

SILVERTOWN TUNNEL

Volume 3: Project Agreement – Schedules 2 to 31

Schedule 23 – Dispute Resolution Procedure

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SCHEDULE 23

DISPUTE RESOLUTION PROCEDURE

1. DISPUTES

- 1.1 If either Party considers that a Dispute has arisen, that Party shall notify the other Party in writing of such Dispute, including the nature, background, extent and details of the Dispute.
- 1.2 Except where expressly stated otherwise, all Disputes shall be resolved in accordance with this Schedule 23 (*Dispute Resolution Procedure*).
- 1.3 Each of the Parties shall:
- (a) co-operate with each other in the early identification, notification and avoidance or resolution of any Dispute; and
 - (b) use reasonable endeavours to negotiate in good faith to settle any Dispute notified pursuant to paragraph 1.1 before taking any further action under this Schedule 23 (*Dispute Resolution Procedure*).

2. SENIOR REPRESENTATIVES

- 2.1 Subject to paragraph 1.3 and paragraph 4 (*Adjudication*), either Party may refer a Dispute, by notice in writing to the other Party, to:
- (a) in the case of TfL, the project director for the Project; and
 - (b) in the case of Project Co, the Chief Executive Officer of Project Co at that time,
- (together, the "**Senior Representatives**") who shall meet and endeavour to resolve the Dispute between them.
- 2.2 Any joint written decision of the Senior Representatives in relation to a Dispute considered pursuant to paragraph 2.1(b) shall be binding upon the Parties.

3. CONFLICT AVOIDANCE PANEL

- 3.1 Subject to paragraph 4 (*Adjudication*), where the Parties do not resolve a Dispute in accordance with paragraph **Error! Reference source not found.** (*Senior Representatives*), either Party may refer a Dispute to a Conflict Avoidance Panel with the prior agreement of the other Party.
- 3.2 Where a referral to the Conflict Avoidance Panel is made pursuant paragraph 3.1, the Parties shall endeavour to agree upon:
- (a) the person(s) whom they would consider suitable to act as the member(s) of the Conflict Avoidance Panel; and
 - (b) the number of member(s) of the Conflict Avoidance Panel (which as a general principle depends upon the issues in dispute but is always an odd number).
- 3.3 In the event of the Parties failing to reach agreement pursuant to paragraph 3.2 within ten (10) Working Days of the agreement under paragraph 3.1, either Party may request

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the Royal Institution of Chartered Surveyors to nominate the member(s) of the Conflict Avoidance Panel to do so (including the number of member(s) of the Conflict Avoidance Panel, which as a general principle depends upon the issues in dispute but is always an odd number).

3.4 The Parties acknowledge and agree that any person selected to act as a member of the Conflict Avoidance Panel shall:

- (a) be a natural person acting in his personal capacity; and
- (b) not be an employee of the Parties or declare any interest, financial or otherwise, in any matter relating to the Dispute.

3.5 Within five (5) Working Days of the appointment of the member(s) of the Conflict Avoidance Panel in accordance with paragraph 3.2 to paragraph 3.4 (inclusive), the referring Party shall refer the Dispute in writing to the Conflict Avoidance Panel, which referral:

- (a) shall include brief written particulars of the Dispute, the relief sought and the basis for claiming the relief sought, including the provisions of this Agreement that are relevant to the Dispute; and
- (b) may include copies of, or relevant extracts from, this Agreement and any other documents on which the Party relies.

3.6 The referring Party shall provide the responding Party with a copy of any documents provided to the Conflict Avoidance Panel at the same time as they are provided to the Conflict Avoidance Panel.

3.7 Within five (5) Working Days of receipt of the referral of the Dispute to the member(s) of the Conflict Avoidance Panel pursuant to paragraph 3.5, the responding Party shall provide the Conflict Avoidance Panel with a brief written response and copies of any documents on which the Party relies and shall provide the referring Party with a copy of any such documents at the same time.

3.8 Within five (5) Working Days of receipt of the response pursuant to paragraph 3.7 (or such longer period as may be agreed by the Parties), the Conflict Avoidance Panel shall notify the Parties of its recommendation(s) for avoiding or resolving the Dispute, such notice to:

- (a) be in writing; and
- (b) include a summary of the Conflict Avoidance Panel's findings and a statement of its reasons for the recommendation(s).

