

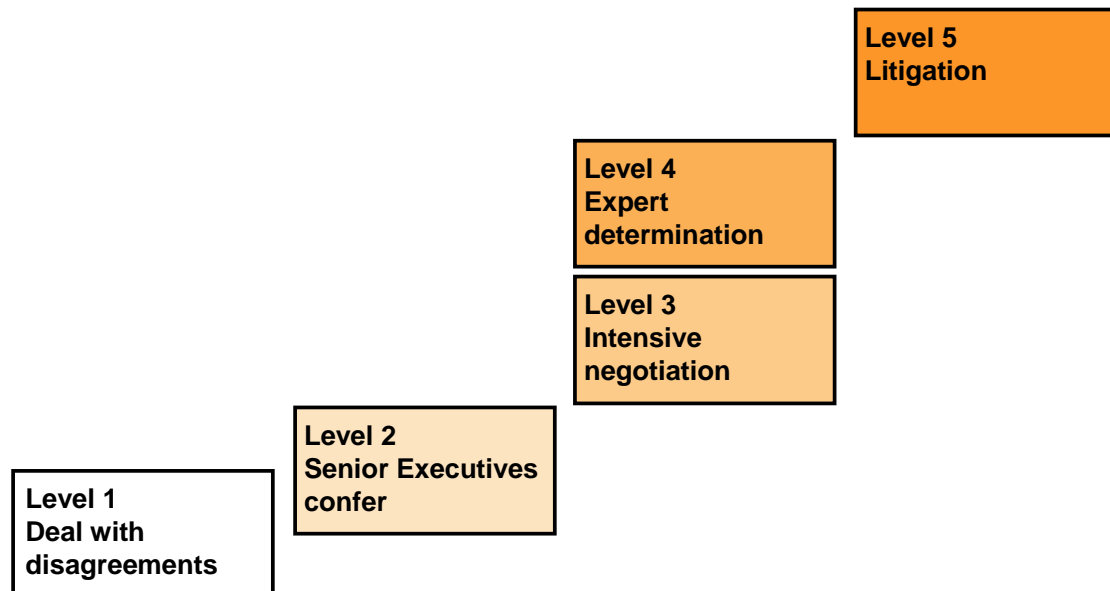


New South Wales Government Procurement System for Construction

Procurement Practice Guide

Contract dispute resolution

July 2008



Important notices

Current version

The current version of this Procurement Practice Guide is maintained on the Internet at:

<http://www.nswprocurement.com.au/Procurement-System-for-Construction/Reference-material/Procurement-practice-guides.aspx>

Amendments

Refer to the Procurement Practice Guide Amendments Log which is available on the Internet at:

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Contract dispute resolution

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Contract dispute resolution

1 Overview

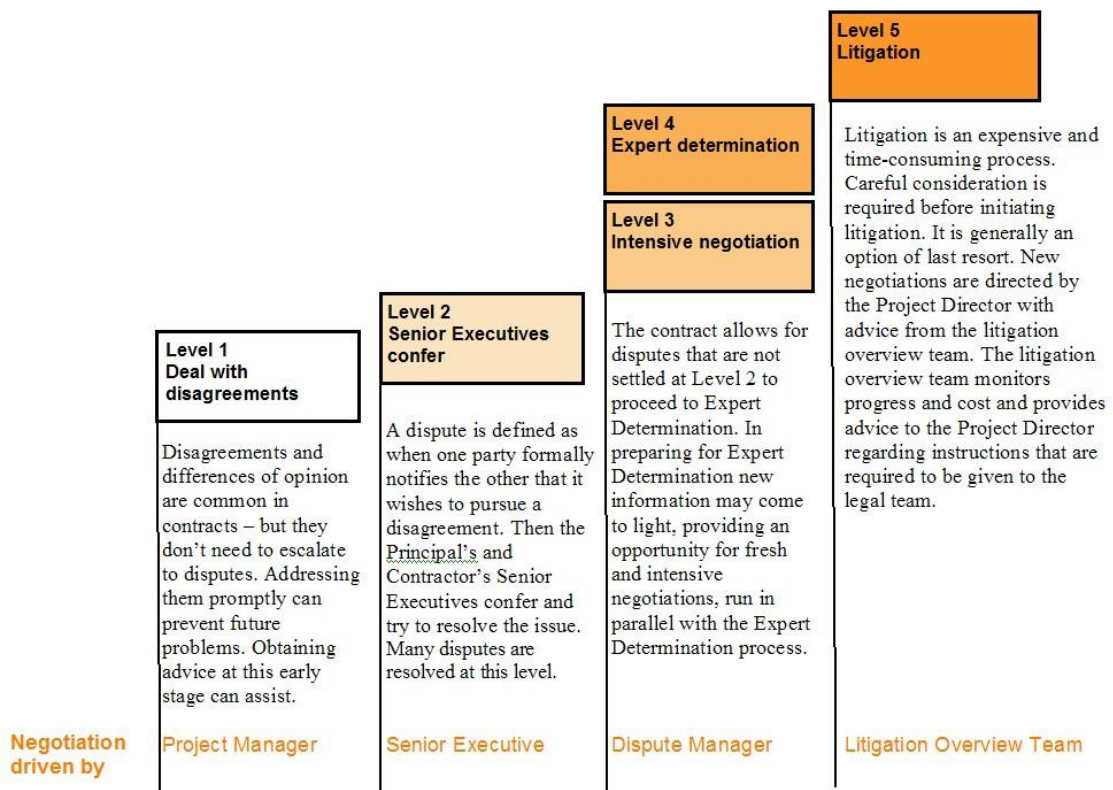
1.1 Introduction

Even one dispute can substantially increase project cost and duration and consume an enormous amount of project resources and time. Project Directors need to actively monitor dispute resolution and risk.

The construction project to be delivered, the price to be paid and the allocation of risk are defined in the contract. When the Contractor and the Project Manager work together cooperatively to achieve the outcome defined in the contract, the goals of both will generally be satisfactorily met.

However, the reality is that contract documentation is sometimes interpreted differently by the two parties; events that were considered unlikely occur and variations are valued differently by each party. These situations and others can lead to differences of opinion between the Contractor and the Project Manager. Differences of opinion are generally resolved through discussion. However, at times differences of opinion remain and are elevated to a formal dispute, diverting resources on both sides of the disagreement from the original intent. It is in the interests of all parties to proactively work to prevent disagreements and disputes festering and to resolve them fairly at the earliest opportunity.

The dispute resolution process outlined in this Procurement Practice Guide is aimed at achieving resolution as quickly and simply as possible, but it recognises that in some cases a resolution may not be achieved easily and additional dispute resolution resources may be required. There are potentially five levels in the dispute resolution process. It is always best to resolve the dispute at the lowest possible level.



About this Procurement Practice Guide

The primary purpose of this Procurement Practice Guide is to assist Project Managers, Dispute Managers and Project Directors to fulfil their roles and responsibilities in managing and resolving differences of opinion and disputes that have arisen between the parties to a construction contract. This Procurement Practice Guide explains how to resolve disputes in a way that achieves the objectives of:

- Promptness;
- Cost effectiveness;
- Probity.

Whilst providing an overview of dispute resolution processes, this Procurement Practice Guide does not attempt to provide a detailed guide on processes such as negotiation, mediation, Expert Determination, or litigation.

This document may be of interest to Contractors. However, Contractors should note that a wide range of factors impact on dispute management practices and no warranty is given that processes will conform to this Procurement Practice Guide.

Terminology used in this Procurement Practice Guide

Different standard forms of contract use different terminology. For simplicity, this document has adopted the following terms.

Terms used in this Procurement Practice Guide	Equivalent term in GC21 contracts	Equivalent term in Minor Works & Mini-Minor Works contracts	Equivalent term in Consultancy Services contracts	Other commonly used terms
Dispute	Issue	Dispute	Dispute	Formal Dispute
Project Manager	Principal's Authorised Person	Principal's Representative	Principal's Representative	Contract Administrator
Contractor	Contractor	Contractor	Consultant	Service Provider
Senior Executive	Senior Executive	Principal's Agent	Principal	Superintendent

Terms are defined in Section 5 [Definitions](#).

About the Commerce Dispute Resolution Unit (CDRU)

The CDRU provides a Treasury-funded service to Government Agencies using the NSW Government *Procurement System for Construction*. This service helps Agencies, Project Managers, Project Directors, Senior Executives and Dispute Managers to minimise, manage and resolve contract disputes.

The CDRU can be contacted at any stage in the dispute resolution process to discuss an issue. The CDRU can assist with:

- interpreting contract clauses
- assessing claims
- appointing a Dispute Manager
- negotiation strategies
- formalising agreements
- the Expert Determination process
- the litigation process
- response to contractor default.

The CDRU collects, analyses and distributes lessons learnt from disputes arising in Government contracts on behalf of NSW Treasury and works to safeguard the State Government in high risk situations.

