

**CUMBRIA COUNTY COUNCIL**

**Lot 2.2**

**SCHEDULE 6.3**

**DISPUTE RESOLUTION PROCEDURE**

Redacted contract

## **SCHEDULE 6.3 – DISPUTE RESOLUTION PROCEDURE**

### **1. BACKGROUND**

This schedule 6.3 sets out the Dispute Resolution Procedure for the purpose of this Agreement.

### **2. NOTICE OF DISPUTE**

2.1 The Dispute Resolution Procedure shall commence with the service of a Notice of Dispute by either party on the other party (with a copy provided to the Framework Authority).

2.2 The Notice of Dispute shall:

2.2.1 set out the material particulars of the Dispute;

2.2.2 set out the reasons why the party serving the Notice of Dispute believes that the Dispute has arisen;

2.2.3 subject to paragraph 2.6, elect whether the Dispute should be dealt with under the Standard Dispute Resolution Timetable or the Expedited Dispute Resolution Timetable; and

2.2.4 if the party serving the Notice of Dispute believes that the Dispute should be dealt with under the Expedited Dispute Resolution Timetable, explain the reason why.

2.3 Unless agreed otherwise in writing, the parties shall continue to comply with their respective obligations under this Agreement regardless of the nature of the Dispute and notwithstanding the referral of the Dispute to the Dispute Resolution Procedure.

2.4 Subject to paragraph 3.4, the parties shall seek to resolve Disputes firstly by commercial negotiation (in accordance with paragraph 3), then by mediation (in accordance with paragraph 4) and lastly, subject to Paragraph 4.11, by recourse to arbitration (in accordance with paragraph 6) or litigation if either party seeks urgent injunctive relief.

2.5 The time periods set out in the Dispute Resolution Timetable shall apply to all Disputes unless the parties agree that an alternative timetable should apply in respect of a specific Dispute.

2.6 The parties may only agree to use the Expedited Dispute Resolution Timetable in exceptional circumstances where the use of the Standard Dispute Resolution Timetable would be unreasonable, including (by way of example) where one party would be materially disadvantaged by a delay in resolving the Dispute. If the parties are unable to reach agreement on the use of the Expedited Dispute Resolution Timetable within five (5) Working Days of the issue of the Notice of Dispute then the use of this timetable shall be at the sole discretion of the Authority.

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

3. **COMMERCIAL NEGOTIATIONS**

- 3.1 Subject to paragraph 3.4, the parties shall use all reasonable endeavours to settle any Dispute between them as soon as possible through commercial negotiation conducted in good faith and in accordance with the procedure set out in this paragraph 3.
- 3.2 The parties shall refer the Dispute to the Level 1 representatives set out in the table below, who shall meet as soon as practicable after the service of the Notice of Dispute but in any event within ten (10) Working Days.
- 3.3 If the Dispute cannot be resolved by the Level 1 representatives within the relevant time period specified in the Dispute Resolution Timetable, or within any other period agreed by the parties, the Dispute shall be referred to the Level 2 representatives set out in the table below for resolution, who shall meet within five (5) Working Days after such referral, or such other period as the parties may agree, in order to attempt to resolve the Dispute.

| Level   | For the Authority        | For the Contractor |
|---------|--------------------------|--------------------|
| Level 1 | Programme Manager        | Programme Director |
| Level 2 | Director for Environment | Project Sponsor    |

Any resolution reached during commercial negotiations shall not be legally binding until it has been documented in writing and signed by, or on behalf of, the parties and in accordance with the Change Control Procedure where changes to this Agreement are required.

- 3.4 If either party is of the reasonable opinion that the resolution of a Dispute by commercial negotiation, or the continuance of commercial negotiations, shall not result in an appropriate solution or that the parties have already held discussions of a nature and intent (or otherwise conducted in the spirit) that would equate to the conduct of commercial negotiations in accordance with this paragraph 3, that party shall serve a written notice to that effect and the parties shall proceed to mediation in accordance with paragraph 4.

