

Conciliation Procedure 2000

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In this Procedure, any reference to the masculine gender shall include reference to the feminine gender and any reference to the neuter shall include the masculine and feminine genders and any reference to the singular shall include the reference to the plural.

Preamble

Conciliation has now become an established method of dispute resolution within the framework of standard forms of contract for construction activities. In 1987 the International Federation of Consulting Engineers (FIDIC) introduced in its standard Forms of Contract amicable settlement procedures as an obligatory preliminary step before arbitration.

The Institution of Civil Engineers (London) introduced Conciliation Procedures in its Minor Works Contract Form published first in 1988. Its success prompted the introduction of such procedures in subsequent forms of contract: the Sixth Edition of the ICE Form and the ICE Design and Construct Contract.

In Ireland, Conciliation has been introduced in the Fourth Edition of the Irish Conditions of Contract for Works of Civil Engineering Construction as a first mandatory step in resolving contractual disputes.

In preparation for the Fourth Edition of the Irish Conditions, Engineers Ireland formed a Committee, in May 1994, to draft an IEI Procedure for Conciliation and a set of associated documents for use in conjunction with these Conditions.

In formulating this Procedure, the Committee studied the ICE Procedure for Conciliation, the ICE Rules for Conciliation, the UNCITRAL Conciliation Rules and other Conciliation procedures. While significant changes and a large number of modifications were made in drawing up this Procedure, the Committee acknowledges that parts are based on the ICE Procedure.

The Committee completed its work in November, 1994, and the Council of Engineers Ireland approved and adopted the Procedure and the relevant associated documents at its meeting of December 3, 1994. These were revised in July 2000.

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1 CONCILIATION PROCEDURE

- 1.1 This Procedure shall apply whenever
- (a) the Parties have entered into any contract which provides for Conciliation for any dispute which may arise between the Parties in accordance with the Conciliation Procedure of Engineers Ireland,
 - or
 - (b) the Parties have agreed in writing subsequent to a dispute arising that the Conciliation Procedure of Engineers Ireland 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 in a time- and cost-effective manner.
- 1.3 Subject to the provisions of the Contract relating to Conciliation, any Party to the Contract may, by giving to the other Party a written notice (hereafter called a “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 Conciliator. The Notice of Conciliation shall be accompanied by a brief statement of the matter to be referred to Conciliation and the relief or remedy sought.
- 1.4 Save where a Conciliator has already been appointed, the Parties shall agree upon a Conciliator within 14 days of the Notice being given under Paragraph 1.3. In default of agreement, any Party may request the President (or, if he is unable to act, a Vice-President) for the time being of Engineers Ireland to appoint a Conciliator within 14 days of receipt of the request by him, which request shall be accompanied by a copy of the Notice of Conciliation.

- 1.5 If, for any reason whatsoever, the Conciliator is unable or fails to complete the Conciliation in accordance with this Procedure, then any Party may require the appointment of a replacement Conciliator in accordance with the procedures of Paragraph 1.4.
- 1.6 Except as otherwise required in the Contract, the Party requesting Conciliation shall deliver copies of the 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 Conciliation:
- to the other party; and
 - to the Conciliator, simultaneously if already appointed or, if not already appointed, immediately after his appointment.
- 1.7 The Conciliator shall start the Conciliation as soon as possible after his appointment and shall use his best endeavours to conclude the Conciliation as soon as possible and in any event within any time limit as may be stated in the Contract, or within two months from the date of his appointment, or within such other time as may be agreed between the Parties.
- 1.8 Each Party shall, upon receipt of notice of the appointment of the Conciliator and within such period as the Conciliator may allow, send to the Conciliator and to the other Party or Parties brief details of the dispute stating its version of the facts, together with, if it so wishes, its views as to the rights, obligations and liabilities of the Parties arising from the dispute and as to the financial consequences.

