

# Dispute Resolution Process for Government of Alberta Construction Contracts

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# DISPUTE RESOLUTION PROCESS FOR GOVERNMENT OF ALBERTA CONSTRUCTION CONTRACTS

## TABLE OF CONTENTS

	<b>Page</b>
<b>ACKNOWLEDGEMENTS</b>	i
<b>PREFACE</b>	ii
<b>1. INTRODUCTION AND USE</b> .....	<b>1</b>
1.1 <u>INTRODUCTION</u> .....	1
1.2 <u>CONTENTS AND USE OF THIS DOCUMENT</u> .....	1
1.3 <u>REFERENCING THE DISPUTE RESOLUTION PROCESS IN           CONTRACTS</u> .....	2
1.4 <u>RESOLUTION OF CLAIMS PRIOR TO ENTERING INTO THE DISPUTE           RESOLUTION PROCESS</u> .....	2
1.5 <u>CONTRACT DEFINITIONS</u> .....	4
1.6 <u>PARTNERING</u> .....	4
1.7 <u>USE OF DISPUTE RESOLUTION PROCESS BY OTHER AGENCIES</u> ..	5
<b>2. GUIDELINES FOR MANDATORY DISPUTE RESOLUTION PROCESS</b> ...	<b>7</b>
2.1 <u>GENERAL</u> .....	7
2.2 <u>NEGOTIATION</u> .....	8
2.3 <u>MEDIATION</u> .....	8
2.4 <u>ARBITRATION</u> .....	8
<b>3. GUIDELINES FOR NEGOTIATION</b> .....	<b>13</b>
3.1 <u>FOUR STAGE - 'INTEREST BASED' MODEL</u> .....	13

3.2	<u>PREPARATION</u> .....	14
3.3	<u>NEGOTIATION</u> .....	14
	3.3.1 <b>Introduction</b> .....	14
	3.3.2 <b>Issues</b> .....	14
	3.3.3 <b>Interests</b> .....	15
	3.3.4 <b>Options and Solutions</b> .....	16
4.	<b>GUIDELINES FOR USE OF A REFEREE</b> .....	19
4.1	<u>GENERAL</u> .....	19
4.2	<u>WHEN TO USE A REFEREE</u> .....	19
4.3	<u>USE OF REFEREES</u> .....	19
4.4	<u>DISPUTE ADVISORY BOARDS</u> .....	20
5.	<b>GUIDELINES FOR PARTNERING</b> .....	21
5.1	<u>GENERAL</u> .....	21
5.2	<u>THE PARTNERING PROCESS</u> .....	21
5.3	<u>PHASE ONE - DEFINE THE OVERALL LONG-TERM STRATEGY</u> ..	22
5.4	<u>PHASE TWO - ENLIST PROJECT PARTICIPANTS</u> .....	22
5.5	<u>PHASE THREE - TEAM FORMATION</u> .....	23
5.6	<u>PHASE FOUR - ON-SITE IMPLEMENTATION</u> .....	23
5.7	<u>PHASE FIVE - PROJECT CLOSE-OUT</u> .....	23
5.8	<u>PARTNERING KEY COMPONENTS</u> .....	24
	5.8.1 <b>Project Charter</b> .....	24
	5.8.2 <b>Team Assessment</b> .....	25
	5.8.3 <b>Issue Resolution Process</b> .....	25
5.9	<u>SELECTING FACILITATORS</u> .....	25

## APPENDICES

<b>A1.</b>	<b>MANDATORY DISPUTE RESOLUTION PROCESS</b>	<b>1</b>
A1.1	<u>GENERAL</u>	1
A1.2	<u>DEFINITION</u>	1
A1.3	<u>DISPUTES</u>	1
	A1.3.1 <b>General</b>	1
	A1.3.2 <b>Disputes Between Contractors</b>	1
	A1.3.3 <b>Disputes with Subcontractors</b>	2
	A1.3.4 <b>Consolidation of Disputes</b>	2
	A1.3.5 <b>Owner's Rights to Require Notice</b>	2
	A1.3.6 <b>Owner Not Compellable</b>	2
	A1.3.7 <b>Breach by The Contractor</b>	2
	A1.3.8 <b>Owners Right to Participate</b>	3
	A1.3.9 <b>References to Owner and Contractor</b>	3
A1.4	<u>NOTICES OF DISPUTE, REFERRAL AND CHALLENGE</u>	3
	A1.4.1 <b>Notice of Dispute</b>	3
	A1.4.2 <b>Notice of Referral, Notice of Challenge</b>	3
A1.5	<u>NEGOTIATED SETTLEMENT</u>	4
A1.6	<u>MEDIATION</u>	4
A1.7	<u>ARBITRATION</u>	4
	A1.7.1 <b>Reference to Arbitration</b>	4
	A1.7.2 <b>Proceed Directly to Arbitration</b>	5
	A1.7.3 <b>Rules for Arbitration</b>	5
	A1.7.4 <b>Selection of the Arbitrator</b>	5
	A1.7.5 <b>Failure to Comply with Timetable</b>	5
	A1.7.6 <b>Arbitrator Agreement</b>	6
A1.8	<u>LITIGATION</u>	6
<b>B1.</b>	<b>RULES FOR CONDUCT OF MEDIATION</b>	<b>1</b>
B1.1	<u>GENERAL</u>	1
B1.2	<u>APPOINTMENT</u>	1
B1.3	<u>MEDIATION AGREEMENT</u>	1

B1.4	<u>TERMS OF REFERENCE</u> .....	1
B1.5	<u>THE MEDIATOR</u> .....	2
	B1.5.1 Responsibilities of the Mediator .....	2
	B1.5.2 The Memorandum of Understanding .....	3
	B1.5.3 Termination .....	3
	B1.5.4 Non-compellable .....	4
	B1.5.5 Arbitration .....	4
<b>C1.</b>	<b>RULES FOR CONDUCT OF ARBITRATION</b> .....	<b>1</b>
C1.1	<u>DEFINITIONS</u> .....	1
C1.2	<u>GENERAL</u> .....	1
C1.3	<u>APPOINTMENTS</u> .....	1
	C1.3.1 Selection of Arbitrator by Parties .....	1
	C1.3.2 Application to the Society .....	1
	C1.3.3 Arbitrator Selection Process Through the Society .....	2
	C1.3.4 Challenges of Appointment .....	2
	C1.3.5 Rebuttal to Challenge .....	2
	C1.3.6 Decision of the Society .....	3
C1.4	<u>THE PROCESS</u> .....	3
	C1.4.1 Provision of Notices .....	3
	C1.4.2 Initiating Resolution Proceedings .....	3
	C1.4.3 Deferring Proceedings .....	3
	C1.4.4 Submission of Position Statements by Parties .....	3
	C1.4.5 Orders and Requests of the Arbitrator .....	4
	C1.4.6 Further Applications to the Arbitrator .....	4
C1.5	<u>THE HEARINGS</u> .....	4
	C1.5.1 General .....	4
	C1.5.2 Adjournment by the Arbitrator .....	5
	C1.5.3 Failure to Attend Hearings .....	5
	C1.5.4 Evaluating the Evidence .....	5
C1.6	<u>THE AWARD</u> .....	5
	C1.6.1 General .....	5
	C1.6.2 Fees and Expenses .....	5

<b>D1.</b>	<b>AGREEMENT FORM FOR SERVICES OF A MEDIATOR</b>	<b>1</b>
D1.1	<u>APPOINTMENT</u>	2
D1.2	<u>IMPARTIALITY</u>	2
D1.3	<u>AVAILABILITY</u>	2
D1.4	<u>COOPERATION</u>	2
D1.5	<u>COMMUNICATIONS</u>	3
D1.6	<u>MEMORANDUM OF UNDERSTANDING</u>	3
D1.7	<u>FEES AND DISBURSEMENTS</u>	3
D1.8	<u>TERMINATION</u>	3
D1.9	<u>CONFIDENTIALITY</u>	4
D1.10	<u>NON-COMPELLABLE</u>	4
D1.11	<u>OTHER MATTERS</u>	4
D1.12	<u>NOTICES</u>	5
D1.13	<u>AGREEMENT</u>	6
<b>E1.</b>	<b>AGREEMENT FORM FOR SERVICES OF AN ARBITRATOR</b>	<b>1</b>
E1.1	<u>APPOINTMENT</u>	1
E1.2	<u>INDEPENDENCE AND IMPARTIALITY</u>	2
E1.3	<u>AVAILABILITY</u>	2
E1.4	<u>ARBITRATOR'S JURISDICTION AND POWERS</u>	3
E1.5	<u>DECISION</u>	3
E1.6	<u>COMMUNICATION WITH THE ARBITRATOR</u>	3
E1.7	<u>FEES AND DISBURSEMENTS</u>	3

E1.8	<u>DEPOSITS AGAINST COSTS</u>	3
E1.9	<u>APPORTIONMENT OF COSTS</u>	4
E1.10	<u>NOTICES</u>	5
E1.11	<u>AGREEMENT</u>	6
<b>F1.</b>	<b>RULES FOR USE OF A REFEREE</b>	<b>1</b>
F1.1	<u>APPLICATION OF REFEREE SERVICES</u>	1
F1.2	<u>APPOINTMENT OF REFEREE</u>	1
	F1.2.1 <b>Referee Agreement</b>	1
	F1.2.2 <b>Availability of the Referee</b>	1
	F1.2.3 <b>Application to the Society</b>	1
	F1.2.4 <b>Appointment of the Referee</b>	1
	F1.2.5 <b>Replacement of the Referee</b>	2
	F1.2.6 <b>Referee Costs</b>	2
F1.3	<u>NOTICE OF REFERRAL</u>	2
F1.4	<u>REFEREES INVESTIGATION</u>	2
	F1.4.1 <b>Time of Commencement</b>	2
	F1.4.2 <b>Investigation Procedures</b>	2
F1.5	<u>TIME AND REFEREES OPINION</u>	3
F1.6	<u>REFEREES CONCLUSION</u>	3
F1.7	<u>NOTICE OF CHALLENGE</u>	3
F1.8	<u>USE OF REFEREE'S CONCLUSION IN FUTURE PROCEEDINGS</u>	3
F1.9	<u>CONSIDERATION FOR USE OF REFEREE</u>	4
<b>G1.</b>	<b>AGREEMENT FORM FOR SERVICES OF A REFEREE</b>	<b>1</b>
G1.1	<u>APPOINTMENT</u>	1
G1.2	<u>BIAS</u>	2
G1.3	<u>AVAILABILITY</u>	2
G1.4	<u>RESPONSIBILITIES</u>	2



G1.5	<u>COOPERATION</u>	2
G1.6	<u>EVIDENCE</u>	3
G1.7	<u>EXPERTS</u>	3
G1.8	<u>TIME</u>	3
G1.9	<u>SITE PRESENCE</u>	3
G1.10	<u>FEES AND DISBURSEMENTS</u>	3
	G1.10.1 <b>General</b>	4
	G1.10.2 <b>Submission of Invoices</b>	4
G1.11	<u>CONFIDENTIALITY</u>	4
G1.12	<u>RIGHTS NOT ASSIGNABLE</u>	4
G1.13	<u>NOTICES</u>	5
G1.14	<u>AGREEMENT</u>	6



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Tim Hawnt (Chair)	Alberta Transportation and Utilities
John Ruttan	Alberta Public Works, Supply and Services
Lindsay McDougal (representing the ARHCA)	Peter Keiwit Management
Gus Hope (representing the ACA)	Carmacks Construction
Lyle Ward (representing CEA)	Consulting Engineers of Alberta
Don Sinclair (representing AAA)	Sinclair and Naito, Architects

In addition, significant contributions were made by: Norman Reid, P. Eng., and Harry Hunter, LLB, private consultants; and Tannis Carlson, LLB of Alberta Justice.

Also Gordon Sloan, LLB, contributed the four stage negotiation model, which was adapted with his permission.

## PREFACE

The dispute resolution process contained in this document has been developed to provide the Government of Alberta and industry participants in Government of Alberta construction contracts with a consistent process for dealing with Contract disputes. The process consists of a staged approach that starts with Negotiation between the parties and then proceeds to Mediation involving a neutral third party and, if the dispute remains unresolved, the final stage is binding Arbitration. Disputes arising from Government of Alberta construction contracts will not be resolved through litigation unless both the government department involved and the contractor agree to do so.

