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Effective implementation of NEC3

Adjudication procedures and practices

WHAT IS ADJUDICATION?

Adjudication may be defined as 'an accelerated and cost-effective form of dispute resolution that, unlike other means of resolving disputes involving a third party intermediary, the outcome is a decision by a third party which is binding on the parties in dispute and is final unless and until reviewed by either arbitration or litigation'.

Adjudication is not arbitration or litigation. Arbitration is a method of resolving disputes between two or more parties by reference to one or more persons appointed for that purpose, typically in accordance with procedures laid down in the Arbitration Act 42 of 1965. Litigation is the system by which the advocates representing each side adduce arguments in a court of law to persuade the tribunal (judge, jury or assessors) that they have the better legal case.

(All the standard forms of contract supported by the Construction Industry Development Board contain adjudication procedures – see CIDB Best Practice Guideline #C3 Adjudication on www.cidb.org.za.)

NEC3 ADJUDICATION PROCEDURE

Each NEC form of contract requires that the party notifying a dispute refers it to an adjudicator for a decision. The decision is binding on the parties unless and until it may be changed by subsequent reference to the tribunal (arbitration or litigation as selected by the parties in the contract data) and is final and binding if a party does not notify the other party of his intention to refer the matter to the tribunal within four weeks of the adjudicator's decision. Such reference to the tribunal is not permitted if the matter has not first been referred to the adjudicator.

The adjudication procedure in the NEC3 family of contracts is included either in Section 9 of the Core Clauses or under Option W1 (Dispute Resolution). (Option W2 is only applicable in the UK.) The adjudicator has jurisdiction from the

NEC3 Adjudicator's Contract entered between him and both of the parties and has duties arising from a combination of that contract and the contract between the parties from which the dispute referred to him has arisen.

Resolution of a dispute by adjudication is mandatory in all NEC3 contracts. There are strict time bars for the notification of a dispute and implementation of the adjudication process which, if not observed, would not only deny the parties their rights to adjudication, but also to any possible further reference to either arbitration or litigation. The adjudicator's fees, based on an agreed hourly rate, and expenses are shared equally between the parties irrespective of the outcome.

APPOINTMENT OF AN ADJUDICATOR

The NEC contracts require that notification of a dispute and submission of information to the adjudicator be done within tight time frames.

If an adjudicator has not already been appointed or cannot be appointed very quickly when a dispute is notified, the time frames will probably not be met.

An adjudicator should ideally be appointed at the same time as the contract between the parties is awarded. If this is not done and the parties cannot subsequently agree after award on the person to be appointed or cannot agree on a new adjudicator should one be required, there is a fall back reference to an adjudicator-nominating body to select an adjudicator.

The JCD Panel of NEC Adjudicators has been established to facilitate the timely appointment of adjudicators using one of two methods.

The standard payment option provided in the NEC3 Adjudicator's Contract is for the parties referring the matter to dispute to pay the adjudicator an advance payment that is stated in the contract data and to share any amount due in equal proportions.

To enable consolidation of related disputes across the whole project it may

be appropriate for the main contract to specify that the subcontract terms should name the same adjudicator as also acting in subcontract disputes.

JOINT CIVILS DIVISION PANEL OF NEC ADJUDICATORS

Overview

The JCD Panel of NEC Adjudicators has been established to facilitate the timely appointment of adjudicators using one of two methods by incorporating specific data in the contract data in a procurement document.

Any person registered with a local or international built environment council and who has suitable experience and expertise may apply to the JCD secretary to be admitted to the panel by e-mailing (news@jointcivils.co.za) or posting (PO Box 119, Parklands, 2121) a completed application for admission and paying an application fee.

Persons who are admitted to the panel will remain on the panel until 1 July. They need to apply to the JCD secretary to remain on the list until 1 July of the following year by completing an annual return and paying an annual fee. Adjudicators who, in the opinion of the JCD, compromise themselves through conflicts of interest or who perform adjudications in a sub-standard manner or not in accordance with the Adjudicator's Contract will not be readmitted to the list.

