



**GUIDELINES**

**FOR**

**AMICABLE SETTLEMENT PROCEDURES**

**(First Edition, 2021)**

## **FOREWORD AND INTRODUCTION**

The standard forms of construction contracts in South Africa recognizes Amicable Settlement Techniques, Adjudication and Arbitration (or alternatively Litigation, for example) as formal procedures for the parties to the construction contract to have their disputes resolved.

The Amicable Settlement Procedure is available to the disputing parties to resolve contractual disputes but due to the seemingly high failure rate of this procedure, it became the proverbial lemon among the oranges.

The purpose of these Guidelines is to provide Amicable Settlement Facilitators with a step-by-step guide to sidestep the pitfalls and to guide and steer the process in such a way that the disputing parties are brought together and will still be able to work together after the dispute has been settled. A construction project is usually not a once-off transaction and may inevitably require the disputing parties to still be able to work in a spirit of mutual collaboration on the project or future project, after the current dispute has been settled.

When two Parties are faced with a dispute that they cannot resolve themselves, it requires that one of the parties refer the dispute in terms of the process set out in the Contract.

The Parties may, at any time, agree to settle any issue regarding the dispute amicably with the help of an independent third party. The disputing Parties should choose the appropriate technique to be followed, subject to certain rules, guidelines and the code of conduct. Although these rules, guidelines and the code of conduct are usually not stated in the contract, the parties should agree on them based on best practise. To assist the parties in selecting the appropriate technique for their dispute, the following have been developed.

## **ACKNOWLEDGEMENT**

The South Africa Institution of Civil Engineering wishes to acknowledge the valuable contributions made by the following persons who compiled, reviewed and made these Guidelines possible:

- Theunis van Zyl – Author (Member of the SAICE Alternative Dispute Resolution Panel)
- Hubert Thompson – Reviewer (Member of the SAICE Alternative Dispute Resolution Panel)
- Jeff Pipe – Reviewer (Member of the SAICE Alternative Dispute Resolution Panel)
- Bryan Westcott - Reviewer (Member of the SAICE Alternative Dispute Resolution Panel)
- Willie Claassen - (Member of the SAICE PMCD Panel)

## **WHAT IS AMICABLE SETTLEMENT?**

Amicable Settlement is a procedure where an independent third party (as a neutral person), in strict confidentiality, conducts a process to facilitate the parties in reaching a settlement on an existing dispute. The role of the independent third party is to remain independent, to stay at “arms-length”, and

not to attempt to achieve the best outcome for the one party over the other.

The parties should own the dispute and the settlement of it where, on the other hand, in Adjudication and Arbitration (or Litigation) the disputing parties become the spectators and usually must surrender the steering wheel to their legal advisors.

Amicable settlement is also a consensual process and there must be a willingness and a mandate by the participants to arrive at an amicable settlement outcome. The parties remain free to withdraw from the amicable settlement procedure at any time and to revert to adjudication, arbitration or litigation, depending on the specific provisions of the construction contract.

Amicable settlement is part of the interest-based approach of the process to resolve the dispute. The interests of the parties are addressed in such a manner that they have a better understanding of their rights and obligations regarding the dispute so that they could explore many different potential solutions, understand each other's perspective towards a win-win solution. The Parties could then take the necessary decisions and actions in their best interest (as well as for the project) so that the construction works could proceed without unnecessary costs and delays, including alterations to the works, extension of time for completion, mitigating measures regarding the works, suspension or cancellation of the works, if necessary. It could also act as a filter to prevent that a dispute escalates further to the more comprehensive procedures. The outcome is usually determined with the Amicable Settlement Facilitator's own knowledge and experience in a relatively cheap, fast and robust manner over a short period of time, and addresses two critical issues:

- Whether monetary relief is due to the contractor if he is entitled to that (as positive cashflow is the lifeblood of the construction industry); and
- It allows the parties to take mitigating measures if conditions, circumstances and situations are experienced which are not favourable to the project and their interest.

## **EVALUATIVE VERSUS FACILITATIVE AMICABLE SETTLEMENT PROCEDURE**

There are in essence two approaches that may be followed in Amicable Settlement procedures, an evaluative approach and a facilitative approach.