- 1.9 As soon as possible after his appointment, the Conciliator shall issue directions establishing, inter alia, the date and place for any Conciliation Meeting with the Parties. Each Party shall inform the Conciliator in writing of the name of its representative for the Conciliation (who shall be deemed to have full authority to act on behalf of, and to bind, that Party) and the names of any other persons who will attend the Conciliation Meeting. This information shall be given at least three working days before the Conciliation Meeting, with copies to the other Party.
- 1.10 The Conciliator may, entirely at his own discretion, issue such further directions as he considers appropriate; meet and question the Parties and their representatives, together or separately; investigate the facts and circumstances of the dispute; visit the site; and request the production of documents or the attendance of people whom he considers could assist in any way. The Conciliator may conduct the proceedings in any way that he wishes and may obtain legal or technical advice, the cost of which shall be met by the Parties in accordance with Paragraph 1.18 or as may be agreed by the Parties and the Conciliator.
- 1.11 The Conciliator may consider and discuss such solutions to the dispute as he thinks appropriate or as may be suggested by any Party. He shall observe and maintain the confidentiality of particular information which he is given by any Party privately, and may disclose it only with the explicit permission of that Party. He shall try to assist the Parties to resolve the dispute in any way acceptable to them.
- 1.12 The Parties shall in good faith co-operate with the Conciliator and, in particular, shall endeavour to comply with requests by the Conciliator to submit written materials, provide evidence and attend meetings.

- 1.13 Any Party may, at any time, ask that additional claims or disputes, or additional parties, shall be joined in the Conciliation. Such applications shall be accompanied by details of the relevant contractual facts, notices and decisions. Such joinder shall be subject to the agreement of the Conciliator and the Parties. Any additional party so joined shall have the same rights and obligations as the other Parties to the Conciliation.
- 1.14 If, in the opinion of the Conciliator, the resolution of the dispute would be assisted by further investigation by any Party or by the Conciliator, or by an interim agreement, including some action by any Party, then the Conciliator shall, with the agreement of the Parties, prepare a direction and/or adjourn the proceedings as may be appropriate.
- 1.15 Once a settlement has been achieved of the whole or of any part of the matters in dispute, the Conciliator may, if so requested by the Parties, assist the Parties to prepare an Agreement incorporating the terms of the settlement. Once signed by the Parties, the said Agreement shall be final and binding upon them with respect to the matters set out therein.
- 1.16 If, in the opinion of the Conciliator, it is unlikely that the Parties will achieve an agreed settlement of their disputes, or if any Party fails to respond to a direction by the Conciliator, the Conciliator shall advise all Parties accordingly and shall prepare his Recommendation within a further period of two weeks.
- 1.17 The Conciliator's Recommendation shall state 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 common law or equity. The Conciliator shall not be required to give reasons for his Recommendation. Nevertheless should he choose to do so, his reasons shall be issued as a separate document, within 7 days of the giving of his Recommendation.

- 1.18 When a settlement has been reached or when the Conciliator has prepared his Recommendation or at any earlier date solely at the discretion of the Conciliator, he shall notify the Parties in writing and send them an account of his fees and disbursements. Unless otherwise agreed between themselves, each Party shall be responsible for payment and shall, within 7 days of receipt of notice from the Conciliator, pay an equal share of the account save that the Parties shall be jointly and severally liable to the Conciliator for the whole of his account. Upon receipt of payment in full the Conciliator shall send his Recommendation to all the Parties. If any Party fails to make the payment due from it, the other Party shall pay the sum to the Conciliator, and such other party shall be entitled to recover the amount from the defaulting Party as a debt due. Each Party shall meet its own costs and expenses.
- 1.19 If no Party rejects the Recommendation by notice in writing to the Conciliator and the other party within two weeks of the date of receipt of the Recommendation or within such other period as the Conciliator may specify, then the Recommendation shall be final and binding on the Parties. However, if one Party rejects the Recommendation, then its terms and provisions and any reasons given by the Conciliator, together with any disclosures made during the Conciliation, shall be and remain privileged and confidential and shall not be divulged to the other party nor used in evidence by any other Party in any subsequent arbitration or litigation.
- 1.20 The Conciliator may be recalled, by written agreement of the Parties and upon payment of an additional fee, to clarify the Recommendation.
- 1.21 The Conciliator shall not be appointed Arbitrator nor be retained or act as advocate or as representative in any subsequent Arbitration between the Parties whether arising out of the dispute, difference, or otherwise arising out of the same Contract unless the Parties otherwise agree in writing. No Party shall be entitled to call the Conciliator as a witness in any subsequent Arbitration or litigation concerning the subject matter of the Conciliation.

- 1.22 The confidential nature of the Conciliation and any Recommendation issued by the Conciliator shall be respected by every person who is involved in the Conciliation Procedure in whatever capacity.
- 1.23 The Parties shall jointly and severally and on behalf of their heirs and successors and any other person claiming through them save harmless and indemnify the Conciliator against any claims, demands, proceedings, damages, costs, charges and expenses whatsoever which may arise in connection with or arising out of the Conciliation or the way in which it is or has been conducted and shall not themselves bring any such claims against the Conciliator.
- 1.24 Any notice or documents required under this Procedure shall be sent to each party by recorded delivery to the principal place of business or if a company to its registered office, or to the address which the Party has notified to the Conciliator. Any notice or documents to the Conciliator required under this Procedure shall be sent by recorded delivery to him at the address which he shall notify to the Parties on his appointment.
- 1.25 In the event that Conciliation is terminated or at its completion, the Conciliator and each Party shall return originals of documents in their possession or custody to the Party which submitted such documents in connection with the Conciliation.