- Project Managers must notify CDRU of all formal disputes.
- Dispute Managers must provide CDRU with a copy of the outcome of Expert Determinations so that the CDRU can track industry dispute trends and initiate changes in the procurement system as appropriate.
- Dispute Managers must provide CDRU with position papers for review when the value of the dispute is in excess of a threshold value and in some other specific circumstances (see the criteria when *developing a position paper*).
- Dispute Managers must provide CDRU with position papers for review when one party is considering or likely to become involved in: liquidation, administration or insolvency; issuing a Show Cause Notice; Termination; Termination for convenience; or Litigation.

CDRU Contact details:

Manager, CDRU

Mail address: Level 11, McKell Building
2-24 Rawson Place
Sydney NSW 2000

Telephone: (02) 93728036

Facsimile: (02) 93728033

Email: manager.cdru@commerce.nsw.gov.au

1.2 NSW Government Purchasing Framework

The NSW Government has established a Procurement Policy to guide the purchase of all goods and services by the Government. The policy applies to all government departments, statutory authorities, trusts and other government entities. State Owned Corporations are exempt, although they are encouraged to adopt aspects of the Policy that are consistent with their corporate goals.

NSW Government *Procurement System for Construction* sits under the umbrella of the NSW Government Procurement Policy. The system is operated by the Department of Commerce on behalf of NSW Treasury and used by Agencies for construction procurement projects, unless they have their own scheme accredited by the NSW Treasury.

This Dispute Resolution Procurement Practice Guide is a part of the NSW Government *Procurement System for Construction*.

Who must use this Procurement Practice Guide

Agencies without an Accredited Procurement System are required to use the NSW Government *Procurement System for Construction* for construction procurement projects and programs with a value greater than \$1M. These Agencies and their agents must follow this Procurement Practice Guide when managing disputes arising during construction projects and construction-related services.

Agencies that do have a procurement system accredited by NSW Treasury under the Agency Accreditation Scheme to deliver construction projects without expert external support are not required to use the NSW Government *Procurement System for Construction*, nor this Procurement Practice Guide. Accredited Agencies should have, as part of their system, their own Dispute Resolution Procurement Practice Guides, but they may choose to adopt this Procurement Practice Guide as an alternative.

How the Procurement System minimises disputes

Many of the components and features of the NSW Government *Procurement System for Construction* are designed to minimise the occurrence and consequences of disputes, such as:

- the prequalification and performance monitoring of experienced Project Managers, ensuring that the contractual relationship between the Contractor and the Principal is proficiently managed;
- the prequalification and performance monitoring of Contractors experienced in project delivery and risk management in specific areas of construction;
- the prequalification and performance monitoring of Dispute Managers with sound interpersonal and negotiation skills; relevant expertise in the building or engineering industry, and an appreciation of the legal issues involved in disputes;
- standard forms of contract that assign risk to the party that is best able to manage the risk;
- this Contract Dispute Resolution Procurement Practice Guide;
- CDRU reviews of the proposed direction of the dispute resolution for high-risk issues; and
- dispute resolution guidance, as required.

1.3 Three objectives of the dispute resolution process

Disputes should be resolved in accordance with the contract and in a prompt and cost-effective manner, without compromising probity requirements.

1 Resolve issues cost-effectively

Investment in resolution should be aimed at achieving value for money. It is rarely appropriate to incur substantial resolution costs over relatively minor matters.

The time, money and resources invested in defending a position should be relative to the magnitude of the amount in dispute. In particular, Agencies must avoid investing heavily in legal services when alternative dispute resolution processes would be more cost effective and suitable.

2 Act quickly

Speedy action can resolve issues before they become formalised into disputes. The resolution process must be deliberately driven and not allowed to stall.

Protracted disputes may compromise project objectives, cause ongoing undue financial hardship to the Contractor, affect productivity, interfere with the day-to-day relationship between the Project Manager and the Contractor, and lead to further disputes.

3 Maintain probity

Probity includes adhering to public sector standards of behaviour, such as fairness, impartiality, consistency, and accountability. Probity is not only about outcome but is also about process: probity is doing things the right way and being seen to do things the right way.

Probity in intrusive and non-intrusive processes

'Intrusive' processes are where an independent third party imposes a decision on the parties to the dispute and the parties participate at arm's length, such as Expert Determination and litigation. By their nature, intrusive processes promote probity as they are transparent and decisions are well documented and able to be audited.

However, the majority of contractual disputes are resolved by non-intrusive processes such as negotiation. Care needs to be taken to ensure that probity is maintained in a negotiated settlement.

In the negotiation process Project Managers, Senior Executives, Project Directors and Dispute Managers must take all necessary steps to ensure probity is maintained, including:

- producing a documented assessment of the claim and a risk analysis of the dispute to the Agency to be reviewed and approved before dispute negotiations begin
- having at least two persons (one a Government employee) present to represent the Principal during dispute negotiations
- when a negotiated resolution has been achieved in principle, submitting a written recommendation to the Agency for approval that addresses terms and amount of the proposed settlement
- having the Agency approve the formal settlement document, i.e. the Deed of Release or variation.

Conflicts of interest

The Project Manager, Senior Executive, Project Director or Dispute Manager involved in the assessment of the claim should be aware of any potential conflicts of interest that they may have and declare them. For example, if the Project Manager prepared the documentation and the particular dispute concerns the interpretation of the documents or allegations of negligence in the preparation of the documents then a second written assessment should be sought from an appropriate party independent of the conflict of interest (e.g. from a Senior Executive).

Private sector consultants undertaking dispute resolution roles on behalf of the Principal must not have an existing financial relationship with the Contractor. The parties must also protect against potential conflicts of interest that may arise from past or proposed future relationships between private sector consultants and the Contractor.

Where conflict of interest is identified as an issue, the matter is to be eliminated or managed to the satisfaction of the next higher level of authority on the Project. If the conflict exists at Project Director level then the matter needs to be resolved to the satisfaction of the Agency Program Director.

Operating within assigned delegation

Project Managers, Dispute Managers, Project Directors and Senior Executives must understand and act in accordance with the Public Finance and Audit Act, 1983. Failure to adhere to the Act is breaking the law and penalties may apply.

The Act addresses accountability and efficient use of public moneys. In particular, the Act requires that expenditure only be committed or incurred by a person within the limits of a delegation conferred in writing by a person entitled to make the delegation.

Anyone involved in dispute resolution must not commit the Agency to a financial settlement, additional costs, or to a change in contract entitlements without prior written approval from the Agency, or an authorised representative of the Principal.

Obtaining this approval from the Agency will require a submission that explains the circumstances of the dispute in detail and demonstrates that the proposed course of action is the best value for money option given the risk and costs associated with alternative courses of action.

2 Understanding disputes

A dispute occurs when a disagreement between the Contractor and the Project Manager is not resolved, and one party gives formal notice to the other party that it wishes to pursue the matter.

The most common protracted dispute arises when a Contractor makes a claim for an increase in the contract sum which is rejected by the Project Manager, and the Contractor formally notifies that it does not accept the decision by the Project Manager.

Whilst it is most often the Contractor that elevates a matter to the level of dispute, the Principal too is also entitled to elevate a matter to dispute.

Disagreements are not disputes

Not every difference of opinion that occurs between the Contractor and the Project Manager becomes a dispute. Most differences of opinion are resolved between the Contractor and the Project Manager and do not become the subject of a formal dispute resolution process. The NSW Government *Procurement System for Construction* encourages co-operative contracting. The GC21 General Conditions of Contract has a Senior Executive appointed from each party who may proactively oversee the contract and assist to resolve potential disputes.

'Security of Payment' adjudications are not a resolution

The *Building and Construction Industry Security of Payment (SoP) Act 1999* (NSW) addresses Contractor cash flow. Some Contractors may attempt to deal with a dispute by submitting an adjudication application under the SoP Act.

If an adjudication requires the Principal to pay the Contractor, the Principal must make this payment. However, an adjudication does not resolve the underlying dispute—either party may pursue the matter as a dispute under the contract, in which case the provisions of this Procurement Practice Guide apply. If both parties choose to accept the adjudication as an appropriate resolution, the dispute must be closed and the agreement formalised.

Why disputes occur

The parties typically enter into a contract with an intent to work cooperatively, but the primary goals of the Contractor and the Project Manager are generally in tension. The Contractor is seeking financial return from a contract that invariably involves risk. The Project Manager is working on behalf of an Agency delivering a project with budget constraints. This predisposes the parties to interpret issues in different ways.

In almost all cases, disputes ultimately are about how much should be paid by the Principal to the Contractor. A dispute can be usefully viewed as a failure on the part of the Contractor to convince the Project Manager that it has an entitlement to additional payment, and a failure on the Project Manager's part to convince the Contractor that it is not entitled to the additional payment.

Typical triggers for disputes include:

- *Financial imperatives*

If a Contractor is not achieving its financial return on its contract or if the Principal's project is suffering from budget overruns, the pressure increases to respectively pursue or resist an increase in the contract sum.

- *Interpretation of contract documentation*

A contract is central in the relationship between the Principal and its Contractor. The contract primarily describes the works or services to be supplied by the Contractor, the conditions under which the supply is to be effected, and the price that the Principal will pay. If this description is not specific or precise it may be interpreted differently by the parties and disputes may arise.