Usually, a facilitative approach should be followed if both parties have a concern on different matters (but related to the dispute) while an evaluative approach should be followed, not because there are different concerns, but rather the Parties want to know who is right and who is wrong regarding the dispute.

The negative perception towards Amicable Settlement as an effective dispute resolution procedure arose as a result of the evaluative approach that have been (and still are) prescribed in the dispute resolution provisions of some construction agreements, called for example as mediation. Evaluative

Amicable Settlement would usually require the Amicable Settlement Facilitator to provide an opinion on which party should be the successful party and the relief to be awarded to the successful party.

Also, the concept of evaluative Amicable Settlement in essence contradicts the whole purpose of “amicable settlement” *i.e.*, to create an environment and facilitate a process where the disputing parties determine the “win-win” outcome without the Amicable Settlement Facilitator expressing an opinion.

Therefore, evaluative Amicable Settlement should be used with caution as the Amicable Settlement Facilitator provides an opinion, which one of the parties may not accept, resulting in a break down in the good will and trust with the Facilitator. Notwithstanding the caution, an evaluative approach (where the Amicable Settlement Facilitator provides a non-binding opinion on the matter) is a value settlement technique or tool. It is cheaper and faster than adjudication.

A Facilitative Amicable Settlement procedure requires the Amicable Settlement Facilitator to skilfully exercise wisdom and discernment in such a way that the parties focus on the interests rather than their position (or their contractual rights). As the “mid-wife” in the process, the Amicable Settlement Facilitator will be navigating the parties to arrive at a position where the disputing parties eventually come up with the win-win solution. It is not for the Amicable Settlement Facilitator to decide what is best for the parties in terms of the outcomes sought.

## **CONFIDENTIALITY and ETHICAL PRACTICES**

The proceedings in Amicable Settlement are confidential in nature unless otherwise required by law. The respective parties may in private sessions with the Amicable Settlement Facilitator disclose information to the Amicable Settlement Facilitator that must remain confidential. The disclosure of such information to the Amicable Settlement Facilitator may be for the purpose of justifying a party’s bargaining position or for the purpose of requesting the Amicable Settlement Facilitator to raise certain questions to the other party.

To achieve common ground, the parties must be free to make admissions and concessions which, if the amicable settlement fails, will not be used against them to their prejudice in the subsequent adjudication, arbitration or court proceedings. GCC 2015, Clause 10.4.4, provides that no reference may be made of the outcome, evidence, submission, statement or admission made during amicable settlement proceedings in any subsequent dispute resolution procedure.

A situation may arise where the Amicable Settlement Facilitator will have to decide whether the information provided comes down to unethical practices or can be seen as “just doing good business”. It is for the Amicable Settlement Facilitator to decide at the end of the day whether such information or conduct is ethically acceptable and whether the Amicable Settlement Facilitator wants to withdraw from the proceedings, without the obligation to state any reasons to the parties.

## **ATTRIBUTES OF A GOOD AMICABLE SETTLEMENT FACILITATOR**

The attributes of a good Amicable Settlement Facilitator are as follows:

1. The Facilitative Amicable Settlement Facilitator does not advise or suggest to the parties what the solution is, unless requested to do so by the parties.
2. The Amicable Settlement Facilitator controls the process, but the outcome is controlled by the parties.
3. The Amicable Settlement Facilitator does not give legal advice.
4. The Amicable Settlement Facilitator does not apply pressure on the parties to find a solution.
5. The Amicable Settlement Facilitator has no preconceived idea on what the outcome will be.
6. The Amicable Settlement Facilitator creates an atmosphere that invites solutions rather than demands.
7. The Amicable Settlement Facilitator has good listening and questioning skills, instead of taking good written notes.
8. The Amicable Settlement Facilitator assist the parties to understand their individual and common interests.
9. The Amicable Settlement Facilitator gains the parties' trust.

