

ICE updates its condition of contracts

The ICE forms of contract have previously included provision for an "Engineer's decision" where a dispute or difference has arisen between the parties. In seeking to ensure that such a process was adopted by the parties prior to any reference to adjudication, a matter was not to be considered as constituting a dispute until the Engineer's decision had been given, or the time for so doing had passed. The effectiveness of this bar to referring a dispute at any time [as provided under the Construction Act], has been often questioned including in the case of *Mowlem v Hydra-Tight* in 2000.

ICE has now reviewed its dispute resolution procedure and has provided the right to a party to refer a dispute at anytime, even if the matter has not been referred to the Engineer. The new procedures provide that:

- the parties are required, as soon as they become aware of any matter which if not resolved might become a dispute, to give early warning notice to the other. The parties are then to meet with the aim of resolving the matter and, if not, to define unresolved issues.
- the parties are required to give each other Notice of the nature of any Dispute and may at any time seek to refer such matters to conciliation or mediation.
- both parties now have the right to refer any difference or dispute to adjudication in accordance with ICE's Procedure of 1997, irrespective as to whether either of the above two procedure has been followed, or not.
- the adjudicator has authority to determine his own jurisdiction.
- if the referring party fails to issue a Notice of Dispute prior to commencing the adjudication proceedings, then that party must pay the adjudicator's costs of determining the extent of his jurisdiction.
- all disputes, save for a failure to give effect to an adjudicator's decision, are to be determined by reference to arbitration.
- the dissatisfaction procedure is still available to the parties by virtue of an amendment to clause 2(7).

The above amendments would appear to make the ICE conditions Construction Act compliant. The question that now arises, however, is whether the retained procedure for dissatisfaction will be used. I am of the opinion that it will, for Adjudication remains a form of rough justice, and when parties consider both the time and cost associated with obtaining an adjudicator's decision it will often be sensible to give the Engineer an opportunity to resolve the dispute first.

Richard Silver

October 2004