This document describes the Dispute Resolution Process to be followed, provides guidelines for its use and identifies specific contract specifications to be incorporated into construction contracts. The use of this dispute resolution process in construction contracts is mandatory for all departments of the Government of Alberta. It is also recommended that other government agencies and government funded bodies consider including this process into their contracts.

This process was developed under the guidance of the Industry/Government Standing Committee on Construction Contracts through a Working Group which had representation from the Alberta Construction Association, the Alberta Roadbuilders and Heavy Construction Association, the Consulting Engineers of Alberta, the Alberta Association of Architects and two government departments.

The group studied the recommendations of the Premier's Task Force on Construction Contracts and reviewed the Canadian Construction Document Committee (CCDC) publication entitled Rules for Mediation and Arbitration of Construction Disputes. The Working Group also received written documentation from the Alberta Arbitration and Mediation Society, and a presentation given by Alberta Justice on interest based negotiation. In addition, the Working Group considered other documents including contract documents currently in use by the Government of Alberta and the City of Edmonton's documentation on the use of a Referee.

Comments on this document or requests for further clarification or information should be directed to Executive Director, Contracts and Compliance Branch, Alberta Transportation and Utilities (427-3642).



# 1. INTRODUCTION AND USE

## 1.1 INTRODUCTION

The **Dispute Resolution Process (DRP)** set out in this document is intended to be included in and form a part of all Government of Alberta construction contracts and is recommended for use by government agencies in their construction contracts.

The DRP consists of various individual processes designed to resolve disputes that arise out of these contracts. These processes are intended as alternatives to the litigation and court system. The nature of these processes range from the informal meeting of the parties as normally experienced during project administration, proceeding in an escalating fashion to semi and then fully structured hearings in the presence and chairmanship of an outside neutral party, as may be required by the failure of the earlier processes to resolve the dispute.

Where outside neutral parties are used, they will be selected and appointed to the role by mutual agreement of the parties to the Contract or, in default of such agreement, by the Alberta Arbitration and Mediation Society.

**By entering into a construction contract which includes the DRP, the government department involved and the Contractor and his subcontractors waive their rights to a litigated resolution of claims and disputes unless all parties agree otherwise.**

## 1.2 CONTENTS AND USE OF THIS DOCUMENT

This document contains two distinct and separate parts. The first part (sections 1-5) contains information of a guidance and instructional nature to assist the parties in understanding and using the process. *These sections do not form part of the Dispute Resolution Process and therefore should not be incorporated into or referenced in the Contract.*

**However, it should be noted that Section 1 provides examples of various clauses which are required to be included in the Contract. These clauses are listed in subsection 1.3 Referencing the Dispute Resolution Process in Contracts and subsection 1.4 Resolution of Claims Prior to Entering into the Dispute Resolution Process.**

The following sections form the first part of this document:

Section 1	Introduction and Use
Section 2	Guidelines for Mandatory Dispute Resolution Process
Section 3	Guidelines for Negotiation
Section 4	Guidelines for Use of a Referee in Dispute Resolution
Section 5	Guidelines for Partnering.

The second part of this document (Appendices A-G) contains the contractual requirements for the DRP. To ensure the DRP forms part of the Contract, the following Appendices must be referenced in the Contract:

- Appendix A Mandatory Dispute Resolution Process
- Appendix B Rules for Conduct of Mediation
- Appendix C Rules for Conduct of Arbitration
- Appendix D Agreement Form for Services of a Mediator
- Appendix E Agreement Form for Services of an Arbitrator.

When the Owner decides that a Referee will be part of the process, the following Appendices must also be referenced in the Contract:

- Appendix F Rules for Use of a Referee
- Appendix G Agreement Form for Services of a Referee.

These Appendices must be used in their present form with no changes.

### 1.3 REFERENCING THE DISPUTE RESOLUTION PROCESS IN CONTRACTS

**To ensure the DRP forms part of the Contract, each Contract must include a clause entitled "Dispute Resolution Process" which references the applicable Appendices of this document. An example of a suitable Dispute Resolution clause is as follows:**

**"Dispute Resolution Process**

*The resolution of disputes arising between parties to this Contract shall follow the processes identified in the document entitled "Dispute Resolution Process for Government of Alberta Construction Contracts", Appendices A, B, C, D, & E. In the event of a conflict between the aforementioned Appendices and other provisions of the Contract, the Appendices shall govern."*

**When the use of a Referee is required, the Dispute Resolution clause must also reference Appendices F and G of this document.**

### 1.4 RESOLUTION OF CLAIMS PRIOR TO ENTERING INTO THE DISPUTE RESOLUTION PROCESS

During the course of a construction contract there may be many issues that arise on which the parties do not agree and which may be resolved prior to initiating the DRP.

Typically, these issues involve a difference of opinion between the parties as to payment or compensation required under the Contract or the time required to complete the Contract. For the purposes of this document and the DRP, these issues will be considered Claims.

It is extremely important that claimants notify the other party of a Claim as soon as possible after the occurrence of the situation giving rise to the Claim. This will allow both parties the opportunity to take immediate action to eliminate or mitigate the factors giving rise to the Claim, to agree on how the work is to proceed (while the Claim is being evaluated) and to keep joint records of any costs associated with the work in question. Failure of the claimant to provide such notice within the prescribed time periods will prejudice the claimant's right to proceed with the Claim.

Prior to initiating the DRP, the parties shall attempt to resolve, through negotiations, any Claims arising out of the Contract. Typically, these negotiations should follow a predetermined administrative review structure commencing with the site supervisors for both parties and terminating with the signatories to the Contract. In the event a Claim is not resolved to the satisfaction of both parties through this process, the claimant would then, in accordance with the notification requirements specified in Appendix A of this document, serve on the other party, a Notice of Dispute or Notice of Referral as applicable. Once this occurs, the Claim becomes a Dispute and the DRP commences.

**To ensure the claim resolution process forms part of the Contract, each Contract must include clauses which define a Claim, the notification requirements for a Notice of Claim including a time period within which such notice must be issued, and the process to be followed for the attempted resolution of Claims.**

The following are suggested clauses to address Claims in the Contract:

"Claims

*If a situation or occurrence arises between the Owner and the Contractor, in connection with or arising out of the Contract or the execution of the Contract Work, which results in a difference in opinion between the parties as to payment or compensation required under the Contract or the time required to complete the Contract, such situation or occurrence shall be considered a claim.*

Resolution of Claims

*Where the Owner or the Contractor considers that a Claim has arisen under the Contract, the Owner or Contractor shall issue a Notice of Claim to the other party.*



*A Notice of Claim shall be in writing, shall state the details of the claim and shall be served in accordance with the notification requirements of the Contract.*

*A Notice of Claim shall be served as soon as possible after the occurrence of the circumstance giving rise to the Claim and not later than seven (7) days after the occurrence of the circumstance, or the claimant becoming aware of the circumstance. Failure to serve a Notice of Claim within this prescribed time period will prejudice the claimant's right to proceed with the Claim, unless the claimant can demonstrate that such delayed Notice did not prejudice the ability of the other party to take action to minimize any additional costs resulting from the Claim.*

*The Parties shall make bona fide efforts to resolve a claim. Attempts to resolve claims shall sequentially follow the Owner's administrative review structure as follows:*

*(Insert applicable administrative levels)*

*In the event the claim is not resolved to the satisfaction of both parties through this process and the claimant wishes to pursue the matter further, it is incumbent upon the claimant to issue a Notice of Dispute in accordance with Appendix A, Mandatory Dispute Resolution Process of the document entitled "Dispute Resolution Process for Government of Alberta Construction Contracts."*

*The Owner or the Contractor may not unilaterally proceed to litigation without agreement of the other party."*

## 1.5 CONTRACT DEFINITIONS

The Appendices and suggested contract clauses contained in this document use the term 'Owner' to represent the government department or agency entering into the Contract. Also, the term 'Contract' is used to describe a Contract between a Contractor and an Owner which incorporates the DRP. **Users must ensure that the meaning of these terms is consistent with any similar terms contained in their contract documents.**

## 1.6 PARTNERING

The use of Partnering is optional and is not covered in the Appendices. When used, Partnering would supplement but not replace the Dispute Resolution Process. Each user must assess the need for Partnering on an individual contract basis and develop a suitable partnering process with the Contractor. Guidelines for Partnering are provided in Section 5 of this document.

## 1.7 USE OF DISPUTE RESOLUTION PROCESS BY OTHER AGENCIES

Claims and disputes arising from Government of Alberta construction contracts which incorporate the Dispute Resolution Process will not be resolved through litigation unless all parties agree to do so. (see clause regarding 'Claims' in subsection 1.4 of this Introduction and subsection A1.8 of Appendix A)

**When the Dispute Resolution Process is used by Agencies which fall under lien legislation such as the Builders' Lien Act of Alberta, it may not be possible to prevent a party from unilaterally proceeding to litigation.** To ensure the DRP does not contravene applicable lien legislation and to attempt to stay any litigation pursuant to lien legislation until the completion of the DRP, such agencies may wish to consider *modifying* the aforementioned clauses by adding the following:

*"...except to the extent necessary to preserve any rights under the applicable lien legislation. The parties agree that action commenced pursuant to such lien legislation shall be stayed pending completion of the Dispute Resolution Process."*



## **2. GUIDELINES FOR MANDATORY DISPUTE RESOLUTION PROCESS**

### **2.1 GENERAL**

The mandatory Dispute Resolution Process (DRP) specifically includes:

- (a) Negotiation**
- (b) Mediation**
- (c) Arbitration**

and the above order is the sequence in which they are to be used. This sequence and inter-relationship between the various components of the DRP are graphically depicted in Figure 1 on Page 10. Similarly, Figure 2 on Page 11 shows the DRP when a Referee is used.

By executing a contract, both parties to that contract agree to be bound to the dispute resolution process contained in the applicable appendices of this document.

The provisions of the Contract respecting notices, addresses for notices, the calculation of notice periods and the deeming or sufficiency of notice apply to this dispute resolution process.

Generally, in these processes all relevant facts, information and whatever else is material to the dispute must be disclosed. The exception is documents to which the courts would apply the doctrine of privilege such as legal advice between solicitor and client, or cabinet documents.

It is a principle of our law of contracts that only the parties to the Contract are bound by its terms and only the parties can enforce any rights under it. Therefore, for the DRP to apply to disputes which may involve subcontractors as well as the Contractor and the Owner, the contract documents must contain provisions to ensure that such disputes are handled in one consolidated process. Similarly, in projects where the Owner has Contracts with several prime contractors and there is the possibility of disputes involving more than one contractor, each individual contract document must contain provisions to ensure that disputes are handled in one consolidated process. Such provisions are contained within Appendix A of this document.

The entire process for the settlement of disputes by either Negotiation, Mediation, or Arbitration will commence when either party serves on the other a written Notice of Dispute stating the nature of the dispute and other general particulars. During the process period, the contract work will proceed without delay.

## 2.2 NEGOTIATION

Negotiation for the settlement of a dispute must begin within fourteen (14) days of the serving of a Notice of Dispute. Efforts to settle must be made in a bona fide manner and each party is required to disclose in a timely fashion all relevant facts, information and whatever else is material to the dispute. Through the process, neither party loses any rights under the Contract, nor may either party rely on any information disclosed by the other in any subsequent action to settle.

In all cases, negotiations should proceed in a timely manner and should be conducted in a good faith, full disclosure, non-adversarial, interest based, and principled fashion as laid out in Section 3, Guidelines for Negotiation.

## 2.3 MEDIATION

Mediation may be initiated by the agreement of both parties during the negotiation period. This introduces a neutral Mediator into the proceedings who will follow the Rules for Conduct of Mediation (Appendix B).

The parties should understand that the Mediator does not impose any basis of settlement. If a settlement is reached, it will be achieved by the disputing parties themselves. The Mediator, however, may assist the parties in the preparation of a Memorandum of Understanding which sets out the terms of the resolution of the dispute.

If settlement is not reached within twenty-eight (28) days of the serving of notice, or longer period if agreed to by the parties, then these proceedings shall cease and the next step in the DRP will commence. This shall occur also if any of the provisions for termination of mediation contained in Appendix B are invoked.