## **THE AMICABLE SETTLEMENT FACILITATOR'S CHECKLIST FOR THE OPENING SESSION**

The following list is provided as a guideline of matters to be dealt with in the opening session:

1. Welcome and introduction – the Amicable Settlement Facilitator
2. Facilities – safety and health
3. Timeslots – commitments and restrictions
4. Signing of the Amicable Settlement Facilitator agreement
5. Authority to settle.
6. Description of the Amicable Settlement Facilitator's role
7. Setting the rules
8. Open sessions versus private sessions – the do's and don'ts
9. The role of legal advisors, if present
10. Documents submitted to the Amicable Settlement Facilitator and the consideration thereof.
11. Introduction of the parties – background, ambitions
12. What the parties would like to achieve out of the sessions

## GUIDANCE ON AMICABLE SETTLEMENT PROCEDURES IN ACCORDANCE WITH THE GCC 2015

### 1. Commencement of amicable settlement procedures

- 1.1 The commencement procedures are a prelude to the amicable settlement procedures that require the parties to discuss and seek agreement from the outset. This makes it clear right from the start of the proceedings that the whole concept of amicable settlement depends on the will of the parties. In this instance, the agreement required between the parties is not difficult, because it is about an appropriate technique and a suitable Amicable Settlement Facilitator. The parties are also required to act with the necessary discipline within the time-barring period for accepting amicable settlement.
- 1.2 GCC 2015 Clause 10.4.2 provides that a party must react to an invitation for amicable settlement within 14 days of the invitation to prevent the referral of the issue to formal dispute resolution procedures. This limiting time period is necessary to ensure that amicable settlement is not abused by delaying tactics.
- 1.3 In the unlikely event that the parties cannot agree on who the Amicable Settlement Facilitator should be, either party may apply to SAICE in terms of GCC 2015, Clause 10.9.1, for nomination of a suitable Amicable Settlement Facilitator from the President's Lists. Should it be required, the Amicable Settlement Facilitator should submit a disclosure statement to ensure his neutrality. (See GCC 2015, Appendix 4, which should be adjusted for amicable settlement).
- 1.4 Amicable settlement commences when the Contractor and the Employer agree to engage in such proceedings. This may be at any time, even midway through arbitration. The parties may also agree at the outset of the Contract to refer all future issues to amicable settlement.

### 2. Amicable settlement procedures

- 2.1 The Amicable Settlement Facilitator is given the duty, while observing the wishes of the parties, to facilitate the amicable settlement proceedings while the parties stay in control of the matter. In exercising his powers, the Amicable Settlement Facilitator may act in the belief that the parties will at all time act in good faith, meaning that they honestly intend to act without taking an unfair advantage over one another.
- 2.2 There are, however, some limitations to this duty, mainly to ensure that the amicable settlement procedure is conducted fairly.
  - 2.2.1 The parties may agree, by referring to specific rules or otherwise, on how the amicable settlement should be conducted. If they do not do so, or fail to agree, the Amicable Settlement Facilitator may conduct the proceedings in such a manner as he considers appropriate, considering the circumstances of the issue, to get the parties on board and to participate.
  - 2.2.2 A preliminary meeting between the parties and the Amicable Settlement Facilitator, as chairperson, is indispensable as it reduces uncertainty at the very start of the proceedings. The minutes of the meeting will form the basis of the procedure. Having a preliminary meeting is a necessary step in getting the parties to discuss and seek agreement on matters from the outset, before the more difficult issues are embarked upon. Furthermore, it also gives parties and the Amicable Settlement Facilitator the opportunity to meet face-to-face and for the Amicable Settlement Facilitator to assume his role as master of the proceedings.
  - 2.2.3 For amicable settlement to succeed, the parties and the Amicable Settlement Facilitator must

be able to explore and understand, as clearly as possible, the nature of the issue between the parties, the background and circumstances that gave rise to the issue, the reasons why the parties were unable to reach agreement among themselves, and the possibility of the parties overcoming the issue. Depending on the complexity of the issue, various ways may be used to achieve this. It may be by oral statements of the parties on a simple issue or requesting the parties to prepare a joint statement of issues or by allowing the claiming party to deliver a submission and allowing the other party to respond. This step will clarify misunderstandings about the issue early in the proceedings.

- 2.2.4 If new matters are raised in the response, or new developments have taken place, or fresh information comes to light, a party may wish to alter his submission, or the Amicable Settlement Facilitator may want to see how the other party responds. If a request is genuine and not a delaying tactic, the Amicable Settlement Facilitator may allow such additional information.
- 2.2.5 To supplement the submissions, the Amicable Settlement Facilitator may propose to the parties to hold further meetings or to hear the parties, even separately. The procedure for hearing the parties will depend on the amicable settlement technique employed, which can vary from informally communicating separately with each party.

