

## SCHEDULE 5

### OTHER CONTRACTUAL TERMS

#### PART 7

##### *Dispute Resolution*

##### **Local resolution of contract disputes**

**89.**—(1) Subject to sub-paragraph (3), in the case of any dispute arising out of or in connection with the contract, the contractor and the Health Board must make every reasonable effort to communicate and co-operate with each other with a view to resolving the dispute, before referring the dispute for determination in accordance with the NHS dispute resolution procedure (or, where applicable, before commencing court proceedings).

(2) Either the contractor or the Health Board may, if it wishes to do so, invite the area medical committee (if any) to participate in discussions which take place pursuant to sub-paragraph (1).

(3) In the case of a dispute which falls to be dealt with under the NHS dispute resolution procedure, as modified by paragraph 36(3), sub-paragraph (1) does not apply where it is not practicable for the parties to attempt local resolution before the expiry of the period specified in paragraph 91(4) as so modified.

##### **Dispute resolution: non-NHS contracts**

**90.**—(1) In the case of a contract which is not an NHS contract, any dispute arising out of or in connection with the contract, except matters dealt with under the complaints procedure pursuant to Part 6 of this Schedule, may be referred for consideration and determination to the Scottish Ministers, if—

- (a) the Health Board so wishes and the contractor has agreed in writing; or
- (b) the contractor so wishes (even if the Health Board does not agree).

(2) In the case of a dispute referred to the Scottish Ministers under sub-paragraph (1)—

- (a) the procedure to be followed is the NHS dispute resolution procedure; and
- (b) the parties agree to be bound by any determination made by the adjudicator.

##### **NHS dispute resolution procedure**

**91.**—(1) Subject to sub-paragraph (2), the procedure specified in the following sub-paragraphs and paragraph 92 applies in the case of any dispute arising out of, or in connection with, the contract which is referred to the Scottish Ministers—

- (a) in accordance with section 17A(4) of the Act<sup>(1)</sup> (where the contract is a NHS contract); or
- (b) in accordance with paragraph 90(1) (where the contract is not a NHS contract).

(2) In the case where—

- (a) a dispute is referred to the Scottish Ministers in accordance with regulation 9(1) (pre-contract disputes), or
- (b) a contractor (or contractors) refers a matter for determination in accordance with paragraph 36(1) or (2),

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(1) Section 17A was inserted by the National Health Service and Community Care Act 1990 (c. 19), section 30.

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the procedure specified in the following sub-paragraphs and paragraph 92 is modified as mentioned in regulation 9 or, as the case may be, paragraph 36.

(3) Any party wishing to refer a dispute as mentioned in sub-paragraph (1) shall send to the Scottish Ministers a written request for dispute resolution which shall include or be accompanied by—

- (a) the names and addresses of the parties to the dispute;
- (b) a copy of the contract; and
- (c) a brief statement describing the nature and circumstances of the dispute.

(4) Any party wishing to refer a dispute as mentioned in sub-paragraph (1) must send the request under sub-paragraph (3) within a period of 3 years beginning with the date on which the matter giving rise to the dispute happened or should reasonably have come to the attention of the party wishing to refer the dispute.

(5) The Scottish Ministers may determine the dispute themselves or, if they consider it appropriate, appoint a panel consisting of three persons (referred to as “the panel”) to consider and determine the dispute.

(6) Before reaching a decision as to who should determine the dispute under sub-paragraph (5), the Scottish Ministers shall, within the period of 7 days beginning with the date on which the dispute was referred to them, send a written request to the parties to make in writing, within a specified period, any representations which they may wish to make about the matter.

(7) The Scottish Ministers shall send, with the notice given under sub-paragraph (6), to the party other than the one which referred the matter to dispute resolution, a copy of any document by which the matter was referred to dispute resolution.

(8) The Scottish Ministers shall give a copy of any representations received from a party to the other party and shall in each case request (in writing) a party to whom a copy of the representations is given to make within a specified period any written observations which it wishes to make on those representations.

(9) Following receipt of any representations from the parties or, if earlier, at the end of the period for making such representations specified in the request sent under sub-paragraph (6) or (8), the Scottish Ministers shall, if they decide to appoint a panel to hear the dispute—

- (a) inform the parties in writing of the names of the persons whom they have appointed on the panel; and
- (b) pass to the panel any documents received from the parties under or pursuant to paragraph (3), (6) or (8).

(10) For the purpose of assisting it in its consideration of the matter, the adjudicator may—

- (a) invite representatives of the parties to appear before the adjudicator to make oral representations either together or, with the agreement of the parties, separately, and may in advance provide the parties with a list of matters or questions to which it wishes them to give special consideration; or
- (b) consult other persons whose expertise the adjudicator considers will assist the adjudicator in the adjudicator’s consideration of the matter.

(11) Where the adjudicator consults another person under sub-paragraph (10)(b), the adjudicator shall notify the parties accordingly in writing and, where the adjudicator considers that the interests of any party might be substantially affected by the result of the consultation, the adjudicator shall give to the parties such opportunity as it considers reasonable in the circumstances to make observations on those results.

(12) In considering the matter, the adjudicator shall consider—

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- (a) any written representations made in response to a request under sub-paragraph (6) but only if they are made within the specified period;
- (b) any written observations made in response to a request under sub-paragraph (8), but only if they are made within the specified period;
- (c) any oral representations made in response to an invitation under sub-paragraph (10)(a);
- (d) the results of any consultation under sub-paragraph (10)(b); and
- (e) any observations made in accordance with an opportunity given under sub-paragraph (11).

(13) In this paragraph, “specified period” means such period as the Scottish Ministers shall specify in the request sent under sub-paragraph (6) or (8), being not less than 2, nor more than 4 weeks beginning with the date on which the request is sent, but the adjudicator may, if the adjudicator considers that there is good reason for doing so, extend any such period (even after it has expired) and where it does so, a reference in this paragraph to the specified period is to the period as so extended.

(14) Subject to the other provisions of this paragraph and paragraph 92 and to any agreement by the parties, the adjudicator shall have wide discretion in determining the procedure of the dispute resolution to ensure the just, expeditious, economical and final determination of the dispute.

(15) Where the adjudicator is a panel, any decision or determination by the panel for the purposes of this paragraph and paragraph 92 may be by a majority.

#### **Determination of dispute**

**92.**—(1) The adjudicator shall record its determination, and the reasons for it, in writing and shall give notice of the determination (including the record of the reasons) to the parties and, in the case where the adjudicator is a panel, to the Scottish Ministers.

(2) Subsections (8) and (9) of section 17A of the Act (NHS contracts), as modified by regulation 10(7)(d) shall apply in the case of a determination of a reference under paragraph 90(1) as they apply in the case of a determination under subsection (4) of that section.

#### **Interpretation of Part 7**

**93.**—(1) In this Part, “any dispute arising out of or in connection with the contract” includes any dispute arising out of or in connection with the termination of the contract.

(2) Any term of the contract that makes provision in respect of the requirements in this Part shall survive even where the contract has terminated.