



**CONSTRUCTING
EXCELLENCE**
South West

Construction Mediation

Guide and Protocol



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Guide

Introduction to Mediation

The purpose of this guide is to provide a document which explains how to use mediation to resolve disputes which relate to construction projects.

Mediation is one of the Alternative Dispute Resolution processes whereby an independent person assists the parties to negotiate a settlement of a dispute. The Pre-Action Conduct and Protocol, which is published under the Civil Procedure Rules, requires the parties to a dispute to consider the use of an Alternative Dispute Resolution process and the Courts have held that a party to a dispute who unreasonably refuses to mediate, could be liable to cost sanctions. Moreover, contract publishers such as the JCT include provisions within its contracts which encourage the use of mediation. Recent statistics produced by the Centre for Effective Dispute Resolution show that 67% of mediations settle on the day of the mediation and a further 19% settle shortly afterwards. Put another way, 86 out of 100 mediations will result in a settlement because of the mediation process.

In this context, Constructing Excellence South West, in collaboration with Mediation for Construction (M4C), has identified the need to highlight how mediation can and should be used to resolve disputes and Constructing Excellence South West supports and encourages the use of mediation as a process of resolving disputes.

To promote the greater use of mediation, this Guide has three sections to it. Firstly, it explains what mediation is and its benefits. Secondly, it provides a set of guidance rules, called the 'Protocol' at each stage of the process, and thirdly, it provides a number of model documents and clauses which can be used or adapted for mediation.

It is hoped that this Guide will be helpful. Mediation is a flexible way to resolve disputes, as such, whilst this Guide explains the general process of mediation it has to reflect the fact that as every dispute is different, so will each mediation. However, this Guide explains how to use mediation to successfully resolve disputes.

Guide

Mediation – An Overview

Mediation is a non-adversarial structured process used to resolve disputes and disagreements using a Mediator as a neutral third party to facilitate settlement.

Mediation can be used successfully at any time. Mediation is often used before resorting to adversarial methods such as adjudication, arbitration or court proceedings. Mediation can be used once proceedings have commenced.

Mediation is designed not only to resolve disputes but also to preserve and re-establish relationships.

To be successful, there must be a mutual commitment by all parties to make the process work.

Unlike a judge, arbitrator, or adjudicator, the Mediator will not impose a decision on the parties but instead will help the parties achieve a mutually agreed settlement.

Mediation is a form of Alternative Dispute Resolution (ADR). Whilst adjudication and arbitration are often referred to as forms of ADR similar to mediation, there are some fundamental differences in the mediation process.

Whilst around 86% of cases settle through mediation, if settlement is not achieved the Mediator may sometimes be asked by the parties to give a non-binding recommendation for settlement.

Mediation is a private process. All information, records, reports or other documents received by a Mediator while serving in that capacity will be confidential and privileged from subsequent production. The parties will maintain the confidentiality of the mediation and cannot rely upon or introduce as evidence anything said or done at the mediation (other than a final signed agreement settling an issue) in any court, arbitration or other proceedings, including adjudication.

Save for situations where the parties have agreed how the costs and expenses of the mediation are to be apportioned between them, the Protocol envisages that the parties will share the costs and expenses of the mediation equally.

Why Mediate?

Mediation is a collaborative method of resolving disputes or differences. By comparison with adjudication, arbitration or court proceedings mediation is:

Quick – cases usually settle within 4 weeks of the parties agreeing to mediate.

Low Cost – given the speed of the process, mediation is generally more cost effective than the alternatives.

Collaborative – parties usually agree to mediate because they want to preserve or salvage working relationships and resolve their disputes or differences before they escalate further. The spirit of mediation aligns with the spirit of collaborative working.

Less formal – the process is informal and its confidential nature usually encourages a more open dialogue.

Less risky – settlement at mediation has the potential for 'win-win' outcomes and removes all the risk which would otherwise be had of losing an adjudication, arbitration or court proceedings.

Flexible – the parties can reach flexible settlements that are not possible with alternative forms of dispute resolution. For example, in a construction context, the parties can agree that payment by Party A will be made in return for completion of work by Party B.