- *Unanticipated events/circumstances*

A contract will normally make provision for unexpected events, and apportion risk between the Contractor and the Principal. Although addressed in the contract, sometimes the Agency and/or the Contractor has not been aware that they are carrying a particular risk until it eventuates and the affected party may not have made sufficient allowance for the risk in their price/budget. As a result, when unanticipated events/circumstances occur, there is often a dispute about liability. For example, unfavourable site conditions may not be apparent at the time of tender and may not be anticipated or allowed for.

- *Unrealised expectations*

The contract will place explicit or implicit performance obligations (e.g. time and quality) on both parties. Each party will have an expectation about how the performance obligations will be met. Unrealised expectations about issues such as time and quality give rise to disputes.

- *Variations requested by the Principal*

The Principal, when requesting a variation to the contract, may expect that the impact on time and cost will be minor. The Contractor may view the requested variation differently.

2.1 Who resolves disputes?

The roles involved in the dispute resolution process depend on the level of the dispute. These roles reflect who is best placed to carry out particular dispute resolution activities at each dispute level.

Project Manager (including Contract Administrator / Principal's Authorised Person / Principal's Representative)

The Project Manager is generally the first person to become aware of any disagreement with the Contractor and is in an ideal position to resolve the matter before it escalates into a dispute. If the dispute proceeds to Expert Determination, the Project Manager will continue to provide information and advice but the responsibility for resolution transfers to the Dispute Manager.

See the dispute resolution process description in Section 4 for specific tasks performed by the Project Manager at the various dispute resolution levels.

Senior Executive (or Principal's Agent)

A number of standard forms of contract require a person at a senior level from both parties to confer to try to resolve the dispute. In the GC21 Contracts these persons are referred to as Senior Executives. The Senior Executives have a key contractual role when a disagreement becomes a formal dispute to try to resolve the dispute. Experienced and respected Senior Executives have proven to be very successful at resolving disputes through negotiation.

The Senior Executive must be an experienced negotiator, familiar with the form and terms of the contract and be perceived to have authority. If the Minister for Commerce is the Principal, the Senior Executive must be an employee of the Department of Commerce.

Senior Executives can also take a proactive role, promoting a good working relationship between the parties and heading off contract disputes before they arise. They may attend progress meetings and provide informal advice to the Project Manager. Such a role can be effective at minimising disputes, and is to be encouraged.

The Project Director may appoint the Senior Executive as the Dispute Manager if the resolution process reaches Level 3.

See the dispute resolution process description in Section 4 for specific tasks performed by the Senior Executive at the various levels.

Dispute Manager (role usually performed by Project Manager if dispute is less than \$250,000)

A person other than the Project Manager must be assigned the role of Dispute Manager for disputes with a value greater than \$250,000.

For disputes less than \$250,000 the Project Manager may take on the role of 'Dispute Manager' unless:

- there is an actual or perceived conflict of interest in relation to the particular dispute;
- the unresolved dispute is affecting the day to day running of the contract (e.g. due to acrimony between parties);
- the dispute becomes excessively protracted.

A separate Dispute Manager allows the Project Manager to concentrate on the core activities of managing the contract.

For major construction projects, Agencies may wish to engage a Dispute Manager at the commencement of the project to ensure that communication between the Project Manager and the Dispute Manager is effective and prompt.

A Dispute Manager would generally be appointed after the Senior Executive has completed its contractual role to confer to try to resolve the dispute. However, if the Senior Executive is still involved in the resolution process the Dispute Manager is required to work cooperatively with the Senior Executive.

See the dispute resolution process description in Section 4 for specific tasks performed by the Dispute Manager at the various levels.

Project Director (the link to the Agency)

The Agency procuring the project delegates to the Project Director the responsibility to ensure that disputes arising on the project are resolved in accordance with this Procurement Practice Guide.

See the dispute resolution process description in Section 4 for specific tasks performed by the Project Director at the various levels.

The Project Director is responsible for monitoring the progress of projects and being aware of potential and realised disputes. The '*What's the risk of dispute on your contract?*' checklist can assist in assessing the risk of dispute. It is recommended that this checklist be completed at least quarterly for each project.

http://www.managingprocurement.commerce.nsw.gov.au/dispute_resolution/dr_ch_risk_of_dispute.pdf

3 Position papers

Position papers are essential for an effective dispute resolution process and provide rigour for decision-making. All formal disputes require a position paper including a risk assessment.

Writing a position paper provides a disciplined procedure to re-examine the issue in dispute and to consider it from different perspectives so that the Project Manager, Senior Executive or Dispute Manager can consider available options and the risks each presents.

The paper provides a concise summary to the Project Director, the Agency and its representatives so that the Agency can make informed decisions about and contribute to the resolution process.

Over time, position papers provide an audit trail of the dispute management process.

3.1 When to write a position paper

The initial position paper must be prepared when a difference of opinion between the parties formally becomes a dispute. Updated position papers must be prepared to reflect the progress of the resolution process and any changes in the nature or quantum of the dispute. As a minimum, position papers are required at the following milestones:

- Initial review of the formal dispute – when notification of a dispute first occurs (level 2). This initial position paper is prepared by the Project Manager.
- Preparation for Intensive Negotiation and Expert Determination – when a dispute is referred to Expert Determination (levels 3 & 4). This position paper is prepared by the Dispute Manager and contains a negotiation strategy and an Expert Determination strategy.
- Preparing for Litigation – when a decision is made to reject the expert’s Determination. (level 5) This position paper is prepared by the Dispute Manager and contains a litigation strategy.

3.2 Content of a position paper

Position papers should include:

- a description of the dispute and all contributing factors
- a consideration of the possible sources of liability and the likelihood of each being accepted by an Expert
- an estimation of the range of possible amounts involved—most probable outcome and worst-case scenario
- a discussion of the options available to resolve the dispute and the costs associated with each
- identify issues that can be separated out and resolved in order to limit the number and scope of issues that may be escalated to the next level
- a recommendation for the next step in the dispute resolution process
- an estimate of the costs of engaging any necessary extra resources.

The level of detail in the position paper should be appropriate to the complexity of the dispute and the stage of the resolution process.

Position papers contain commercially sensitive material and may provide a basis for the request of legal advice. Therefore, they should always be titled “Privileged” to provide protection from legal discovery by the claimant should litigation eventuate.

Position papers are confidential documents prepared for the Principal and the contents must not be disclosed to the Contractor or its agents.

Assessment of the claim including risk analysis

Generally, the Project Manager will have already made an assessment of the claim and it is usually that assessment that the Contractor disagrees with. Once the claim becomes a dispute, it is necessary to objectively reassess the claim using a different methodology than is used when assessing a claim that is not in dispute. The different methodology is described here and is essentially the risk analysis part of the assessment.

The Principal’s team needs to be informed about the uncertainties in relation to the claim. For example, the team will take a different approach if it is told:

- the claim is worth \$0, or
- the most likely scenario is that the claim is worth \$0, but there is a risk that it could be seen by an Expert to be worth \$500,000.

It is the exploration of alternative ways to view the claim that is referred to as the “risk analysis”. The risk analysis considers what may happen if the matter goes to

Expert Determination. The risk analysis is about asking, “How might an Expert view this?” The risk analysis should be embedded in the assessment of claim.

There are 7 matters to address when developing a position paper.

1. Describe the issue in dispute and any other disagreements

Clearly state what this assessment is covering. Also identify any other related, unrelated or potential disagreements or other matters of relevance on this project. Generally, related matters should be covered by this assessment and resolved with this dispute. However, negotiations are an opportunity to also resolve unrelated matters on the project. This can increase the goodwill between parties and assist in reaching a successful outcome on this dispute.

The position paper should discuss:

1. What is the issue in dispute?
2. What is the amount claimed by the Contractor?
3. What justification is the Contractor providing for this claim?
4. Is the amount claimed by the Contractor likely to increase with time?
5. With regard to this Contractor on this project, are there other related disputes, related claims, or related potential claims?
6. With regard to this Contractor on this project, are there other unrelated disputes, unrelated claims, or unrelated potential claims?

2. Assess the possible sources and likelihood of Principal liability

The contract documentation and supporting information must be considered as a whole. Relying on one particular clause to deny Principal liability is generally unwise. Consider the possibility of Principal liability arising from either a clause in the contract or from a breach of contract. It is recommended that advice be sought from peers and the Senior Executive to obtain a range of views on possible Principal liability. Generally, external legal opinion is not required at this stage; however general advice from the CDRU may be sought. The question of whether a liability exists or not should be addressed before any discussion of its extinction is entered into.

The position paper should discuss:

1. What clauses of the contract is the Contractor relying on to support its claim?
2. What is the likelihood of the claimed basis of liability being accepted by an Expert?
3. Does the contract entitle the Contractor to extra payment, or extra time, in relation to this matter?
4. If, in your opinion, the contract does not entitle the Contractor to extra payment, or extra time, what is the possibility that an Expert would disagree?
5. Has there been a breach of the contract, by the Principal, that could give rise to payment for an additional amount?
6. If, in your opinion, there has not been a breach of the contract, by the Principal, that could give rise to payment for an additional amount, what is the possibility that an Expert would disagree?