4. **MEDIATION**

- 4.1 In the event that a Dispute between the parties cannot be resolved by commercial negotiation in accordance with paragraph 3 the parties shall attempt to resolve it in accordance with CEDR's model mediation procedure.
- 4.2 If the parties are unable to agree on the joint appointment of a Mediator within the timescale specified in the applicable section of the Dispute Resolution Timetable, they shall make a joint application to CEDR to nominate the Mediator.
- 4.3 The parties shall use all reasonable endeavours to ensure that the Mediator, after consultation with the parties where appropriate, shall:
  - 4.3.1 attend any meetings with either or both of the parties preceding the mediation, if requested or if the Mediator decides this is appropriate and the parties agree;

- 4.3.2 read before the mediation each Case Summary and all the documents sent to him;
- 4.3.3 chair, and determine the procedure for the mediation;
- 4.3.4 assist the parties in drawing up any written settlement agreement; and
- 4.3.5 abide by the terms of CEDR's model mediation procedure and CEDR's code of conduct for mediators.

4.4 The parties shall ensure that the Mediator (and any member of the Mediator's firm or company) shall not act for either of the parties individually in connection with the Dispute in any capacity during the Term. The parties accept that in relation to the Dispute neither the Mediator nor CEDR is an agent of, or acting in any capacity for, any of the parties. Furthermore, the parties and the Mediator accept that the Mediator (unless an employee of CEDR) is acting as an independent contractor and not as an agent or employee of CEDR.

#### 4.5 **CEDR**

4.5.1 The parties shall ensure that CEDR, in conjunction with the Mediator, shall make the necessary arrangements for the mediation including, as necessary:

- (a) nominating, and obtaining the agreement of the parties to, the Mediator;
- (b) organising a suitable venue and dates;
- (c) organising exchange of the Case Summaries and documents;
- (d) meeting with either or both of the parties (and the Mediator if appointed), either together or separately, to discuss any matters or concerns relating to the mediation; and
- (e) general administration in relation to the mediation.

4.5.2 If there is any issue about the conduct of the mediation upon which the parties cannot agree within a reasonable time, CEDR shall, at the request of any party, decide the issue for the parties, having consulted with them.

4.5.3 The parties agree to notify the Mediator that they wish to observe the relevant timescales agreed in the Dispute Resolution Timetable.

#### 4.6 **Participants**

4.6.1 Each party shall state the names of:

- (a) the person(s) who shall be the lead negotiator(s) for that party, who must have full authority to settle the Dispute for the purpose of the Mediation; and
- (b) any other person(s) (such as professional advisers, colleagues or subcontractors) who shall also be present at, and/or participating in, the mediation on that party's behalf.

#### 4.7 **Exchange of Information**

- 4.7.1 Each party shall send to CEDR at least two (2) weeks before the mediation, or such other date as may be agreed between the parties and CEDR, sufficient copies of:
- (a) its Case Summary; and
  - (b) all the documents to which the Case Summary refers and any others to which it may want to refer in the mediation.
- 4.7.2 In addition, each party may send to the Mediator (through CEDR) and/or bring to the mediation further documentation which it wishes to disclose in confidence to the Mediator but not to any other party, clearly stating in writing that such documentation is confidential to the Mediator and CEDR.
- 4.7.3 The parties shall procure that the Mediator shall be responsible for sending a copy of each party's Case Summary and supporting documents (pursuant to paragraph 4.7.1) to the other simultaneously.
- 4.7.4 The parties should seek to agree:
- (a) the maximum number of pages of each Case Summary; and
  - (b) a joint set of supporting documents or the maximum length of each set of supporting documents.

#### 4.8 **The Mediation**

- 4.8.1 The mediation shall take place at the time and place agreed and arranged by the parties. The parties agree to arrange the time and place for the mediation within the timescale specified in the applicable section of the Dispute Resolution Timetable. If the mediation cannot be arranged within the relevant timescale the parties shall treat the delay as though they had agreed an extension to the Dispute Resolution Timetable in accordance with paragraph 2.7.
- 4.8.2 The parties shall procure that the Mediator shall chair, and determine the procedure at, the mediation.
- 4.8.3 No recording or transcript of the mediation shall be made.
- 4.8.4 The parties agree to notify CEDR that the maximum duration for the mediation meeting shall be as set out in the applicable section of the Dispute Resolution Timetable.

