

## A Guide to Adjudication for Employers, Contractors and Subcontractors in Construction Contracts

### 1. Introduction

Adjudication is an alternative dispute resolution procedure in the area of construction contracts. The Housing Grants, Construction and Regeneration Act 1996 (the Act) gives a party to a Construction Contract the right to refer a dispute arising out of the contract to adjudication. The intention of Parliament was "to introduce a speedy mechanism for settling disputes and construction contracts on a provisional interim basis, and requiring the decision of Adjudicators to be in force pending the final determination of disputes by arbitration, litigation or agreement..." [Dyson J in *Macob Civil Engineering v. Morrison Construction Limited*]

Since the case of *Macob* adjudication has evolved considerably. The process is generally considered to be working successfully by those within the construction industry. The Department of Environment, Transport and the Regions published a Consultation Document entitled "*Improving Adjudication in the Construction Industry*" in April 2001; following a lengthy review, in March 2005 the DTI published a consultation document entitled "*Improving Payment Practices in the Construction Industry*" containing a section on Adjudication. Following the consultation period, which ends on 21.6.05, it is likely that further guidance to Adjudicators and some statutory modifications will be made.

### 2. Basic Points

- Adjudication is normally used to ensure payment.
- There must be a dispute between the parties arising out of the contract.
- The Adjudicator must normally make a decision within 28 days of a referral of the dispute to him, subject to an extension of time of 14 days.
- The Adjudicator's decision is normally binding upon the parties and can be enforced by application to the Courts for summary judgment. There are only limited situations where the Court will refuse to enforce payment, such as where the Adjudicator acted outside of his jurisdiction, or where he did not act fairly or impartially (breach of 'natural justice').
- Adjudication gives "temporary finality" to a dispute and parties can continue with their contractual relationship and still refer the dispute to Arbitration or to the Court for final determination. However the Adjudicator's decision must still be complied with in the interim.
- Under the Act, a construction contract must contain eight minimum requirements concerning the right to adjudication. If it does not, then the Scheme for Construction Contracts will apply. These are a set of rules which contain all eight points and will automatically apply to the contract to the extent that the contract is deficient.

### 3. Particular Points for Contractors and Subcontractors

- The procedure is speedy, and relatively cheap when compared with full-blown litigation or arbitration. If you have not been paid in time or paid in full by your employer the procedure is particularly useful.
- To start adjudication, you firstly have to see whether your construction contract is compliant with the Act. If not, you follow the Scheme for Construction Contracts. You commence with a Notice of Adjudication.
- The Notice of Adjudication must describe precisely the dispute or disputes being referred to the Adjudicator otherwise the decision will not be enforced.
- The other party will serve a Response.
- The Adjudicator may make a decision purely on paper, or there may be a hearing.

### 4. Particular Points for Employers

- You need to ensure that your paperwork and contract management is properly in place. Does your contract comply with the Act? If not then are you aware of the provisions of the Scheme for Construction Contracts?
- Are you sure that your Notice of Intention to Withhold Payment properly specifies the amount it is proposed to withhold? Otherwise it will be ineffective and invalid and the contractor or subcontractor is likely to succeed in obtaining a decision from an Adjudicator that you must pay the full amount of a stage payment due even though you may have good reasons for not making full payment.
- Are you aware of the mechanism under your contract for determining what payments become due and when, and the final date the payment in relation to any sum which becomes due?
- You must be sufficiently geared up to respond to a reference to adjudication quickly. The procedure requires an Adjudicator to make a decision speedily. A contractor or subcontractor may well choose a time to make the referral when many members of your company are on holiday, so be prepared.

This Information Sheet is a guide only to the Adjudication procedure and is not a substitute for seeking professional advice on specific issues.

Thomson Snell & Passmore will be pleased to assist you in any part of the Adjudication process, from the drafting of

the Notice of Adjudication through to the Adjudication Hearing (should there be a hearing) and at any stage in between. We will also be pleased to advise you upon any matters arising out of your construction contract.

Contact Chris Whittington in our Property Construction Unit for further information on 01892 510000 or at [chris.whittington@ts-p.co.uk](mailto:chris.whittington@ts-p.co.uk)

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