3. Explore Time Bars, Set-off and Cross Claims

The possibilities of time bars, set-offs or cross-claims or the like that might extinguish or reduce the amount payable should be explored.

The position paper should discuss:

1. Is the right to extra payment or time extinguished, barred or reduced by any provision of the contract, set-offs or cross-claims or the like?
2. If, in your opinion, the right to extra payment or time is extinguished, barred or reduced by a provision of the contract, a set-off or a cross-claims or the like,

what evidence do you have to support your position. What is the possibility that an Expert would disagree?

4. Examine the evidence that relates to the Contractor's claim

A variation claim may be rejected on the basis that insufficient supporting material has been provided by the Contractor. However, a position paper requires a more thorough exploration of this issue.

The position paper should discuss:

- Has the Contractor supported the claim with sufficient information that allows you to reasonably evaluate it?
- If so, are the Contractor's rates and prices reasonable? (Obtain Quantity Surveyor's advice.)
- If you do not have sufficient information to evaluate the claim use first principles and site records to estimate the value of the claim. Discuss the degree of uncertainty in your estimate.
- Has the Contractor supported its claim by sufficient evidence, facts and specific detail, rather than anecdotes? Would an Expert be in a reasonable position to award the Contractor compensation, if due?
- If not, what is the likelihood that the Contractor will be able to support its claim by sufficient evidence, facts and specific detail should the matter proceed to Expert Determination?

5. Estimate a range of possible amounts payable

There may be a range of estimates of the potential amount payable that can be considered depending on how the estimate is calculated.

A matrix showing the potential amounts payable against various liability possibilities may be helpful. An example follows of a matrix prepared for a hypothetical dispute on a Minor Works contract, involving Principal-caused delay, where there is uncertainty over:

- the number of weeks delay for which the Principal is liable; and
- the cost of that delay.

		Liability possibilities			
		Principal liable for 5 weeks	Principal liable for 10 weeks	Principal liable for 20 weeks	
Cost	Weekly delay worth \$1000	\$5,000	\$10,000	\$20,000	In this case: Optimistic estimate: Principal pays \$5,000 Most likely scenario: Principal pays \$50,000 Worst case scenario: Principal pays \$200,000
	Weekly delay worth \$5000	\$25,000	\$50,000	\$100,000	
	Weekly delay worth \$10000	\$50,000	\$100,000	\$200,000	

The position paper should discuss:

1. Optimistic estimate of amount payable
2. Most likely scenario of amount payable
3. Pessimistic (worst-case scenario) estimate of amount payable
4. The assumptions used when calculating these amounts

A range of estimates is essential in informing the Principal's negotiation team.

When considering a worst-case scenario, consider:

- the possibility that an Expert does find that the Principal has a liability, even if, in your opinion, a liability does not exist;
- the costs the Contractor has been able to substantiate to date, as well as other costs the Contractor may be able to reasonably substantiate in the future;
- the amounts that have been claimed to date by the Contractor as well as amounts the Contractor may be able to reasonably claim under additional or alternative heads of claim related to the circumstances of this dispute;
- the potential cost involved in related disputes and related potential disputes;
- the possibility that the amount associated with this dispute may increase over time.

Estimates of amount payable should, wherever possible, be based on evidence, e.g. site records and resource records. It must be established that rates and prices used are reasonable. (Obtain Quantity Surveyor's advice.) Where evidence is not available, estimate the amount payable starting from first principles (rather than from the Contractor's assumptions). Do not use 'standard' formulae from construction publications, such as Hudson's formula, to determine delay costs.

6. Consider the likelihood and cost of going to Expert Determination

The cost of a dispute is not limited to the settlement amount to be paid by the Principal to the Contractor, but includes the cost, to both parties, of the dispute resolution process itself.

Once a dispute has been referred to Expert Determination, the updated position paper should discuss:

1. What further costs are likely to be incurred by the Principal in the Expert Determination process? Consider the following potential costs associated with Expert Determination:
 - costs of a building/construction industry professional with experience in Expert Determinations, to manage the process and prepare submissions (this will usually be the Dispute Manager);
 - costs of legal advisers with experience in construction contract disputes to assist in preparation of submissions and to prepare sections of the submissions;
 - costs of technical experts such as quantity surveyors and programmers to prepare expert reports to support submissions;
 - costs of project personnel and others representing the Principal who may have to prepare statements, assist in preparing submissions and/or review submissions; and
 - the proportion of the Expert's cost that will be borne by the Principal.
2. Also estimate the costs that the Contractor is likely to incur in the Expert Determination process?

7. Assess any other risk factors that may be relevant

Position papers should include an assessment of any other risk factors that may be relevant to the dispute and to the Agency, e.g. risk of delay to project or following contracts; risk of the Contractor going into liquidation or terminating. Such risk factors are not directly relevant to the assessment of possible Contractor entitlement, but may impact on project strategy and budget and therefore need to be communicated to the Agency.

3.3 Review of position papers

Matters that have become disputes are, by definition, difficult problems to resolve with potentially significant impacts on the Government's financial resources. Disputes not managed properly can lead to damaging precedents within the industry and costly escalation.

Treasury requires the CDRU to undertake a specialist review of position papers in high risk cases. These strategic reviews are funded by NSW Treasury so there is no additional expense incurred by the project.

When a review is needed

Treasury requires a dispute resolution specialist to review position papers in high risk cases, that is, when:

- the value of the dispute is in excess of a threshold value
 - if the Project Manager is acting as the Dispute Manager - \$100,000
 - if the Project Manager comes from the same firm as the Dispute Manager - \$100,000
 - otherwise - \$250,000

or

- when one or both parties are considering or likely to become involved in:
 - Liquidation/Administration/Insolvency
 - Show Cause Notice
 - Termination
 - Termination for convenience
 - Litigation.

In assessing the 'value of the dispute', consider the overall potential project cost escalation, including the cost of related disputes and the cost of defending and managing the dispute. Disputes may not initially exceed the threshold, but as they escalate and the Principal's costs of management accrue, the threshold may be reached and the specialist reviews are then required.

Generally, one week should be allowed for the review. The Project Manager or the Dispute Manager should forewarn the CDRU of upcoming matters to enable the CDRU to manage workflow.

3.4 The purpose of the review

The primary objectives of these reviews are to assist Agencies in:

- safeguarding the rights of the State as Principal under the contract; and
- achieving prompt, cost effective dispute settlements, while maintaining probity.

In particular, a review of the initial position paper can prevent the primary parties from becoming entrenched in narrow positions. Often, each party to a dispute sees the matter as black and white, when experience from other disputes across the State may suggest shades of grey.

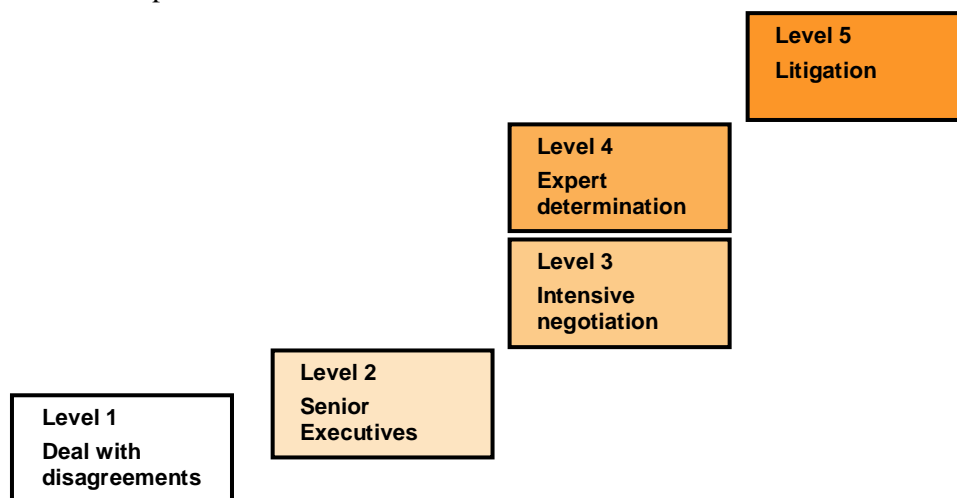
Specialist review when a dispute enters the Expert Determination phase may identify a way to bring parties back to the negotiation table and avoid the time and expense of an Expert Determination. In addition, the CDRU can provide essential advice at this time on establishing the terms of reference for the Expert Determination, choosing an Expert and preparing the Principal's case.

A dispute resolution specialist review only provides guidance and does not relieve the Agency from responsibility for, and management of, the dispute resolution.

The CDRU will report back to the Project Director either supporting the proposed approach or recommending alternative action.

4 The dispute resolution process

This section provides an outline of the steps involved in dispute resolution at different dispute resolution levels.



