

Avoidance, Management and Resolution of Disputes under Contracts (AS 11004): An exercise in common sense

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Abstract

This paper briefly reviews the development of contractual provisions for dispute avoidance and management, and explains the motivation for, and the operation of, the proposed new process of contract facilitation.

Much has been much written in Australia² and internationally³ about the means by which disputes under contracts might be avoided or reduced. Whilst the emphasis upon the development of contractual procedures for avoidance and resolution is relatively recent, there have been significant reforms to contracting which have recognised the wisdom of contractual models focussed on co-operation and a conciliatory approach to resolution. The development of relationship contracting⁴ was seen as one solution to the problem. The development in England of the successful NEC3 contract model is another, along with the American ConsensusDOCS 2007. Hopefully, the adoption in AS 11000 2016 of an express obligation of good faith and an early warning procedure will have a similar affect.

The historic contractual form based on the insertion of a theoretically independent administrator to perform interim assessment and certification roles under the contract is no longer seen by some as commercially realistic or procedurally viable.⁵ The unfortunate reality is that a significant source, or cause, of disputes under construction contracts is the absence of, or inadequacy in, the teaching of

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² The best and most recent example is the text P Gerber and B Ong, *Best Practice in Construction Disputes* (LexisNexis Butterworths, 2013). Other examples are: Cooperative Research Centre for Construction Innovation, *Guide to Leading Practice for Dispute Avoidance* <http://www.construction-innovation.info/images/pdfs/DAR_Overview.pdf> and related *Dispute Avoidance and Resolution – A literature Review* <http://www.construction-innovation.info/images/pdfs/Literature_Review.pdf>, and ACCC Benchmarks - Dispute Resolution <https://www.accc.gov.au/system/files/Benchmarks%20for%20Dispute%20Avoidance_0.pdf>.

³ P Fenn and R Gameson (eds), *Construction: Conflict: Management and Resolution* (Chapman & Hall, 2012) <http://www.communicationcache.com/uploads/1/0/8/8/10887248/construction_conflict_management_and_resolution_-_2005.pdf> .

⁴ D Jones, 'Relationship Contracting' in J C Bueno *The Projects and Construction Review* (Law Business Research, 2012) <<http://www.dougjones.info/wp-content/uploads/2012/07/projects-and-construction-review-published-relationship-contracting.pdf>>;

Australian Constructors Association, *Relationship Contracting: Optimising Project Outcomes* (1999) <<http://www.constructors.com.au/wp-content/uploads/1999/02/Relationship-Contracting-Optimising-Project-Outcomes-1999.pdf>>

⁵ Gerber and Ong, above n 2, at [1.43] described the role as 'archaic'. The difficulties involved were considered by Lord Hoffman in *Beaufort Developments(NI) v Gilbert-Ash NI Ltd* [1998] UKHL 19 [28].

students of architecture and engineering about the role and responsibilities of a contract administrator. The 2016 Global Construction Disputes Report by Arcadis, found that the most common cause of disputes internationally was the ‘failure to properly administer the contract’.⁶ The recognition of this inadequacy has generated a number of contractual processes designed to circumvent the inherent difficulties caused by improper contract administration. In some respects the introduction of Security of Payment legislation was, in part, necessary to address the problem under contracts with a theoretically independent administrator who fails to act appropriately.

This paper briefly reviews the development of contractual methods to avoid and manage conflict and examines the differences in approach adopted. Lastly, it explains the motivation for, and the operation of, the new process of Contract Facilitation to be introduced in the new Australian Standard AS 11004 2016 ‘Avoidance, Management and Resolution of Disputes Under Contracts’ (a copy of which is an Annexure to this paper) which is linked to the imminent Australian Standard AS 11000, General Conditions of Contract.

An early example⁷ of the way in which the problem could be addressed was the 1986 presentation to the Chartered Institute of Arbitrators (Wales) and the Institution of Engineers (South Wales) by Clifford Evans:

Let there be appointed at the commencement of the contract a mediator or conciliator, call him an ‘independent intervenor’, paid a small retainer shared equally by the contractor and employer and called in to settle a dispute immediately it arises – without waiting until the end of the contract. Both employer and contractor would be bound by the decision, at least until completion, when either party would have the right to go to arbitration in the normal way.

