

# CEDR Model Project Mediation Protocol and Agreement



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## **Guidance notes to CEDR Model Project Mediation Protocol and Agreement**

*[These notes do not form part of the CEDR Model Project Mediation Protocol and Agreement]*

### **Introduction**

The aim of project mediation is to help support the successful delivery of a project by identifying and addressing problems before they turn into disputes about payment and delay.

Project mediation enables conflict management and dispute resolution to be integrated into the contract as part of a collaborative contracting approach. It can be used for almost any project but may be particularly appropriate for:

- PPP or long term contracts
- technically complex contracts
- contracts involving many contractors/sub-contractors/suppliers
- contracts sensitive to a history of poor contract performance and/or adversarial relationships.

The benefits of project mediation are that it:

- offers a robust conflict management approach with a focus on dispute prevention
- shows that parties are taking collaborative working seriously
- is more flexible and cost effective than other conflict management mechanisms adopted at the outset of a project (such as a dispute resolution board)
- can be budgeted for in advance.

As project mediation is integrated into the contract, it will be included as part of the contract procurement documentation. However, if it has not been included, the parties can still adopt project mediation.

### **Documentation**

The CEDR Model Project Mediation Agreement, which has been kept short and simple, incorporates the Model Project Mediation Protocol (“the Model Protocol”). The Project Mediation Agreement (“the Agreement”) can vary the Model Protocol. The variations, if any, can be set out in the body of the Agreement or the Project Mediation Agreement can state the variations made in manuscript (or otherwise) on the incorporated Model Protocol.

The Model Protocol sets out the terms and conditions under which the contracting body and contractor (referred to as “the Core Parties”) and any identified consultants, sub-contractors or specialist suppliers

(referred to as “Key Suppliers”) and the Project Mediators will follow. It provides a framework in which the Project Mediators can function to aid the early identification of actual or potential differences, disputes and claims and facilitate their resolution. The Model Protocol also refers to the CEDR Model Mediation Procedure in the event that the parties require a Formal Mediation and includes, as Appendix 1, the Key Supplier Joining Agreement used to join in a new Key Supplier to the Project Mediation Agreement.

### **Appointment of Project Mediators**

Once the Core Parties have decided that they want to adopt project mediation for their project, CEDR Solve will assist them in identifying the Project Mediators and preparing the documentation.

CEDR Solve will appoint two trained Project Mediators who will be chosen on the basis of the mix of skills and professional backgrounds the parties think will be most appropriate for the project (for example, a construction lawyer and an architect). On smaller projects, it may be more appropriate to have a single Project Mediator.

CEDR Solve will charge a single appointment fee for both Project Mediators.

### **Key components and cost basis**

Project mediation under CEDR Solve consists of three components:

- (1) Access to two mediators for the duration of the project - At regular intervals one or both of the mediators will attend the project site to discuss progress and identify with the parties any actual or potential communication problems. Normally, the visit will coincide with the regular project or site meetings. The mediators may have discussions with the Parties or Key Supplier(s) together or separately to assist in the prevention of disputes or clarify the information requirements they need to address in a dispute prior to settlement discussions. The mediators also receive core documentation and review it during the course of the works.

Outside the site visits, it is for the parties to keep the mediators informed about any issues that might affect contract performance. The parties may call one or other of the mediators at any time to discuss project concerns and seek guidance.

*Cost basis:* monthly retainer and hourly rate for each Project Mediator. A daily rate is also agreed should the need arise, for example, for whole day site visits or a formal mediation [See (3) below]

- (2) Project mediation workshop - Prior to contract commencement, CEDR Solve will arrange a half-day project mediation workshop attended by all project decision-makers including:

- project managers/leaders, consultants and designers
- sub contractors/suppliers

- government agencies (if involved)
- any other organisations/people upon whom the project will impact and whom the project decision-makers wish to invite.

The mediators will set out the format of the workshop, which shall generally include:

- the roles and responsibilities of the project members
- understanding how others function
- project mediation review: principles, process and the role of the Project Mediators
- identifying communication lines
- identifying project pressure points

*Cost basis:* 'one off' fee.