3.9 The Parties acknowledge and agree that the recommendations of the Conflict Avoidance Panel are not binding on the Parties.

3.10 If a Party is dissatisfied with the recommendations notified by the Conflict Avoidance Panel pursuant to paragraph 3.8, such Party shall notify the other Party in writing within five (5) Working Days of notification by the Conflict Avoidance Panel of the reasons why it is dissatisfied with the recommendations.

3.11 Each Party shall bear its own costs and expenses in relation to any reference of a Dispute to the Conflict Avoidance Panel and shall bear in equal shares the remuneration and

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expenses of the member(s) of the Conflict Avoidance Panel and the fees of the professional body or association requested to propose the member(s) of the Conflict Avoidance Panel.

3.12 Save as required by law:

- (a) the Parties and the member(s) of the Conflict Avoidance Panel shall keep confidential all information of whatever nature provided by or on behalf of the parties to the Dispute pursuant to this paragraph 3 (*Conflict Avoidance Panel*) and the Conflict Avoidance Panel's recommendations (including its findings and its reasons for the recommendations); and
- (b) the Parties shall not make use of or rely upon any such information or the Conflict Avoidance Panel's recommendations (including its findings and its reasons for the recommendations), which are without prejudice.

4. **ADJUDICATION**

4.1 Notwithstanding paragraph 1.3, paragraph **Error! Reference source not found.** (*Senior Representatives*) or paragraph 3 (*Conflict Avoidance Panel*), either Party may at any time give the other notice of intention to refer a Dispute to adjudication in accordance with this paragraph 4 (*Adjudication*).

4.2 When giving its notice of intention to refer a Dispute pursuant to paragraph 4.1, the referring Party shall nominate an adjudicator, who must be approved in writing by the non-referring Party. If such approval is not obtained within four (4) days, either Party shall have the right to apply to the Chartered Institute of Arbitrators (or, in the event that the Chartered Institute of Arbitrators ceases to exist, by another nominating body agreed between the Parties within the four (4) day period), directing it to nominate an independent adjudicator within three (3) days.

4.3 Once appointed pursuant to paragraph 4.2, such adjudicator shall be the "**Adjudicator**" for the purposes of this Agreement in relation to the relevant Dispute and such Dispute shall be deemed to have been referred to the Adjudicator for the purposes of this paragraph 4 (*Adjudication*).

4.4 The Party referring a Dispute to the Adjudicator shall, within seven (7) days of the appointment of the Adjudicator, provide its submission on the Dispute to the Adjudicator, with a copy by letter to the other Party.

4.5 The non-referring Party shall provide any submission on the Dispute to the Adjudicator within seven (7) days of the first submission under paragraph 4.4.

4.6 The Parties shall comply with any request of the Adjudicator in relation to the Dispute.

4.7 Any communication between a Party and the Adjudicator shall be communicated contemporaneously to the other Party.

4.8 Subject to paragraph 4.9, the Adjudicator shall be required to provide to both Parties the Adjudicator's written decision on the Dispute within twenty eight (28) days of the reference under paragraph 4.3 (or such longer period as the Parties may agree after the reference).

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- 4.9 The Adjudicator shall have the power to extend the period of twenty eight (28) days referred to in paragraph 4.8 by up to fourteen (14) days, with the consent of the Parties.
- 4.10 Unless the Parties otherwise agree, the Adjudicator shall be required to give reasons for their decision in relation to any referred Dispute.
- 4.11 The Parties acknowledge and agree that unless and until a Dispute is finally determined by the Courts in accordance with paragraph **Error! Reference source not found.** (*Reference to Court*) or by the agreement of the Parties, the Adjudicator's decision shall be binding on both Parties who shall forthwith give effect to the decision.
- 4.12 The Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify in their decision or, in absence of such decision, equally by the Parties.
- 4.13 Unless agreed otherwise by the Parties, the Parties shall bear their own costs arising out of a reference to the Adjudicator, including legal costs and the costs and expenses of any witnesses.
- 4.14 In relation to any Dispute referred to the Adjudicator pursuant to paragraph 4.3, the Adjudicator shall:
- (a) have the power to correct their decision so as to remove a clerical or typographical error arising by accident or omission;
 - (b) be deemed not to be an arbitrator but shall render his decision as an expert, and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Adjudicator or their determination or the procedure by which the determination is reached;
 - (c) be required to act impartially and shall be entitled to take the initiative in ascertaining the facts and the law in relation to a Dispute referred; and
 - (d) have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement.
- 4.15 Save as provided in paragraph 6 (*Related Disputes with Key Sub-Contractors*), all information, data or documentation disclosed or delivered by a Party to the Adjudicator in consequence of or in connection with their appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not be permitted to, save as permitted by clause 50 (*Confidentiality*), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Adjudicator's work.
- 4.16 The Parties acknowledge and agree that the Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of their functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.
- 4.17 If, in relation to a Dispute, the Adjudicator has not notified their decision and the time provided by paragraph 4.8 (as extended by paragraph 4.9) has expired, then the original referring Party under paragraph 4.1 shall, within ten (10) Working Days of such expiry, nominate a replacement adjudicator and paragraph 4.2 to this paragraph 4.17 (inclusive) shall apply again in relation to such replacement adjudicator.