The engineer (and here I must remind you that I’m talking about architects and their role in the JCT contract, as well as engineers) is not always right: occasionally he is late in issuing drawings or instructions or there are minor errors in drawings, all of which could cause claims to arise against the employer. How can one expect the engineer or architect to have an independent view when assessing these claims, knowing that acceptance of the claim would be an admission to the employer of his liability? If, however, the engineer or architect knew that there was an independent intervenor waiting in the wings who could, if a dispute arose over such matters, quite quickly attach the blame to him, would not this concentrate his mind even more and ensure that drawings and instructions were issued on time, and would not this help to make the contract run more smoothly?⁸

The ‘independent intervenor’ model has developed, in recent years, into various forms of contractual adjudication and in many countries including Australia, by statutory adjudication of payment claims. While it has certain benefits, including speedy interim decisions upon disputes, there are disadvantages. The first is that the decision is imposed upon the parties, even if only on an interim basis, and as such is not the product of consensus. Secondly, in the absence of consensus, or agreement, the underlying issues are not resolved and remain a potential irritant to inter-party relations.

It seems to be accepted that the underlying objective of a Dispute Avoidance Process (**DAP**) is to provide assistance to the parties to enable them to achieve resolution, that is, rather than there being a ‘solution’

⁶ Arcadis International, *Global Construction Disputes Report* (June 2016) <<https://www.arcadis.com/en/global/our-perspectives/2016/06/construction-disputes-hit-record-length-of-over-15-months/>>.

⁷ Located by, and referred to, by Colin Wall in Colin Wall, ‘The Dispute Resolution Adviser Service (Paper presented at DRBF Conference, Sydney, 2012) <<http://www.drbfconferences.org/documents/Sydney/WallPaper.pdf>>.

⁸ See Gerber and Ong, above n 2, Ch 8 for consideration of the Evolution of Dispute Avoidance Processes (**DAPs**).

assessed by a neutral person and imposed upon the parties.⁹ The relationship between the parties and their dispute resolution practitioner or adviser involves a considerable degree of trust. The process needs to ensure that mutual trust and the confidence of both parties in the process is maintained. One risk in determinative dispute resolution procedures is that if a decision, or determination, is made that is favourable to one party, then the other may, quite naturally, be dissatisfied with the decision, with the potential loss of confidence in the process. Accordingly, it is sensible to ensure, whenever possible, that there is a degree of separation between the alternative dispute resolution (**ADR**) practitioner and the process of decision-making. Decisions by the practitioner as to the means by which the parties might have issues between them independently resolved, even if binding in the sense that the parties have agreed to implement the decisions, involve such a separation. Advice or decisions as to who might be engaged by the parties to provide an independent assessment of an issue, after consultation with the parties, do not involve a great risk to the maintenance of trust.

The dispute resolution procedure underlying a DAP would seem to be more akin to mediation rather than an adjudication. It ought to be possible to develop a process which maintains the role of the practitioner as an assistant, along with some variations which the parties agree to accommodate, in the issues addressed by the ADR practitioner.

The Dispute Resolution Adviser

In 1990, Hong Kong-based Colin Wall¹⁰ undertook research into the most recent thinking on avoidance and management of construction disputes. As a result, the concept of the Dispute Resolution Adviser (**DRA**) emerged.¹¹ The first DRA was appointed to a government contract in Hong Kong in 1991. The DRA system, in a number of forms, has since formed part of most government contracts in Hong Kong and has been enormously successful.

The focus upon dispute management and resolution in Hong Kong is now centred upon the Hong Kong Construction Industry Council (**CIC**) and its extensive guidance documents.¹²

The Initial Decision Maker

Until 2007 building contracts published by the American Institute of Architects (**AIA**) and contractor associations in the United States included a role for the architect as the front-line initial decider of disputes between the parties.¹³ This model proved reasonably effective as a dispute resolution process for many decades and, in 1967 was said to ‘work so well that lawyers and courts will probably remain relatively unimportant in this sphere of conflict resolution’.¹⁴ Another factor which might have influenced the degree to which courts and lawyers in the US were involved in building disputes was the mandatory requirement under standard form contracts for disputes to be referred to arbitration. In more recent times, the growth of claims by contractors based on design or documentation errors or incorrect contract administration by the architect meant that the independence of the architect as the decision-maker became problematic.

