

CLC TASKFORCE: COVID-19 CONTRACTUAL GUIDANCE



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TEMPLATE I – SETTLEMENT AGREEMENT

SUMMARY

- To be read in conjunction with CLC COVID-19 Contractual Guidance – Best Practice.
- If the parties to an existing contract wish to settle their agreed/negotiated positions on matters that were previously in contention, a Settlement Agreement should be used to record those agreed/negotiated conclusions and ensure they are legally binding on all parties.
- This template contains a precedent Settlement Agreement designed to work with any contract.
- CLC advocates collaboration in the context of fair and responsible contractual behaviour and therefore encourages the parties to share risks arising from pandemics to safeguard project delivery and industry sustainability as opposed to applying commercial pressures to transfer risk.

1. EXPLANATORY NOTES

- 1.1. This is a template Settlement Agreement to allow parties (regardless of the form of contract) to record their settlement on issues arising as part of their discussions in order to conclude the Contract. The template should be adjusted based on the circumstances of any negotiated settlement and the relevant contractual provisions.
- 1.2. Special attention must be paid to the terms of the existing Contract before the template Settlement Agreement is finalised.
- 1.3. This is general guidance and the letter is a general template. Nothing in this document constitutes legal advice. A party's contractual rights will depend on the wording of its particular contract and the factual circumstances on its project. If in doubt, legal advice should be sought.
- 1.4. If you have any comments or feedback please email: construction.enquiries@beis.gov.uk

SETTLEMENT AGREEMENT

This Settlement Agreement is made on [*** INSERT DATE]¹ (the 'Settlement Date') between the following parties (each a 'party' and together the 'parties'):

PARTIES²

- (1) [*** INSERT NAME OF EMPLOYER] a company incorporated in [*** England and Wales] whose company number is [*** INSERT COMPANY NUMBER] and whose registered office is at [*** INSERT REGISTERED OFFICE] ('Employer'); and
- (2) [*** INSERT NAME OF CONTRACTOR] a company incorporated in [*** England and Wales] whose company number is [*** INSERT COMPANY NUMBER] and whose registered office is at [*** INSERT REGISTERED OFFICE] ('Contractor').

BACKGROUND

- A The parties entered into a construction contract dated [*** INSERT DATE] for the [*** INSERT DESCRIPTION OF WORKS/PROJECT] (the 'Contract')³.
- B ⁴[The parties are engaged in a dispute [*** regarding, full details of which are set out in the schedule attached] (the 'Dispute').
- OR
- The parties are engaged in proceedings in respect of various disputes arising out of the Contract in the [*** identify tribunal] ([*** insert case number(s)]) [*** as detailed in the schedule] (the 'Dispute').]
- C The parties have agreed to settle the Dispute and further claims arising out of the same facts but not yet forming part of this Agreement without any admission of liability or wrongdoing by either party, on the terms set out in this Settlement Agreement.
- D [*** Both parties will bear their respective legal costs if any.]
- E Both parties agree to withdraw from their respective claims in respect of the Contractor's final account for the Contract (and any alleged further or alternative claims to payment for the Contract) and any or all alleged claims from the Employer relating to works carried out by the Contractor under the Contract. Neither party will pay further monies to the other'.⁵

¹ This should be the date on which the parties want the Settlement Agreement to come into effect – not the date of the signatures.

² If any formal dispute resolution procedure has been instigated, the parties to this agreement should be those who are party to the dispute resolution system which has been instigated to ensure this agreement does not leave any party outside the scope of this agreement. Also if the settlement is to grant a right to any other party, or confer an obligation, that other party should also be party to this settlement agreement.

³ This will differentiate this contract from any other between the parties.

⁴ It may be necessary to state in the description of the dispute(s) *except as expressly stated, the definition does not encompass any of the other claims, rights or remedies (or specific/unknown claims) under the Contract.*

⁵ If there are any related claims with third parties, it may be useful to cross-reference them so that it is clear the agreement envisages that it includes for any residual liability under related claims. If the settlement is to include such items as release of retentions or assignment of intellectual property rights it would be useful to identify them here. If the settlement is the result of negotiations and/or an ADR process, it would be prudent to identify the *who, what, where and when*, of how the settlement came about.