### **3. Communication**

Separate meetings between the Amicable Settlement Facilitator and a party are essential to reach common ground without negative emotional reactions from the other party. The Amicable Settlement Facilitator may have separate confidential discussions with the parties to find out what would be acceptable to them without disclosing such information to the other party.

### **4. Information**

- 4.1 The information submitted, for example, the submissions stating and supporting the case as required by GCC 2015, Clause 10.1.3, must be made available to both parties to ensure a fair procedure. However, information beyond the information, like the relationship between the parties, proposed concessions and other sensitive and confidential matters, carries the risk that if made available to the other party, may prejudice the proceedings. There are three types of information:
  - 4.1.1 Information that must be disclosed to the other party.
  - 4.1.2 Information to be kept confidential must not be disclosed to the other party.
  - 4.1.3 Information not in the two abovementioned categories may be disclosed at the discretion of the Amicable Settlement Facilitator.

### **5. Settlement Agreement**

- 5.1 The purpose of the Settlement Agreement is to ensure that a settlement or a partial settlement is enforceable. A written and signed Settlement Agreement would provide for this. If such a Settlement Agreement is not honoured, the failure could be referred to arbitration or court proceedings.
- 5.2 The Amicable Settlement Facilitator should not become the author of the settlement agreement, unless requested to do so by the Parties, but should rather assist the parties in recording their

settlement agreement in writing.

- 5.3 In the case of Evaluative Amicable Settlement Facilitation, the Amicable Settlement Facilitator's opinion is not binding on the parties unless it is accepted by signing a Settlement Agreement. If the issue or part thereof remains unresolved after delivery of the Amicable Settlement Facilitator's opinion, the compulsory dispute resolving procedures will prevail.

**6. Role of the Amicable Settlement Facilitator in subsequent proceedings**

- 6.1 The possibility of an Amicable Settlement Facilitator, to whom all the confidential information was divulged during the proceedings of amicable settlement, being called as a witness in subsequent dispute resolution procedures, will discourage parties from divulging information. This will reduce the efficacy of amicable settlement. Similarly, with such confidential knowledge, the Amicable Settlement Facilitator would not be able to act fairly as an adjudicator, arbitrator or representative of a party in subsequent formal dispute resolution procedures. To ensure open and sincere discussions in amicable settlement, the Amicable Settlement Facilitator may not be involved in subsequent dispute resolution proceedings in any way.

**7. Liability of the Amicable Settlement Facilitator**

The Amicable Settlement Facilitator cannot be held responsible for damage and loss caused by his acts or omissions unless he acted in bad faith, meaning an intentional dishonest act, for example, accepting a bribe to influence his opinion.

**8. Fees and expenses**

It is advisable for the Amicable Settlement Facilitator to state his scale of fees and possible expenses that he will claim in his acceptance letter. The parties must agree on this fee, as well as on the procedure for payment of the Amicable Settlement Facilitator's fees and expenses during the preliminary meeting.

---



## AMICABLE SETTLEMENT PROCEDURES: GCC 2015

### 1. Scope of the Procedures

- 1.1 These procedures apply to the amicable settlement of an issue between the Contractor and the Employer as set out in Clause 10.4 of the General Conditions of Contract for Construction Works, Third Edition (2015) (GCC 2015).
- 1.2 Amicable settlement refers to the procedure by which issues are settled with the help of a sole independent and impartial third party, called an Amicable Settlement Facilitator, using a Facilitative or Evaluative approach (or any technique agreed between the Parties)
- 1.3 The parties may agree to modify any of the provisions of these procedures at any time.

### 2. Commencement of amicable settlement proceedings

- 2.1 The party who wishes to initiate an amicable settlement shall extend a written invitation to the other party to settle the issue amicably under these procedures, stating briefly:
  - 2.1.1 The nature of the issue
  - 2.1.2 A proposed amicable settlement technique
  - 2.1.3 Details of the proposed Amicable Settlement Facilitator to be appointed in terms of GCC 2015, Clause 10.9.1
- 2.2 The parties shall discuss and seek to reach agreement on the amicable settlement technique to be used and the Amicable Settlement Facilitator to be appointed.
- 2.3 Amicable settlement proceedings shall commence once the other party accepts the invitation. Acceptance shall be confirmed, in writing, stating the amicable settlement technique decided on and the Amicable Settlement Facilitator to be appointed.
- 2.4 Amicable settlement failure shall be dealt with in accordance with GCC 2015, Clause 10.4.2.