¹⁰ The acknowledged father of DRA procedure: see <<http://www.mediate.com/articles/ColinWallMemorial.cfm>>.

¹¹ See Gerber and Ong, above n 2, Ch 7 for a detailed analysis of the DRA model.

¹² <http://www.cic.hk/cic_data/pdf/about_cic/publications/eng/V10_6_e_V00_Guidelines_DisputeResolution.pdf>.

¹³ Philip Bruner, ‘The Initial Decision Maker: The New Independent Dispute Resolver In American Private Building Contracts’ (2010) *ICLR* 375.

¹⁴ *Ibid* 376.

In 2007 the AIA introduced its own General Conditions of Contract which introduced a role for an independent Interim Decision Maker (**IDM**).¹⁵ The objective was to distance the architect from potential conflicts of interest and as a recognition of the difficulties inherent in the traditional ‘dual role’.

The development of the IDM has provided the opportunity for parties to engage dispute resolution practitioners or experienced lawyers in the role. It is, however, only one of the range of approaches to dispute resolution which have been introduced in recent years. The extent to which the IDM process is being adopted under construction contracts has not yet been identified, however the reform has been widely welcomed.¹⁶

The American ConsensusDOCS

Also in 2007 a group of construction industry professional associations in the United States published a suite of standard form contracts titled the ConsensusDOCS suite, which went further than the AIA 2007 contracts and included express obligations on the parties to ‘actively and continually pursue collaboration... and endeavour to promote harmony and collaboration among all Project participants’.¹⁷ It is not yet possible to measure the extent to which the ConsensusDOCS have been adopted in the construction industry.

NEC3 Contract

The first New Engineering Contract (**NEC**) was published in the United Kingdom in 1993 under the leadership of an engineer, Martin Barnes CBE. It introduced a significantly different style providing for contracting to ‘stimulate rather than frustrate good management’.¹⁸ The third edition NEC3 was launched in 2005 and has received remarkable acceptance in the United Kingdom and internationally.

The express requirement in NEC3 that the parties co-operate throughout the course of the contract, and in a spirit of mutual trust, is an example of the style introduced in this new form. Clause 10.1 provides:

*The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and co-operation.*¹⁹

Significantly, the NEC3 form was adopted for use under all contracts for the London Olympics 2012, and incorporated an Independent Dispute Avoidance Panel procedure (**IDAP**). The IDAP process ensured completion of the Games venues and infrastructure on time and, remarkably, without a single dispute developing beyond the process.

¹⁵ AIA A201-2007, Section 15.

¹⁶ See AIA Review at <http://www.aia.org/groups/aia/documents/pdf/aiab078767.pdf>.

¹⁷ ConsensusDOCS 300, Tri-party Agreement for Collaborative Project Delivery, section 3.4.

¹⁸ See NEC History at <https://www.neccontract.com/About-NEC/History>.

¹⁹ This provision was considered in *Mears Limited v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC) by Mr Justice Akenhead who stated that he was ‘not satisfied ... that the obligation to act in a spirit of mutual trust and cooperation or even in a ‘partnering way’ would prevent a party from relying on any express terms of the contract freely entered into by each party’.

Dispute Resolution Board

The Dispute Resolution Board (**DRB**) procedure developed in the United States for use under major infrastructure contracts has had significant success internationally, including in Australia where an Australian branch of the DRB Federation has been established.²⁰

The Dispute Avoidance Board Rules published by the Australian branch have been included in AS 11004 2016 as a further option for parties to contracts to avoid, manage and resolve disputes under contracts which include the AS 11000 2016 General Conditions.

CONTRACT FACILITATION – AS 11004 2016 – Part 1

Generally

The MB 010 Committee which undertook the drafting of what has become AS 11000 2016 recognised that the confinement of dispute resolution options to arbitration or expert determination would not give appropriate recognition to the range of procedures which are available. The development of dispute avoidance and resolution processes, such as those referred to earlier, was recognised as being appropriate for the new Australian Standard. It was also obvious that in pursuit of the objective of reducing procedural matters from the General Conditions, it would be inappropriate to include extensive provisions for dispute resolution.