THE PARTIES AGREE:

1 Interpretation

- 1.1 In this Settlement Agreement, unless the context otherwise requires:
 - 1.1.1 the singular includes the plural and vice versa;
 - 1.1.2 references to sub-clauses, clauses or Schedules (if any) are to sub-clauses, clauses or Schedules of this Settlement Agreement;
 - 1.1.3 'including' (or similar words) means including without limitation;
 - 1.1.4 clause headings do not affect their interpretation; and
 - 1.1.5 references to legislation (including any subsidiary legislation) include any modification or re-enactment thereof in force as at the Settlement Date.
- 1.2 The Background recitals above are intended to be binding.

2 Authority

- 2.1 Each party warrants and represents to the other that it has the right, power and authority to enter into and perform this Settlement Agreement.
- 2.2 The signatories warrant that they have full authority to enter into this Settlement Agreement and bind the party they represent.
- 2.3 Each party warrants and represents that it has not sold, transferred, assigned or otherwise disposed of its interest in the Dispute.

3 Terms of settlement

The parties agree as follows:

- 3.1 This Settlement Agreement is in full and final settlement of the Dispute and any causes of action whatsoever which the parties have against each other arising out of or in relation to the Contract. Each party and their associated companies, officers, directors, agents or affiliates releases and forever holds harmless the other party from all causes of action, claims, proceedings, set offs, claims, demands, costs and expenses whatsoever in relation to or arising out of the Contract and any other matter arising out of the relationship between the parties, whether known at the time of entering into this Settlement Agreement or unknown, whether in this jurisdiction or any other, excluding any claim for breach of this Settlement Agreement.
- 3.2 For the avoidance of doubt, this Settlement Agreement does not waive any rights or causes of action available to [*** identify the party whose right is being preserved] arising out of or connected with [*** identify the subject matter of the carve out] and nothing in this Settlement Agreement shall be construed or affect the rights of [*** identify the party] in respect of such matters.
- 3.3 Except as expressly compromised or set out in the Settlement Agreement, nothing in the agreement shall affect the parties' rights and obligations under the Contract.
- 3.4 This Settlement Agreement is entered into in connection with the compromise of the Dispute and in the light of other considerations. It is not and shall not be represented

or construed by the parties as, an admission of liability or wrongdoing on the part of any party to this Settlement Agreement or any other person or entity.

3.5 ⁶[*** INSERT NAME OF PARTY] shall pay to [*** INSERT NAME OF PARTY] in cleared funds £[*** INSERT SUM IN FIGURES] ([*** INSERT AMOUNT IN WORDS]) by 4pm on [*** INSERT DATE]; to bank account [*** INSERT ACCOUNT NUMBER] sort code [*** INSERT SORT CODE].

3.6 ⁷[*** From the Settlement Date, the proceedings relating to the Dispute will be stayed and the parties consent to an order being made in the terms of the attached [Tomlin OR Consent] order.]

4 Indemnity

4.1 Save in relation to any liability relating to death or personal injury, each party indemnifies, and shall keep indemnified, the other party against all costs and damages (including legal expenses) incurred in any future actions, claims or proceedings in respect of the Dispute, or any part of it, which it or any of its associated companies, officers, directors, agents or affiliates may bring against the other party or any of its associated companies, officers, directors, agents or affiliates.

4.2 The parties agree not to do any act (or authorise, procure or permit the doing of any act) the intention of which is to seek to frustrate or circumvent the terms of this Settlement Agreement.

5 Legal costs

5.1 There shall be no order as to costs in relation to the Dispute. Each party is responsible for its legal and other costs in relation to the negotiation, preparation and performance of this Settlement Agreement.⁸

6 Time of the essence

6.1 Time shall be of the essence in respect of the following obligations under this Settlement Agreement⁹: a) [*** XXX]

7 Assignment

7.1 Each party will be permitted to assign its rights on not more than two occasions only without the consent of the other party.