#### 4.9 **Settlement Agreement**

Any settlement reached in the mediation shall not be legally binding until it has been reduced to writing and signed by, or on behalf of, the parties and in accordance with the Change Control Procedure where changes are required to this Agreement. In any event any settlement agreement must be finalised within the timescales specified in the Dispute Resolution Timetable unless the parties agree an extension to the Dispute Resolution Timetable in accordance with paragraph 2.7 or the timetable is otherwise extended by operation of paragraph 4.8.1. The parties shall procure that the Mediator shall assist the parties in recording the outcome of the mediation.

#### 4.10 **Termination**

4.10.1 The mediation shall terminate when:

- (a) a party withdraws from the mediation;
- (b) a written settlement agreement is concluded;
- (c) the Mediator decides that continuing the mediation is unlikely to result in a settlement; or
- (d) the Mediator decides he should retire for any of the reasons in CEDR's code of conduct.

#### 4.11 **No Stay of Proceedings**

Any litigation or arbitration in relation to the Dispute may be commenced or continued notwithstanding the mediation unless the parties agree otherwise or a court so orders.

#### 4.12 **Confidentiality**

4.12.1 The parties shall ensure that every person involved in the mediation shall keep confidential and not use for any collateral or ulterior purpose:

- (a) information that the mediation is to take place or has taken place, other than to inform a court dealing with any litigation relating to the Dispute of that information; and
- (b) all information (whether given orally, in writing or otherwise) arising out of, or in connection with, the mediation including the fact of any settlement and its terms.

4.12.2 All information (whether oral or documentary and on any media) arising out of, or in connection with, the mediation shall be without prejudice, privileged and not admissible as evidence or disclosable in any current or subsequent litigation or other proceedings whatsoever. This does not apply to any information, which would have been admissible or disclosable in any such proceedings but for its use in the mediation.

4.12.3 Paragraphs 4.12.1 and 4.12.2 shall not apply insofar as any such information is necessary to implement and enforce any settlement agreement arising out of the mediation.

4.12.4 Neither party to the mediation shall call the Mediator or CEDR (or any employee, consultant, officer or representative of CEDR) as a witness, consultant, arbitrator or expert in any litigation or other proceedings whatsoever. The parties shall procure that the Mediator and CEDR shall not voluntarily act in any such capacity without the written agreement of the parties.

#### 4.13 **Mediator's fees and expenses**

4.13.1 CEDR's fees (which include the Mediator's fees) and the other expenses of the mediation shall be borne equally by the parties. Payment of these fees

and expenses shall be made to CEDR in accordance with its fee schedule and terms and conditions of business.

4.13.2 Each party shall bear its own costs and expenses of its participation in the mediation.

#### 4.14 **Exclusion of Liability**

Neither the Mediator nor CEDR shall be liable to the parties for any act or omission in connection with the services provided by them in, or in relation to, the mediation, unless the act or omission is shown to have been in bad faith.

### 5. **EXPERT DETERMINATION**

5.1 If the Agreement expressly requires a Dispute to be referred to expert determination or the Dispute relates to any aspect of the technology underlying the provision of the Services or otherwise relates to an ICT technical, financial technical or other technical nature as the parties agree and the dispute has not been resolved using the Level 2 representatives or mediation pursuant to paragraph 4, then either party may request (which request will not be unreasonably withheld or delayed) by written notice to the other that the Dispute is referred to an Expert for determination.

5.2 The Expert shall be appointed by agreement in writing between the parties, but in the event of a failure to agree within ten (10) Working Days, or if the person appointed is unable or unwilling to act, the Expert shall be appointed on the instructions of either the president of BCS (The Chartered Institute for IT) (or any other association that the Parties reasonably understand to have replaced it) in relation to a technical Dispute, or to the president of the Law Society in relation to all other Disputes.