The Committee resolved to encourage Standards Australia to undertake the task of introducing a new, but linked, Standard in which the range of processes for the resolution of disputes could be explained and the procedural rules identified. A possible additional benefit was that to have the ADR procedures specifically prescribed in an Australian Standard could remove uncertainty as to what each process involved, along with provide certainty as to the procedural rules. The new Dispute Resolution Standard was also recognised as being capable of having broader application to commercial contracts, and not simply those based on the new AS 11000 General Conditions.

As an alternative to adopting arbitration or expert determination as the dispute resolution procedure under the contract, Clause 47 of AS 11000 General Conditions enables the parties to a contract to elect ‘to avoid, manage and resolve disputes whatsoever arising out of or in connection with the subject matter of the *Contract* either by Contract Facilitation or Dispute Avoidance Board’. Clearly, the agreement to adopt either of the alternative DAPs does not need to have been concluded at the time of execution of the contract.

Although the Contract Facilitation Agreement includes only the Principal and the Contractor as parties, the procedure includes the subcontractors.²¹ The second paragraph in subclause 1.2(a) provides:

Further, in order to give full effect to this dispute avoidance and resolution procedure, all subcontracts for the performance of work under the Contract shall include a provision

²⁰ The Australasian Chapter of the DRBF was initially established in 2003 as the Dispute Resolution Board Australasia (**DRBA**). Its growth over the next ten years led to it being established in January 2013 as Region 3 of DRBF: see <<http://www.drbf.org.au/>>.

²¹ AS 11001 2016 General Conditions of Subcontract (back to back with AS 11000) includes a provision which also links to AS 11004 2016. This will enable the Facilitator to address issues across all of the contracts under which issues might arise.

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requiring the subcontractor to participate fully in the Contract Facilitation procedure including the management and resolution of any dispute between the Principal and the Contractor concerning the performance of work under the subcontract.

The process also includes consultants. Subclause 1.4 (b) requires both parties to:

Ensure that all subcontractors and consultants engaged by them for the performance of the work under the Contract also fully participate in the Contract Facilitation procedure.

Apart from its application to contracts including the AS 11000 General Conditions, Contract Facilitation may be adopted under **any** contract. Subclause 1.2(b) provides:

Alternatively, if the parties to any contract, including a construction contract which does not include the General Conditions, agree to avoid, manage and resolve disputes arising out of or in connection with the subject matter of the contract by way of Contract Facilitation, the provisions of this Part 1 shall apply.

In subclause 1.3 (a) the objective of the engagement of the Facilitator is stated as being:

...to assist the parties during the performance of the contract to minimise the number of claims, to avoid disputes and to settle disagreements and issues before they become a dispute under the contract,

The objective is, further, pursuant to subclause 1.3 (b):

to encourage co-operation between the Contractor, the Principal, subcontractors including selected subcontractors, the Superintendent and consultants engaged by the Principal, so as to minimise the number of claims, to avoid disputes and to settle disagreements and issues before they become a dispute under the contract.

Qualifications and selection

As noted earlier the ideal dispute resolution background for an independent non-determinative practitioner is as a mediator. Accordingly subclause 1.5 (a) describes the Facilitator as having:

broad experience in the construction industry in a senior professional, management or legal capacity... and... established dispute resolution skills with an emphasis on mediation.

The first alternative for the selection of the Facilitator is by agreement. In time, a body of persons with broadly based respect across the industry will become recognised to perform this role.

If the parties cannot agree, then the selection process in subclause 1.5 (c) is designed to identify the collectively most acceptable candidate for both parties.

Engagement – Services

The definition of the services to be provided by the Facilitator deliberately has been left in open terms to permit flexibility and to allow the process to develop such that the requirements of the parties and the particular project are addressed, rather than imposing a prescriptive procedure.

The General Services listed in subclause 1.7 are particularly limited and in general terms, with the expectation that the precise management of the Contract Facilitation can be agreed between the parties and the Facilitator.

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The additional Particular Services listed in subclause 1.8 are more detailed, however, again in somewhat general terms to enable the precise definition of the services to be agreed.

AS 11000 Specific Particular Services

Subclause 1.8 (a) identifies how the Early Warning procedure in subclause 2.2 of the General Conditions might be implemented with the assistance of the Facilitator.

Subclause 1.8 (d) addresses an issue which is frequently associated with mismanagement and inadequate contract administration, resulting in disagreements, disputes and inefficiency. The identification of a role for the Facilitator in the process of updating the program is clear example of how the process addresses known areas of conflict.