- (3) Formal mediation (if required) - Where the parties are unable to resolve their conflict through discussions and interventions by the Project Mediators, the parties may enter into a formal mediation conducted by the Project Mediators using the CEDR Model Mediation Procedure.

*cost basis:* daily rate and pro rata hourly rate for additional hours related to the formal mediation.

All fees are shared equally by the Core Parties.

## CEDR Model Project Mediation Protocol

### Definitions

<b>Core Parties</b>	The Contracting Body and the Contractor
<b>Dispute</b>	Any actual or potential claim, difference or dispute
<b>Formal Mediation</b>	A mediation conducted under the CEDR Model Mediation Procedure
<b>Key Supplier(s)</b>	Any sub-contractor, consultant or specialist supplier entering into the CEDR Model Project Mediation Agreement
<b>Lead Negotiator</b>	The representative of the Contracting Body, Contractor or Key Supplier(s) who has full authority to settle any dispute
<b>Parties</b>	Core Parties and Key Supplier(s)
<b>Project Mediators</b>	The Project Mediator or Project Mediators appointed by the Core Parties in accordance with paragraphs 2-7 inclusive of this Model Project Mediation Protocol.

### Project Mediation Agreement

- 1 The Core Parties, Key Suppliers, the Project Mediator(s) and CEDR Solve will enter into an agreement based on the CEDR Model Project Mediation Protocol (“the Model Protocol”). The Model Protocol will be incorporated into, form part of, and may be varied by, the Project Mediation Agreement.

### The Project Mediators

- 2 The Project Mediators shall comprise either one or two mediators.
- 3 The Core Parties in consultation with the Key Supplier(s) shall, unless the Project Mediators have already been nominated, nominate either one or two Project Mediators by agreement within [21] days of the date on the CEDR Model Project Mediation Agreement.
- 4 The terms of remuneration of each Project Mediator shall be mutually agreed by the Core Parties when agreeing the terms of each Project Mediator’s appointment. The Core Parties shall be jointly and severally responsible for paying one half of each Project Mediator’s remuneration.
- 5 The appointment of an individual Project Mediator may be terminated by the Core Parties acting together but shall not be terminated by any Core Party acting alone. The appointment of a Project Mediator shall terminate if:
  - a Project Mediator declines to act or is unable to act due to death, disability or resignation;
  - the last payment is made between the Core Parties in respect of the Project; or at such other time as the Core Parties may mutually agree.

- 6 If a Project Mediator's appointment is terminated the Core Parties may, in consultation with the Key Supplier(s), appoint an appropriately qualified person or persons to replace any of the Project Mediators. Any Core Party may, on 7 days' written notice to the other, request CEDR Solve to nominate a Project Mediator in order to fill a vacancy in the Project Mediators.
- 7 If there is any issue about the conduct of the Mediation (including as to the nomination of the Project Mediators) upon which the parties cannot agree within a reasonable time, CEDR Solve will, at the request of any party, decide the issue for the parties, having consulted with them.

### **Referring a dispute**

- 8 Any Core Party and any Key Supplier(s) may at any time refer any dispute to the Project Mediators who shall proceed in accordance with this Model Protocol.
- 9 The referral of any dispute under this Model Protocol shall not affect any Parties' right to refer at any time a dispute to any other applicable dispute resolution process arising under the agreement between the applicable Parties, including but not limited to adjudication, arbitration or court proceedings as appropriate.

### **Conduct of Project Mediation and the powers of the Project Mediators**

- 10 At the commencement of the project the Project Mediators shall, with the assistance of the Parties and CEDR Solve, organise a project mediation workshop to provide an overview of the project mediation process to representatives of the Core Parties and Key Supplier(s).
- 11 The Project Mediators shall visit the Project site at intervals of not more than [56] days, and may visit more frequently during key phases of the project at the request of the Core Parties. In the absence of agreement between the Project Mediators and the Core Parties, the Project Mediators shall determine the frequency of their site visits.
- 12 The time and agenda of each site visit shall be agreed between the Core Parties and the Project Mediators. In the absence of an agreement, the Project Mediators shall decide the timing and agenda.
- 13 The purpose of the Project Mediators visiting the Project is to enable the Project Mediators to become and remain acquainted with the nature and progress of the works at the Project and of any dispute.
- 14 Project visits shall be attended by the Project Mediators, the Core Parties and the Key Supplier(s). The Project visits shall be co-ordinated by the Contracting Body in co-operation with the Contractor. The Contracting Body shall ensure that adequate and appropriate meeting facilities are available at the Project for the visits.

