



**Clackmannanshire  
Council**

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**Clackmannanshire Council**

**ICT Services Agreement**

**Schedule Part 4**

**DISPUTE RESOLUTION PROCEDURE**

## **Dispute Resolution Procedure**

### **DEFINITIONS**

<b>"Case Summary"</b>	a concise summary of a party's case in a Dispute subjected to mediation;
<b>"Dispute Resolution Timetable"</b>	the Standard Dispute Timetable or the Expedited Dispute Timetable;
<b>"Exception"</b>	a deviation of project tolerances in accordance with PRINCE2 methodology in respect of the Agreement or in the supply of the Services;
<b>"Expedited Dispute Timetable"</b>	the reduced timetable for the resolution of Disputes set out in the Appendix to this schedule part (Dispute Resolution Procedure) to be used in accordance with the provisions of paragraph 1.6 of this schedule part (Dispute Resolution Timetable);
<b>"Expert"</b>	the person appointed by the parties in accordance with paragraph 3.2 of this schedule part 4 (Dispute Resolution Procedure);
<b>"Notice of Dispute"</b>	a written notice served by one party on the other stating that the party serving the notice believes that there is a Dispute;
<b>"Standard Dispute Timetable"</b>	the standard timetable for the resolution of Disputes set out in Appendix to this schedule part 4 (Dispute Resolution Procedure);

## 1. INTRODUCTION

- 1.1 The Dispute Resolution Procedure shall start with the service of a Notice of Dispute.
- 1.2 The Notice of Dispute shall:
  - 1.2.1 set out the material particulars of the Dispute;
  - 1.2.2 set out the reasons why the party serving the Notice of Dispute believes that the Dispute has arisen;
  - 1.2.3 elect (subject to the provisions of paragraph 1.6 below) whether the Dispute should be dealt with under the Standard Dispute Timetable or the Expedited Dispute Timetable; and
  - 1.2.4 if the party serving the Notice of Dispute believes that the Dispute should be dealt with under the Expedited Dispute Timetable, explain the reason why.
- 1.3 Unless agreed otherwise, the parties shall continue to comply with their respective obligations under the Agreement regardless of the nature of the Dispute and notwithstanding the referral of the Dispute to the Dispute Resolution Procedure.
- 1.4 Subject to paragraph 2.5, the parties shall seek to resolve Disputes firstly by commercial negotiation (as prescribed in paragraph 2 below), and lastly by recourse to arbitration (as prescribed in paragraph 4) or litigation (in accordance with clause 59 (Governing Law and Jurisdiction)). Specific issues may be referred to Expert Determination (as prescribed in paragraph 3 below) where appropriate.
- 1.5 The time periods set out in the Dispute Resolution Timetable shall apply to all Disputes unless the parties agree that an alternative timetable should apply in respect of a specific Dispute.
- 1.6 The parties may only agree to use the Expedited Dispute Timetable in exceptional circumstances where the use of the Standard Dispute Timetable would be unreasonable, including (by way of example) where one party would

be materially disadvantaged by a delay in resolving the Dispute. If the parties are unable to reach agreement on the use of the Expedited Dispute Timetable within five Working Days of the issue of the Notice of Dispute then the use of this timetable shall be at the sole discretion of the Council.

- 1.7 If at any point it becomes clear that an applicable deadline set out in the Dispute Resolution Timetable cannot be met or has passed, the parties may agree in writing to extend the deadline. Any agreed extension shall have the effect of delaying start of the subsequent stages set out in the Dispute Resolution Timetable by the period agreed in the extension.

## 2. COMMERCIAL NEGOTIATIONS

- 2.1 Subject to paragraph 2.5, the parties shall use all reasonable endeavours to settle any Dispute between them in good faith and in accordance with the procedure set out in this paragraph 2.
- 2.2 In the first instance, the Council and the Contractor will make reasonable endeavours to resolve all Disputes as soon as possible, at the lowest level in the project structure in which they can best be managed. Where either party considers that a Dispute cannot be resolved within acceptable timescales the dissatisfied party may escalate the Dispute to the next level in the partnering structure in accordance with the following escalation process ("**Escalation Process**"), provided that the parties shall not repeat this process in respect of a Dispute relating to an Exception that has been escalated already in accordance with this process:

<b>Escalation Process</b>
Council and Contractor Representative; then
Chief Executive of the Council and Director level of the Contractor

- 2.3 The speed of escalation and resolution of Disputes during this commercial negotiations stage will be judged by reference to the seriousness and operational impact of the issue and should be agreed between the parties (but in default of agreement at the discretion of the Council). The timescale

for resolving Disputes by commercial negotiations shall be as set out in the applicable section of the Dispute Resolution Timetable.

- 2.4 If the parties have not settled the Dispute in accordance with the Escalation Process and the time period provided in paragraph 0 then the parties shall refer the matter to either (i) expert determination in accordance with paragraph **Error! Reference source not found.** of this schedule part 4 or (ii) arbitration in accordance with paragraph 4 of this schedule part 4, but only with the express written consent of the Council as set out in paragraph 4.
- 2.5 If either party is of the reasonable opinion that the resolution of a Dispute by commercial negotiation, or the continuance of commercial negotiations, will not result in an appropriate solution or that the parties have already held discussions of a nature and intent (or otherwise were conducted in the spirit) that would equate to the conduct of commercial negotiations in accordance with this paragraph 2, that party shall serve a written notice to that effect and the parties shall proceed in accordance with clause 2.4 above

### **3. EXPERT DETERMINATION**

- 3.1 If the Agreement expressly requires a Dispute to be referred to expert determination or the Dispute relates to any aspect of the technology underlying the provision of the Services or otherwise relates to an ICT technical, financial technical or other technical nature as the parties agree and the dispute has not been resolved using the process set out in clause 2 then either party may request (which request will not be unreasonably withheld or delayed) by written notice to the other that the Dispute is referred to an Expert for determination.
- 3.2 The Expert shall be appointed by agreement in writing between the parties, but in the event of a failure to agree within 10 Working Days, or if the person appointed is unable or unwilling to act, the Expert shall be appointed on the instructions of the president of the Law Society of Scotland (or any other association that the parties reasonably understand to have replaced it).

