that parties will generally

follow Sub-clause 45.4, Sub-clause 46.2 makes it clear that for activities which do fall under the Act either party may call for adjudication at any time without first formally establishing a 'Dispute'.

Clause 46 has been modelled to correspond with Clause 108 of the Housing Grants, Construction and Regeneration Act 1996 under which an adjudicator's decision is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement. Sub-clause 46.8 of the Contract mirrors section 108(3) of the Act.

While there is, as yet, no judicial authority on the point, it is arguable that adjudication under the Act can proceed even if an Expert Determination is also in hand. If so, it would appear that an Expert's finding given before an adjudicator has given his decision will stay the adjudication, while a finding given after a decision will over-ride the latter. But it would be far better to avoid the problem by choosing one approach or the other at the earliest possible stage.