The chairman of the JCD may be called upon to nominate an adjudicator where an adjudicator resigns or becomes unable to act and the parties cannot agree on a replacement. A form for this purpose is available on the division's website (see www.jointcivils.co.za)

Using the panel

Parties to an NEC contract can use the JCD Panel of NEC Adjudicators in one of two ways:

- **Option 1** The employer selects a listed person and inserts his name in the

contract data provided by the employer. The contractor then either accepts the person chosen or may suggest another listed person. The parties agree on the person chosen prior to award of the contract between them.

■ **Option 2** Make reference to the JCD Panel of NEC Adjudicators in the contract data provided by the employer and after contract award, the party intending to refer the first dispute to adjudication selects two listed persons who have confirmed their availability to act as an adjudicator, the other party selects one of these two persons to be the adjudicator and the parties make the necessary arrangements for his immediate appointment

The facility for an external adjudicator nominating body to make a selection is still available in the event any of the two options should fail, for example the adjudicator resigns or becomes unable to act and the parties cannot agree on a replacement.

It should be noted that clause F.3.17 (complete adjudicator's contract) of the CIDB Standard Conditions of Tender state that: 'Unless alternative arrangements have been agreed or otherwise provided for in the contract, arrange for both parties to complete formalities for appointing the selected adjudicator at the same time as the main contract is signed.'

This requires the successful tenderer (contractor) as a condition of tender to conclude the contract with the adjudicator with the employer, should this be required.

Preparing contract data

The following data should be inserted into the contract data provided by the employer for an ECC3 contract. Other contracts in the NEC3 family will be similar.

■ **Option 1 – Choosing the adjudicator before contract award** The employer nominates the adjudicator in the contract data for Option W1 by choosing a person from the JCD Panel of NEC Adjudicators (see table 1)

It should be noted that the various NEC3 contracts state that 'The parties appoint the adjudicator under the NEC Adjudicators Contract current at the starting date'

■ **Option 2 – Choosing an adjudicator after contract award** The party intending to refer the first dispute to adjudication selects two persons from the JCD Panel of NEC Adjudicators, confirms their availability. The other party selects which of the two is to be the adjudicator (see table 2)

The Z clause (see table 3) should be added where use is made of the JCD's Panel of NEC Adjudicators after award, that is, Option 2

Admission criteria

Candidates applying to be accredited and admitted to the JCD Panel of NEC Adjudicators are required to:

- (1) be professionally registered with a local or international built environment council;

Table 1 Choosing the adjudicator before contract award

Data for Option W1		Guidance notes
The adjudicator is		Insert data
Name	.....
Address	.....
Tel No	.....
Fax No	.....
E-mail	.....
The adjudicator nominating body is:	The Chairman of the Joint Civils Divisions of the Institution of Civil Engineering and the South African Institution of Civil Engineering (see www.jointcivils.co.za)	
The tribunal is	.....	Insert either 'arbitration' or 'a South African court of law'
If the tribunal is arbitration, add the following:		
The arbitration procedure is	As set out in the Rules for the Conduct of Arbitrations Fifth Edition 2005 published by the Association of Arbitrators (Southern Africa)	Alternatively state: As set out in the Rules of the Arbitration Foundation of Southern Africa. Or, in the case of an international contract, As set out in the UNCITRAL Arbitration Rules
The place where arbitration is to be held is	.....	Insert town or city where arbitration is to be held
The person or organisation who will choose an arbitrator ■ if the parties cannot agree a choice or ■ if the arbitration procedure does not state who selects an arbitrator, is	The Chairman of the Association of Arbitrators (Southern Africa)	Alternatively state: The Chairman of the Arbitration Foundation of Southern Africa