- 3.3 The Expert shall act on the following basis:
- 3.3.1 he/she shall act as an expert and not as an arbitrator and shall act fairly and impartially;
  - 3.3.2 the Expert's determination shall (in the absence of a material failure to follow the agreed procedures) be final and binding on the parties;
  - 3.3.3 the Expert shall decide the procedure to be followed in the determination and shall be requested to make his/her determination within 30 Working Days of his appointment or as soon as reasonably practicable thereafter and the parties shall assist and provide the documentation that the Expert requires for the purpose of the determination;
  - 3.3.4 any amount payable by one party to another as a result of the Expert's determination shall be due and payable within 20 Working Days of the Expert's determination being notified to the parties;
  - 3.3.5 the process shall be conducted in private and shall be confidential;  
and
  - 3.3.6 the Expert shall determine how and by whom the costs of the determination, including his/her fees and expenses, are to be paid.

#### **4. ARBITRATION**

- 4.1 The parties may at any time before court proceedings are commenced agree that the Dispute should be referred to arbitration in accordance with the provisions of paragraph 4.4.
- 4.2 Before the Contractor may commence any court proceedings it shall serve written notice on the Council of its intention and the Council shall have 15 Working Days from receipt of the Contractor's notice in which to reply requesting the Dispute to be referred to arbitration in accordance with the provisions in paragraph 4.4.

4.3 In its notice to the Council pursuant to paragraph 4.2, the Contractor may request that the Dispute is referred to arbitration, to which the Council may, in its sole discretion consent.

4.4 If a Dispute is referred to arbitration the parties shall comply with the following provisions:

4.4.1 the arbitration shall be governed by the provisions of the Arbitration (Scotland) Act 2010 and all arbitrations hereunder shall be conducted under the terms of the Chartered Institute of Arbitrators Scottish Short Form Arbitration Rules 2012 (the "2012 Rules"), with the following amendments

Article 1.6 - Article 1.6 is deleted and replaced by the following term:

The Act also includes "default rules" which can be modified or dis-applied by the agreement of the parties. Default rules 1,2,5,6,40,41,53 and 69 shall not apply in their entirety to both parties. Default rules 22, 41 and 69 shall not apply in their entirety except where any respect of any dispute or difference has been raised by the Employer only, and references within the Default Rules shall be read accordingly. Except as set out herein, no other default rule is modified or dis-applied by these rules.

Article 1.8 - The figure £25,000 where it appears in the first and second sentence shall be deleted.

Article 3.4 - The word "parties" where it appears shall be deleted and replaced with "Contractor". At the end of article 3.4 the following wording shall be inserted:

"The Arbitrator shall have no power to request a reasonable deposit from the Employer in respect of his fees."

Article 6.1 - Article 6.1(ii) shall be deleted and replaced as follows:

"the parties' legal and other expenses, subject to an overall limit of 10% of the sum claimed and not exceeding 10% of the Charges."

Article 7.1 - At the end of Article 7.1, the following term shall be inserted:

"The Parties agree that the manner that interest is to be calculated in should be simple interest and should not exceed the Interest Rate".

## **2. Notice of reference to arbitration**

Schedule Part 1, clause 2 shall be amended as follows:

The words "and in accordance with the provisions of the 2012 Rules" are to be inserted between "8" and "either" on the first line of the said clause 2.

## **3. Powers of arbitrator**

Schedule Part 1, clause 3 shall be amended as follows:

The words ", the 2012 Rules" are to be inserted between the words "2010" and "and" on the first line of the said clause 3 and the words "dis-application in whole or any part of any of the default rules" shall be deleted and replaced with the following:

"the dis-application of the default rules as set out in the 2012 Rules as amended in accordance with Schedule 1, clause 1".

4.4.2 the arbitration proceedings shall take place in Alloa, failing which in either Glasgow or Edinburgh

## **5. URGENT RELIEF**

Nothing in this schedule part 4 shall prevent either party from seeking interim orders at any time.

## **6. SUB-CONTRACTORS**

6.1 The Contractor shall procure that any Sub-contractor involved in Services which are the subject of a Dispute shall, at the request of either party, provide any assistance required in order to resolve the relevant Dispute, including the provision of any information, data or documentation and the attendance at any meetings or hearings.

6.2 The Council shall not be responsible for any costs incurred by any Sub-contractor participating in the resolution of any Dispute.

## APPENDIX

### Dispute Resolution Timetable

Disputes will be escalated in accordance with the following timetable:

<b>Stage</b>	<b>Standard Dispute Timetable</b>	<b>Expedited Dispute Timetable</b>
Time permitted for resolution of Dispute by commercial negotiations pursuant to paragraph 2 of this schedule from the date of the Notice of Dispute	three months	one month