2 GUIDE TO CONCILIATION PROCEDURE

- 2.1 *The main difference between Conciliation and Arbitration is that the outcome of a Conciliation is not imposed and only becomes binding with the consent of each party. 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 Conciliator.*
- Unlike an arbitration which goes through several stages before progressing to a hearing and which may take several months before an award is published, conciliation is a speedy process. Normally, a conciliation process will take a period measured in days rather than weeks or months. Conciliation is essentially an assisted negotiation.*
- 2.2 *The aim of Conciliation is to reach an agreed solution. If for any reason such an agreed solution does not prove possible, then the Conciliator is required to make a Recommendation as to how, in his opinion, the matter should be settled.*
- 2.3 *Because the aim is to reach a settlement, the Conciliation proceedings are conducted on a “without-prejudice” basis. That means that everything disclosed by any party during the proceedings, or stated or written by the Conciliator to the parties in the course of the Conciliation which is the subject of legal privilege, may not be used in evidence by the other party in any subsequent proceedings (whether arbitration or litigation) unless both parties agree otherwise.*
- 2.4 *The Engineers Ireland Procedure permits the Conciliator to communicate privately and separately with each party and, unless specifically authorised, the Conciliator will not subsequently reveal to any other party what he has been told; this is a procedure which is not available to an arbitrator or judge.*

- 2.5 *The Conciliator's job is to explore with the parties their interests; to find their strengths, weaknesses and needs; to identify possible areas of accommodation or compromise; and to search for possible alternative solutions. Solutions may be explored which could lead the parties to an agreed settlement. Where the Conciliation follows an Engineer's Decision, the parties are equally free to explore options that were not available to the Engineer.*
- 2.6 *The information given to the Conciliator is not given under oath or affirmation; it need not be comprehensive; and there is no cross-examination. The Conciliator is not bound by the rules of evidence and will be guided only by what the parties choose to tell him and by his own professional knowledge and experience.*
- 2.7 *If the parties can reach a settlement on the whole of the dispute(s) or any part thereof by way of interim agreements, the Conciliator will assist them to ensure that any such agreement is recorded in writing in a form which is enforceable. If all the Parties so agree, the Conciliator may be appointed as an arbitrator for the purpose of issuing a consent award or otherwise. The Conciliator shall not accept appointment as arbitrator in connection with or arising out of the related Contract in any other circumstances. If agreement cannot be reached, the Conciliator will make a Recommendation on the unresolved portion of the dispute(s) not subject to interim agreement.*
- 2.8 *If no Party rejects the Recommendation by notice in writing to the Conciliator and to the other Party within two weeks of the date of receipt of the Recommendation or within such other period as the Contract entered into by the Parties may specify, then the Recommendation becomes final and binding on the Parties. It is important to realise that for the Recommendation to be rejected, a decision has to be made by someone to make such rejection and to assume the responsibility for the consequences of so doing.*

- 2.9 *The Recommendation is not comparable to the award of an Arbitrator or the judgement of a Court. The Recommendation is the Conciliator's opinion of how the dispute might be resolved in the most practical way.*
- 2.10 *Conciliation may be used at any time, by the agreement of the Parties, to resolve disputes that arise, but it also can be used as a stage in the dispute resolution process.*
- 2.11 *Conciliation is mandatory in some standard Conditions of Contract and may be used with other conditions with the agreement of the Parties. Such agreement may be either before or after the contract is formed.*
- 2.12 *If it is agreed to refer a dispute to Conciliation under a Contract which does not include a provision for the referral of disputes to Conciliation, it is important to check the timetable under the dispute resolution clauses to ensure that any limits stated therein will not be exceeded because of the Conciliation. If there is such a likelihood, the agreement to conciliate should include provision for suspending such a timetable for the period of the Conciliation.*
- 2.13 *If, in the case of a Contract which does not include a provision for the referral of disputes to Conciliation, it is agreed by the Parties to refer a dispute to Conciliation, then any appointing authority to be named in the Conciliation Agreement between the parties must give prior consent to being so named. The President of Engineers Ireland will always consent if the Engineers Ireland Procedure is used.*