

## **Adjudication Provisions in PPP Contracts**

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As a result of the complex interaction of the multitude of contracts involved in a PFI/PPP scheme and the pass down of risk from the Authority procurer through the Project Company to the Building Contractor and Facilities Management Contractor the dispute resolution provisions within PFI/PPP project documents are necessarily more complex than most.

The further complication is that PFI contracts are excluded from the statutory Adjudication regime under the Housing Grants Act by means of the Construction Contracts Exclusion Orders but that does not apply to every contract within the project documents, including importantly the Building Contract. It will be important therefore for those acting for the Project Company to seek to agree a dispute resolution procedure which is compliant with the Housing Grants Act so that it can be passed down into the principal sub-contracts with minimal amendment.

Looking for the purposes of this article at the provisions generally to be found within the Project Agreement between the Authority and the Project Company and the Building Contract between the Project Company and the Building Contractor, the basic contractual dispute resolution mechanisms tend to remain as expected namely adjudication and either arbitration or court.

However, there tend to be complex adjudication provisions involving procedures for conjoining of disputes, introduction of third parties to disputes, options to use the same adjudicator in separate disputes and name borrowing provisions.

Added to this mix, the general structure of the risk and remedy profile is that certain matters will be defined as "Equivalent Project Relief" (EPR) items. This means that when there is a claim for money or relief from contractual obligations, to the extent that the circumstances behind the claim at Building Contract level are the same as those at Project Agreement level, and the same remedies apply, the Building Contractor's remedy is restricted to the amount or relief the Project Company can recover from the Authority. This is in line with the underlying aim of the Project Company to ensure pass through of all risks so that they do not end up with liabilities to the Building Contractor without having a remedy against the Authority. There are exceptions to this for any element of the claim arising from a breach by the Project Company which is not also a breach by the Authority.

The Building Contract will include procedures for pursuing a claim under the Building Contract against the Project Company and, as a quid pro quo for acceptance of EPR, it will also contain obligations on the Project Company to pursue the relevant claim against the Authority under the Project Agreement. The Building Contract will normally require payment by the Building Contractor to the Project Company of the costs of pursuing the Building Contractor's claims. There will be obligations on the Project Company to consult with the Building Contractor in respect of any proposed compromise or withdrawal of the claim and the Building Contractor would generally have a right to refuse to consent on reasonable grounds to any such compromise or withdrawal.

It is also in the context of EPR claims that the name borrowing provisions are found within the Building Contract. These will allow the Building Contractor, in certain circumstances, to take the name of the Project Company and pursue the relevant claim under the Project Agreement against the Authority. There are provisions dealing with the Building Contractor's obligation to indemnify the Project Company in respect of any awards of costs where the name borrowing provisions are applied.

The name borrowing provisions can only apply where the claim by the Building Contractor to the Project Company is identical to the claim by the Project Company to the Authority. This is most likely to be in situations of extension of time under Work Compensation Events since when considerations of financial claims are introduced, there is almost certain to be a divergence between the amounts the Building Contractor is entitled to recover under the Building Contract and the amounts the Project Company will wish to recover due to funding considerations.

Sitting alongside the EPR provisions and the name borrowing provisions are generally detailed Adjudication provisions.

The relevant procedures for appointment of the Adjudicator and rules governing the conduct of the Adjudication are set out along with procedures designed to promote consistency of decision making at Project Agreement and Building Contract level.

There are essentially three scenarios namely (i) conjoining of disputes both of which have already been referred to Adjudication where they deal with the same issue; (ii) joining of a third party to a dispute which has already been referred to Adjudication and where no formal dispute need yet have arisen with the third party; and (iii) use of the same adjudicator where disputes are neither conjoined nor the third party mechanism used.

Conjoining - If any dispute referred to Adjudication is, in the opinion of the Project Company, the same or connected with a dispute arising out of a related agreement (such as the Project Agreement), Project Company may request the Adjudicator to conjoin the related dispute with the original dispute.

This procedure is not often used in practice since it requires the Project Company to sit in the middle defending claims by the Building Contractor on the one hand and pursuing the same claims against the Authority on the other and at the same time.

Other disadvantages of such a process are that, being a three party procedure, it is inevitably more expensive and likely to take longer than a two party procedure due to the increased complexity. The provisions which require the Building Contractor to pay the Project Company's costs arising as a result of their obligation to pursue any claim could potentially apply in a conjoined procedure, depending on the wording of the relevant clause, significantly increasing the cost to the Building Contractor. The parties are not entirely in control of the process as the application to conjoin would be at the instance of the Project Company and the decision on whether to allow matters to be conjoined would be in the hands of the Adjudicator. Where the claims relate to matters which fall within the definition of EPR, the Building Contractor's remedy will still be limited to the award to the Project Company under the Project Agreement.

The procedure may be useful where there are matters such as interpretation of contractual provisions which are common between two contracts and where a consistent decision is required as opposed to in circumstances such as extension of time/compensation claims where it is likely either that EPR provisions will apply,

directing parties towards less complex, two party name borrowing procedure, or else towards the Project Company pursuing the claim against the Authority.

Third Party Procedure – Broadly, this applies where in relation to any dispute, the Project Company claims that it would have, in respect of the subject matter of the dispute, a right of relief, contribution or indemnity against a third party under any related agreement such as the Project Agreement and could apply whether or not a dispute has actually arisen between the Project Company and the Authority. In such circumstances the Adjudicator can be requested to order the Authority to be convened as a third party.

There are strict timetables generally applicable to such a procedure since the overall aim of the Adjudication remains, as with statutory Adjudication, to get a quick decision, in twenty eight days where possible. As with the conjoining procedure, the application is made by the Project Company and the decision on whether to allow it is made by the Adjudicator so the procedure is not entirely within the control of the parties to the dispute.

This procedure brings with it similar considerations to the conjoining procedure above in terms of timescale, cost and complexity.

Same Adjudicator – This provides for the same Adjudicator to be appointed to deal with disputes under the Building Contract and the Project Agreement. If parties manage to make the timescales run close together, it is possible for such claims to run concurrently but they would not be run together in one Adjudication procedure as with the conjoining and third party procedures. This would allow consistency of decision making where that is necessary and without the complexities and strict timetables involved in the other two forms of procedure.

The decision on what is the right procedure to use in any dispute will depend on the circumstances of the particular dispute and this is something which requires careful consideration at the outset.

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