Final – a settlement of the dispute reached at mediation is usually full and final.

Parties who are reluctant to mediate will face pressure from the Court to do so:

The Pre-Action Protocol for Construction and Engineering Disputes and the Civil Procedure Rules 1998 (in particular the Overriding Objective and the Practice Direction for Pre-Action Conduct), which apply to all construction and engineering disputes, provide for mediation at an early stage.

A refusal to mediate must be supported by very good reasons in order to avoid sanctions, often in costs, which the Court is increasingly likely to otherwise impose.

The Mediation Process

	Stage 1 Referral	Stage 2 Agreement to Mediate and Terms	Stage 3 Briefing the Mediator
Who is involved	<ul style="list-style-type: none"> • The parties to the dispute • The administrator 	<ul style="list-style-type: none"> • The parties to the dispute • The administrator • The Mediator 	<ul style="list-style-type: none"> • The parties • The Mediator
Purpose	<ul style="list-style-type: none"> • Agree to mediate • Initial steps to appoint Mediator 	<ul style="list-style-type: none"> • Identify agreed Mediator • Establish Mediator fees and expenses • Record terms of appointment of Mediator • Record terms on which mediation will be conducted • Set a date for the mediation meeting 	<ul style="list-style-type: none"> • Provide Mediator with enough information to understand the disputes • Ensure mediation agreement has been completed
Responsibility	<ul style="list-style-type: none"> • The parties to the dispute • The administrator 	<ul style="list-style-type: none"> • The parties to the dispute • The administrator 	<ul style="list-style-type: none"> • The parties • The Mediator
Information	<ul style="list-style-type: none"> • Details of the parties to the dispute • The amount of the dispute • Outline of dispute • Identify any connected parties for the purposes of the conflict check 	<ul style="list-style-type: none"> • Conflict of interest check or any other reason why the Mediator should not act • Dates for mediation • Fees and expenses of mediation 	<ul style="list-style-type: none"> • Documents to assist the Mediator to understand the issues
Time period	7 days	7 days	14 days

Stage 4 Setting of the Procedure	Stage 5 Exchange of Information	Stage 6 The Mediation Meeting	Stage 7 The Outcome
<ul style="list-style-type: none"> • The parties • The Mediator 	<ul style="list-style-type: none"> • The parties • The Mediator 	<ul style="list-style-type: none"> • The parties to the dispute • The administrator • The Mediator 	<ul style="list-style-type: none"> • The parties • The Mediator
<ul style="list-style-type: none"> • Establish the best approach to the mediation and highlight any issues of particular importance 	<ul style="list-style-type: none"> • Identify any additional documentation that would assist the Mediator or the parties 	<ul style="list-style-type: none"> • To conduct meeting sessions with the Mediator in private with the aim of reaching settlement of the dispute 	<ul style="list-style-type: none"> • To record the terms of settlement or identify any reasons for settlement not being reached and consider how to resolve them
<ul style="list-style-type: none"> • The parties • The Mediator 	<ul style="list-style-type: none"> • The parties • The Mediator 	<ul style="list-style-type: none"> • The administrator 	<ul style="list-style-type: none"> • The parties • The Mediator
<ul style="list-style-type: none"> • The amount of the dispute • Whether there are any time constraints having regard to any live adjudication, arbitration or court proceedings • The stage at which any live project has reached having regard to the interests of the project • The identity of any third parties who may be contacted by the Mediator with the agreement of the parties and invited to join the mediation process (in the interests of promoting settlement of all issues) • Disclosure of documents • The need or otherwise for any expert evidence • The proposed date for the Mediation Meeting 	<ul style="list-style-type: none"> • Any documents requested by the parties subject to any reasonable objection 	<ul style="list-style-type: none"> • Position statements • Documents relevant to the dispute 	<ul style="list-style-type: none"> • Settlement agreement • Reasons for not reaching a settlement
7 days	7 days	1 day	n/a

Protocol

Stage 1 – The Referral

1.1

The purpose of this stage is to identify whether there is a dispute which needs to be resolved in a more formal context than 'without prejudice' discussions and with the assistance of someone other than the parties involved.