- 15 The Core Parties and Key Supplier(s) shall furnish each Project Mediator with one copy of all documents requested by the Project Mediators. This may include any documentation that is pertinent to the works or the performance of the contract between the Core Parties in respect of the Project.
- 16 The Project Mediators may discuss matters in private at any time in order to consider the nature and progress of the Project or any matter relating to a dispute, whether referred to the Project Mediators or not.
- 17 Any and all written communications between one party and the Project Mediators shall be copied to the Core Parties unless the party sending the written communication states in writing on the communication that it is to be seen only by the Project Mediators.
- 18 The Project Mediators may adopt any reasonable procedure to progress the resolution of any dispute referred to them by any of the Parties. This may include meeting with any of the parties together or meeting any party privately. The Project Mediators will attempt to agree the procedure, timetable and agenda for taking the matter forward, including the exchange of information, telephone discussions, meetings or site visits and in the absence of prompt agreement by the parties the Project Mediators shall decide the procedure.
- 19 The Project Mediators may request short summaries or position papers from any party to be provided before a meeting.
- 20 The parties shall:
  - attend all discussions, meetings and correspondence in good faith and trust with the aim of reaching an agreement for the resolution of any dispute; and
  - promptly provide within a timetable established by the Project Mediators such short summaries, position papers further explanation or clarification and documentation as may be requested by the Project Mediators.
- 21 The Project Mediators shall have the power to adopt an inquisitorial procedure in respect of the facts of any dispute. The Project Mediators may in their absolute discretion decide who shall attend any particular meeting. Amongst other things the Project Mediators may:
  - establish the procedures to be used during the course of the Project in attempting to facilitate the resolution of any dispute;
  - conduct any site visits, meetings or discussions as they think fit;
  - take the initiative in ascertaining the facts relating to any dispute;
  - make use of their own specialist knowledge, if any;
  - request any party to supply the Project Mediators with such documents as the Project Mediators may reasonably require in connection with any dispute;
  - question any of the parties and their representatives, agents, or employees; and



- give other directions that they consider reasonably necessary in an attempt to resolve any dispute.
- 22 The resolution of any dispute may include a settlement agreement reached between the applicable parties or the instigation by the applicable parties of any new or revised procedure in respect of the Project.
- 23 The Project Mediators may, during meetings, make notes for their own use to remind them of the content of discussions.
- 24 Where a dispute has not been capable of resolution through interventions by the Project Mediators, then the parties may agree to a Formal Mediation conducted by the Project Mediators. In that event, the CEDR Model Mediation Procedure, current at the time the parties agree to a Formal Mediation, will apply.

### **Lead Negotiators**

- 25 A Lead Negotiator may be replaced on [21] days' written notice to the Project Mediators, CEDR Solve, the Core Parties and Key Supplier(s) current at the date of issue of the written notice.

### **Key Supplier(s)**

- 26 In the event that a Key Supplier is replaced or a new Key Supplier is appointed the Core Parties shall require the new Key Supplier to participate in the project mediation process and to sign the Key Supplier Joining Agreement set out in Appendix 1 of this Model Protocol.

### **Termination**

- 27 This Project Mediation Agreement may be terminated by the Core Parties acting together, CEDR Solve or the Project Mediators acting together giving CEDR Solve 28 days written notice of termination. This Project Mediation Agreement shall then terminate on the expiry of the period of 28 days from the date of issue of the written notice.
- 28 In the event of insolvency by any of the Core Parties, CEDR Solve, or all of the Project Mediators, this Project Mediation Agreement shall immediately terminate.

### **Stay of proceedings**

- 29 Any litigation or arbitration or adjudication in relation to any dispute may be commenced or continued notwithstanding the project mediation process or Formal Mediation referred to in paragraph 24 unless the applicable parties agree otherwise or a court so orders.