## 2.4 ARBITRATION

Arbitration must be entered into as the next step, unless mutually agreed otherwise by the parties. Selection and appointment procedures for a jointly retained Arbitrator, as well as the rules according to which the arbitration is to be conducted are set out in Appendix C, Rules for Conduct of Arbitration. The terms of the Arbitrator's engagement are covered by a three party form of agreement. After signing, the Arbitrator will immediately enter into the proceedings. Since the timing of commencing the arbitration may be considered critical, he will immediately, in consultation with the parties, determine whether it shall be carried out at once or deferred to the completion of the contract work.

In either case, unless the parties otherwise agree, the Arbitrator will conduct the arbitral proceedings according to the Arbitration Act, Revised Statutes of Alberta (1980), C43.1 as amended, and the Rules agreed to between the two parties. The Arbitrator will deliver his Award to the parties which will resolve the dispute and be final and binding upon them, with grounds for

appeal only as laid out in the Arbitration Act.

Figure 1

# DISPUTE RESOLUTION PROCESS

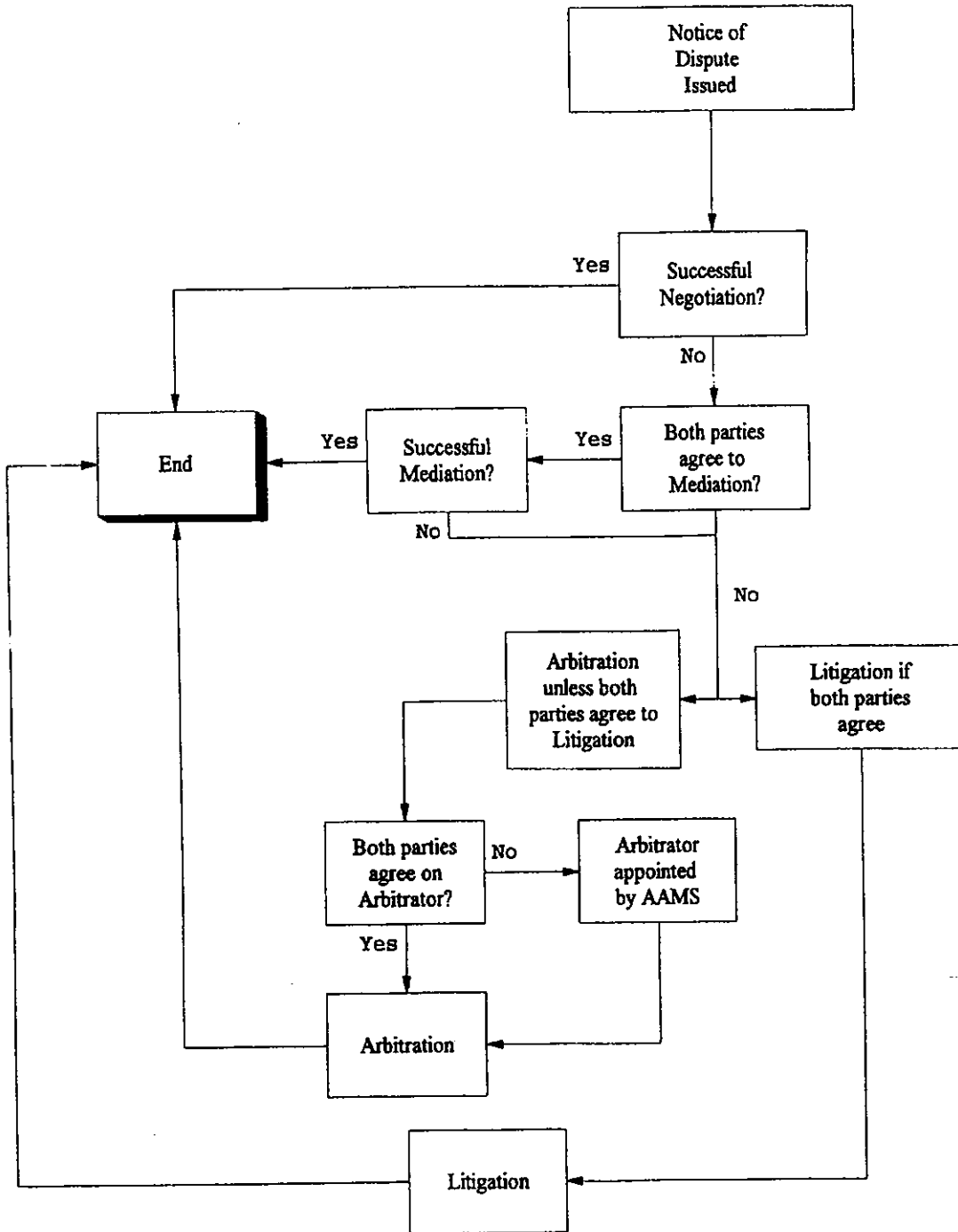
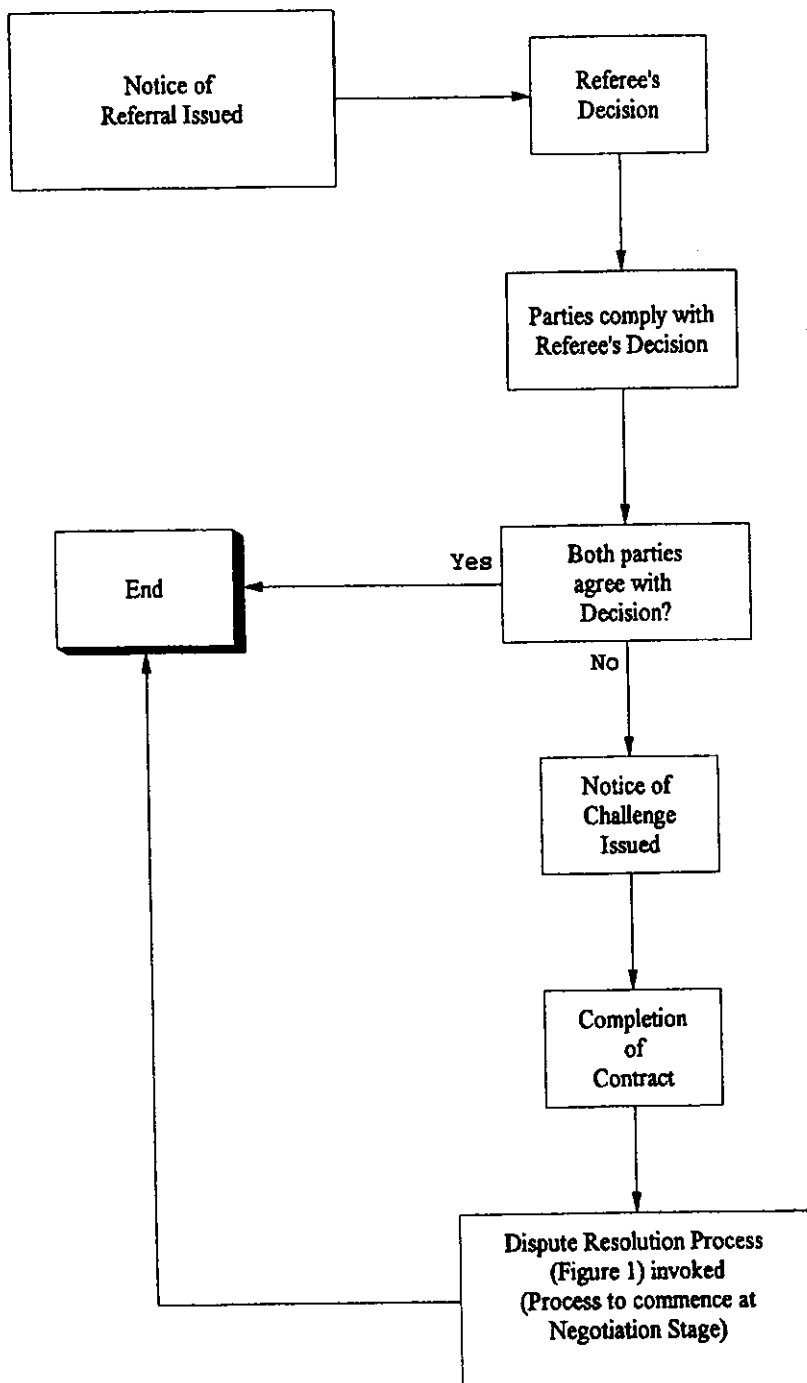


Figure 2

## DISPUTE RESOLUTION PROCESS USING REFEREE







### 3. GUIDELINES FOR NEGOTIATION

#### 3.1 FOUR STAGE - 'INTEREST BASED' MODEL

**Interests** are peoples' needs, desires, concerns, fears and hopes. (i.e. **need** for sufficient revenue to cover costs; **desire** to turn a profit; **concern** that dispute will damage reputation; **fear** that the dispute will lead to the calling of a loan; **hope** for future business).

Interests may be **substantive** or what one wants to achieve by negotiation (i.e. compensation for extra work on the site), **psychological** or emotional (i.e. concern about fair treatment and respect for work completed), and **procedural** or control over the process and timing for negotiation. People are often unable to reach agreement unless all of these 3 'interest' parameters are met. In a highly charged situation, one person might be too angry to reasonably reflect on new information and move toward understanding and agreement. In other situations, consultation within large government departments or companies may require time and may conflict with the priorities and needs of another organization.

Interest based or principled negotiation involves the identification of the interests of each party. Mutual and complimentary interests are identified. For example, parties often have a mutual interest in resolving a dispute as quickly and inexpensively as possible. Both parties are often interested in a high quality product and their reputation in the industry.

Interest based negotiations begin by identifying ground rules and issues and then exploring interests. Consensus on the issues might be quite general in order to reach agreement. For example, how to come to terms with a claim as distinguished from "whether or not the claim is payable". Once issues and interests are explored, the parties focus on generating options which meet as many of the parties' mutual, and other, interests as possible. A solution is crafted from a variety of alternatives generated, and evaluated by how many of the parties' interests it meets. The more durable solutions are those that meet most of the needs of the parties.

Negotiation sessions are most successful when:

- parties are of the view that there is a reasonable chance of reaching a settlement by discussion
- sessions are based on a full and frank disclosure of information
- parties are willing to understand the problem from the perspective of the "other side"
- the atmosphere is non-adversarial; parties maintain a constructive, problem solving tone.

Consistent with Appendix B, Rules for Conduct of Mediation, participation by senior officers of each party is required. Senior officers must have authority to settle the issues in principle and at whatever level of financial consideration may be arrived at and agreed to.

Where senior officials are unable to participate in person or attend a full session, they must be available for consultation during the negotiation session.

### 3.2 PREPARATION

- Think about existing areas of agreement.
- Determine what you need to know (and may already know) about other parties' issues.
- Determine what the other party should know about your facts.
- Anticipate the other party's approach; look at the issues and interests of both parties.
- Consider alternatives if a negotiated agreement is not reached.

### 3.3 NEGOTIATION

#### 3.3.1 **Introduction**

- Establish the need to negotiate.
- Negotiate ground rules about procedural matters including format of sessions, interruptions and phone calls.
- Confirm agreement on the time set aside for the session.
- Set a positive, future-focused tone.
- Identify areas in which there is already substantial agreement.
- Confirm that a senior officer is present or available for authorization to settle.
- Get commitment to proceed as outlined in preparation of this stage.

#### 3.3.2 **Issues**

- Give a non-positional statement of the issues as you see them.

- Invite a similar response and listen carefully.
- Verbally recognize interests as they arise.
- Try to limit questions to those which clarify information.
- Break the issues into more manageable parts.
- Summarize what has been said, emphasizing common issues.
- Frame the issues in a general, neutral way. Parties can then agree to move forward.

At any stage during the process, consideration can be given to referencing or exploring an issue previously discussed.

### 3.3.3 Interests

- Ask open ended questions such as, "When you said... what did you have in mind?", to encourage others to give something other than a 'closed' yes or no answer.

"I'd like to hear more about..."

"What was important to you about...."

"Can you tell me what you meant when you said...I'm not clear"

"Earlier I heard you say... but now I hear you saying that... I'm a bit confused about this..."

- Try to avoid leading, directory or 'closed' questions.
- Test your theory about the others' interests.
- Affirm and acknowledge the others' interests.
- Make your interests known; remain non-positional.

- Develop a neutral statement that phrases the goal for the negotiation process in a way that meets as many interests of the parties as possible.

