

Preliminary note to EURIM on developing guidance On ADR in public sector ICT procurement and contract renegotiations – 2 June 2010

1 Purpose

- 1.1 Failed ICT projects are no strangers to political and media attention. Even if projects are progressing well, the sometimes unwarranted anticipation of failure places its own pressures on the Authority and the supplier. The purpose of this note is to set out the main components of more detailed future guidance and awareness-raising in Alternative Dispute Resolution (ADR) good practice in public sector procurement. In particular, it refers to mediation as a key aspect of dispute prevention and conflict management.

2 Key messages

- 2.1 Mediation should not be seen as a “distress purchase” when relationships and progress have significantly deteriorated. Experience shows that it is part of good procurement and project management practice. ADR needs to be integrated as part of a project strategy not left as an add-on. This involves adopting mediation techniques and approaches as much as it does in employing impartial third party assistance. It is coupled with the view that traditional risk management approaches often leave out ways of dealing with human factors i.e. purely technical risk assessment misses out the main project risks which deal with the interfaces and inter/intra-relationships between parties. Communication breakdowns both cause and equally are caused by project failings.
- 2.2 Despite the fact that communication and relationship problems are cited in research as *the most common reason for disputes*, the importance of managing project and supplier relationships as part of a dispute prevention function is still often ignored. Not only is an understanding of available non-escalation/prevention mechanisms desirable but also raising awareness of aspects of effective communication and negotiation which lie at their heart.

3 CEDR credentials in ADR guidance in the public sector

- 3.1 Over the last twenty years CEDR has been in contact with many Departments of State, their agencies and other public authorities in work dealing with policy making, contract drafting, the administration of schemes and consultation on and delivery of training courses. Among other activities this included developing specific mediation training for the Treasury Solicitor and Ministry of Justice and helping OGC draft its original dispute resolution guidance on ADR. OGC currently refers to CEDR’s Model Mediation Procedure under Schedule 8.3 of its ICT guidance on dispute resolution procedures.

- 3.2 CEDR produced an *ADR Guide for Local Authorities in Public Private Partnerships* in consultation with a number of key agencies, including Partnerships UK and 4ps (now Local Partnerships). The guide was endorsed by 4ps as "*the key source of guidance*" in the, then, latest version of the *Local Government Supplement to the Standardisation of PFI Contracts*.
- 3.3 More recently, CEDR advised the Department of Health on the development of a structured dispute resolution process and related contract clauses for inclusion within its standard contracts for community, acute, mental health and ambulance services. These clauses have now been adopted.

4 Why is more detailed guidance on ADR and dispute prevention approaches necessary?

- 4.1 The Government plans to save £1.7bn by delaying or stopping contracts, and will review how current PFI/PPP projects can be best managed to extract improved VfM or renegotiate contracts so they are more affordable. The Government has also just put into effect a moratorium on ICT projects and the National Audit Office and Audit Commission have called for public bodies to work together more effectively to maximise procurement savings. (*A review of collaborative procurement across the public sector - May 2010*).
- 4.2 More detailed ADR/dispute prevention guidance, therefore, is timely in that as cash becomes more and more squeezed, the risk of disputes and relationship breakdowns will become more acute, and even if the dispute is dealt with, there is the possibility of the hangover of the dispute transferring to another project. Budgets will need to focus on service delivery, not legal battles or be sunk into ineffective and aggravating dispute resolution procedures.
- 4.3 CEDR guidance aims to complement OGC's guidance on procurement and contract negotiation. The guidance will recognise that whilst it is possible to point to disputes arising out of any number of procurement, design and operational management activities, all these areas of activity have many human variables. In particular, there may be great inequality amongst project or negotiation team members in their ability to deal with problems and disputes and it is often easy to fall back on adversarial behaviours and turning the contract into an arena for combat. Also, project and negotiation teams must increasingly take into account different cultures and the possibility that their counterparts will come with different problem resolution philosophies.