### **Confidentiality**

- 30 Every person involved in the project mediation process or Formal Mediation referred to in paragraph 24 will keep confidential and not use for any collateral or ulterior purpose any information (whether given orally, in writing or otherwise) arising out of, or in connection with, the project mediation process or Formal Mediation, including the fact of any settlement and its terms, save for the fact that project mediation or a Formal Mediation is to take place or has taken place.
- 31 All information (whether oral, in writing or otherwise) arising out of, or in connection with, the project mediation process or Formal Mediation referred to in paragraph 24 will be without prejudice, privileged and not admissible as evidence or disclosable in any current or subsequent litigation, arbitration, adjudication or other proceedings whatsoever. This does not apply to any information, which would in any event have been admissible or disclosable in any such proceedings.
- 32 The Project Mediators will not disclose to any other party any information given to him by a party in confidence without the consent of that party.
- 33 Paragraphs 30-32 inclusive shall not apply if, and to the extent that:
- all parties consent to the disclosure; or
  - the Project Mediators are required under the general law to make disclosure; or
  - the Project Mediators reasonably consider that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
  - the Project Mediators reasonably consider that there is a serious risk of their being subject to criminal proceedings unless the information in question is disclosed.
- 34 None of the parties to the CEDR Model Project Mediation Agreement will call the Project Mediators or CEDR Solve (or any employee, consultant, officer or representative of CEDR Solve) as a witness, consultant, arbitrator or expert in any litigation, arbitration, adjudication or other proceedings whatsoever arising from, or in connection with, the matters in issue in the project mediation process or a Formal Mediation. The Project Mediators and CEDR Solve will not voluntarily act in any such capacity without the written agreement of all the parties.

### **Assignment**

- 35 No party to the Project Mediation Agreement shall assign the Project Mediation Agreement or any right under it.

### **Contracts (Rights of Third Parties) Act 1999**

- 36 Any party that is not expressly a party to the Project Mediation Agreement shall not receive any rights or benefits under or in connection with the Project Mediation Agreement pursuant to the Contracts (Rights of Third Parties) Act 1999.

### **Exclusion of liability**

- 37 Neither the Project Mediators nor CEDR Solve shall be liable to the Core Parties or Key Supplier(s) for any act or omission in connection with the services provided by them in, or in relation to, the project mediation process or any Formal Mediation referred to in paragraph 24, unless the act or omission is shown to have been in bad faith.

## Appendix 1–Key Supplier Joining Agreement

### Date

### Parties

\_\_\_\_\_ (“ the Contracting Body”)

\_\_\_\_\_ (“the Contractor”)

(jointly ”the Core Parties”) and

\_\_\_\_\_ (“the Key Supplier”)

*Add full names, company registration number and registered office*

### Project (“the Project”)

*Add brief description of project including commencement and planned completion date*

### ***Joining Agreement***

1. The Core Parties and the Key Supplier have agreed that the Key Supplier shall from the date of this Joining Agreement assume all of the rights and obligations of a Key Supplier pursuant to the CEDR Model Project Mediation Agreement dated [insert] and shall become a party to that Agreement in respect of the Project.
2. The wording and expressions in this Joining Agreement shall have the same meaning as in the CEDR Model Project Mediation Agreement.
3. The law and language of this Joining Agreement shall be the same as the law and language of the CEDR Model Project Mediation Agreement.
4. Any party that is not expressly a party to this Joining Agreement or the CEDR Model Project Mediation Agreement shall not receive any rights or benefits under or in connection with this Joining Agreement or the CEDR Model Project Mediation Agreement pursuant to the Contracts (Rights of Third Parties) Act 1999.

**Signed**

On behalf of the Contracting Body \_\_\_\_\_ Date \_\_\_\_\_

On behalf of the Contractor \_\_\_\_\_ Date \_\_\_\_\_

On behalf of [add name of Key Supplier(s)] \_\_\_\_\_ Date \_\_\_\_\_

## CEDR Model Project Mediation Agreement

### Parties

\_\_\_\_\_ (“the Contracting Body”)

\_\_\_\_\_ (“the Contractor”)

(jointly “the Core Parties”) *Add full names, company registration number and registered office*

\_\_\_\_\_ (“Key Supplier(s)”)

*Add full names, company registration number and registered office*

\_\_\_\_\_ (“the Project Mediator(s)”)

Centre for Effective Dispute Resolution Limited, 70 Fleet Street, London EC4Y 1EU (“CEDR Solve”)

### Project (“the Project”)

*Add brief description of project, including commencement and planned completion date*

### Participation in Project Mediation

- 1 The Core Parties and Key Supplier(s) agree to follow the CEDR Model Project Mediation Protocol (“the Model Protocol”) in relation to the conduct of the Project Mediation process. The Model Protocol [as varied by this Project Mediation Agreement] is incorporated into, and forms part of, this Project Mediation Agreement.