### 3.3.4 Options and Solutions

- Summarize areas of agreement to this point.
- Maintain a list of issues that must be resolved in order to reach agreement. The list should be visible to all parties during the negotiations. The use of black or whiteboards, or flipcharts is suggested.
- List and evaluate options.
- Consider brainstorming or other forms of listing or generating ideas without any obligation to either the generator of the ideas or the other party.

Be creative and look to the future.

Help generate a variety of options that will lead to agreement.

List without evaluating.

Expand the options listed.

Develop the more promising options and evaluate them.

- List objective criteria against which options can be measured.

market value	costs
precedent	ethical standards
scientific judgement	equal treatment
professional standards	tradition
efficiency	reciprocity
court decisions	

- Look for solutions to maximize mutual gain and meet joint goals.
- Select fair, agreeable solutions.
- Test solutions by raising hypotheticals to ensure that the solutions will be workable and lasting:

"What will it be like when...?" "What will happen if...?"

"If we go ahead with this idea how would you see following up with...?"

"How do you see proceeding with ... if ...?"

- Draft a Memorandum of Understanding covering all points of agreement.
- Ensure that an opportunity to obtain legal advice is available before a Memorandum of Understanding is finalized.



## 4. GUIDELINES FOR USE OF A REFEREE

### 4.1 GENERAL

Another form of dispute resolution lies in the use of a Referee. The Referee is selected on the basis of technical knowledge and background of experience in the construction industry, coupled with freedom from conflicts of interest, actual or perceived, and the capability of acting impartially on disputes that may arise on the project. The Referee is neither a Mediator nor an Arbitrator, and is bound by no guidelines or rules other than those outlined in Appendix F, Rules for Use of a Referee and Appendix G, Agreement Form for Services of a Referee.

### 4.2 WHEN TO USE A REFEREE

It is difficult to say exactly when and where the referee concept should be used. In this day of globally based trade, now more than ever, we are experiencing the supply of equipment and materials from a variety of international sources. Scheduling problems alone suggest the value of an independent party such as a Referee to deal with the inevitable differences. Also, on large or complex projects where an inordinately high number of interlocking and over-lapping disciplines and sub-trades are present, the potential for dissension and dispute is high. In these instances, where rapid resolution of disputes is critical to the success of the project, the use of a Referee would be easily justified. The role of a Referee has also been found useful on incentive based contracts where the contractor is rewarded say, if on a cost plus basis the aggregate of his costs is less than a previously agreed upon target price, and he shares in the differential. The determination of what properly are chargeable costs in the formula are prone to dispute and a neutral party such as a Referee is invaluable in reaching a conclusion on those aspects.

It does not seem practical nor even desirable to set down a series of pragmatic factors as to when the referee concept should be invoked. In the final analysis, judgement, experience and the intimate knowledge of the project details should be the basis for the decision to use or not use the referee process. Possibly the best approach would be to try the concept on what seems to be a few suitable projects thus gaining an opportunity to assess its merit. More and more the experience seems to be very favourable when applied to suitable situations with proper inter-party arrangements and the judicious selection of the Referee.

### 4.3 USE OF REFEREES

Should the Owner decide that the use of Referee will be employed, such determination must be made clear in the contract documents so that, at the time of bidding, the Contractor is aware of the planned use.

The Referee is jointly selected and appointed at the onset of the Work in accordance with the terms of Appendix F, Rules For Use of a Referee. The Referee enters into a three party



agreement with the parties to the Contract in accordance with Appendix G, Agreement Form For Services of a Referee. The Referee's role and authority must provide for unconstrained investigative work. He must be granted full disclosure of all information required and be allowed access to the work site. He may discuss the relevant matters with whomever he likes and the parties are bound to cooperate with him in his investigation.

The Referee is made available from the outset, and commences an investigation immediately upon receiving a Notice of Referral (the triggering instrument for this form of DRP). Acting as an expert, the Referee gives a timely ruling (conclusion) by which the parties are bound until the total performance of the Work or completion of the Contract. Any challenge to the conclusion must be submitted in writing within fourteen (14) days of receipt of such conclusion. If either party disputes the order of the Referee, final resolution will be deferred until the end of the Work. The DRP provisions contained in Appendix A, Mandatory Dispute Resolution Process will then be used to resolve the matter.

The effect of this deferral process is one of defusing the problem and maintaining harmonious working relationships that are so essential to the efficient continuation of the work.

#### 4.4 DISPUTE ADVISORY BOARDS

Dispute Advisory Boards could also be used in the dispute resolution process. Their costs can vary significantly, and the assembling of such a Board would require some effort. For most of the project situations likely to be encountered, the use of Boards would not be an appropriate alternative. For the few situations for which a Board may be appropriate, the use of a single Referee with authority to engage such additional expert help as may be required may be a more cost-effective solution.

## 5. GUIDELINES FOR PARTNERING

### 5.1 GENERAL

On certain types of projects, particularly complex projects with a lengthy construction duration, the concept of Partnering may be applicable. Partnering is the application of a philosophy that attempts to prevent or avoid disputes rather than address their resolution. When compared to Partnering, all forms of the DRP and the litigative court system are reactive.

The decision as to whether or not Partnering is used on a project will be made voluntarily by both the Contractor and the Owner after executing the Contract.

Partnering has been defined for the construction industry as a long term commitment between two or more organizations for the purpose of achieving their specific business objectives by maximizing the effectiveness of each participant's resources. The commitment aims to build trust over the course of the construction period through dedication to common goals and understanding of each others individual expectations and values. Expected benefits include improved efficiencies and cost-effectiveness, increased opportunity for innovation, and continuous improvement of quality products and services. Partnering is a synergy; a cooperative, collaborative management effort among contracting and related parties to complete a project in the most efficient, cost-effective way possible. This is achieved by setting common goals, keeping lines of communication open, and solving problems together as they arise.

The success of partnering depends almost entirely on trust between the parties. This must be built up and developed from the very beginning of the Contract. This development will be greatly assisted by the use of a moderator or a neutral party familiar with the concept and its uses.

### 5.2 THE PARTNERING PROCESS

Partnering is a voluntary, organized process by which two or more organizations having shared interests perform as a team to achieve mutually beneficial goals.

The partnering process encourages all stakeholders to resolve problems at the lowest level of authority possible. The process works to eliminate barriers between stakeholders and to build relationships among individuals involved in a project.

Partnering has several factors that are critical to its success. The process can be adapted to meet many different circumstances, but to ensure optimal application, several basics must be in place.

These critical success factors are:

- all needs must be clearly defined and documented prior to initiating work

- all leaders must be directly involved in all aspects from the outset through project completion
- knowledgeable committed facilitator(s) must be engaged from the outset through project completion
- a comprehensive charter must be prepared, published and signed by all stakeholders
- all work processes, systems and structures must be clearly defined and documented
- ground rules must be specified, agreed to by all parties, published and used to guide the relations between the parties.

For Partnering to be successful, it is necessary to involve all affected participants and convince each that they have common goals and needs. Sincerity and commitment to the partnering process is essential.

The essential elements to successful implementation of the partnering process are listed below. It is common practice to use facilitators or third-party consultants to implement the process. The cost of such specialists should be shared equally between both parties.

### 5.3 PHASE ONE - DEFINE THE OVERALL LONG-TERM STRATEGY

Partnering must be based upon sound strategy established by senior management using goals and objectives that are measurable. Key activities during this stage are:

- attending leadership, strategic planning and partnering sessions
- defining a long-term vision with supporting strategies and measurable goals and objectives
- implementing training across all involved organizations.

### 5.4 PHASE TWO - ENLIST PROJECT PARTICIPANTS

Key activities include:

- educating the organization on the partnering process
- making a financial commitment and defining objectives clearly for each participant
- assessing leadership and technical issues
- defining the specific process to be implemented.

### 5.5 PHASE THREE - TEAM FORMATION

Participants convene and begin the process of teaming and relationship building. Key activities required are:

- orienting new stakeholders and defining roles
- establishing a project 'charter' (see Key Components)
- creating an evaluation mechanism and a continuous review procedure
- establishing an issue-resolution process (see Key Components)
- developing a problem-solving process and action plans
- practising interaction and communication skills.

### 5.6 PHASE FOUR - ON-SITE IMPLEMENTATION

Time committed to Partnering peaks during this step. Key activities during this phase are:

- holding regular Partnering Leaders meetings
- securing weekly or monthly assessments, evaluation and feedback (see Key Components)
- engaging in daily proactive problem-solving
- encouraging creative thinking throughout the team
- resolving difficult technical and financial issues
- modifying the issue resolution process so that its effectiveness is maximized
- calling partnering review meetings to improve the process
- supporting skill-building/monitoring behaviour
- calling formal team meetings
- implementing action plans for the transition to operation phase
- celebrating success and recognizing individual accomplishments.

### 5.7 PHASE FIVE - PROJECT CLOSE-OUT

When done correctly, partnering yields hundreds of innovative practices. These lessons should be incorporated into the conceptual stage of future design and construction efforts. Key activities at this time include:

- reviewing team goals, both successes and failures
- developing best practice improvement plans
- recognizing individual contributions
- continuing the process on future projects
- celebrating success.

Regularly scheduled project-level meetings are a vital element to successful Partnering. At these meetings, it is important that stakeholders discuss ways to improve their partnering efforts. Also, the meetings should be used to identify and resolve present as well as potential problems.

For Partnering to succeed, the parties must bring up current and potential problems to be worked on by the team. There also must be an open exchange of information about all aspects of the project during the meetings. This will ensure that everyone is fully informed and eliminate the surprises that contribute to lack of trust among stakeholders.

By identifying potential problems in advance, teams can use project meetings to activate problem-solving procedures.

Once in place, it is essential that the team stay focused on keeping the partnering process viable to prevent the possibility of stakeholders reverting to their old ways and habits. The most effective way to enhance the partnering spirit is to have project leaders set the right example.

Each party must be objective and fair with each new issue. When a team member feels that his or her counterpart has not been reasonable it is important for that person to bring the issue to the attention of the other party. This frank discussion is essential in developing better understanding of each other's views, and ultimately improves future communications.

When trying to find a win-win solution to an issue, all team members who may be able to contribute to a problem's resolution should be involved.

Notwithstanding that under certain circumstances, written documented communication is a contractual necessity, parties should avoid "letter wars". An effective technique is to review a draft of letters with the receiving parties in advance and to incorporate their ideas on how to express an issue. That way the final letter becomes a joint product and greatly reduces the need for a formal reply.

Letters should be limited to the essential aspects, avoid arguments and be viewed as opportunities to build understanding and trust.

## **5.8 PARTNERING KEY COMPONENTS**

When implementing Partnering, team members must develop and use the following key components. They are required if the team is to stay focused and accountable.

### **5.8.1 Project Charter**

The 'Charter' is comprised of a Mission Statement and list of specific goals. Together they define the team's commitment to the project and their resolve to work together. At the conclusion of the workshop, all participants must sign the Charter, which is then posted in prominent locations at all job sites. The charter must express and be compatible with the legitimate needs of all the stakeholders.

### 5.8.2 Team Assessment

The assessment is a tool to measure the performance of the team and to encourage mutual accountability. Team members should fill out an evaluation survey each month. It should measure the success of the team in meeting partnering goals and identify opportunities for improvement.

### 5.8.3 Issue Resolution Process

Stakeholders must commit to openly identify all actual or potential problems or major issues.

Often the best approach is a detailed problem-resolution matrix or chart. This involves designating project participants by name from each stakeholder organization who have a commitment for involvement in the resolution process. Another key element is the commitment to a maximum length of time for an issue to be deliberated before it is escalated to the next level.

The issue resolution chart, with its escalation requirements, should be a flexible procedure that can be changed by consensus throughout the life of the Contract.

## 5.9 SELECTING FACILITATORS

The use and selection of the facilitator is a business decision which should be made jointly by all stakeholders. Before choosing a facilitator, the stakeholders need to understand not only the potential benefits, but also the training and support they will need prior to starting the partnering effort. It is crucial that the facilitator remain involved throughout the life of the project.

The following checklist can help in selecting the right facilitator.

A good facilitator should possess:

- a basic understanding of construction
- strong communication and listening skills
- solid organizational and people skills
- demonstrated team-building skills
- well-developed problem-solving/conflict management skills.

# **APPENDIX A**

## **MANDATORY DISPUTE RESOLUTION PROCESS**

# **A1. MANDATORY DISPUTE RESOLUTION PROCESS**

## **A1.1 GENERAL**

In the event of a conflict between this Appendix and other provisions of the Contract, this Appendix shall govern.