1.2

Mediation can begin in different ways:

1.2.1 The contract can stipulate that the parties will attempt to settle their dispute using mediation (an example of such a clause is at **[Annex A]**); or

1.2.2 The parties reach an agreement to mediate after the dispute has arisen usually at the request of one of the parties; or

1.2.3 A recommendation is made by the Court that the parties should seek to settle the dispute by mediation.

1.3

If the parties have not already agreed to mediate then one of the parties should contact the other parties to the dispute asking them if they are willing to use a mediation process to settle their dispute. This is known as 'the Referral Letter'.

1.4

The Referral Letter will contain a request that the parties attempt to resolve their dispute by mediation and details of:

1.4.1 the parties;

1.4.2 the contract under which the dispute has arisen;

1.4.3 an outline of the dispute and a statement of the amount (or approximate amount) in dispute;

1.4.4 details of any connected persons to the dispute (who are not a party to the dispute).

1.5

A model form of Referral Letter is at **[Annex D]**.

1.6

Once the parties have agreed to mediate, the parties will need to complete a number of formalities. These are:

1.6.1 The selection of a Mediator.

1.6.2 The entering into the Contract for the Appointment of the Mediator **[Annex B]**.

1.6.3 The signing of the Mediation Agreement **[Annex C]**.

1.7

The parties may be assisted with the selection of the Mediator by a dedicated mediation service provider (Administrator) who will have a thorough understanding of the mediation process. Dedicated mediation service providers include:

**Mediation for
Construction**
Innovation Centre
Copse Road
Yeovil
Somerset
BA22 8RN
T: 020 3411 4425
E: admin@m4c.org.uk

**Centre for Effective
Dispute Resolution**
70 Fleet Street
London
EC4Y 1EU
T: 020 7536 6000
E: info@cedr.com

Protocol

Stage 2 – Agreement to Mediate and Terms

2.1

The purpose of this stage is to formally appoint a mediator through the Administrator.

2.2

Once the parties have agreed to mediate, the Administrator will provide to them the Contract for the Appointment of the Mediator ('the Contract') and the Mediation Agreement.

2.3

A model form Contract for the Appointment of the Mediator is at **[Annex B]**. The Contract sets out the terms of business of appointing the Mediator. The Contract should be signed by the parties before any further steps are taken in the process. The Contract should confirm the fees and likely expenses of the mediation (and the Mediator) and require the parties to enter into a Mediation Agreement.

2.4

The Mediation Agreement will record the terms on which the parties (and those that are attending) have agreed to mediate. A model form of Mediation Agreement is at **[Annex C]**. The Mediation Agreement should confirm:

2.4.1 the names of the parties;

2.4.2 a description of the dispute being mediated;

2.4.3 provisions relating to confidentiality; and

2.4.4 the without prejudice status of the process.

2.5

Once the procedural matters have been concluded, the Administrator will liaise with the parties to set a timetable for the mediation process including fixing an agreed date for the Mediation Meeting (Stage 6).

Stage 3 – Briefing the Mediator

3.1

The purpose of this stage is to select the Mediator.

3.2

The parties will either select the Mediator or alternatively the Administrator may nominate either a Mediator or several Mediators (usually 3) so that the parties can agree who the Mediator will be.

3.3

The parties may decide that the Mediator should have specific industry knowledge or experience. The parties should agree on the identity of the Mediator so that they have absolute confidence and trust in the Mediator's abilities.

3.4

Mediators come from a variety of professional backgrounds but a Mediator with a good understanding of the subject matter of the dispute is always to be preferred as the ability to reality-test the parties' strengths and weaknesses is essential. To do this effectively, the Mediator should understand the basic legal principles and processes which relate to the mediation.

3.5

The Mediator may recommend that they should be assisted by a co-mediator. A co-mediator might be needed in disputes where:

3.5.1 there are more than three parties to the dispute;

3.5.2 there are technical or legal matters on which the Mediator and the parties would be assisted by input from a co-mediator who has specialist or technical knowledge.