5. REFERENCE TO COURT

- 5.1 If a Party is dissatisfied with the decision after the Adjudicator notifies their decision pursuant to paragraph 4.8, then either Party may, within twenty (20) Working Days of receipt of the Adjudicator's decision, notify the other Party of its intention to refer the Dispute to the Courts of England (the "**Courts**") for final determination.
- 5.2 For the avoidance of doubt, if a Party fails to notify the other Party pursuant to paragraph 5.1, such Party will be taken to have waived its right to refer the matter to the Courts and the decision of the Adjudicator will be final and binding.
- 5.3 Where a Dispute is referred to the Courts for final determination, the Courts shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement, to vary or cancel the decision of the Adjudicator and, where appropriate, to order financial compensation to be paid by one Party to the other.

6. RELATED DISPUTES WITH KEY SUB-CONTRACTORS

- 6.1 In the event that Project Co serves a notice of adjudication on TfL in respect of a Dispute which concerns the same issues of fact or law or fact and law as arise in an existing adjudication between Project Co and a Key Sub-Contractor (a "**Related Dispute**"), Project Co agrees that, the provisions of paragraph 4.2 will apply to such referral save that the same adjudicator as is appointed in respect of the Related Dispute (the "**Related Dispute Adjudicator**") shall be nominated by Project Co as the adjudicator in respect of the Dispute for TfL's approval pursuant to paragraph 4.2.
- 6.2 Where paragraph 6.1 applies:
- (a) in the event that the Related Dispute Adjudicator is nominated and approved but is not available to be appointed in respect of the relevant Dispute, or is not willing to be so appointed, or becomes unable to act during the course of his appointment, the provisions of paragraph 4.2 will apply without the amendment required by paragraph 6.1; and
 - (b) whether or not the Related Dispute Adjudicator is appointed in respect of the Dispute, Project Co agrees that it will waive its rights of confidentiality in respect of the Related Dispute Adjudicator's decision and reasons in respect of the Related Dispute and Project Co will promptly provide the same to any other adjudicator appointed in respect of the Dispute;
 - (c) Project Co shall provide the Related Dispute Adjudicator's decision and reasons to TfL promptly after they are received by Project Co.

7. CONTINUING OBLIGATIONS AND RIGHTS

- 7.1 Unless this Agreement has already been repudiated or terminated, the Parties shall:
- (a) continue to comply with, observe and perform all of their obligations under this Agreement regardless of the nature of the Dispute and notwithstanding the referral of the Dispute for resolution under this Schedule 23 (*Dispute Resolution Procedure*); and

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- (b) give effect to every decision of the Adjudicator and the Courts delivered under this Schedule 23 (*Dispute Resolution Procedure*).
- 7.2 The provisions of this Schedule 23 (*Dispute Resolution Procedure*) shall continue to apply to any Dispute notwithstanding the repudiation or termination of this Agreement.
- 7.3 No Party shall be prevented from, or delayed in, seeking any order for specific performance or for interim or final injunctive relief or for other equitable relief as a result of the provisions of this Schedule 23 (*Dispute Resolution Procedure*), nor shall this Schedule 23 (*Dispute Resolution Procedure*) apply in respect of any circumstances where such remedies are sought.