5.3 The Expert shall act on the following basis:

5.3.1 he/she shall act as an expert and not as an arbitrator and shall act fairly and impartially;

5.3.2 the Expert's determination shall (in the absence of a material failure to follow the agreed procedures) be final and binding on the parties;

5.3.3 the Expert shall decide the procedure to be followed in the determination and shall be requested to make his/her determination within thirty (30) Working Days of his appointment or as soon as reasonably practicable thereafter and the parties shall assist and provide the documentation that the Expert requires for the purpose of the determination;

5.3.4 any amount payable by one party to another as a result of the Expert's determination shall be due and payable within twenty (20) Working Days of the Expert's determination being notified to the parties;

5.3.5 the process shall be conducted in private and shall be confidential; and

5.3.6 the Expert shall determine how and by whom the costs of the determination, including his/her fees and expenses, are to be paid.

**6. ARBITRATION**

6.1 The parties may at any time before court proceedings are commenced agree that the Dispute should be referred to arbitration in accordance with the provisions of paragraph 6.4.

6.2 Before the Contractor may commence any court proceedings it shall serve written notice on the Authority of its intention and the Authority shall have fifteen (15) Working Days from receipt of the Contractor's notice in which to reply requesting the Dispute be referred to arbitration in accordance with the provisions in paragraph 6.4.

6.3 In its notice to the Authority pursuant to paragraph 6.2, the Contractor may request that the Dispute is referred to arbitration, to which the Authority may, in its sole discretion consent.

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

6.4.1 the arbitration shall be governed by the provisions of the Arbitration Act 1996 and the LCIA procedural rules in force at the Agreement Date shall be applied;

6.4.2 the decision of the arbitrator shall be binding on the parties (in the absence of any material failure by the arbitrator to comply with the LCIA procedural rules);

6.4.3 subject to paragraph 6.4.4, the tribunal shall consist of a sole arbitrator to be agreed by the parties and in the event that the parties fail to agree the appointment of the arbitrator within ten (10) Working Days or, if the person appointed is unable or unwilling to act, as appointed by the LCIA;

6.4.4 if the Dispute is of a complex nature, the parties may agree, or the Authority at its sole discretion may direct, that the tribunal shall consist of three (3) arbitrators, to be agreed by the parties and in the event that the parties fail to agree the appointment of the arbitrators within ten (10) Working Days or, if the persons appointed are unable or unwilling to act, as appointed by the LCIA;

6.4.5 the seat of the arbitration shall be England;

6.4.6 the language of the arbitration shall be English; and

6.4.7 the arbitration proceedings shall take place in London or other location in England as determined by the Authority.

**7. URGENT RELIEF**

Nothing in this schedule 6.3 shall prevent either party from seeking injunctive relief at any time.

**APPENDIX – DISPUTE RESOLUTION TIMETABLE**

Disputes shall be escalated in accordance with the following timetable:

| <b>Stage</b>   | <b>Standard Dispute Resolution Timetable</b> | <b>Expedited Dispute Resolution Timetable</b> |
|--|--|---|
| Time permitted for resolution of the Dispute by the Level 1 representatives pursuant to paragraph 3.2 of this schedule 6.3 from the date of reference to them                            | ten (10) Working Days                        | three (3) Working Days                        |
| Time permitted for resolution of the Dispute by the Level 2 representatives pursuant to paragraph 3.3 of this schedule 6.3 from the date of reference to them                            | fifteen (15) Working Days                    | five (5) Working Days                         |
| Period of time in which Dispute is to be referred to mediation in accordance with paragraph 4.1 of this schedule 6.3 from the date of the expiry of the period set out immediately above | ten (10) Working Days                        | five (5) Working Days                         |
| Period of time permitted in paragraph 4.2 of this schedule 6.3 to agree the appointment of the Mediator  | ten (10) Working Days                        | five (5) Working Days                         |
| Period of time in which Mediator may convene the mediation meeting from the date of appointment in accordance with paragraph 4.8.1 of this schedule 6.3                                  | thirty (30) Working Days                     | twenty (20) Working Days                      |
| Maximum duration of mediation meeting in accordance with paragraph 4.8.4 of this Schedule 6.3  | three (3) Working Days                       | one (1) Working Day                           |
| Period of time in which the mediation settlement is to be recorded in writing and signed by the parties in accordance with paragraph 4.9 of this schedule 6.3                            | ten (10) Working Days                        | five (5) Working Days                         |