## **A1.2 DEFINITION**

In this Appendix 'Dispute Resolution Process' shall mean:

Appendix A	Mandatory Dispute Resolution Process
Appendix B	Rules for Conduct of Mediation
Appendix C	Rules for Conduct of Arbitration
Appendix D	Agreement Form For Services of a Mediator
Appendix E	Agreement Form For Services of an Arbitrator
Appendix F	Rules for Use of a Referee, and
Appendix G	Agreement Form for Services of a Referee

## **A1.3 DISPUTES**

### **A1.3.1 General**

Unless the Contract has already been repudiated or terminated, the Contractor shall, during any Dispute Resolution Process and without prejudice to any claim the Contractor may have:

- a) proceed with the Work without delay, and
- b) comply with any instructions issued by the Owner with respect thereto, unless and until such instructions are revised, as hereinafter provided, in a negotiated settled-settlement or an arbitral or judicial award.

### **A1.3.2 Disputes Between Contractors**

If any dispute arises between the Contractor and any other Contractors having contracts with the Owner on the Project which affects or may affect the interest, rights or obligations of the Owner, or the co-ordination of the work of different contractors, the Contractor shall serve on the Owner a Notice of Dispute and the provisions of the Dispute Resolution Process shall apply. Such Notice shall be served on the Owner within seven (7) days of the Contractor receiving from or serving on another Contractor, a Notice of Dispute.



### **A1.3.3 Disputes with Subcontractors**

If any dispute arises between the Contractor and a subcontractor or between different subcontractors which the Contractor considers to affect or may affect the interest, right or obligations of the Owner relating to the Project, the Contractor shall serve on the Owner a Notice of Dispute and the provisions of the Dispute Resolution Process shall apply. Such Notice shall be served on the Owner within seven (7) days of the Contractor receiving from or serving on a subcontractor, a Notice of Dispute. The Contractor shall ensure that the provisions of the Dispute Resolution Process, including without limitation the consolidation in subsection A1.3.4, are contained or incorporated by reference in all contracts for work on this Project between the Contractor and its subcontractors.

### **A1.3.4 Consolidation of Disputes**

The Owner may require that disputes referred to in subsections A1.3.2 and A1.3.3 be consolidated.

### **A1.3.5 Owner's Rights to Require Notice**

The Owner has the right to require that the Contractor provide it with copies of Notices of Dispute served by or received by the Contractor and may require the Contractor to serve on it a Notice of Dispute whenever the Owner deems its interests require it to be a party to the resolution of such dispute. Such Notice of Dispute shall be served on the Owner within seven (7) days of the Contractor receiving notice from the Owner requiring such Notice.

### **A1.3.6 Owner Not Compellable**

The Owner is not compellable as a party or as a witness in any dispute between the Contractor and other contractors or between the Contractor and its subcontractors unless the Contractors or subcontractors have incorporated the Dispute Resolution Process by reference in their respective contracts and the Owner has been served with a Notice of Dispute pursuant to the provisions of this Appendix A.

### **A1.3.7 Breach by The Contractor**

If the Contractor is in breach of any of its obligations under subsections A1.3.2, A1.3.3, A1.3.4 or A1.3.5, including without limitation the time limits therein set forth, the Contractor shall hold the Owner harmless from all claims, disputes or costs arising from or related to a dispute which it might, but for such breach, have been entitled to pursue against the Owner.

### A1.3.8 Owners Right to Participate

The Owner has the right to join as a party in the action or participate in any Dispute Resolution Process arising out of a dispute.

### A1.3.9 References to Owner and Contractor

References to the Owner and the Contractor in the Dispute Resolution Process shall be deemed to refer to the Contractor, or the Contractor and subcontractors, where the context requires or permits.

## A1.4 NOTICES OF DISPUTE, REFERRAL AND CHALLENGE

### A1.4.1 Notice of Dispute

This subsection (A1.4.1) does not apply when the Contract calls for the use of a Referee.

A dispute shall be deemed to arise when the Owner or the Contractor serves on the other party a written Notice of Dispute.

A Notice of Dispute shall be in writing, shall state the nature of the dispute, and shall be served in accordance with the notification requirements of the Contract.

A Notice of Dispute must be served within fourteen (14) days of one party's receipt of the other party's final written position regarding a Claim, if the position is not acceptable, or at any time prior to the receipt of such written position.

**A party failing to serve a Notice of Dispute in accordance with this subsection (A1.4.1), forfeits any rights to a claim, reimbursement, costs or any other matter arising out of the dispute.**

### A1.4.2 Notice of Referral, Notice of Challenge

This subsection (A1.4.2) only applies when the Contract calls for the use of a Referee.

A dispute shall be deemed to arise when the Owner or the Contractor serves the Referee with a written Notice of Referral.

A Notice of Referral shall be in writing, shall state the nature of the dispute, and shall be served in accordance with the notification requirements of the Contract.

A Notice of Referral must be served within fourteen (14) days of one party's receipt of the other party's final written position regarding a Claim, if the position is not acceptable, or at any time

prior to the receipt of such written notification. The dispute shall then be resolved in accordance with Appendix F, Rules for the Use of a Referee.

In the event either party does not agree with the conclusion of the Referee, that party may issue a Notice of Challenge. A Notice of Challenge shall be served in accordance with the requirements of Appendix F, Rules for Use of a Referee. The Notice of Challenge shall then be resolved in accordance with Appendix A, Mandatory Dispute Resolution Process. The resolution of a Notice of Challenge shall commence within fourteen (14) days following the total performance of the Work or completion of the Contract, unless both parties agree otherwise.

**A party failing to serve a Notice of Referral in accordance with this subsection (A1.4.2), forfeits any rights to a claim, reimbursement, costs, or any other matter arising out of the dispute.**

**A party failing to serve a Notice of Challenge in accordance with this subsection (A1.4.2) is deemed to have accepted the Referee's decision regarding the dispute.**

#### A1.5 NEGOTIATED SETTLEMENT

Within fourteen (14) days after the serving of a Notice of Dispute or in the case of a Notice of Challenge, within fourteen (14) days following the total performance of the Work or completion of the Contract, the parties shall commence negotiations for the purpose of settling the dispute. Such settlement process may include the use of mediation, if both parties agree.

The Owner and the Contractor shall make bona fide efforts to settle, by negotiations, any dispute arising between them and provide full, frank, and timely disclosure of all relevant facts, information, and documents to facilitate such negotiations.

#### A1.6 MEDIATION

The Owner and the Contractor shall enter into an agreement with the Mediator prior to the mediation proceedings, the basis for which agreement is contained in Appendix D, Agreement Form for Services of a Mediator.

The mediation proceedings shall be carried out in accordance with Appendix B, Rules for Conduct of Mediation.

#### A1.7 ARBITRATION

##### A1.7.1 **Reference to Arbitration**

If after twenty-eight (28) days following the service of the Notice of Dispute or in the case of a Notice of Challenge, twenty-eight (28) days following the total performance of the Work or

completion of the Contract, or such period as the parties may agree, the parties have not settled all matters under dispute, the dispute or any unsettled matters shall be deemed to have been referred to arbitration unless the parties agree otherwise.

#### **A1.7.2 Proceed Directly to Arbitration**

The parties may agree at any time to proceed directly to arbitration. In such event, within fourteen (14) days of the agreement to proceed to Arbitration, the party filing the Notice of Dispute or Notice of Challenge shall serve the other party or parties with a notice to refer the dispute to arbitration.

#### **A1.7.3 Rules for Arbitration**

A dispute referred to arbitration pursuant to the provisions of subsections A1.7.1 or A1.7.2 shall be decided by a single arbitrator and the provisions of Appendix C, Rules for Conduct of Arbitration shall apply, unless the parties agree on some particular variation thereof.

#### **A1.7.4 Selection of the Arbitrator**

Within fourteen (14) days of the deemed reference to arbitration under subsection A1.7.1 or of the service of the notice referred to in subsection A1.7.2, the party filing the notice shall either submit to the other party or parties, the name of an Arbitrator acceptable to it or shall request the Alberta Arbitration and Mediation Society to recommend or appoint an Arbitrator. If a party receiving such submission objects to the person suggested as Arbitrator, it shall within fourteen (14) days, notify its objection to the party filing the notice and shall, within the same time, request the Alberta Arbitration and Mediation Society to appoint an arbitrator. If the objection and request are not submitted within fourteen (14) days of receipt of the submission, the party shall be deemed to have accepted the person suggested as Arbitrator. In objecting to a person suggested, a party need give no reasons for its objections. A copy of a request to the Alberta Arbitration and Mediation Society shall be sent to all other parties to the arbitration.

#### **A1.7.5 Failure to Comply with Timetable**

If the party filing the Notice of Dispute or Notice of Challenge does not serve the Notice referred to in subsection A1.7.2 within the time set forth in that subsection or does not submit the name of a suggested Arbitrator or make application to the Alberta Arbitration and Mediation Society for the appointment of an arbitrator within the time set forth in subsection A1.7.4, that party shall be deemed to have waived all rights to pursue such disputes, or costs arising from or related to a dispute so referred to arbitration.

#### **A1.7.6 Arbitrator Agreement**

The Owner and the Contractor, and any other party to the arbitration, shall enter into an agreement with the Arbitrator immediately after the appointment of the Arbitrator, generally in accordance with the terms contained in Appendix E, Agreement Form for Services of an Arbitrator.

#### **A1.8 LITIGATION**

The Owner or the Contractor may not unilaterally proceed to litigation without agreement of the other party.

# **APPENDIX B**

## **RULES FOR CONDUCT OF MEDIATION**



## **B1. RULES FOR CONDUCT OF MEDIATION**

### **B1.1 GENERAL**

The parties shall make bona fide efforts to reach settlement of the issues identified in the Notice of Dispute or the Notice of Challenge through negotiation. If both parties agree, this may include mediation, in which case each party shall be responsible for its own costs and share the costs of the mediation proceedings equally.

### **B1.2 APPOINTMENT**

A single mediator acceptable to both parties shall be appointed, and in the event that such agreement is not reached forthwith, on the application of either party, the Alberta Arbitration and Mediation Society ('Society') will be called upon to put forward the names and resumes of suitable candidates and assist in the final appointment of the Mediator. The application to the Society shall include:

- a) identification of the underlying contract
- b) a copy of the Notice of Dispute or Notice of Challenge
- c) the name and address of the party making application
- d) the name and address of the other party(ies) to the issues in dispute
- e) brief particulars of the issues in dispute and the relief sought
- f) the approximate amount in dispute
- g) payment to the Society of its required fee (if any) for rendering assistance.

### **B1.3 MEDIATION AGREEMENT**

The Mediator, in consultation with all parties, will prepare the Agreement Form contained in Appendix D, Agreement Form for Services of a Mediator. It shall include a Terms of Reference and among other things, name himself as the appointed Mediator. Once completed it will be signed by all parties.

### **B1.4 TERMS OF REFERENCE**

Terms of Reference will include the following, but which by agreement of the parties and the Mediator, may be added to, deleted from, or varied to suit the circumstances:

- a) Full and candid disclosure of all facts and information material to the issues in dispute is to be made by each party in a timely fashion.
- b) In the event that settlement is not reached by this mediation, the parties shall not rely on anything proffered by the parties or the Mediator,



including disclosures, information, offers of settlement etc. in any subsequent proceedings to settle the issues in dispute.

- c) Each party may employ expert witnesses or retain them jointly with the other party.
- d) Each party's legal counsel, if any, may be kept available for consultation but should preferably not actively participate during the mediation sessions and shall remain external to the sessions.
- e) No one will be sworn and since no "evidence" is given, no transcripts or audio recordings shall be kept of the mediation sessions.
- f) Either party may request a caucus in private with the Mediator during the proceedings and vice versa. The Mediator shall hold all matters conferred upon during caucus meetings in strict confidence, unless agreement is reached among those conferring to disclose the matters. However, the Mediator may communicate any information to the other party (including trial offers of settlement) as authorized by, but not beyond, the instructions of the initiating party.
- g) Each of the disputing parties shall attend with an Officer or Designate who has the authority, or alternatively can obtain it within one hour, to settle on the issues in dispute to whatever financial magnitude.