Facilitation meetings

The conduct of an initial Facilitation as provided by subclause 1.7 (c) involves a critical introduction to the process for all relevant site and management representatives. In some respects, it forms a foundation upon which the Facilitator and the critical personnel can develop their own issues management methods for the course of the contract.

The extent to which further Facilitation meetings are necessary will be a matter of judgment, primarily on the part of the Facilitator, and may depend upon the manner in which the process operates on site.

Non-binding recommendations

A Particular Service stated in Clause 1.8 (f) is the capacity of the Facilitator to make non-binding recommendations as to the procedure by which disagreements concerning a claim by any party might be resolved. This is an important example of the underlying objective of distancing the Facilitator from a determinative role. The procedure is defined in Clause 1.10 which provides:

- (a) *When requested by the parties, the Contract Facilitator may provide written non-binding recommendations as to the process by which resolution might be achieved in relation to any disagreement or dispute which arises, including the persons who might be appointed to conduct the process.*
- (b) *If the parties agree to accept the recommendation of the Contract Facilitator then the parties will share equally the costs of the performance of the recommended process, and may agree in writing to accept the conclusion of the recommended process as being final and binding upon them.*
- (c) *If permitted under the relevant Security of Payment legislation non-binding recommendations may be made by the Contract Facilitator in relation to the assessment or adjudication of payment claims.*

The provision in subclause (c) is potentially a very valuable step in the process of avoiding the tactical and commercial use of Security of Payment legislation. On the other hand it might be said that that the process of Contract Facilitation is intended to remove the necessity for the use of such legislation to overcome improper contract administration.

The consequences of acceptance by the parties to a dispute of a non-binding recommendation has deliberately been left open. The parties might be persuaded to agree to be bound by the outcome of the recommended process, however it would be conceptually incompatible to prescribe that consequence.

Interim determinations

This part of the process involves another example of the concept of distancing the Facilitator from a determinative role. It recognises that the acceptance by site management personnel of the value of the Contract Facilitation model will be a major part of its success. Accordingly the decision to agree to accept a recommendation is removed to a higher level of management.

The adoption of an interim determination step in the process provides for a speedy 'internal' assessment of a claim or issue rather than an 'external' determination under a procedure recommended by the Facilitator under clause 1.10. It is as close as the Facilitator gets to having a determinative role.

Remaining disputes or differences

The parties may agree to resolve outstanding disputes for determination under a process nominated at the time of agreement to employ Contract Facilitation. The possible alternatives are expert determination, commercial arbitration or litigation. Having regard to the efforts in preparation and documentation by the parties of their claims, it would assist the industry if a short form arbitration or expert determination procedure were developed under which only the existing documentation was relied upon.

ANNEXURE - Part 1 Contract Facilitation

1.1 Introduction

Contract Facilitation is a dispute avoidance management and resolution procedure outlined in this Part 1 of AS11004 2016, (“*Contract Facilitation*”). Its purpose is to ensure that the parties to construction contracts, in particular, avoid the costs and disruption generated by disagreement, and achieve early resolution of disputes.

1.2 Application

- (a) When *the parties* to the construction contract identified in Item A in the Schedule to this Part 1 (“the *Contract*”) including General conditions AS11000-2016 (“*the General conditions*”) have agreed pursuant to sub-clause 47.1 and subclause 47.2 of *the General conditions* to avoid, manage and resolve disputes arising out of or in connection with the subject matter of the *Contract* by way of *Contract Facilitation* the provisions of this Part 1 shall apply. Italicised terms in this Part 1 of AS 11004-2016, where applicable, have the same meaning as applies in *the General conditions*.

Further, in order to give full effect to this dispute avoidance and resolution procedure, all subcontracts for the performance of work under the *Contract* shall include a provision requiring the subcontractor to participate fully in the *Contract Facilitation* procedure including the management and resolution of any dispute between the *Principal* and the *Contractor* concerning the performance of work under the subcontract.

- (b) Alternatively, if the parties to any contract, including a construction contract which does not include *the General conditions*, agree to avoid, manage and resolve disputes arising out of or in connection with the subject matter of the contract by way of *Contract Facilitation*, the provisions of this Part 1 shall apply.