The responsibilities of the Project Manager, the Senior Executive, the Dispute Manager and the Project Director at each dispute resolution level are also outlined in this Section.

The Procurement Practice Guide does not attempt to provide a detailed user guide on processes such as negotiation, mediation, Expert Determination, or litigation. It is expected that Agencies will ensure that disputes are managed by experienced and skilled people. Inappropriate expertise on either side of the delivery of a contract can contribute to the initiation and continuation of a dispute. Those involved in dispute resolution need to have sound interpersonal skills; relevant expertise in the industry, e.g. building or engineering, and an appreciation of the legal issues involved.

4.1 Follow the contract

Each standard form of contract under the NSW Government *Procurement System for Construction* identifies when a difference of opinion becomes a dispute and prescribes procedures to resolve the dispute. This Procurement Practice Guide is to be read in conjunction with the dispute resolution procedures set out in the particular contract under which the dispute has arisen.

Even while negotiation is being pursued, the Dispute Manager must ensure that the dispute resolution process and timeframes prescribed in the contract is strictly followed unless there are exceptional circumstances. This is to ensure the Principal is not later disadvantaged by being perceived to have waived its rights, for example, to time bars. For example, GC21 contracts prohibit the Contractor from referring an issue to Expert Determination (or from taking any other legal action) more than 49 days after notification of a dispute. This ensures issues are addressed promptly and it is important to preserve this time bar.

If it is proposed that the resolution process for a particular dispute should involve a different path or timeline to that set out in the contract, a written case is to be prepared for the one-off change to the terms of the contract. Agency approval obtained through the Project Director is required. Any change to the contract path and timelines are also subject to approval by the other party to the contract.

The standard form contracts that are supported by the NSW Government *Procurement System for Construction* are listed below, together with the relevant dispute management clauses. Contracts are updated regularly and so reference should be made to the actual Bond Copy of the contract under which the dispute has arisen.

- Mini Minor Works Contract
 - Clause 13 Disputes
- Minor Works Contract
 - Clause 16 Disputes
- C21 Construction Contract (for contracts currently in progress)
 - Clause 62 Notification of Issue
 - Clause 63 Resolution by senior executives
 - Clause 64 Expert Determination
- GC21 Construction Contract
 - Clause 73 Notification of Issue
 - Clause 74 Resolution by senior executives
 - Clause 75 Expert Determination
- Consultancy Services Contract: Fee over \$30,000
 - Clause 12 Dispute Resolution

4.2 Level 1 – Deal with disagreements

Disagreements and differences of opinion are common in contracts – but they don't need to escalate to disputes.

Typical initial trigger

The Contractor verbally or in writing expresses dissatisfaction with an unresolved variation or other matter.

Key actions at this level

Re-examine the issues

Disagreements and differences of opinion can often be resolved by reasonable discussion. Consider the viewpoint of the other party – being objective is vital to resolving disagreements.

Get advice

It is always worthwhile for the Project Manager to get another person's opinion about the claim – they can provide a fresh perspective. The Project Manager should discuss the matter with his or her peers, managers, the Senior Executive, or the CDRU. Often discussing the matter with someone not close to the problem can prevent a potential dispute from developing into a dispute.

Misunderstandings or procedural matters, such as site access difficulties, are often resolved by the early involvement of the Senior Executive outside the formal dispute resolution process. Potential disputes may be averted by the proactive vigilance of Senior Executives.

Consider the contract as a whole

Consider the matter in the context of the overall contract and how it has been administered. Beware of focusing only on selective phrases from the contract.

Always seek an outcome based on the contract

Work cooperatively

Make every effort to help the Contractor meet their contractual obligations. Compromise on matters that will not adversely impact the project outcome while maintaining control over the contract, cost, quality and timing.

Project Managers are not adequately fulfilling their duties (and possibly acting negligently) if they accept a Contractor's demands in order to avoid a dispute where adequate justification for a settlement has not been made.

Specific tasks by role

Project Manager

- Seeks advice from others in their own organisation and the Senior Executive under the contract.
- Re-examines the issue.
- Attempts to resolve the disagreement with the Contractor.
- Advises Senior Executive and Project Director if a dispute is expected or if it is likely the impasse will become protracted.
- Formalises resolution if achieved.

Senior Executive

- May take a proactive role in preventing disputes.
- Provides advice to Project Manager.
- May speak informally with people at an equivalent level in the Contractor organisation.
- May attend some or all key site meetings.

Project Director

- Monitors the dispute risk factors (including the number and duration of unresolved claims) and intervenes as required. The Project Director completes the questionnaire in appendix A at regular intervals, typically quarterly, to help monitor dispute risk.
- Finds out whether site relations are becoming adversely affected by disagreement. If so, addresses the issues.

4.3 Level 2 – Senior Executives confer

A dispute occurs when a disagreement between the Contractor and the Project Manager is not resolved, and one party gives formal notice to the other party that it wishes to pursue the matter. When a difference of opinion is elevated to a formal dispute, the Senior Executives are required by the contract to confer. The majority of disputes arising on Department of Commerce managed projects are resolved by the intervention of the Senior Executives. The Senior Executive can provide a fresh view and more diverse experience. Having a well-respected, knowledgeable and experienced Principal's Senior Executive can save considerable cost and time in the dispute resolution process. If the Minister for Commerce is the Principal the Senior Executive must be an appropriate officer within the Department of Commerce.

Typical initial trigger

Contractor or Principal formally advises the other party that the matter is a dispute under the contract.

Each contract type defines the procedure for notifying a dispute (or Issue). For example, in GC21 contract clause 73, the Contractor notifies the Principal of an Issue and provides a copy of the notice to the Senior Executive. The Minor Works contract, at clause 16, requires only that the Contractor notify the Principal's Agent. The persons notified of the dispute must as soon as practicable notify the Project Manager, the Senior Executive and the Project Director.

Key actions at this level

Prepare Initial position paper

This documents the background and current status of the dispute and provides an assessment of the dispute. See Position papers in Section 3.

Senior Executives confer

GC21 contracts typically require the Contractor to wait for at least 21 days after notifying a dispute before referring the issue to Expert Determination. During this time the Principal's and Contractor's Senior Executive must promptly confer to resolve the dispute.

'Conferring' typically involves making contact with the Contractor, understanding their position, presenting the Principal's opinion and reasons for it, and seeking to resolve the issue.

Formalise agreement if issue is resolved

Successful negotiations should result in full and final settlement of all issues. Writing down a list of agreed matters, jointly prepared at the time of the discussion, creates a shared understanding and reduces the opportunity for future disagreement. The agreement must then be formalised by:

- a variation approval form (suitable if a disagreement has been resolved early);
- an exchange of letters (suitable if a dispute has been notified but resolved quickly); or
- a Dead of Release (suitable for negotiated resolution of more complex matters).

Specific tasks by role

Project Manager

- Familiarises him/herself with the contract dispute resolution clauses & timeframes.
- Liaises with, and provides relevant documents to, the Senior Executive.
- Prepares the initial position paper (typically within 14 days of dispute notification) and promptly advises the Project Director of the potential value of the dispute.
- Formally (in writing) notifies the CDRU within a week of the dispute process being initiated of the dispute, providing a description of the issue in dispute, the circumstances and the claimed value. (The notice may be an email that has been confirmed as having been received). See [About the Commerce Dispute Resolution Unit \(CDRU\)](#).
- Forwards a copy of the position papers to the CDRU if the criteria when [developing a position paper](#) are met.
- Participates in negotiations if required.
- Formalises resolution if achieved.

Senior Executive

- Receives a copy of dispute notification.
- Provides support to the Project Manager & reviews initial position paper.
- Promptly confers with the Contractor's Senior Executive to resolve the dispute.
- Advises the Project Director of any information relevant to the management of the contract or project.
- Discusses a negotiation strategy with the Project Director and who should be involved.
- May assist to formalise the resolution.

Project Director

- Reviews issues and cost estimates presented in the initial position paper.
- Provides support to the Senior Executive, including obtaining Agency approval and funding to settle if required.
- Monitors resolution progress and intervenes as required.

- Prepares to engage Dispute Manager should dispute not be resolved at this level.
- Engages a different person as Dispute Manager, if the process stalls at Level 2, or if the Project Manager has a conflict of interest.

4.4 Level 3 – Intensive negotiation

The majority of contract disputes are resolved by negotiation. Whilst negotiations continue throughout Levels 1 to 5 (and may indeed be intense at any level), negotiations at Level 3 require a documented and well-thought-through negotiation strategy. It is recommended that these Level 3 negotiations be implemented in parallel with the Expert Determination process (Level 4) prescribed in the contract. Negotiations at this level can resolve the dispute and the Expert Determination process need not be completed, saving time and costs and allowing the parties to have some control of the outcome, rather than having a decision imposed on them.

A Dispute Manager is required to manage the substantial workload associated with levels 3 and 4 in the dispute resolution process.

Typical initial trigger

Contractor or Principal formally refers the dispute to Expert Determination.

