

Mediation Procedure 2011

*Approved by the Dispute Resolution Board of Engineers Ireland,
February 2011*



Preamble

This Mediation Procedure has been prepared by Engineers Ireland principally for use with disputes arising out of engineering work and, in particular, construction contracts. However its use is not restricted to such work and it has been purposely written to allow for more general application in all areas of commercial activity.

This Procedure initially arose out of discussions with representatives of the RIAI, SCS, ACEI and CIF at the Liaison Committee while considering revisions to the RIAI form of contract. In formulating this Procedure Engineers Ireland has drawn widely from the body of information available on Mediation; however the use of the Construction Mediation Procedure 2002 published by the Institution of Civil Engineers is acknowledged.

It is not intended to produce this document in hard copy; instead it will be made freely available on the Engineers Ireland website so that it may be downloaded and used by parties involved in Mediation. A contribution to the costs incurred by Engineers Ireland will be sought where the procedure is used, without a presidential appointment, by a Mediator on the Engineers Ireland Panel.

The document will be reviewed and updated as required and parties using it are advised to check the date so that they are using the current version. Finally the Board would welcome comments and suggestions from those using the document.

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February 2011

PREFACE

Engineering work covers a very broad range of commercial and industrial activity; traditionally Mediation has not been much used in the resolution of disputes arising from such endeavours. The dominant engineering segment has tended to be the construction industry which has used conciliation as a non-adjudicative process since the 1990s when stepped dispute resolution clauses, with mandatory Conciliation before Arbitration, were first introduced. The first Engineers Ireland Conciliation Procedure was published in 1995.

However the use of Mediation as a process has increased dramatically in recent years and this is acknowledged in the Civil Liability and Courts Act 2004 and also in the Consultation Paper published by the Law Reform Commission in 2008. This trend has been further underlined by the LRC Report published in November 2010 under the title *Alternative Dispute Resolution: Mediation and Conciliation*. Increasingly, outside of the construction industry, Mediation is being used for engineering disputes, sometimes with Expert Determination, as a more efficient and expeditious approach to resolve disputes.

Mediation, as Conciliation, is a form of assisted negotiation but it differs in that it is purely facilitative and the Mediator simply assists the parties to arrive at their own solution. It is the dispute resolution process which offers greatest flexibility to the parties who are not necessarily bound by the constraints of the contract between them in seeking to resolve their differences. Consequently it is the process which is most likely to foster rather than sunder existing relationships.

Mediation is a voluntary process which is available to parties at any stage of the dispute. It is conducted on a without prejudice and confidential basis which means that nothing disclosed during the Mediation may be used in any subsequent proceedings, for example, in Court or Arbitration. It is also relatively cheap and rapid with a reported high level of success; even in the event of failure, the parties are in no worse position than before the Mediation.

The role of the Mediator is to explore with the parties their interests, strengths, weaknesses and perceived needs; to identify possible areas of accommodation or compromise and to search for possible alternative solutions. Anything can be explored which would lead the parties to an agreed settlement.

This Procedure has deliberately avoided an unduly prescriptive approach to the process - instead leaving it to the parties and the Mediator to tailor the discussions to meet their own needs. Generally a Mediation Meeting involves a mix of joint sessions between the Mediator and all the parties together, as well as private or caucus sessions involving the Mediator and only one of the parties. Equally Mediation Meetings are frequently intended to last only one day but obviously can be extended if necessary to tease out complex disputes in order to focus on what really divides the parties.

It is intended that this Procedure will be reviewed and amended from time to time. Any party using the Procedure is encouraged to write to Engineers Ireland to set out any comments or proposals to be taken into account in any such review.

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1.0 USE OF PROCEDURE:

- 1.1 This Procedure shall apply to any dispute where the parties have agreed on its use and it may be used in any dispute where parties seek a negotiated resolution with the assistance of a neutral third party acting as Mediator.
- 1.2 The Mediation shall be conducted in accordance with the version of the Procedure in force on the date of the Mediation Notice.
- 1.3 The parties may vary the provisions of this Procedure by written agreement at any time provided the Mediator is notified.

2.0 REFERRAL TO MEDIATION:

- 2.1 Subject to the provisions of the governing contract any party may by written notice to the other parties, to be known as a Mediation Notice, request that a dispute shall be referred to Mediation. The Mediation Notice should contain details of all the parties involved and be accompanied by a brief statement of the matter or matters in dispute as well as details of the relief or remedy sought.

3.0 APPOINTMENT OF THE MEDIATOR:

- 3.1 Where a Mediator has not already been appointed, the parties shall agree on a Mediator within 28 days of the Mediation Notice described in Section 2. In default of such agreement any party may apply to the President of Engineers Ireland for nomination or appointment of a Mediator, enclosing a copy of the Mediation Notice and the appropriate fee. Where an appointment is sought, details of the authority to do so shall also be provided.
- 3.2 Within ten days of the receipt of such an application the President, or alternatively the Vice President, of Engineers Ireland shall nominate or appoint a Mediator.

- 3.3 If the parties wish to appoint more than one Mediator, for example to act as Co-Mediator, the provisions of Sections 3.1 and 3.2 shall apply except that the parties, and if necessary the President of Engineers Ireland, shall consult with any Mediator already appointed.
- 3.4 If for whatever reason it is necessary to appoint a replacement Mediator the provisions of Sections 3.1 to 3.3 shall apply.