5 Ad hoc mediation in ICT disputes

- 5.1 The use of ad hoc mediation is familiar to the ICT industry either as an attempt to by-pass litigation or arbitration, or as part of litigation proceedings. CEDR has successfully mediated many ICT disputes . Examples include:

- 5.1.1 A government department entered into a contract for the supply of software licences. The department understood that a trial period for software suitability and testing would precede final acceptance. During the trial, the software was deemed unsuitable and the supplier was told the contract would be terminated. The parties were in dispute over whether the department was entitled to terminate the contract without making any payment, whether payment was contingent upon successful completion of the trial and whether the software provided met the requirements of the brief. A second dispute related to the duration of a contract for the provision of consultancy support and software maintenance. A clause in both contracts directed the parties to arbitration in the event of a dispute. However, the parties agreed to try mediation first and, should no settlement result, would pursue arbitration. The dispute was resolved in a day, saving the cost of arbitration estimated at 5% of the contract value.
- 5.1.2 A mortgage and loan company entered into a ten-year agreement with an ICT company to provide services for all its offices. Three years into the contract a dispute occurred over invoicing and payment. The ICT company claimed it had not been paid for its services while the mortgage and loan company claimed the ICT company was not invoicing correctly. The amount in dispute was £175million. The dispute settled after two days with mediation costs of £6800 per party.
- 5.1.3 Parties entered into a contract to design, develop and customise an electronic network-based trading system in order for the claimant, a UK company, to run live auctions on the internet. The defendant was also to provide support and maintenance for the system. The claimant alleged that over a ten-month period the system malfunctioned four times. The claimant terminated the contract for material breach and claimed damages. The defendant and guarantors alleged the claimant was in repudiatory breach of the contract and counterclaimed damages. The damages claimed amounted to £2.15m. The dispute was settled in a day with mediation costs of £3500 per party.
- 5.2 While mediation settlement rates remain high (typically, above 80%), that is only part of the picture. More is needed to encourage a practical understanding of the relationship between conflict and negotiation to prevent disputes from arising in the first place.

6 Aspects of ADR guidance and related awareness-raising for development

6.1 *Model ADR contract clauses* with considerations at procurement stage including:

- whether to use an ad hoc or institutional procedure
- whether the procedure is single or multi-step (now common in more complex ICT contracts)

- the timescales involved
- whether the procedure covers all or certain types of dispute
- the cost - which would also include setting financial thresholds, where possible, to reduce the risk of the cost of resolution exceeding the value of the dispute.

(Refer to www.cedr.com/about_us/library/documents.php)

6.2 *Dispute prevention (non-escalation mechanisms)* and collaborative contracting covering:

- Partnering and contracts promoting principles of collaborative working e.g. NEC3 (endorsed by OGC for public sector construction procurement)
- Non-escalation mechanisms:
 - All purpose three stage - negotiation, mediation and arbitration
 - “Carve-out” - categorises types of dispute to which different procedures apply. Typically in ICT contracts, “technical” disputes are referred to expert determination
 - Standing Dispute Boards and their variants
 - Project Mediation under *CEDR Model Project Mediation Protocol and Agreement*.

(Refer to www.cedr.com/CEDR_Solve/services/project_mediation_form.php)

6.3 *Awareness-raising/training* on the role of negotiation in effective conflict management to enable participants to:

- Define conflict and negotiation
- Identify the role of negotiation in effective conflict management
- Recognise and use different types of negotiation effectively
- Recognise your negotiation partner’s style and identify appropriate adaptations to your own approach
- Use a phase model to analyse and structure negotiations
- Prepare effectively for a negotiation
- Practice different negotiation techniques.

6.4 *Leadership review/strategic team reviews* using a 3rd party facilitator to assist teams to benchmark their negotiation/communication effectiveness and how to improve their performance and realism on project options.

7.0 **Finally**, as with all our activities, CEDR would seek to work with all stakeholders in developing detailed ADR guidance and awareness raising programmes.