## **B1.5 THE MEDIATOR**

### **B1.5.1 Responsibilities of the Mediator**

The Mediator as facilitator will, among other things:

- a) Consult with the parties and upon receipt of the list of attendees for each party, establish the time and place for the meetings and the nature of information, documents, etc. to be produced.
- b) Manage the proceedings to ensure that each party is given fair and equal opportunity to present its case, position, and interests; encouraging active negotiating participation.
- c) Act as a catalyst to promote understanding, explore alternative solutions, conciliatory gestures, and other means that appear as acceptable proposals in the process of seeking grounds for settlement.

- d) Remain alert to any perceived opportunities toward settlement and assist by focusing discussion and pursuit of them; proposing a private caucus with either party as he considers appropriate.
- e) Assist the parties in the preparation of a Memorandum of Understanding which will set out in clear and sufficient detail, the agreement reached for the settlement of each of the issues named in the Notice of Dispute or the Notice of Challenge. Such assistance may include initial trial and error draft wordings in the process of bringing the parties together on common ground.
- f) Provide **no** legal advice to any party to the mediation during the period of the mediation process. Notwithstanding, the Mediator may recommend that a party retain independent legal counsel prior to entering into any Memorandum of Understanding.

#### **B1.5.2 The Memorandum of Understanding**

The Memorandum of Understanding expresses in writing the settlement terms agreed to, and which, when signed by both parties becomes final and binding upon them with obligation to carry out the terms of settlement set forth in it, or in accordance with the terms of the Contract as may have been agreed upon.

#### **B1.5.3 Termination**

Mediation proceedings will be terminated:

- a) if either party serves notice that it is not willing to continue, or,
- b) upon breach of the Mediation Agreement, or,
- c) if the Mediator serves notice that in his opinion it is in the best interest of the parties to do so, or,
- d) at the expiration of twenty-eight (28) days following the serving of a Notice of Dispute, or in the case of a Notice of Challenge at the expiration of twenty-eight (28) days following the total performance of the Work or completion of the Contract; or such longer period as the parties and the Mediator may agree, or,

- e) if agreement to settle is reached by the parties.

If for any reason whatsoever excepting in the case of a settlement, mediation is terminated, the Mediator shall forthwith issue to the parties, a written Notice of Discontinuance of Mediation.

#### **B1.5.4 Non-compellable**

The Mediator is not compellable as a witness; he shall not be subpoenaed to give evidence relating to his role as the Mediator or on any matters or issues arising out of the Contract in any subsequent proceedings including arbitration or in the courts.

#### **B1.5.5 Arbitration**

In the event of termination of mediation and if there remain any unsettled issues contained in the Notice of Dispute or the Notice of Challenge, then the dispute shall be deemed to be referred to Arbitration unless the parties mutually agree otherwise.

# **APPENDIX C**

## **RULES FOR CONDUCT OF ARBITRATION**



# C1. RULES FOR CONDUCT OF ARBITRATION

## C1.1 DEFINITIONS

In this Appendix the following definitions shall apply unless the context requires otherwise:

- a) 'the Act' means the Arbitration Act, Revised Statutes of Alberta (1980) C.43.1 as amended.
- b) 'Arbitrator' means a sole arbitrator or two or more arbitrators.
- c) 'Party' means any party to the arbitration.
- d) 'the Society' means the Alberta Arbitration and Mediation Society.

## C1.2 GENERAL

*Arbitration will be in accordance with the Act. The Arbitrator will treat the parties equally and fairly and decide the matters in dispute according to the Arbitration Agreement and the Contract under which the matters arose, taking into consideration any applicable usage of trade.*

## C1.3 APPOINTMENTS

### C1.3.1 **Selection of Arbitrator by Parties**

*Arbitration shall be by a single arbitrator unless otherwise agreed to by the parties. In the event that the parties cannot agree upon an acceptable person, either party may request in writing that the Society appoint or recommend the appointment of an arbitrator.*

### C1.3.2 **Application to the Society**

Such application will include:

- a) the name and address of the party applying
- b) the name and address of the opposing parties
- c) brief particulars of the dispute and the relief sought
- d) the approximate amount in dispute.

The application shall be accompanied by a payment of such fees, if any, as the Society may require.

### **C1.3.3 Arbitrator Selection Process Through the Society**

Upon receipt of such application and the payment of the proper fees, if any, the Society will submit to each party simultaneously, the names of not less than three persons whom it considers suitable as Arbitrator for the particular dispute. The Society will provide the address and brief particulars of the qualifications of each person so named.

Each party shall return a copy of such list ranking its preference for such persons and with the name of any person unacceptable to either party, deleted. The Society will give due consideration to the preferences so disclosed, and will invite the preferred person or one of the preferred persons to act as Arbitrator. If all names are deleted, the Society will submit a further list, but if again all names are deleted, the Society will select a person of its own choosing and will invite the person to act as Arbitrator.

Upon the acceptance by the person selected, the Society will appoint in writing such person as Arbitrator and will notify the parties of the appointment and give the address for service of the Arbitrator.

In accepting an appointment as Arbitrator, the person invited shall provide the Society in writing with a statement that he knows of no circumstances which could give rise to an apprehension of bias on the part of the parties.

If an appointed Arbitrator is removed or becomes incapable of acting, the Society will, on the application of a party, appoint another arbitrator in the same manner.

Where an Arbitrator is replaced, all hearings shall be repeated.

### **C1.3.4 Challenges of Appointment**

A party may challenge an Arbitrator appointed by the Society, on any ground provided in the Act for removal of an Arbitrator, and subject to the same qualifications as are set out in the Act. Such challenges shall be made to the Arbitrator in the first instance and shall be in writing setting out the grounds relied upon. A copy of the challenge shall be served on the other party or parties.

### **C1.3.5 Rebuttal to Challenge**

If the Arbitrator does not agree to resign, the party making the challenge may refer the matter to the Society by notice in writing. A copy of such notice shall be served on the other party or parties and on the Arbitrator.

### **C1.3.6 Decision of the Society**

The decision of the Society will be in writing and shall be final and binding on the Arbitrator and the parties. Notice of the decision shall be served on the Arbitrator and on all parties to the arbitration.

Notwithstanding that a challenge has been made and has not been finally decided upon, the Arbitrator may continue with the arbitration process.

## **C1.4 THE PROCESS**

### **C1.4.1 Provision of Notices**

The party who filed the Notice of Dispute or Notice of Challenge, referred to in Appendix A, Mandatory Dispute Resolution Process, shall provide the Arbitrator with a copy of such Notice and shall prepare, in consultation with the other party and the Arbitrator, a form of agreement with the Arbitrator generally in accordance with Appendix E, Agreement Form for Services of an Arbitrator.

### **C1.4.2 Initiating Resolution Proceedings**

The Arbitrator shall enter into the proceedings as soon as practical and shall manage the process to achieve a just and timely conclusion to the dispute.

As soon as practical after his appointment, the Arbitrator shall call a preliminary meeting of the parties to organize the process. Such meeting may be by conference telephone call if convenient.

### **C1.4.3 Deferring Proceedings**

The Arbitrator shall decide, after consultation with the parties, whether the process is to be followed immediately, or whether it is preferable to defer the proceedings until the Work of the Contract has been generally completed. If the proceedings are to be deferred, he shall order the parties to keep him informed of the progress of the Work, so that he may call a further preliminary meeting as soon as the parties are ready to proceed.

### **C1.4.4 Submission of Position Statements by Parties**

If and when the proceedings are to be followed immediately, the Arbitrator shall order the claimant to file a written statement setting out the basis for his claims within a stated time, and the respondent to file a written statement setting out his defence and any counterclaim within a stated time. If a counterclaim is filed, the claimant shall be required to file a statement of his defense within a stated time.



Such statements shall be accompanied by a list of the principal documents on which the party relies.

Such statements shall be filed with the Arbitrator and shall be served simultaneously on all other parties.

#### **C1.4.5 Orders and Requests of the Arbitrator**

The Arbitrator shall give all such orders as he considers advisable or necessary to ensure that the hearings shall be conducted in a timely manner and with fairness to all parties.

The Arbitrator may order a party to produce for his inspection any documents which he considers relevant. All other parties may inspect and make copies of all such documents. The Arbitrator may not order the production of any document which would not be producible in court.

#### **C1.4.6 Further Applications to the Arbitrator**

A party may make an application to the Arbitrator on any matter before the hearings commence. Such application shall be in writing and shall be served on all other parties. Such other party or parties may make submissions to the Arbitrator within seven (7) days, serving a copy of such submissions on all other parties. Upon receipt of such submissions or after the time for receiving them has passed, the Arbitrator shall consider the same and shall make such order or shall give such ruling as he deems appropriate and shall give written notice thereof to the parties.

### **C1.5 THE HEARINGS**

#### **C1.5.1 General**

The Arbitrator shall give written notice to the parties of the date, time and place of the hearings, having regard to any representations made to the parties. Not less than seven (7) days notice of the hearings shall be given, unless the parties have agreed in writing to a shorter period.

Subject to such adjournments as the Arbitrator considers reasonable, the hearings shall be continued daily until completed.

The hearings shall be conducted in private and only such persons as the Arbitrator deems necessary shall be present. The parties and their representatives, whether legal or otherwise, shall not be excluded from the hearings.

### **C1.5.2 Adjournment by the Arbitrator**

The Arbitrator may adjourn a hearing or meeting for such period as he deems appropriate if a party appears with a legal or other professional representative without proper notice having been given of his intention to do so, or for any other reason he considers necessary or desirable.

### **C1.5.3 Failure to Attend Hearings**

If a party fails to attend or be represented at any meeting or hearing of which due notice has been given, the Arbitrator may continue in his absence. The Arbitrator may not make an award by default but must make his Award after consideration of evidence properly put before him.

### **C1.5.4 Evaluating the Evidence**

The Arbitrator is entitled to use his own technical knowledge and skill and his knowledge of the ordinary practice of his profession in reaching conclusions from his own inspection and in evaluating the evidence but not in lieu of evidence.

## **C1.6 THE AWARD**

### **C1.6.1 General**

The Act provides that the Arbitrator shall decide the matter in dispute in accordance with the law including equity, unless the parties agree in writing to require the Arbitrator to decide on the basis of what is fair, or equitable, or on some other grounds.

The award is final and binding on the parties, subject only to such right of appeal as is provided in the Act.

The Arbitrator has authority to award interest as part of his Award.

### **C1.6.2 Fees and Expenses**

The Arbitrator is entitled to notify the parties that his Award has been signed and that it will be sent to the parties on payment of the amount of his fees and expenses outstanding. A party paying such amounts may recover from the other party or parties any amount that such other party or parties should have paid under the award or the Arbitration Agreement.

If the parties settle the dispute after the Arbitrator has scheduled the hearings and has set time apart for them, the Arbitrator shall have the right to include in his account for fees, a sum in respect of the time allocated for the hearings.



# **APPENDIX D**

## **AGREEMENT FORM FOR SERVICES OF A MEDIATOR**



# D1. AGREEMENT FORM FOR SERVICES OF A MEDIATOR

Form of Agreement  
for  
Services of a Mediator

THIS AGREEMENT IS MADE the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_

BETWEEN

(Government Department or Agency's Name)

referred to as "the Owner"

-and-

(Contractor's name)

referred to as "the Contractor"

-and-

(Mediator's name)

referred to as "the Mediator"

Whereas Contract No. \_\_\_\_\_ for the construction of **(Description of Contract Work)** \_\_\_\_\_ by the **(Government Department or Agency's Name)**, which has been entered into by the Owner and the Contractor, provides for the potential settlement of disputes by negotiation including Mediation;

And whereas the Owner and the Contractor have mutually agreed to retain jointly the services of a qualified and competent person to act as Mediator to assist in the settlement of a matter which has arisen under the Contract;

And whereas the Owner and the Contractor require that the person appointed as Mediator shall act fairly and impartially in all respects and will assist expeditiously as provided for in the Contract in the resolution of certain disputes between the Owner and the Contractor;

In consideration of the mutual covenants set out in this Agreement, the parties agree as follows:

#### D1.1 APPOINTMENT

The Owner and the Contractor hereby name and appoint **(Mediator's name)** to act personally as the Mediator under the Contract.

The Mediator, **(Mediator's name)**, hereby accepts the appointment as Mediator.

The mediation proceedings shall be carried out in accordance with Appendix B, Rules for Conduct of Mediation of "Dispute Resolution Process for Government of Alberta Construction Contracts".