### 3. Amicable settlement procedures

- 3.1 Each party shall, always, act in good faith.
- 3.2 Although the Amicable Settlement Facilitator has the duty to facilitate the amicable settlement proceedings while the parties stay in control of the matter, he may:
  - 3.2.1 Conduct the procedure as he considers appropriate, subject to these procedures and guided by the principles of fairness, impartiality, and the wishes of the parties.
  - 3.2.2 Call for a preliminary meeting with the parties to decide on the procedure and time frames to be adopted.
  - 3.2.3 Request each party to submit to him and the other party, a statement of the party's position on the issue, supplemented by such documentation as the party may deem necessary.
  - 3.2.4 At any stage in the proceedings, request a party to submit appropriate additional information.
  - 3.2.5 Call further meetings to hear oral presentations, reconcile opposing views, discuss proposals, or communicate directly with the parties to achieve a mutually acceptable solution.
  - 3.2.6 Propose various procedures about settling the issue as a whole or elements of the issue which need not be in writing or accompanied by reasons.

3.3 Each party may, at his own initiative or at the invitation of the Amicable Settlement Facilitator, submit suggestions about settling the issue.

#### **4. Representation**

4.1 The parties may be represented and/or assisted by persons of their choice. However, for legal representation, the other party should consent to that, which could be in writing.

4.2

#### **5. Communication**

5.1 The Amicable Settlement Facilitator may communicate with the parties together or separately, provided that in the case of separate communication the consent of the other party is given.

5.2 The place and time of such meetings shall be determined by the Amicable Settlement Facilitator, in consultation with the parties.

#### **6. Information**

6.1 Whenever the Amicable Settlement Facilitator receives information concerning the issue from a party, he shall disclose such information to the other party so that the other party may have the opportunity to respond appropriately. However, should one party give information to the Amicable Settlement Facilitator, subject to keeping it confidential, such information shall not be disclosed to the other party.

#### **7. Settlement Agreement**

7.1 When the parties reach agreement on a settlement of the issue or an element of the issue, the parties shall draw up a written settlement agreement.

7.2 By signing the settlement agreement, the parties conclude the issue or element of the issue and are bound by the agreement.

#### **8. Confidentiality**

8.1 Unless the parties agree otherwise, the proceedings, evidence given, admissions, submissions and statements made and the outcome of amicable settlement shall be regarded as private and confidential and no reference shall be made to it as required by GCC 2015, Clause 10.4 4.

#### **9. Termination of Proceedings**

9.1 The proceedings are terminated on the date of:

9.1.1 The signing of a settlement agreement by the parties.

9.1.2 A written statement by the Amicable Settlement Facilitator, after consultation with the parties concerned, that further efforts to settle the issue amicably are no longer justified.

9.1.3 Receipt by the Amicable Settlement Facilitator of a written and signed joint declaration by the parties that the proceedings have been terminated.

9.1.4 The Amicable Settlement Facilitator withdraws from the proceedings.

9.2 During the proceedings, the parties undertake not to initiate any adjudication, arbitration or court

proceedings in respect of the issue under consideration, except where such arbitration or court proceedings are necessary to preserve a party's rights.

**10. Role of Amicable Settlement Facilitator in subsequent proceedings**

10.1 If the issue cannot be settled amicably, the parties and the Amicable Settlement Facilitator shall undertake that the Amicable Settlement Facilitator shall not be called as a witness or act as an Adjudication Board Member, Arbitrator or representative of either party in any subsequent proceedings.

**11. Liability of the Amicable Settlement Facilitator**

11.1 The Amicable Settlement Facilitator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Amicable Settlement Facilitator unless the act or omission was in bad faith. The Contractor and the Employer shall exempt and indemnify the Amicable Settlement Facilitator against all claims by third parties and, in this respect, shall be jointly and severally liable.

**12. Fees and expenses**

12.1 Each party shall bear its own costs arising from the amicable settlement procedure.

12.2 The parties shall, in equal shares, pay the Amicable Settlement Facilitator the amount of his expenses and the amount of his fee based on a scale of fees as agreed between the Amicable Settlement Facilitator and the parties before commencement of the amicable settlement procedure.