1.3 The Objectives

- (a) *Contract Facilitation* involves the appointment by the parties to a contract of an independent individual (“the *Contract Facilitator*”) to assist the parties during the performance of the contract to minimise conflict and to encourage early resolution of disagreements and disputes.
- (b) The role of the *Contract Facilitator* is to encourage co-operation between the *Contractor*, the *Principal*, *subcontractors* including *selected subcontractors*, the *Superintendent* and consultants engaged by the *Principal*, so as to minimise the number of claims, to avoid disputes and to settle disagreements and issues before they become a dispute under the contract.

1.4 Obligations of the Principal and the Contractor

The *Principal* and the *Contractor* shall:

- (a) Participate fully in the *Contract Facilitation* procedure and comply with their respective obligations under the *Facilitation Agreement*.
- (b) Ensure that all *subcontractors* and consultants engaged by them for the performance of the work under the *Contract* also fully participate in the *Contract Facilitation* procedure, and
- (c) Ensure that all relevant information and documentation is made available to the *Contract Facilitator* to enable the timely and effective performance of the *Facilitation Agreement*.

1.5 Selection and Appointment of Contract Facilitator

- (a) The *Contract Facilitator* shall have broad experience in the construction industry in a senior professional, management or legal capacity and possess established dispute resolution skills with an emphasis on mediation. They shall be neutral and independent of the parties.
- (b) The *Contract Facilitator* shall be appointed within twenty (20) days of the date of acceptance of the tender for the *Contract* following consultation and agreement between the parties, or by means of the selection process based on ranking by preference in subparagraph (b).
- (c) If *the parties* have not agreed as to the appointment of the *Contract Facilitator* then within ten (10) days of the date of acceptance of tender *the parties* shall exchange lists of five (5) nominees along with Curriculum Vitae, conflict disclosure statements and fee proposals for each. The *parties* within five (5) days of the initial exchange shall exchange a further list of the ten (10) nominees ranked in reverse order of preference. The nominee with the lowest combined ranking shall be appointed.

1.6 Engagement of Contract Facilitator

- (a) The parties and the *Contract Facilitator* are to execute a *Contract Facilitation Agreement* based on the form set out in the Annexure to this Part 1, including completed schedules of *Facilitation Services* and *Facilitation Fees*. The form of the Agreement may be amended following consultation and agreement between the *Principal* and *Contractor* on the one part and the *Contract Facilitator* on the other.
- (b) The *Facilitation Services* to be provided by the *Contract Facilitator* shall include the *General Facilitation services* listed in subclause 1.7 and may include any of the *Particular Services* listed in subclause 1.8 and any additional services as agreed. The scope of services will be agreed between the *Principal* and the *Contractor* on the one part and the *Contract Facilitator* on the other.

1.7 General Facilitation services

The general facilitation services to be provided by the *Contract Facilitator* shall include:

- (a) Obtaining copies of, and developing an understanding of, all relevant contract documentation.
- (b) Contacting all relevant representatives of the *Principal*, the *Contractor*, subcontractors, the *Superintendent* and consultants to familiarise them with the *Contract Facilitation* procedure.
- (c) Conducting an initial Facilitation Meeting with all site and management representatives of the *parties*, the subcontractors and consultants and the *Superintendent*.
- (d) Obtaining copies of and maintaining files of all documents including, Minutes of Contract and Site Management Meetings and documents arising under the Early Warning Procedure under subclause 2.2 of the *General conditions*.
- (e) Meeting at least monthly with representatives of the *parties*, the subcontractors, the consultants and the *Superintendent*, either separately or together, to identify those issues which might develop into disputes and to assist the parties in the management and resolution of such issues.
- (f) Providing bi-monthly Facilitation Reports to the *parties* as to the progress of avoidance and management of potential disputes.
- (g) Providing advice, assistance and recommendations to the *parties* as to how claims, disagreements or disputes might be resolved.