The nature and the particulars of the matters which have given rise to the items on which the Owner and the Contractor would like to reach agreement through mediation, are contained in the Notice of Dispute or Notice of Challenge dated \_\_\_\_\_, \_\_\_\_\_, a copy of which has been provided to the Mediator and is appended hereto.

#### D1.2 IMPARTIALITY

The Mediator confirms that he has no interest in the outcome of the dispute and has disclosed any past involvement, if any, with either of the parties or their affiliates, and shall disclose in a timely fashion in the future, any facts or circumstances of which he may become aware, which may give rise to a reasonable apprehension of bias by the Owner or the Contractor.

#### D1.3 AVAILABILITY

The Mediator confirms that he is conversant with the time requirements within the Contract and Appendix B, Rules for Conduct of Mediation of "Dispute Resolution Process for Government of Alberta Construction Contracts" and that he is immediately available to perform his services under this Agreement.

Having been provided with a Notice of Dispute or Notice of Challenge issued under the Contract, he shall proceed forthwith, and shall make arrangements and conduct the proceedings in consultation with the Owner and the Contractor, treating them as matters of urgency, and in any event within the times required under this Agreement and the Contract.

#### D1.4 COOPERATION

The Owner and the Contractor and their representatives shall cooperate with each other and the Mediator to assist the Mediator to perform his duties and discharge his responsibilities as expeditiously as possible.

#### D1.5 COMMUNICATIONS

As provided for in Appendix B, Rules for Conduct of Mediation of "Dispute Resolution Process for Government of Alberta Construction Contracts" the Mediator shall, among other things, manage the proceedings to ensure that each party is given fair and equal opportunity to present its position and interests in a timely and thorough manner. He may caucus privately with either or both parties as he deems appropriate, but shall hold in strict confidence all matters conferred upon during such caucus meetings unless authorized by the initiating party to communicate specific offers of settlement or possibilities material to it, to the other party.

#### D1.6 MEMORANDUM OF UNDERSTANDING

The Mediator shall assist the Owner and the Contractor in the preparation of a Memorandum of Understanding that sets out in clear and sufficient detail any agreement reached between them for settlement of the matters named in the Notice of Dispute or Notice of Challenge. When signed by both parties it becomes final and binding and the Owner and the Contractor agree to carry out all the terms thereof.

#### D1.7 FEES AND DISBURSEMENTS

The Owner and the Contractor shall share equally the cost of mediation. Payment for the Mediator's fees and disbursements shall be made as follows:

- a) for duties performed and responsibilities discharged under this Agreement on a time expended basis at the rate of \$\_\_\_\_\_ per \_\_\_\_\_
- b) all actual and reasonable disbursements which have been paid by him in order to perform his services and discharge his responsibilities under this Agreement.

The Mediator shall submit invoices to both the Owner and the Contractor as is reasonable commensurate with the timing of the requirement of his services. Payment to the Mediator shall be made within thirty (30) days of receipt of an invoice.

#### D1.8 TERMINATION

Mediation proceedings under this Agreement will be terminated:

- a) if either party serves notice that it is not willing to continue, or,
- b) upon breach of the Mediation Agreement, or,



- c) if the Mediator serves notice that in his opinion, it is in the parties interests to do so, or,
- d) at the expiration of twenty-eight (28) days following the serving of the Notice of Dispute, or in the case of a Notice of Challenge at the expiration of twenty-eight (28) days following the total performance of the Work or completion of the Work, or such longer period as the parties and the Mediator may agree, or,
- e) if agreement to settle is reached by the parties.

If for any reason whatsoever excepting in the case of a settlement, mediation is terminated, the Mediator shall forthwith issue to the parties a written Notice of Discontinuance of Mediation.

In the event of termination, the Mediator is entitled to payment and shall be paid as provided for herein.

#### D1.9 CONFIDENTIALITY

The Mediator shall hold in strict confidence and shall not disclose to any person, any documents or information provided to him or to which he gains access in the course of performing his duties or discharging his responsibilities under this Agreement.

#### D1.10 NON-COMPELLABLE

The Mediator is not compellable as a witness, he shall not be subpoenaed to give evidence relating to his role as the Mediator or on any matters or issues arising out of the Contract in any subsequent proceedings including arbitration or the courts.

#### D1.11 OTHER MATTERS

This Agreement is not assignable.

The Mediator may assist the parties in clarifying the terms of the Memorandum of Understanding and shall be entitled to be paid for such assistance.

D1.12 NOTICES

Any notices required to be given under this Agreement shall be given in writing by pre-paid mail or facsimile transmission dispatched to the respective parties as follows:

To: \_\_\_\_\_  
Project Manager

\_\_\_\_\_

Government Department or Agency

\_\_\_\_\_

Address

\_\_\_\_\_

Fax No.

To: \_\_\_\_\_

Contractor

\_\_\_\_\_

Address

\_\_\_\_\_

Fax No.

To: \_\_\_\_\_

Mediator

\_\_\_\_\_

Address

\_\_\_\_\_

Fax No.

The parties may change the information above by written notice to each other and that change shall take effect on receipt.

D1.13 AGREEMENT

This Agreement has been executed in triplicate as shown below, each party taking one copy:

\_\_\_\_\_  
Contractor

\_\_\_\_\_  
Signature of Authorized Officer

\_\_\_\_\_  
Printed Name of Authorized Officer

\_\_\_\_\_  
Witness Signature

\_\_\_\_\_  
Mediator

\_\_\_\_\_  
Signature of Mediator

\_\_\_\_\_  
Printed Name of Mediator

\_\_\_\_\_  
Witness Signature

\_\_\_\_\_  
Owner

\_\_\_\_\_  
Signature of Authorized Representative

\_\_\_\_\_  
Printed Name of Authorized Representative

\_\_\_\_\_  
Witness Signature

# **APPENDIX E**

## **AGREEMENT FORM FOR SERVICES OF AN ARBITRATOR**



# E1. AGREEMENT FORM FOR SERVICES OF AN ARBITRATOR

## Form of Agreement for Services of an Arbitrator

THIS AGREEMENT IS MADE the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_

BETWEEN

(Government Department or Agency's Name)

referred to as "the Owner"

-and-

(Contractor's name)

referred to as "the Contractor"

-and-

(Arbitrator's name)

referred to as "the Arbitrator"

Whereas Contract No. \_\_\_\_\_ for the construction of (Description of Contract Work) \_\_\_\_\_ by the (Government Department or Agency's Name), which has been entered into by the Owner and the Contractor, provides for Arbitration to settle disputes arising out of the Contract;

And whereas the Owner and the Contractor have mutually agreed to appoint a qualified and competent person who will act fairly and impartially in all respects as Arbitrator;

In consideration of the mutual covenants set out in this Agreement, the parties agree as follows:

### E1.1 APPOINTMENT

The Owner and the Contractor hereby appoint (Arbitrator's name) to act as Arbitrator under the Contract, or,

The Owner and the Contractor accept the appointment made by the Alberta Arbitration and Mediation Society of (Arbitrator's name) as Arbitrator under the Contract.

The Arbitrator (Arbitrator's name), hereby accepts or confirms his acceptance of the appointment as Arbitrator under the Contract.

The arbitration shall be conducted under the provisions of the Alberta Arbitration Act, and Appendix C, Rules for Conduct of Arbitration of "Dispute Resolution Process for Government of Alberta Construction Contracts."

A copy of the Contract and Appendix C, Rules for Conduct of Arbitration of "Dispute Resolution Process for Government of Alberta Construction Contracts" have been provided to the Arbitrator and form part of this Agreement.

#### E1.2 INDEPENDENCE AND IMPARTIALITY

The Arbitrator hereby declares that the biographical sketch which he previously provided the Owner and the Contractor as the basis for this appointment is true and accurate in every respect, and furthermore, that there are no circumstances likely to give justifiable doubts as to his independence or impartiality and that he will disclose any such circumstances to the parties if any should arise after the signing of this Agreement and before the arbitration is concluded, and shall disclose in a timely fashion any facts or circumstances which may arise during the term of this Agreement which may give rise to reasonable apprehension of bias by the Owner or the Contractor.

#### E1.3 AVAILABILITY

The Arbitrator confirms that he is conversant with the time requirements within the Contract and Appendix C, Rules For Conduct of Arbitration and that he is immediately available to enter upon the arbitral proceedings and that his services shall remain available until the arbitration has been concluded.

Having been provided with the Notice of Dispute or Notice of Challenge served under the provisions of the Contract, the Arbitrator shall proceed forthwith in a timely and efficient manner.

The Arbitrator shall decide after consultation with the parties whether the proceedings should be followed immediately or should be deferred to the completion of the Work under the Contract.

If the proceedings are to be deferred, the Arbitrator shall give instructions for being kept informed of the progress of the Work.

#### E1.4 ARBITRATOR'S JURISDICTION AND POWERS

The Arbitrator is bound by this Agreement and his jurisdiction and powers are those set out in this Agreement.

The Arbitrator shall confine himself to and is restricted to deciding the matter before him on the basis of the evidence presented to him in accordance with Appendix C, Rules for Conduct of Arbitration of "Dispute Resolution Process for Government of Alberta Construction Contracts" and this Agreement; and shall make his decision in accordance with and by applying the principles of justice, law and equity unless the parties have agreed in writing that the decision shall be based on what is fair or equitable or on some other grounds.

#### E1.5 DECISION

The Arbitrator shall issue a decision in writing that is signed by him and contains his main findings of fact and conclusions.

#### E1.6 COMMUNICATION WITH THE ARBITRATOR

No party or anyone on their behalf shall communicate with the Arbitrator directly or indirectly or in any fashion without including all other parties in any such communication.

#### E1.7 FEES AND DISBURSEMENTS

The Owner and the Contractor shall share equally the cost of arbitration. Payment for the Arbitrator's fees and disbursements shall be made as follows:

- a) fees on a time expended basis in connection with the arbitral proceedings at the rate of \$\_\_\_\_\_ per \_\_\_\_\_
- b) reimbursement of all expenses paid out by the Arbitrator and made necessary by the provision of his services under this Agreement.

#### E1.8 DEPOSITS AGAINST COSTS

The Arbitrator may, from time to time, require each party to deposit by cash or certified cheque an amount towards the Arbitrator's fees and expenses.

If the required deposits are not made, the Arbitrator may order the suspension or termination of the proceedings and in any case may withhold delivery of his Award until payment to him is complete.



If the required deposit is not made by one party, the other party may pay the amount required to allow the proceedings to continue.

E1.9 APPORTIONMENT OF COSTS

The Arbitrator shall award costs in accordance with the Alberta Arbitration Act unless the parties have agreed on the basis for the apportioning of costs.

E1.10 NOTICES

Any notices required to be given under this Agreement shall be given in writing by pre-paid mail or facsimile transmission dispatched to the respective parties as follows:

To: \_\_\_\_\_  
Project Manager

\_\_\_\_\_

Government Department or Agency

\_\_\_\_\_

Address

\_\_\_\_\_

Fax No.

To: \_\_\_\_\_

Contractor

\_\_\_\_\_

Address

\_\_\_\_\_

Fax No.

To: \_\_\_\_\_

Arbitrator

\_\_\_\_\_

Address

\_\_\_\_\_

Fax No.

The parties may change the information above by written notice to each other and that change shall take effect on receipt.

E1.11 AGREEMENT

This Agreement has been executed in triplicate as shown below, each party taking one copy:

\_\_\_\_\_  
Contractor

\_\_\_\_\_  
Signature of Authorized Officer

\_\_\_\_\_  
Printed Name of Authorized Officer

\_\_\_\_\_  
Witness signature

\_\_\_\_\_  
Arbitrator

\_\_\_\_\_  
Signature of Arbitrator

\_\_\_\_\_  
Printed Name of Arbitrator

\_\_\_\_\_  
Witness Signature

\_\_\_\_\_  
Owner

\_\_\_\_\_  
Signature of Authorized Representative

\_\_\_\_\_  
Printed Name of Authorized Representative

\_\_\_\_\_  
Witness Signature

# **APPENDIX F**

## **RULES FOR USE OF A REFEREE**



## **F1. RULES FOR USE OF A REFEREE**

### **F1.1 APPLICATION OF REFEREE SERVICES**

Where the Contract provides for the use of a referee, if any dispute or difference has arisen between the parties, or either party considers that an action of the other is based on a wrong interpretation of the Contract or the rights and obligations thereunder, or if the parties cannot agree on any equitable adjustment called for in the Contract, then either party may within fourteen (14) days of any such dispute, difference or action arising, give notice to the other party that it is referring such dispute to the Referee.