⁶ The parties will have to carefully consider which obligations of each party are conditional upon the obligation of another. For example, if the Employer wants to make any payment conditional upon the rectification of any residual defects, or the provision of any collateral warranties, or equally if the Contractor wants to make any further performance conditional upon a part payment with a reducing balance of instalments over a progressive time period. Ultimately this is the heart of the commercial collaborative settlement, but it is vital that the parties agree the detail. There is no such thing as a bad deal provided the parties are able to sustain the outcome.

⁷ This is for where formal dispute resolution proceedings are underway.

⁸ If a formal dispute resolution process is underway this clause may need to be adapted to suit and include a formal order which can be filed as proof of settlement.

⁹ The obligations listed as time-critical will give rise to a terminable breach of the Settlement Agreement if those time base requirements are not met.

8 Governing law and jurisdiction

- 8.1 The formation, validity, construction, performance, and all other aspects of this Settlement Agreement or of any term will be governed by the law of England and Wales.
- 8.2 The courts of England and Wales will have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Settlement Agreement.

9 Entire agreement

- 9.1 This Settlement Agreement constitutes the entire agreement between the parties in relation to its subject matter and supersedes any prior agreements, representations or understandings between them, whether in writing or oral, in respect of its subject matter unless expressly incorporated by reference in this Settlement Agreement.
- 9.2 Each party acknowledges that it has not entered into this Settlement Agreement in reliance on, and shall have no remedies in respect of, any representation or warranty that is not expressly set out in this Settlement Agreement. No party shall have any claim for innocent or negligent misrepresentation on the basis of any statement in this Settlement Agreement. This clause does not affect a party's liability in respect of a fraudulent misrepresentation or its own wilful default in this regard.

10 Amendment of the agreement

- 10.1 No amendment or variation of this Settlement Agreement will be valid unless agreed in writing by an authorised signatory of each party.
- 10.2 Unless otherwise expressly agreed, no delay, act or omission by either party in exercising any right or remedy will be deemed a waiver of that, or any other, right or remedy.

11 Rights of third parties

- 11.1 For the purposes of the Contracts (Rights of Third Parties) Act 1999, this Settlement Agreement is not intended to and does not give any person who is not a party to it any right to enforce any of its provisions¹⁰.

12 Severability

- 12.1 If any clause in this Settlement Agreement (or part thereof) is or becomes illegal, invalid or unenforceable under applicable law, but would be legal, valid and enforceable if the clause or some part of it was deleted or modified (or the duration of the relevant clause reduced), the relevant clause (or part thereof) will apply with such deletion or modification as may be required to make it legal, valid and enforceable.

¹⁰ This ensures the agreement does not inadvertently give a someone who is not party to the agreement a right. This is also why all parties who might be relevant to rights or obligations (including guarantees) should be party to the agreement.

13 Counterparts

13.1 This Settlement Agreement may be signed in any number of counterparts and by the parties on separate counterparts, each of which when signed and dated shall be an original, and such counterparts taken together shall constitute one and the same agreement. This Settlement Agreement shall not be effective until each party has signed one counterpart.¹¹

Attestation and signature

IN WITNESS whereof the parties have entered into this Settlement Agreement on [*** INSERT THE SETTLEMENT DATE].

Signed by [*** INSERT FULL NAME OF DIRECTOR/AUTHORISED SIGNATORY]
for and on behalf of	[*** DIRECTOR OR AUTHORISED SIGNATORY]
[**** INSERT NAME OF PARTY COMPANY]	

and

Signed by [*** INSERT FULL NAME OF DIRECTOR/AUTHORISED SIGNATORY]
for and on behalf of	[*** DIRECTOR OR AUTHORISED SIGNATORY]
[*** INSERT NAME OF PARTY COMPANY]	

¹¹ This allow the agreement to be signed/executed without the need for all parties to be in one place.