### Participants

- 2 The Contracting Body, the Contractor and Key Supplier(s) will each identify a Lead Negotiator in writing within [21] days of the date on this Project Mediation Agreement. The Lead Negotiator shall have full authority to settle any dispute.
- 3 Each person in signing this Project Mediation Agreement is deemed to be agreeing to the provisions of this Project Mediation Agreement on behalf of the organisation he/she represents.

## Confidentiality

- 4 The Core Parties, Key Suppliers(s), the Project Mediator(s) and CEDR Solve will be bound by the confidentiality provisions of the Model Protocol.

## Project Mediation fees, expenses and costs

- 5 CEDR Solve's fees will be borne equally by the Core Parties and shall comprise:
- a workshop fee;
  - a monthly retainer fee for the Project Mediator(s) with disbursements;
  - an hourly rate with disbursements in respect of each Project Mediator for reasonable time spent over and above the time allowed by each Project Mediator in respect of the monthly retainer;
  - a fee for any Formal Mediation conducted in accordance with the CEDR Model Mediation Procedure referred to in paragraph 24 of the Model Protocol.
- 6 The Core Parties, CEDR Solve and the Project Mediators shall agree the point on the Project at which any reduced retainer fee shall apply.

### 6a *[Optional/additional wording where the contract is a construction contract]*

From the first day of the month following the month in which the certificate or statement of practical completion in respect of the Project is issued the retainer fee shall be reduced by 50%. The reduced retainer fee is payable until the last day of the calendar month in which the last payment is made between the Core Parties or termination of this Project Mediation Agreement.

- 6b The retainer fee in respect of each Project Mediator shall apply from the end of the month in which the Project Mediator was first appointed until the last day of the calendar month in which the certificate or statement of practical completion in respect of the Project is issued.
- 7 Each party will bear its own costs and expenses of its participation in the project mediation process.
- 8 CEDR Solve's fees, including the Project Mediator's fees, shall remain fixed for the first 12 months of each Project Mediator's appointment and thereafter may be adjusted as agreed by the Core Parties, CEDR Solve and the applicable Project Mediator. Adjusted fees shall be applicable from the anniversary date of the date on which the Project Mediator became effective.
- 9 Each person signing this agreement on behalf of the organisation he/she represents is agreeing on behalf of that organisation to participate in project mediation on the basis of CEDR Solve's fees agreed by the Core Parties and CEDR Solve.

**Contracts (Rights of Third Parties) Act 1999**

10 Any party that is not expressly a party to this Project Mediation Agreement shall not receive any rights or benefits under or in connection with this Project Mediation Agreement pursuant to the Contracts (Rights of Third Parties) Act 1999.

**Law and language**

11 The Project Mediators, the Core Parties and Key Supplier(s) shall conduct the Project Mediation process in the English language. This Project Mediation Agreement shall be governed by, construed and take effect in accordance with English law. The court of England shall have exclusive jurisdiction to settle any dispute which may arise out of, or in connection with, this Project Mediation Agreement.

**Human Rights**

12 The referral of a dispute to mediation under the Model Protocol does not affect any rights that may exist under Article 6 of the European Convention on Human Rights.

**Model Protocol amendments**

13 Set out any amendments to the Model Protocol.

**Signed**

On behalf of the Contracting Body \_\_\_\_\_ Date \_\_\_\_\_

On behalf of the Contractor \_\_\_\_\_ Date \_\_\_\_\_

On behalf of [add name of Key Supplier(s)] \_\_\_\_\_ Date \_\_\_\_\_

On behalf of [add name of Project Mediator(s)] \_\_\_\_\_ Date \_\_\_\_\_

On behalf of CEDR Solve \_\_\_\_\_ Date \_\_\_\_\_