Key actions at this level

Select a Dispute Manager

The Project Manager manages the dispute resolution process at Levels 1 and 2 as part of the contract administration brief. Once the matter is referred to Expert Determination, the Project Director engages a Dispute Manager who may be:

- the Project Manager (if the dispute is less than \$250,000);
- the Senior Executive;
- selected from the Commerce Pre-qualification Panel; or
- the Commerce Dispute Resolution Unit.

If the Minister for Commerce is the Principal the Dispute Manager must be an appropriate officer within the Department of Commerce.

It is considered reasonable for a Project Manager to also be engaged as the Dispute Manager for disputes valued at \$250,000 or less as these are likely to be less complex and easier to resolve due to the smaller amount involved. Smaller disputes do not generally warrant the employment of additional and specialist resources. However, for disputes over \$250,000 it is essential to appoint a dedicated Dispute Manager to ensure a prompt, cost-effective resolution because:

- the set of skills and the role of a Dispute Manager are different to those of a Project Manager for this scale of dispute;
- a Project Manager is primarily concerned with the day-to-day management of the project or contract and should not be distracted by managing a potentially contentious, complex and time-consuming dispute.

Irrespective of who undertakes the Dispute Manager role, the costs associated with the management and settlement of the dispute are a project cost to be funded by the Agency.

A Dispute Manager must have:

- considerable experience in the construction industry, familiarity with and respect for government processes, and a working knowledge of Contract Law;
- excellent negotiation skills and experience in negotiating contract disputes;
- no conflict of interest. The Dispute Manager must have no financial involvement with the other parties in dispute, or have a direct or indirect interest in the outcome of the dispute;

- the ability to remain objective and impartial throughout the process; and
- the necessary time available to undertake the role while not compromising other Project roles.

A sample brief for the fee-for-service engagement of a Dispute Manager, a sample letter of engagement, and industry consultant engagement guidelines are available through the NSW Government *Procurement System for Construction*. The brief must require the Consultant not to accept the engagement if he/she has a conflict of interest or is not suitably experienced. The brief must set out what is required of the Dispute Manager CDRU is available to provide guidance on the briefing and engagement of a consultant Dispute Manager, if requested.

The Dispute Manager is responsible for managing the dispute resolution process, but has no authority to commit the Principal to a settlement, or suggest a settlement offer to the Contractor, without obtaining prior authorisation from the Agency via the Project Director.

Prepare thoroughly

Effective negotiation requires thorough preparation and an in depth understanding of the contractual and factual issues surrounding the dispute. Negotiation is unlikely to succeed if the parties have fixed views and are reluctant to compromise their positions or if the negotiation is entered into without sufficient preparation and commitment. However, entrenched positions are frequently relinquished in a successfully managed negotiation forum.

An updated position paper is essential before commencing Level 3 negotiations. This position paper will include a fresh negotiation strategy and an Expert Determination strategy. This paper must be reviewed by the CDRU if the conditions for the [review of position papers](#) are met. The negotiation strategy as set out in the position paper should be approved by the Agency, prior to the commencement of this negotiation phase.

Engage and manage additional resources

The Dispute Manager identifies the additional specialists required during a dispute management process. These may include:

- legal consultants;
- programming consultants;
- quantity surveyors; and
- consultants with industry-specific expertise relevant to the dispute.

Specialist may help prompt resolution of a dispute, particularly when the dispute involves one main issue: such as the effect on the program of numerous variations; or the impact on the foundations of the geotechnical conditions; or the legal interpretation of a particular clause. Such resources may well be required anyway for contribution to the preparation of [Expert Determination](#) submissions.

However, use of additional specialist resources needs to be judicious. Sometimes the more time, money and resources invested in defending a position, the harder it is to bring about a cost-effective negotiated settlement. Effort can be diverted into pursuing peripheral issues and marginal defences, taking the focus from the primary matters. This is particularly true if attempting to pursue a tenuous defence through heavy investment in legal services, when more pragmatic alternative dispute resolution processes are advisable. In extreme cases the outcome could be more driven by the accrued resolution costs than the basic claim.

The cost incurred and the outcome of additional resources will depend on the brief given. A brief aimed at a “cost-effective, prompt resolution of the dispute” will have a very different consequence than a brief requiring the consultant to “rigorously defend the Principal’s position”. The Dispute Manager writes the brief and manages the engagements of additional specialist resources.

The Dispute Manager may have specialist skills in an area relevant to the particular dispute, e.g. legal expertise or programming expertise. Indeed, a Dispute Manager may have been particularly chosen because of the match between his/her specialist skills and the needs of the particular dispute. It is expected that there would be an increase in efficiency when a Dispute Manager is able to undertake other specialist tasks and provide advice to the Principal accordingly. Differentiation between an industry expert's role and an advocacy role need to be considered should the dispute progress to Levels 4 and 5. Expert submissions would need to be independent and technical submissions by a Dispute Manager may be seen in the advocacy role.

Select the negotiating team

To obtain a successful outcome for the Agency, negotiations must be undertaken by appropriately experienced and well-informed personnel. The Project Director considers who can best contribute to the negotiation process.

For disputes above \$250,000 the Project Manager may attend the Level 3 negotiations but must not be responsible for conducting them. However, if the relationship between the Project Manager and the Contractor has been adversely affected by the dispute, it may be prudent not to have the Project Manager present during the negotiations.

For disputes up to and including \$250,000, the Project Manager will most often be the Dispute Manager and therefore would be expected to attend the negotiation. The Senior Executive or other representative of the Principal usually conducts the negotiation to prevent contamination of the Project Manager's day-to-day contract management relationship with the Contractor.

The Principal's Senior Executive may be asked to attend Level 3 negotiations, but this does not diminish the responsibility of the Project Director to see that the dispute is resolved, or of the Dispute Manager to manage the dispute resolution process at this Level.

Negotiate

Negotiations need to be carried out in a spirit of respect for each party's point of view. The Principal's representatives should be receptive to argument by the Contractor but rigorous in expecting validation of that argument, and vice versa. It is through the exploration and discussion of the facts that arguments are usually won or lost. Negotiation involves each party working to convince the other of their position. Typically each party moves towards a compromise position both can accept.

Typically, a successful negotiation process usually results in the Contractor offering to settle the dispute for an amount that the Principal's negotiators consider to be fair and reasonable and able to be justified to the Agency, but are always subject to final approval by the Agency.

To avoid misunderstandings, a list of matters agreed, including payment and related issues, should be prepared at the time of negotiation and then formalised. For example, does the settlement amount include GST? Does the settlement amount cover all outstanding disputes or only one? Negotiations should be seen as an opportunity to close off possible related claims and perhaps all issues to the date of the negotiation, not just the issue in dispute.

If agreed, obtain approval to settle

If negotiations result in agreement in principle to a settlement amount, a recommendation for the approval of funds can be put to the Agency for its decision. The recommendation should be supported by an assessment of Principal's liability and details of the negotiation process, which together provide an auditable trail justifying the settlement figure.

The Deed of Release

Once approved by the Agency, the settlement is usually formalised with a legal contract referred to as a Deed of Release or Supplementary Agreement (see [Formalise agreement if issue is resolved](#)). This is signed by both parties to the initial contract. The Deed will likely supersede sections of the initial contract.

Drafting the Deed of Release is a specialist activity requiring the input of experienced personnel – the Deed may expose the Principal to considerable risk. Minor incorrect wording or phrasing can have major financial consequences and can extinguish the contractual rights of the Principal. The Contractor's obligations under the contract, especially in relation to liability for faults in the works or services that may become apparent in the future, must be retained.

A standard Deed of Release is not provided as part of the NSW Government *Procurement System for Construction* since each agreement is unique to the individual contract, the contract status at the time of the settlement and the settlement itself. However, examples of clauses can be obtained from the CDRU.

The Dispute Manager arranges engagement of a legal adviser, with appropriate experience, to draft the Deed of Release. The Deed of Release must include all matters agreed to during the negotiations, i.e. the list of matters agreed to by both parties in negotiation becomes the reference document for drafting the Deed of Release. The Project Manager, Project Director, and the Agency must review the Deed of Release to ensure that all matters agreed during the negotiations have been incorporated into the document and that the Deed properly reflects the contract status.

Specific tasks by role

Project Manager

- Provides information to Dispute Manager, including copies of the contract documents; relevant communications; and details of other related disputes or disagreements.
- Reviews updated position paper and provides input.
- Provides information to the negotiation team.
- Assists to formalise resolution if achieved.

Senior Executive

- Continues to take part in negotiation process if requested by the Project Director.
- Reviews updated position paper and provides input.
- May assist to formalise the resolution.

Dispute Manager

- Responsible for managing the resolution process and resolving the dispute in a manner that achieves the [three objectives of the dispute resolution process](#).
- Becomes familiar with the dispute resolution procedures set out in the contract, and ensures adherence to the contract processes and timeframes unless prior approval from the Project Director has been obtained in writing.
- Becomes familiar with all aspects of the dispute, any related disputes, and any potential disputes. This involves reviewing all other relevant documents, including the contract documents and relevant communications and site meeting minutes, and interviewing the Project Manager and Senior Executive.
- Discusses the dispute with the Contractor and gathers information from the Contractor, when authorised to do so by the Project Director.
- Identifies additional specialist resources required during for the negotiation and Expert Determination strategies.