Protocol

3.6

The Mediator's neutrality and integrity in the mediation process are key elements of the mediation. To ensure impartiality, the Mediator has a responsibility to disclose to the parties all actual and potential conflicts of interest which the Mediator reasonably knows and which could reasonably be seen as raising a question about the Mediator's impartiality. Once disclosed by the Mediator, the parties should confirm that they are happy that no conflict of interest exists with the selected Mediator. This should be done before entering into the Mediation Agreement.

3.7

The Mediation Agreement should be signed before the mediation date.

3.8

Once the Mediator has been selected and the parties have agreed the terms of appointment and entered into a Mediation Agreement, then the parties should send the Mediator a short narrative explaining the dispute.

Stage 4 – Setting of the Procedure

4.1

The purpose of this stage is for the Mediator to outline the mediation process prior to the Mediation Meeting.

4.2

The advantage of mediation over other dispute resolution processes is the flexible nature of the process.

4.3

This Protocol assumes that the Mediator will be engaged by the parties at an early stage of the dispute. An early stage of the dispute means (in the context of this Protocol) that the parties have reached deadlock on some or all issues in dispute but have not commenced any formal dispute resolution procedure such as adjudication, arbitration or court proceedings.

4.4

In the event that formal proceedings have commenced, the Protocol anticipates that the parties will appoint a Mediator as soon as possible although the Mediator can be appointed at any stage.

4.5

Once the parties have appointed the Mediator, the Mediator will contact the parties so as to allow the Mediator to ask any questions and get a better understanding of the dispute.

4.6

The parties and the Mediator will discuss separately (and in private) the best approach to the mediation and highlight any issues of particular importance. The Mediator will establish at an early stage the best approach to the mediation process having regard to:

Protocol

4.6.1 the financial amount in dispute;

4.6.2 whether there are any time constraints having regard to any live adjudication, arbitration or court proceedings which are underway;

4.6.3 the project's current stage reached;

4.6.4 the identity of any third parties who may be contacted by the Mediator with the agreement of the parties and invited to join the mediation process (in the interests of promoting settlement of all issues);

4.6.5 the disclosure of documents;

4.6.6 the need for any expert evidence; and

4.6.7 the proposed date for the Mediation Meeting.

These are called 'the Planning Factors'.

4.7

The Mediator may suggest that in the interests of the process there should be an initial meeting between the parties' directors or owners as this can assist the parties to identify the issues in dispute. An initial meeting may not be necessary if the Mediator has been able to deal with matters through private telephone calls.

4.8

The Mediator should keep under review the Planning Factors and the proposed date for the Mediation Meeting having regard to the Planning Factors. In exceptional circumstances the Mediation Meeting could be adjourned and the Mediator will set a revised date with the Administrator.

Stage 5 – Exchange of Information

5.1

The purpose of this stage is for the parties to provide details of the dispute.

5.2

The Mediator will be provided with a written outline of the dispute from the parties together with copies of any key documents that may assist the Mediator in understanding the matters in issue, together with any offers of settlement that have already been made.

5.3

The Protocol recognises that mediation often takes place before the parties have reached a stage in formal proceedings where disclosure has taken place. The Protocol therefore recognises the benefits of exchanging sufficient information about the dispute or difference to allow the parties to broadly understand each other's position and make informed decisions about settlement.

5.4

The Mediator will therefore assist the parties in identifying any additional documentation that would assist:

5.4.1 the Mediator; or

5.4.2 the parties themselves.

5.5

The parties should cooperate with any recommendation made by the Mediator for the provision of any documents.

Protocol

Stage 6 – The Mediation Meeting

6.1

The purpose of this stage is for the parties to attend the Mediation Meeting.

6.2

The date of the Mediation Meeting should be set at an early stage.

6.3

Arrangements for the Mediation Meeting will usually be determined by the parties in conjunction with the Administrator and the Mediator.

6.4

The meeting venue needs to be suitable for conducting the mediation with adequate facilities to hold private meetings.

