

Public Lecture
at
Engineers Ireland
on
How the Public Works Contracts
might be used in the Private Sector

by
Ciaran Fahy
Anthony Hussey

Adjudication Procedure

4 July 2013

Permission to use the Institution of Civil Engineers Adjudication Procedure in the preparation of this document is gratefully acknowledged.

Rule 1 General Principles

- 1.1 The adjudication shall be conducted in accordance with this Procedure and the Adjudicator shall be appointed under the Adjudicator's Agreement which forms a part of this Procedure.
- 1.2 The object of adjudication is to reach a fair, rapid and inexpensive determination of a dispute arising in relation to the Contract and this Procedure shall be interpreted accordingly.
- 1.3 All communications to the Adjudicator are to be copied to the other parties in the same manner, at the same time and marked as such.
- 1.4 The Adjudicator shall be a named individual and shall act impartially.
- 1.5 In making a decision, the Adjudicator may take the initiative in ascertaining the facts and the law. The adjudication shall be neither an expert determination nor an arbitration. In making a decision the Adjudicator may take the initiative in ascertaining the facts and the law and may also rely on the Adjudicator's own expert knowledge and experience.
- 1.6 Subject to the Contract, the Adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration or by written agreement.
- 1.7 The Parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration or written agreement. Payment shall be made in accordance with the payment provisions in the Contract (in the next stage payment which becomes due after the date of issue of the Adjudicator's decision) unless otherwise directed by the Adjudicator.

Rule 2 The Notice of Adjudication

- 2.1 Any Party may give notice at any time of its intention to refer a dispute arising in relation to the Contract to adjudication by giving a written Notice of Adjudication to the other Party. The Notice of Adjudication shall include
 - name and address and contact details of the parties
 - date of issue of the Notice of Adjudication
 - the details and date of the Contract between the Parties
 - the issues which the Adjudicator is being asked to decide
 - details of the nature and extent of the redress sought.

Rule 3 The appointment of the Adjudicator

- 3.1 Where an Adjudicator has either been named in the Contract or agreed prior to the issue of the Notice of Adjudication the Party issuing the Notice of Adjudication shall at the same time send to the Adjudicator a copy of the Notice of Adjudication and request confirmation, within two days of the date of issue of the Notice of Adjudication, that the Adjudicator is able and willing to act.
- 3.2 Where an Adjudicator has not been so named or agreed the Party issuing the Notice of Adjudication may include with the Notice the names of one or more persons with their addresses who have agreed to act, any one of whom would be acceptable to the referring Party, for selection by the other Party. The other Party shall select and notify the referring Party and the selected Adjudicator within two days of the date of issue of the Notice of Adjudication.
- 3.3 If confirmation is not received under Rule 3.1 or a selection is not made under Rule 3.2 or the Adjudicator does not accept or is unable to act then either Party may request the person or body named in the Contract or if none is so named Engineers Ireland to appoint the Adjudicator. Such request shall be made immediately and shall be in writing on the appropriate form of application for the appointment of an adjudicator and accompanied by a copy of the Notice of Adjudication and the appropriate fee.
- 3.4 If for any reason whatsoever the Adjudicator is unable to act or resigns, either Party may require the appointment of a replacement Adjudicator in accordance with the procedure in Rule 3.3.

Rule 4 Referral

- 4.1 The referring Party shall immediately upon receipt of confirmation under Rule 3.1, or notification of selection under Rule 3.2, or appointment under Rule 3.3, and within seven days of the date of the Notice of Adjudication send to the Adjudicator, with a copy to the other Party, a full statement of its case which should include
 - a copy of the Notice of Adjudication
 - a copy of any adjudication provision in the Contract
 - the information upon which it relies, including supporting documents.
- 4.2 The date of referral of the dispute to adjudication shall be the date upon which the Adjudicator receives the documents referred to in Rule 4.1. The Adjudicator shall notify the Parties forthwith of the date.