- Prepares updated position paper (as per “*Content of a Position Paper*”), including a negotiation strategy and an Expert Determination strategy.
- Forwards copies of the position papers to the CDRU for review if the criteria when *developing a position paper* are met.
- Considers and responds appropriately to feedback on position papers from the CDRU, the Project Manager, the Senior Executive and the Project Director.
- Writes the briefs for additional specialist resources, reviews the fee proposals, makes recommendations for engagement of those resources to the Project Director, drafts letters of engagement and manages the engagements of those resources.
- Undertakes specialist tasks, such as programming reviews or legal reviews, if appropriately skilled, in the service of providing the Principal with advice.
- Keeps the Project Director informed of any developments and updates the position paper if required: for example, in light of new information provided by additional specialist resources.
- Implements negotiation and Expert Determination strategies: the negotiation strategy may include the Dispute Manager conducting or assisting negotiations with the Contractor.
- Recommends a form of assisted negotiation if appropriate and, if approved by the Agency and agreed by the Contractor, undertake all necessary tasks required to drive the selected process (see *Forms of assisted negotiation*).
- Drafts Agency briefing notes as required.
- Reports on outcome of negotiation to Project Director.
- Formalises resolution if achieved (see *Formalise agreement if issue is resolved*): this may include managing the preparation of a Deed of Release (see *Deed of Release*).
- Notifies the CDRU of the resolution if achieved.

Project Director

- Engages Dispute Manager.
- Reviews updated position paper, and feedback from CDRU, if requested.
- Selects the people to be involved in negotiation.
- Liaises with Agency and obtains approval of strategies. Seeks approval for additional resources if required and engages resources.
- Monitors negotiation process & intervenes, if required.
- If negotiation is successful in principle, seeks Agency approval of specific funds to settle dispute and of formalised settlement agreement.

Forms of assisted negotiation

The parties to the dispute may agree to choose to vary the dispute resolution path specified in the contract. However, this should be the exception, and caution is recommended when considering such a course. Agencies should seek advice from CDRU before agreeing to an alternative resolution path. Even minor variations could have the effect of negating time-bars within the contract, thereby reducing the Principal’s defence options.

Two alternative dispute resolution paths are mediation and obtaining an expert opinion.

Mediation

Mediation is a process where an independent and neutral third party assists both of the parties to the dispute to reach a settlement.

None of the standard forms of contract in the NSW Government *Procurement System for Construction* require mediation. There is some debate within the dispute resolution industry as to whether mediation is well suited to resolving contract disputes. However, when both parties consider mediation to be the most suitable dispute resolution process for their particular situation, the parties may agree to use a mediation process or some other form of assisted negotiation process to resolve their dispute. Such processes are usually jointly funded by the parties in dispute.

Agreement on the mediator and the mediation process

Before commencing mediation the parties to the dispute must agree on the mediator and on how the process will operate, i.e. the terms of reference and the limits of the role of the mediator. There are no universally agreed terms of reference for a mediation process. By definition, mediation involves a neutral party to the dispute that does not give opinions. However, parties to a dispute may extend the concept and elect to engage an industry expert for this process to offer non-binding decisions during or at the conclusion of the process. This extension of the mediation concept is sometimes referred to as “conciliation”.

Advantages of mediation

The objective of the mediator is to ensure that each party’s point of view, concerns and grievances are heard and acknowledged. This enables each party to acquire a detailed understanding of the other party’s position. The mediator assists the parties to focus on the needs, desires and interests of the other party rather than on their own demands or final offers. The mediator can assist the parties to develop options to resolve the dispute and then assist the parties to evaluate the options from each other’s and their own point of view.

Throughout the process, the mediator sets the standard of behaviour for the process and directs the parties away from obstructive behaviour such as placing blame or the continual interruption of the other party. In this way, the process is recognised as fair by each party. Mediation may allow the parties to the dispute to more easily see possible settlement options.

When to use mediation

Mediation may be appropriate when resolution by direct negotiation is considered unlikely due one or more of the following factors:

- there has been a souring of the relationship between the parties; or
- the parties have difficulty communicating with each other; or
- at least one of the parties holds an extremely entrenched position.

Mediation will most likely work if both parties are committed to a bipartite resolution and strongly wish to avoid a more expensive and time-consuming process, such as Expert Determination or litigation. However, if a party is committed to proceeding to Expert Determination, then mediation is an unnecessary expense and is unlikely to add value beyond a committed direct negotiation.

The CDRU can provide general advice on establishing and managing a mediation process or other assisted negotiation processes.

Obtaining expert opinion

Another dispute resolution option is to supplement negotiations with binding or non-binding expert opinion. Some of the standard forms of contract in the NSW Government *Procurement System for Construction* (e.g. GC21) contain clauses to refer a disagreement over a valuation of a variation to an independent, jointly funded and usually jointly selected Valuer.

This principle can be extended to engaging an independent programmer to determine the impact of numerous events on the overall program. Likewise, an industry expert with legal training could be engaged to provide an opinion as to whether there is an entitlement to a variation claim.

Obtaining expert advice is particularly useful where negotiations have become fixed on a single issue.

The CDRU can provide sample terms of reference, and sample agreements to proceed with obtaining an expert opinion; sample briefing documents and letters of engagement for the industry expert; advice on selecting an industry expert and general advice on preparing a submission.

4.5 Level 4 – Expert Determination

In Expert Determination an independent industry Expert makes a decision about the dispute. The contract prescribes the Expert Determination process, however it is recommended that fresh negotiations (Level 3 Negotiations) be implemented in parallel with Expert Determination.

A Dispute Manager is required to manage the substantial workload associated with levels 3 and 4 (see *Select a Dispute Manager*). Project Directors must manage the costs associated with Expert Determination.

Expert Determination was introduced into NSW Government contracts in the early 1990s. The NSW Government has found that Expert Determination generally results in satisfactory outcomes and is significantly cheaper and quicker than litigation.

The standard forms of contract in the NSW Government *Procurement System for Construction* require the parties to refer unresolved disputes to Expert Determination. In other contracts, parties to the dispute can, at any stage, agree to have their dispute resolved through Expert Determination.

Experience has shown that Experts focus on common sense, logic and facts, and do not require voluminous legal submissions (which don't necessarily correlate to improved outcomes and are frequently expensive).

Whilst Expert Determination is generally far less expensive than litigation, the costs can still be significant and include:

- costs of an industry professional with experience in preparing Expert Determinations, to manage the process and prepare submissions (this will usually be the Dispute Manager);
- costs of legal advisers with experience in construction contract disputes to assist in preparation of submissions and to possibly prepare sections of the submissions;
- costs of technical experts such as quantity surveyors and programmers to prepare expert reports to support submissions;
- costs of project personnel who may have to prepare statements, assist in preparing submissions and/or review submissions; and
- costs of the Expert.

Given the unrecoverable costs involved in Expert Determination, well-informed, serious attempts at negotiation generally should be undertaken in parallel with the beginning stages of the Expert Determination process.

Typical initial trigger

Contractor or Principal formally refers the dispute to Expert Determination.

Key actions at this level

Prepare thoroughly

The Expert Determination process requires a coordinated and managed strategy. Additional resources may be required: programmers, engineering or building consultants, and solicitors (see *Engage and manage additional resources*).

In addition to having the updated position paper reviewed, it is recommended that advice be sought from the CDRU at the outset of the Expert Determination process, particularly regarding the selection of the Expert and the briefing of the Expert.

Engage an Expert

Refer to the contract for specific details on the Expert Determination process. General information is presented here.

The parties agree on an Expert within a specified timeframe. If they can't agree a specified independent body nominates one. The Principal engages the Expert, and both parties share equally the fees of the Expert and bear their own costs.

Make submissions

The usual process is:

- The party, which referred the matter to Expert Determination, is required to make a written submission to the Expert within, typically, 15 business days after the date of the Expert's engagement.
- Following receipt of the first party's submission, the other party has a similar period to make its written submission to the Expert, which may include cross-claims.
- The first party then has, typically, 10 business days to submit a response.
- Then the second party has the same time to submit a final response.

The Expert considers the submissions and makes a determination, typically within 12 weeks of being engaged.

The Expert's determination is final and binding if the value is under a specified amount (often \$500,000). Payment must be made, typically within 28 days.

If the determination is over the specified amount the decision is not binding and either party can choose to commence litigation.

Specific tasks by role

Project Manager

- Contributes to the Expert Determination process as required.
- Reviews summary of determination and makes comment.

Senior Executive

- Contributes to the Expert Determination process if required.
- Reviews summary of determination and makes comment, if required.