4.0 INDEPENDENCE OF THE MEDIATOR:

- 4.1 Before appointment any prospective Mediator shall disclose in writing to the parties any facts or circumstances which might call into question the Mediator's independence in the eyes of the parties.
- 4.2 After appointment the Mediator shall immediately disclose to the parties any facts or circumstances of a similar nature concerning the Mediator's independence which may have arisen during the course of the Mediation.
- 4.3 If any party objects to the appointment or continued service of a Mediator on the grounds of lack of independence that Mediator shall be disqualified and a replacement shall be appointed in accordance with Section 3.

5.0 CONDUCT AT THE MEDIATION:

- 5.1 Once appointed the Mediator shall be provided with a copy of the Mediation Notice as well as contact details for all the parties.
- 5.2 The Mediation shall be conducted as the Mediator considers appropriate and best suited to lead to an expeditious resolution of the dispute and to comply with any time constraints in the contract. If there are no such time limits, the Mediation shall come to a conclusion within two months of the appointment of the Mediator, unless the parties agree otherwise.

- 5.3 During the Mediation the parties and their representatives shall engage with the Mediator and each other and use their best efforts to resolve the dispute by agreement.
- 5.4 As soon as practicable after appointment, the Mediator shall, after consultation with the parties, set out in writing the date and place of the Mediation Meeting.
- 5.5 Each party shall set out a summary of its position for the Mediator at least ten days before the Mediation Meeting fixed in section 5.4 and the format, layout and extent of such summary shall be discussed with the Mediator prior to submission. In general a copy of any such summary shall be circulated to all of the other parties; however failure by a party to circulate all or part of its summary shall not prevent the Mediation Meeting from proceeding.
- 5.6 At any time the Mediator may:
- meet and discuss with the parties and their representatives together or separately;
 - enquire about the facts and circumstances of the dispute;
 - visit the site or any other place of business;
 - suggest the production of documents or the attendance of persons whom the Mediator considers could assist in any way;
 - issue such other requests and requests as the Mediator considers appropriate.
- 5.7 At least three days prior to the Mediation Meeting each party shall write to the Mediator and the other parties giving the name of its representatives who will have full authority to act on its behalf at the Meeting together with the names of any persons who will be attending.

- 5.8 During the Mediation Meeting the Mediator may meet with the parties and their representatives separately or together. The Mediator shall not propose or promote any solution but may discuss or consider any option with the parties which is likely to facilitate agreement. The Mediator shall observe and maintain the confidentiality of all information given by any party privately and may only disclose it with the express permission of that party. The Mediator shall assist the parties to resolve the dispute in any way and based on terms and conditions that are acceptable to them.

6.0 CONCLUSION OF THE MEDIATION:

- 6.1 The Mediation shall come to an end by agreement if and when the parties sign a written Settlement Agreement. The parties will not be bound at any stage of the Mediation prior to the signing of such an agreement. The Mediator shall, if requested, assist in the drafting of such an agreement and may sign it as a witness but not as a party.
- 6.2 The Mediation may also be terminated by the Mediator in writing after consultation with the parties if the Mediator is of the view that further attempts at settlement are unlikely to be successful.
- 6.3 The Mediation may be terminated by any party at any time by written notice to the Mediator and the other parties.
- 6.4 A Notice under 6.2 or 6.3 shall conclude the Mediation and allow any party to initiate any further Dispute Resolution steps provided in the contract.

7.0 CONFIDENTIALITY/WITHOUT PREJUDICE:

- 7.1 The parties and the Mediator shall at all times maintain the confidentiality of the process and shall endeavour to ensure that anyone acting on their behalf or through them shall do likewise.
- 7.2 Apart from a Settlement Agreement as described in Section 6.1, all documents prepared for or produced at the Mediation shall be confidential and privileged and shall not be admissible in evidence in any subsequent dispute resolution process or litigation. However documents which are otherwise admissible in Court or Arbitration shall not be rendered inadmissible arising from their use in Mediation.
- 7.3 Details of the Mediation shall be confidential and shall not be adduced or referred to in any subsequent proceedings, except as required by law and insofar as may be necessary to bring into effect or enforce any Settlement Agreement as described in section 6.1. The entire Mediation shall be conducted on a without prejudice basis.

8.0 MISCELLANEOUS PROVISIONS:

- 8.1 The Mediator shall not be called as a witness by any party in any subsequent proceedings concerning the subject matter of the Mediation.
- 8.2 The Mediator shall not be appointed as Arbitrator or act in any such determinative role between the parties in the same dispute or in any other dispute arising out of the same contract unless all the parties involved in that later dispute and the Mediator otherwise agree in writing.
- 8.3 Each party shall meet its own costs and expenses and shall share the Mediator's fees and expenses equally; however the parties shall be jointly and severally liable for the Mediator's full fees and expenses. The Mediator may require the parties to make a payment, prior to the Meeting, to cover the anticipated fees up to the end of the Meeting.

- 8.4 The Mediator shall not be liable to the parties or any person claiming through them for any matter arising out of or in connection with the Mediation or the way in which it was conducted and the parties shall not themselves bring any such claims against the Mediator.
- 8.5 Engineers Ireland, together with the President its servants and agents, shall not be liable for any act or omission in connection with any appointment made or any Mediation conducted under this procedure.