Rule 5 Conduct of the adjudication

- 5.1 The Adjudicator shall reach a decision within 28 days of the date of referral, or such longer period as is agreed by the Parties after the dispute has been referred. The Adjudicator may extend the period of 28 days by up to 14 days with the consent of the referring Party.
- 5.2 The Adjudicator shall determine the matters set out in the Notice of Adjudication, together with any other matters which the Parties and the Adjudicator agree should be within the scope of the adjudication. The Parties and the Adjudicator agree that any question regarding the jurisdiction of the Adjudicator shall be determined by the Adjudicator.
- 5.3 The Adjudicator may open up review and revise any decision (other than that of an Adjudicator unless agreed by the Parties), opinion, instruction, direction, certificate or valuation made under or in connection with the Contract and which is relevant to the dispute. The Adjudicator may order the payment of a sum of money, or other redress but no decision of the Adjudicator shall affect the freedom of the Parties to vary the terms of the Contract or other authorised person to vary the works in accordance with the Contract.
- 5.4 The other Party may submit its response to the statement under Rule 4.1 within 14 days of the date of referral. The period of response may be extended by agreement between the Parties and the Adjudicator.
- 5.5 The Adjudicator shall have complete discretion as to how to conduct the adjudication, and shall establish the procedure and timetable, subject to any limitation that there may be in the Contract or the Act. The Adjudicator shall not be required to observe any rule of evidence, procedure or otherwise, of any court and, without prejudice to the generality of these powers, may
- direct the means of communication
 - ask for further written information
 - meet and question the Parties and their representatives
 - visit the site
 - request the production of documents or the attendance of people who could assist
 - set times for (a)6(e) and similar activities
 - proceed with the adjudication and reach a decision even if a Party fails:
 - (i) to provide information
 - (ii) to attend a meeting
 - (iii) to take any other action requested by the Adjudicator

issue such further directions as the Adjudicator considers to be appropriate.

- 5.6 The Adjudicator may obtain legal or technical advice but must first notify the Parties before doing so.
- 5.7 Any Party may at any time ask that additional Parties shall be joined in the adjudication. Joinder of additional Parties shall be subject to the agreement of the Adjudicator and the existing and additional Parties. An additional Party shall have the same rights and obligations as the other Parties, unless otherwise agreed by the Adjudicator and the Parties.

Rule 6 The Decision

- 6.1 The Adjudicator shall make a decision and so notify the Parties within the time limits in Rule 5.1 and such decision shall contain reasons. The Adjudicator may make a decision on different aspects of the dispute at different times.
- 6.2 The Adjudicator may in any decision direct the payment of such simple or compound interest at such rate and between such dates or events as the Adjudicator considers appropriate.
- 6.3 Where the Adjudicator either fails to make a decision or alternatively notifies the Parties of inability to reach a decision, then either Party may give seven days notice of its intention to refer the dispute to a replacement Adjudicator appointed in accordance with the procedures in Rule 3.3.
- 6.4 If the Parties are not notified in accordance with Rule 6.3 then the Adjudicator shall not be entitled to any fees or expenses but the Parties shall be responsible for the fees and expenses of any legal or technical adviser appointed under Rule 5.6 subject to the Parties having been notified of such appointment.
- 6.5 The Parties shall bear their own costs and expenses incurred in the adjudication. The Parties shall be jointly and severally responsible for the Adjudicator's fees and expenses, including those of any legal or technical adviser appointed under Rule 5.6. In the decision the Adjudicator may direct a Party to pay all or part of the Adjudicator's fees and expenses; in the absence of such direction the Parties shall pay the Adjudicator's fees and expenses in equal shares.
- 6.6 The Parties shall be entitled to the relief and remedies set out in the decision and to seek summary enforcement thereof, regardless of whether the dispute is to be referred to legal proceedings or arbitration. No issue decided by the Adjudicator may subsequently be laid before another Adjudicator unless so agreed by the Parties.

- 6.7 Any clerical or typographical error or ambiguity arising by accident or omission may be corrected in a decision either at the initiative of the Adjudicator or at the request of either Party within seven days of the notification of the decision to the parties. The Adjudicator shall make any corrections within seven days of any request by a party.