### **F1.2 APPOINTMENT OF REFEREE**

#### **F1.2.1 Referee Agreement**

Within thirty (30) days following the execution of the Contract between the Owner and the Contractor, the parties shall appoint and enter into a written agreement, the basis for which agreement is contained in Appendix G, Agreement Form for Services of a Referee, with a person acceptable to each as the Referee to whom disputes arising between the parties during the course of the Contract may be referred for immediate interim resolution.

#### **F1.2.2 Availability of the Referee**

Immediately following the execution of the agreement for his services, the Referee will make himself available for the purposes of the agreement and will continue to do so until the total performance of the Work or completion of the Contract. In consideration for this, he will be paid fees as laid out in the term of the Agreement, and as may be further provided therein.

#### **F1.2.3 Application to the Society**

In the event that the parties cannot agree upon an acceptable person as the potential Referee within the time allowed herein, either party may request in writing that the Alberta Arbitration and Mediation Society name and appoint the Referee.

#### **F1.2.4 Appointment of the Referee**

The appointment of the Referee will be a joint appointment by the parties and irrevocable by either of them without the consent of the other. The appointment of the Referee will continue until total performance of the Work.

### **F1.2.5 Replacement of the Referee**

If the Referee resigns or dies before the total performance of the Work or completion of the Contract, the parties shall immediately appoint in accordance with the provisions of the foregoing, a replacement Referee, who for all purposes of the Contract, shall from and after such appointment, be the Referee.

### **F1.2.6 Referee Costs**

The parties shall agree with each other and the Referee upon the fees to be payable to the Referee and expenses to be reimbursable to him.

Each party shall bear its own costs and expenses in preparing submissions and making appearances before the Referee.

## **F1.3 NOTICE OF REFERRAL**

A Notice of Referral shall be in writing and addressed to the Referee, and that party shall simultaneously provide a copy of all such material to the other party. The other party shall then immediately transmit to the Referee such written reply in such form as it may choose.

## **F1.4 REFEREES INVESTIGATION**

### **F1.4.1 Time of Commencement**

As soon as he shall have received the other party's reply, but in any event at the expiry of fourteen (14) days from the receipt by him of such references (whether or not he has by then received the reply), the Referee shall immediately proceed to investigate the dispute with a view to its resolution. He shall read any written materials submitted to him by the parties, and shall make all such other investigations as he thinks desirable including visiting the project site or the premises of the parties, and talking to whomever he wishes in connection with the dispute.

### **F1.4.2 Investigation Procedures**

When carrying out these investigations, the Referee shall not be bound by the strict rules of evidence, but shall rely upon his judgement and discretion to establish the background to the matters in dispute.

The Referee shall be entitled to call for any further documentation which he requires from the parties and after consultation with the parties, and with their agreement may appoint any experts, whether technical or legal specialists, he considers necessary to assist him to perform his duties or discharge his responsibilities.

F1.5 TIME AND REFEREES OPINION

The Referee shall conduct his investigations as a matter of urgency. As soon as he has formed a view as to the proper legal application of the Contract to the circumstances giving rise to the dispute, and the proper course of action to be taken for its resolution, he shall call the representatives of the parties together at the project site or such other place as seems to him most appropriate and inform them together verbally of the view which he has formed. Each of them shall there and then be entitled to address him verbally with regard to his view and the Referee shall listen to them for a reasonable period.

F1.6 REFEREES CONCLUSION

After giving due consideration to the verbal exchange during the aforementioned meeting with the parties, the Referee shall immediately deliver to the parties duplicate copies of his written conclusion, which shall specify the Referees' conclusion as to the proper application of the terms of the Contract to the dispute, or the proper equitable adjustment, his reasons for such conclusions and the effect of such conclusion on the execution of the Contract and the Work from then onwards. In making any such conclusions, the Referee shall be deemed to be an expert and not an arbitrator.

Subject to the provisions of subsection F1.7, the parties shall be irrevocably bound by the conclusion of the Referee and shall, in carrying out the balance of the Contract, give effect to the Referees' conclusion.

F1.7 NOTICE OF CHALLENGE

Subject to complying fully with the conclusions of the Referee, on any such reference either party may, within fourteen (14) days of receiving such conclusion, serve written Notice of Challenge to the other party of intention to challenge such conclusion, and the matter shall be dealt with in the manner set out in Appendix A, Mandatory Dispute Resolution Process.

F1.8 USE OF REFEREE'S CONCLUSION IN FUTURE PROCEEDINGS

At any arbitration or other proceeding involving disputes or differences in respect of which the Referee has given a conclusion as to the proper interpretation of the Contract and the rights of the parties thereunder, the Referee may be called to produce his conclusion and to explain his reasoning to the Arbitrator or court. Either party may question the Referee during the arbitration or other proceeding if any. Neither the Arbitrator nor the court shall be obliged to accept the Referee's conclusion as correct and the judgement or award shall reflect solely the Arbitrator's or the court's decision on the matters in dispute.



F1.9 CONSIDERATION FOR USE OF REFEREE

In consideration of the parties agreeing herein to abide by the conclusions of the Referee until the end of the Contract, neither party shall take advantage of nor assert any statute of limitations or any term of the Contract which might bar a claim arising from a conclusion of the Referee at the end of the Contract, provided that an arbitration or court proceeding is commenced within two (2) years of the termination of the Contract.

# **APPENDIX G**

## **AGREEMENT FORM FOR SERVICES OF A REFEREE**



# G1. AGREEMENT FORM FOR SERVICES OF A REFEREE

Form of Agreement  
for  
Services of a Referee

THIS AGREEMENT IS MADE the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_

BETWEEN

(Government Department or Agency's Name)

referred to as "the Owner"

-and-

(Contractor's name)

referred to as "the Contractor"

-and-

(Referee's name)

referred to as "the Referee"

Whereas Contract No. \_\_\_\_\_ for the construction of **(Description of Contract Work)** \_\_\_\_\_ by the **(Government Department or Agency's Name)**, which has been entered into by the Owner and the Contractor, requires that they jointly retain the services of a qualified and competent person to perform the duties of the Referee under the Contract;

And whereas the Owner and the Contractor require that the person appointed as Referee shall act fairly and impartially in all respects and to expeditiously dispose, as provided for in the Contract, of any disputes between the Owner and the Contractor;

In consideration of the mutual covenants set out in this Agreement, the parties agree as follows:

## G1.1 APPOINTMENT

The Owner and the Contractor hereby name and appoint **(Referee's name)** to act personally as the Referee under the Contract, a copy of which has been provided to the Referee, and which Contract forms part of this Agreement.

The Referee, **(Referee's name)**, hereby accepts the appointment as Referee.

This appointment of the Referee will continue in force until total performance of the Work and is irrevocable by either the Owner or the Contractor without the written consent of the other.

#### G1.2 BIAS

The Referee confirms that he has disclosed, and shall disclose in a timely fashion in the future, any facts or circumstances of which he may become aware, which may give rise to a reasonable apprehension of bias by the Owner or the Contractor.

#### G1.3 AVAILABILITY

The Referee confirms that he is conversant with the time requirements within the Contract and that he shall be immediately available to perform his services under this Agreement when required and furthermore that his services shall remain available and impartial, subject to subsection G1.2, throughout the term of this Agreement.

#### G1.4 RESPONSIBILITIES

The Referee shall perform all his duties, discharge all his responsibilities and comply with all the applicable requirements which are specified under this Agreement and the Contract.

The Referee shall give his full and immediate attention to the performance of his duties and discharging of his responsibilities as, when, and to the extent required under this Agreement and the Contract.

Upon receiving a Notice of Referral as provided for in the Contract, he shall proceed forthwith and arrange such meetings as are required in Appendix F, Rules for the Use of a Referee of "Dispute Resolution Process for Government of Alberta Construction Contracts", and shall conduct his investigations and proceedings as matters of urgency, and in any event within the times required under this Agreement and the Contract.

#### G1.5 COOPERATION

The Owner and the Contractor and their representatives shall cooperate with each other and the Referee to assist the Referee to perform his duties and discharge his responsibilities as expeditiously as possible.

#### G1.6 EVIDENCE

The Referee shall not be bound by the strict rules of evidence, but shall rely upon his own judgement and discretion, so as to establish the background and determine his conclusion respecting the matters in dispute.

The Referee shall conduct his investigations in any manner he considers to be most advantageous to the resolution of the dispute, and he is not bound by any specific rules of procedure and in particular, may talk to anyone with or without any representative of either party being present.

#### G1.7 EXPERTS

Subject to prior consultation with the Owner and the Contractor, and with their agreement, the Referee may appoint any experts, whether technical or legal specialists, he considers necessary to assist him to perform his duties or discharge his responsibilities.

The Referee shall impose a confidentiality obligation on all such experts which is identical to that imposed on him under this Agreement.

The Referee shall not delegate any of his responsibilities to an expert or any other person.

#### G1.8 TIME

The appointment of an expert under subsection G1.7 on any matter does not excuse the Referee from making and delivering his conclusion on any particular matter within the time required under the Contract, if any.

The Owner and the Contractor or their representatives may agree to extend the time or times specified in the Contract, if any, on any particular matter under consideration by the Referee.

#### G1.9 SITE PRESENCE

The Referee shall visit the site of the Work as required by the Contract or whenever he deems it advisable.

Where required by the Owner and the Contractor, the Referee shall establish a site office, which shall be separate and apart from any site office of the Owner or the Contractor.

## G1.10 FEES AND DISBURSEMENTS

### G1.10.1 **General**

The Owner and the Contractor shall share equally the cost of the Referee. Payment for the Referee's fees and disbursements shall be made as follows:

- a) for duties performed and responsibilities discharged under this Agreement, on a time expended basis at the rate of \$\_\_\_\_\_ per \_\_\_\_\_
- b) all actual and reasonable disbursements which have been paid by him in order to perform his services and discharge his responsibilities including the fees and expenses to any experts appointed in accordance with this Agreement.

### G1.10.2 **Submission of Invoices**

The Referee may submit invoices monthly to both the Owner and the Contractor or as is commensurate with the timing of the requirement of his services. Payment shall be made to the Referee within thirty (30) days of receipt of an invoice.

## G1.11 CONFIDENTIALITY

The Referee shall hold in strict confidence and shall not copy or disclose to any person, other than an expert retained in accordance with the terms of this Agreement, any documents or information provided him or to which he gains access in the course of performing his duties or discharging his responsibilities under this Agreement, without the prior written consent of both the Owner and the Contractor unless required to do so by a court or arbitrator after the completion of the Work of the Contract.

## G1.12 RIGHTS NOT ASSIGNABLE

The appointment of the Referee and any rights arising out of this Agreement are personal to the Referee and may not be assigned.

G1.13 NOTICES

Any notices required to be given under this Agreement shall be given in writing by pre-paid mail or facsimile transmission dispatched to the respective parties as follows:

To: \_\_\_\_\_  
Project Manager  
\_\_\_\_\_  
Government Department or Agency  
\_\_\_\_\_  
Address  
\_\_\_\_\_  
Fax No.

To: \_\_\_\_\_  
Contractor  
\_\_\_\_\_  
Address  
\_\_\_\_\_  
Fax No.

To: \_\_\_\_\_  
Referee  
\_\_\_\_\_  
Address  
\_\_\_\_\_  
Fax No.

The parties may change the information above by written notice to each other and that change shall take effect on receipt.



G1.14 AGREEMENT

This Agreement has been executed in triplicate as shown below, each party taking one copy:

\_\_\_\_\_  
Contractor

\_\_\_\_\_  
Signature of Authorized Officer

\_\_\_\_\_  
Printed Name of Authorized Officer

\_\_\_\_\_  
Witness Signature

\_\_\_\_\_  
Referee

\_\_\_\_\_  
Signature of Referee

\_\_\_\_\_  
Printed Name of Referee

\_\_\_\_\_  
Witness Signature

\_\_\_\_\_  
Owner

\_\_\_\_\_  
Signature of Authorized Representative

\_\_\_\_\_  
Printed Name of Authorized Representative

\_\_\_\_\_  
Witness Signature