Dispute Manager

- Undertakes all tasks specified under Specific Tasks by Role for the Dispute Manager in Level 3 plus the following additional tasks.
- Manages the Expert Determination process, including helping to select the Expert, in consultation with the Project Director and the other party.
- Writes the Expert's letter of engagement and "Summary of Dispute". Obtains the other party's concurrence to the letter and Summary. Submits the letter and Summary to the Project Director for approval.
- Manages and usually prepares the Principal's submissions.
- Reviews and summarises determination and, if it is not binding, recommends whether it should be accepted or not and why.
- Provides the CDRU with a copy of the Expert Determination and the summary of it.

Project Director

- Provides input to the Expert selection process.
- Obtains Agency approval of proposed Expert and additional specialist resources and engages resources, if required.
- Engages the Expert.
- Monitors Expert Determination process and associated costs.

- Reviews summary of determination.
- Assists Agency to make a decision to accept or reject the determination.

4.6 Level 5 – Litigation

Litigation is an expensive and time-consuming process. Careful consideration is required before initiating litigation. When litigation is contemplated or appears likely, the Dispute Manager is to provide an updated position paper to the Project Director. The Dispute Manager must forward this paper to the CDRU for strategic review - this is irrespective of the amount involved.

New negotiations, directed by the Project Director with advice from the litigation overview team, should commence as soon as practicable to attempt to resolve the dispute and curb accruing costs associated with the litigation process.

It is Government policy (Premiers' Memorandum 94-25) that whenever possible, settlement of disputes relating to construction should be achieved by using approved alternative methods of dispute resolution rather than resorting to the court system. Alternative methods of dispute resolution are often a quicker, more cost effective way of satisfactorily resolving disputes. However, litigation is preferred over arbitration – arbitration incurs similar costs to litigation. Potential litigation between Government Authorities is subject to the Premiers' Memorandum 97-26.

Whilst generally seen as a last resort option by both parties, litigation is occasionally initiated by the Contractor, and, more infrequently, initiated by the Principal. For the Principal it may well still be the most effective method of dispute resolution if:

- there is a very substantial sum in dispute;
- there are substantial legal questions in dispute;
- the dispute is a multi-party dispute; or
- there are substantial allegations of dishonesty.

The Project Director is ultimately responsible for engaging, briefing and giving instructions to the legal team as directed by the Agency, after input from the "litigation overview team". Monthly, or quarterly reports as appropriate, are to be prepared on behalf of the Agency for its Treasury analyst.

Typical initial trigger

Decision is made to reject Expert Determination (if allowed under the contract, i.e. the value is under a specified amount).

Key actions at this level

Establish a litigation overview team

The litigation overview team must include the Project Director, the Dispute Manager, representatives of the Agency, and a person from the Contract Dispute Resolution Unit (funded by the project). A Treasury representative may also be included in the team.

The focus of the litigation overview team will be to monitor the progress and cost of the litigation phase of the dispute resolution process and to provide advice to the Project Director regarding instructions that are required to be given to the legal team – the outcome of litigation is only as good as the instruction given.

Engage a legal team

The legal team receives instruction, provides legal advice, prepares for court proceedings and represents the Principal.

Specific tasks by role

Project Manager

- Contributes to the litigation process as required.
- Reviews updated position papers and gives advice on the issues as required.

Senior Executive

- Contributes to the litigation process if required.
- Reviews updated position papers and makes comment, if required.

Dispute Manager

- Updates the previous position paper, including the litigation strategy and a new negotiation strategy (both strategies would be devised in consultation with the Project Director).
- Further updates this position paper as required, incorporating input from the litigation overview team and the legal team as appropriate.
- Forwards copies of the position papers to the CDRU for review.
- Supports the litigation overview team and the legal team, including preparing detailed estimates and taking part in negotiation as required.
- Drafts Agency briefing notes and prepares monthly or quarterly reports for the Agency to submit to its Treasury analyst, as required.

Project Director

- Reviews position papers, briefing notes and reports prepared by the Dispute Manager.
- Regularly informs Agency of progress, provides advice to and takes directions from Agency.
- Appoints litigation overview team as approved by the Agency, provides up-to-date information to the litigation overview team and considers its advice.
- Engages, briefs and gives instructions to the legal team as directed by the Agency, and receives advice and opinion from the legal team.

5 Definitions

Agency

New South Wales Government Department or Declared authority within the meaning of the Public Sector Employment and Management Act 2002 NSW, or an entity established by a separate Act of New South Wales Parliament, where that entity is expressed to represent the Crown, except for State Owned Corporations within the meaning of the State Owned Corporations Act 1989 NSW.

Bond copy

The original copy of the contract. Generally, the version of the contract issued when tenders were called, as varied by addenda and correspondence exchanged up to and including the Letter of Award.

Contract Dispute Resolution Unit (CDRU)

Department of Commerce, Contract Dispute Resolution Unit. The CDRU provides a Treasury funded service to Agencies to facilitate the minimisation, management and resolution of contract disputes.

Manager, CDRU

Mail address: Level 11, McKell Building
2-24 Rawson Place
Sydney NSW 2000

Telephone: (02) 93728036
Facsimile: (02) 93728033
Email: manager.cdru@commerce.nsw.gov.au

Contract Administrator

See [Project Manager](#).

Contractor

A company or other legal entity that provides goods or services to an Agency under a contract; e.g. a construction contractor or a construction-related consultant such as an architect or engineer; is referred to as a Service Provider in the NSW Government *Procurement System for Construction*.

Conciliation

A form of Alternative Dispute Resolution in which the parties bring their dispute to a neutral third party (the conciliator), who helps to reduce tension, improve communication and explore possible solutions. Conciliation is similar to Mediation but differs in the amount of input the conciliator has into the resolution of the dispute. Unlike the mediator, the conciliator may analyse any possible evidence related to the dispute and offer the parties his/her own expert opinion, which the parties may either accept or reject.

Deed of Release

The written document that sets out the terms of the settlement agreement resolving the dispute, and is signed by the parties to the contract from which the dispute originated.

Dispute

An unresolved disagreement between the Project Manager (representing the Principal) and his/her equivalent for the Contractor in relation to respective contract entitlements, which is formally elevated by one party to the level of a dispute (or Issue) as defined by the contract. Under GC21, elevation is to the Senior Executive and, under Minor Works forms of contract, elevation is to the Principal's Agent.

Dispute Manager

The person responsible for managing resolution of the dispute. The Dispute Manager has no authority to commit the Principal to a settlement, or suggest a settlement offer to the Contractor. The Dispute Manager's role is extensive and described in this Procurement Practice Guide.

Expert

The person independent of the dispute, usually with a relevant industry and legal background, appointed to determine the dispute according to the provisions of the Contract.

Expert Determination

The formal process prescribed in standard forms of contract, whereby a dispute is referred to an Expert to make a determination. Both parties to the dispute provide written submissions to the Expert.

Issue

As defined in the GC21 standard forms of contract, any issue, dispute or difference of opinion raised by either party under clause 73 of GC21. In other NSW Government *Procurement System for Construction* contracts, the term "dispute" is used instead of Issue.

Letter of Award

A document issued by the Principal in a contract to accept the offer by the successful tenderer.

Mediation

A process in which an independent and neutral third party assists the parties to a dispute in reaching a negotiated settlement.

Mediation is a non-intrusive process by which the parties to a dispute are responsible for determining the settlement of their dispute in the mediation process. No settlement is imposed on the parties by the mediator, or even proposed by the mediator.

Potential dispute

A disagreement between the Contractor and the Project Manager, where the Project Manager is of the opinion that one party is likely to give notice to the other party that it wishes to raise the disagreement to the level of a dispute.

Principal

The party or legal entity, named in the contract documents, which formally contracts with the Contractor. Under the NSW Government *Procurement System for Construction* this is most often a Minister of the NSW Government, representing the Crown.

Probity

Integrity; uprightness; honesty.

When carrying out duties for Government, probity includes maintaining adherence to public sector standards such as fairness, impartiality, consistency, selflessness, and accountability in the pursuit of value for money. Probity is more than just the avoidance of corrupt or dishonest behaviour. Probity is also about process and transparency of process, i.e. Probity is doing things the right way and being seen to do things the right way.

Project Director

The Project Director is the person (employee or consultant) representing the Agency for which the project is being procured. The Project Director is appointed early in a project and will already have clear guidelines that govern its relationship with the Agency.

Project Manager

The Contract Administrator. The Principal's nominated representative administering the Contract; that is the person managing the day-to-day operation of the contract on behalf of the Principal. Depending on which contract is being used, the Project Manager may be referred to under the contract as the Principal's Authorised Person (GC21 General Conditions of Contract), or the Principal's Representative (Minor Works).

Senior Executive

Under the NSW Government *Procurement System for Construction* GC21 standard forms of contract, the Principal's Senior Executive is the person named in the contract who is required to confer with the Contractor's Senior Executive in an attempt to resolve an Issue. In the Minor Works Contract, the Principal's Agent takes on a similar role. In this Procurement Practice Guide the term 'Senior Executive' is used to refer to the Principal's Senior Executive or a person under another standard form contract to whom a dispute is elevated by the Project Manager prior to Expert Determination.

Service Provider

See [Contractor](#).