Rule 7 Miscellaneous provisions

- 7.1 Unless the Parties agree, the Adjudicator shall not be appointed arbitrator in any subsequent arbitration between the Parties under the Contract. No Party may call the Adjudicator as a witness in any legal proceedings or arbitration concerning the subject matter of the adjudication.
- 7.2 The Adjudicator is not liable for anything done or omitted while acting as Adjudicator unless the act or omission is in bad faith, and any employee or agent of the Adjudicator is similarly protected from liability. The Parties shall save harmless and indemnify the Adjudicator and any employee or agent of the Adjudicator against all claims by third parties and in respect of this shall be jointly and severally liable.
- 7.3 Neither Engineers Ireland, or any other appointing body using this Procedure, nor its servants or agents shall be liable to any Party for any act omission or misconduct in connection with any appointment made or any adjudication conducted under this Procedure.
- 7.4 Unless otherwise agreed, Notices shall be sent by any effective means to the address stated in the Contract for service of notices, or if none, the principal place of business or registered office (in the case of a company). Any agreement required by this Procedure shall be evidenced in writing.
- 7.5 This Procedure shall be interpreted in accordance with the law of the Contract.

Rule 8 Definitions

- 8.1 The ~~Adjudicator~~ means the person named as such in the Contract or appointed in accordance with this Procedure.
- ~~Contract~~ means the contract or the agreement between the Parties which contains the provision for adjudication.
- ~~Party~~ means a Party to the Contract and references to either Party or the other Party or Parties shall include any additional Party or Parties joined in accordance with this Procedure.

ADJUDICATOR'S AGREEMENT

THIS AGREEMENT is made on the day of
... 20

between (the first Party):

of:

and (the second Party):

of:

and (where there is a third Party):

of:

(~~the Parties~~) of the one part and:

of:

(~~the Adjudicator~~) of the other part.

Disputes or differences may arise/have arisen* between the Parties under a Contract dated

..... and known as:

.....
.....

and these disputes or differences shall be/have been* referred to adjudication in accordance with this procedure (to be referred to as ~~the Procedure~~) and the Adjudicator has been requested to act.

IT IS NOW AGREED as follows.

1. The rights and obligations of the Adjudicator and the Parties shall be as set out in the Procedure.
2. The Adjudicator accepts the appointment and agrees to conduct the adjudication in accordance with the Procedure.
3. The Parties bind themselves jointly and severally to pay the Adjudicator's fees and expenses in accordance with the Procedure as set out in the attached Schedule.
4. The Parties and the Adjudicator shall at all times maintain the confidentiality of the adjudication and shall endeavour to ensure that anyone acting on their behalf or through them will do likewise, save with the consent of the other Parties which consent shall not be unreasonably refused.
5. Unless otherwise requested within 28 days after the decision has been made, the Adjudicator shall destroy the documents which have been provided in relation to the adjudication.

*Delete as necessary

Signed on behalf of:

First Party:

Name:

Signature:

Date:

Second Party:

Name:

Signature:

Date:

Third Party (where there is a third Party):

Name:

Signature:

Date:

Adjudicator:

Name:

Signature:

Date:

SCHEDULE to the ADJUDICATOR'S AGREEMENT

The Adjudicator shall be paid at the hourly rate of p in respect of all time spent upon, or in connection with, the adjudication including time spent travelling.

The Adjudicator shall be reimbursed, at cost, in respect of all disbursements properly made including, but not restricted to:

- (a) Administrative and out of pocket expenses.
- (b) Charges for legal or technical advice obtained in accordance with the Procedure.

The Adjudicator is/is not currently registered for VAT. Where the Adjudicator is registered for VAT it shall be charged additionally in accordance with the rates current at the date of invoice.

All payments shall become due 7 days after receipt of invoice, thereafter interest shall be payable at the rate in the Late Payment Regulations.

*Delete as necessary