6.5

The Mediation Meeting and related mediation communications are private and held on a without prejudice basis. The parties and their representatives may attend the Mediation Meeting. Other persons may attend only with the permission of the parties and with the consent of the Mediator. All participants at the Mediation Meeting will have signed a confidentiality agreement, usually as part of the Mediation Agreement.

6.6

The Mediator may be provided with a mediation bundle prepared by the parties no later than 7 days before the Mediation Meeting, the contents of which will reflect the matters discussed during earlier stages.

6.7

The parties are expected to provide the Mediator with their respective private and confidential risk assessments in the form of the party's and their opponent's best, worst and most likely alternatives to a negotiated outcome. In other words, the parties are expected to provide their respective 'win' and 'lose' scenarios which could be relevant to settling the dispute.

6.8

The purpose of the analysis is to help the parties make informed decisions about the possible options that may be discussed or offered at mediation. Any analysis should identify the legal costs to date and the best estimate of the legal costs to resolution through proceedings.

6.9

The conduct of the Mediation Meeting is decided by the Mediator. The Mediator may hold joint sessions with the parties at any stage. The Mediator may also hold private sessions with the parties. All matters discussed in the sessions are private and confidential and held on a without prejudice basis.

6.10

The parties are encouraged to prepare a draft settlement agreement in advance of the Mediation Meeting as the process of drafting and agreeing the terms of settlement can take some time.

6.11

If requested by the parties, the Mediator may make non-binding recommendations for resolution of the dispute or difference.

Protocol

Stage 7 – The Outcome

7.1

The purpose of this stage is to record the agreed settlement.

7.2

If a settlement is successfully achieved, the mediation is concluded by the parties recording all the terms of settlement in writing and signing the agreement ('Settlement Agreement'). An example of a Settlement Agreement is at **[Annex E]**.

7.3

If the parties have already commenced court or arbitration proceedings then the settlement agreement will state that the parties will stop those proceedings and this is done with a consent order.

7.4

If the parties do not reach an agreed settlement, the mediation concludes at the end of the Mediation Meeting. It is best practice for the Mediator to encourage the parties to identify any reasons why agreement could not be reached in a single document that would remain confidential to the parties and for the parties to discuss with the Mediator proposals on how any remaining disputes or differences might be resolved without the need for adjudication, arbitration or court proceedings.

Toolkit

Toolkit Documentation

A Incorporation Clause

If any dispute arises in connection with this [Agreement][Contract], the parties agree to enter into mediation to settle such a dispute and will do so in accordance with the Constructing Excellence Guide to Mediation Protocol ('the Protocol'). Unless otherwise agreed between the parties shall within 14 days of notice of the dispute, the mediator will be nominated by (delete all but one. If no nominator is selected, the nominator shall be Mediation for Construction):

[Mediation for Construction (M4C) of Innovation Centre, Copse Road, Yeovil, Somerset BA22 8RN]

[The Royal Institute of Chartered Surveyors (RICS) of 12 Great George Street, (Parliament Square), London, SW1P 3AD]

[The Centre for Effective Dispute Resolution (CEDR) of 70, Fleet Street, London, ECEY 1EU]

[The Royal Institute of British Architects (RIBA) of 66 Portland Place, Marylebone, London, W1B 1NT]

[name one of the mediation bodies listed on the Constructing Excellence South West's website at www.constructingexcellencesw.org.uk]

('the **Nominator**'). To initiate the mediation a party must give notice in writing (Referral) to the other party or parties to the dispute referring the dispute to mediation. A copy of the Referral should be sent to the Nominator. Unless otherwise agreed, the mediation will start not later than 28 days after the Referral in accordance with the Protocol. No party may commence any court proceedings or arbitration in relation to any dispute arising out of this [Agreement][Contract] until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay."



B Contract for the Appointment of a Mediator
<https://goo.gl/pbN330>



C Mediation Agreement
<https://goo.gl/lY0qiz>



D Referral Letter
<https://goo.gl/ICGX54>



E Settlement Agreement
<https://goo.gl/bEBTkN>

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The *Contract for the Appointment of a Mediator* and *The Mediation Agreement* have been supplied courtesy of Mediation for Construction (M4C).



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