1.8 Particular Facilitation services

In addition to the *General Facilitation Services*, the *Contract Facilitator* may be appointed to provide the following particular services:

- (a) Conduct *Resolution Meetings* to address matters identified under the Early Warning procedure pursuant to subclause 2.2 of the *General conditions*.
- (b) Provide advice to the *parties* as to the means to be adopted for the management and resolution of issues arising under the Early Warning procedure.
- (c) Conduct at least bi-monthly Facilitation Meetings with site and management representatives of the *parties*, the subcontractors and consultants and the *Superintendent*.
- (d) Review the procedure adopted for the revision by the *Contractor* of the program pursuant to subclause 35.4 of the *General Conditions* and the assessment of such revisions by the *Superintendent*.
- (e) Advise the *parties* as to how any issues arising in the course of the revision and assessment of the revised program, might be resolved.
- (f) Make Non-binding Recommendations to the *parties* as to the procedure for resolution of disagreements concerning a claim by either of the *parties* under the relevant provisions of the *Contract* for or relating to:
 - (i) a *variation*;
 - (ii) an *extension of time*;

- (iii) a *latent condition*;
 - (iv) *defective works or materials*;
 - (v) the amount of any payment claim; or
 - (vi) any other matter when requested by the parties.
- (g) When agreed by the parties, make written a Interim Determination of particular disputes between the parties.

1.9 Facilitation Meetings

The initial Facilitation Meeting will address the contract administration and management procedures required under all contracts including subcontracts. The issues addressed will include the necessity for prompt and focussed communication by all participants to identified individuals of all relevant matters.

If agreed by the *parties*, the *Contract Facilitator* shall conduct further Facilitation Meetings with site and management representatives of the *parties*, subcontractors, the *Superintendent* and consultants, with the intention that all potential problems, disagreements and claims are progressively identified and addressed.

1.10 Non-binding Recommendation

- (a) When requested by *the parties*, the *Contract Facilitator* may provide written non-binding recommendations as to the process by which resolution might be achieved in relation to any disagreement or dispute which arises, including the persons who might be appointed to conduct the process.
- (b) If *the parties* agree to accept the recommendation of the *Contract Facilitator* then the parties will share equally the costs of the performance of the recommended process, and may agree in writing to accept the conclusion of the recommended process as being final and binding upon them.
- (c) If permitted under the relevant Security of Payment legislation non-binding recommendations may be made by the *Contract Facilitator* in relation to the assessment or adjudication of payment claims.

1.11 Interim Determination

When requested by the parties, the *Contract Facilitator* may provide written Interim Determinations of particular disputes between the *parties*.

Interim Determinations by the *Contract Facilitator* will be addressed to nominated senior management representatives of the *Principal* and the *Contractor*. The *parties'* representatives are to meet within ten (10) business days of delivery of the Interim Determination and attempt to reach an agreement as to whether, or to what extent, the Interim Determination will be accepted by the *parties* as final and binding.

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The terms of any Interim Determination must not be disclosed in any subsequent proceedings which include the particular dispute, but may be relied upon by either of *the parties* after the conclusion of those proceedings on any argument concerning the costs of the proceedings.

1.12 Remaining Disputes or Differences

In the event that any dispute or difference between the *parties* remains unresolved as at the date of delivery by the *Superintendent* of the *final certificate* under the *Contract* then, unless agreed by the *parties* otherwise, such dispute shall be resolved by the procedure identified in Item B in the Schedule to Part 1 hereof.

1.13 Cost of Contract Facilitation Procedure

The *Principal* and the *Contractor* shall each pay half of the costs of the *Contract Facilitation* procedure in accordance with the *Contract Facilitation Agreement* referred to in subclause 1.5(c) above.

1.14 Contract Facilitation Agreement

The *parties* and the *Contract Facilitator* shall execute a *Contract Facilitation Agreement* completed as necessary, including the Schedules of services and Fees as agreed, based upon the draft set out in the Annexure to this Part 1.

The *Contract Facilitation Agreement*:

- a) Shall, unless terminated early under subclauses, b) i) or ii), remain in force until the date of the delivery of the *final certificate* under *the Contract*,
- b) May be terminated early;
 - (i) by the *Contract Facilitator* upon 30 *business days* notice in writing to *the parties*, or
 - ii) by the *parties*, acting jointly upon 20 *business days* notice in writing to the *Contract Facilitator*.
- c) **If terminated early the *parties* may appoint a replacement *Contract Facilitator* in accordance with Clause 1.5 of this Part 1.**

1.15 Generally

All communications between the *parties* and the *Contract Facilitator* during the course of, and all documentation generated under, the *Contract Facilitation* procedure, shall be privileged.

The *Contract Facilitator* shall be excluded from liability for any and all actions taken in the course of the *Contract Facilitation* procedure.