Table 2 Choosing an adjudicator after contract award

Data for Option W1		Guidance notes
The adjudicator is	The person selected by the parties in terms of the relevant Z Clause from the Panel of NEC Adjudicators set up by the Joint Civils Division of the Institution of Civil Engineers and the South African Institution of Civil Engineering (see www.jointcivils.co.za)	Insert Z clause (see below)
The adjudicator nominating body is	The Chairman of the Joint Civils Divisions of the Institution of Civil Engineering and the South African Institution of Civil Engineering (see www.jointcivils.co.za)	
The tribunal is	.....	Insert 'arbitration' or a 'South African court of law'
If the tribunal is arbitration add:		
The arbitration procedure is	As set out in the Rules for the Conduct of Arbitrations Fifth Edition 2005 published by the Association of Arbitrators (Southern Africa)	Alternatively state: As set out in the Rules of the Arbitration Foundation of Southern Africa. Or, in the case of an international contract, As set out in the UNCITRAL Arbitration Rules
The place where arbitration is to be held is	.....	Insert town or city where arbitration is to be held
The person or organisation who will choose an arbitrator ■ if the parties cannot agree a choice or ■ if the arbitration procedure does not state who selects an arbitrator, is	The Chairman of the Association of Arbitrators (Southern Africa)	Alternatively state: The Chairman of the Arbitration Foundation of Southern Africa

- (2) have suitable work experience:
- (a) as a built environment professional on construction projects at a senior level; and
 - (b) in the development of contract documentation, contract administration or disputes involving one or more contracts in the NEC family of contracts; and
- (3) demonstrate the following three outcomes to peers through an interview, a written examination, the submission of a portfolio of work, attendance of courses or a combination thereof, as required by the JCD:

Outcome 1:

Communicate the manner in which any one of the NEC3 family of contracts operate.

- 1 The risk management and project management procedures are described
- 2 The compensation event procedure is communicated
- 3 The payment procedures of the main options are communicated
- 4 The adjudication process is communicated

Guideline: Extensive experience in drafting contract data, works information

and pricing data or the administration of a contract as a project manager is essential.

Outcome 2:

Communicate with experts in other professions regarding dispute assessment criteria.

- 1 Factual and technical information regarding the contract is communicated to members of other professions, including the legal profession.

- 2 Communications from members of other professions, including the legal profession, are interpreted.
- 3 Limitations of own skill base recognised in order to know when advice from others is required.

Guideline: Registration as a professional engineer or architect, or equivalent in another construction profession of at least ten years' standing and contacts with recognised experts, particularly on legal issues, is a recommendation.

Table 3 Z Clause

Z	Additional conditions of contract
The additional conditions of contract are:	
Z1	Selection and appointment of the adjudicator
	A party may at any time notify the other party of the names of two persons he has chosen from the Panel of NEC Adjudicators set up by the Joint Civils Division of the Institution of Civil Engineers and the South African Institution of Civil Engineering (see www.jointcivils.co.za) and whose availability he has confirmed to act as the adjudicator. The other party selects one of the two nominees to be the adjudicator within four days, failing which the person chosen by the first party will be the adjudicator. The parties appoint the selected adjudicator under the NEC3 Adjudicator's Contract, June 2005, within seven days of this notice

Outcome 3:

Adjudicate a dispute in a contract.

Assessment criteria

- 1 The contractual position of the parties to a dispute is ascertained
- 2 Correct procedures in accordance with the provisions of an NEC contract are identified
- 3 The inquisitorial process associated with an adjudication is communicated
- 4 The rules of natural justice, not as an arbitrator or legal assessor, with due regard to contract law, common law principles, legal precedent and statutory legislation, are applied to a dispute
- 5 The amount of money and/or time that either party may be due calculated in accordance with the NEC compensation procedures
- 6 Fair and independent judgment is presented in written arguments and decisions in a clear understandable form capable of in depth scrutiny

Guidelines:

- Attendance and passing of courses associated with aspects of NEC adjudication is a recommendation

- Attendance of NEC3 training events, workshop and user group events
- Age and maturity of candidate – most likely over the age of 45 but normally under 70 at the date of application to be placed on the JCD Panel of NEC Adjudicators
- The qualities of an adjudicator for an ECC contract should, as a minimum, include:
 - 1 Knowledge of the procedures in the ECC
 - 2 A full understanding of the roles of the project manager and the supervisor
 - 3 A full understanding of how construction costs arise and how they are affected by changes to plan
 - 4 Knowledge of construction planning and of how plans are affected by changes
 - 5 The ability to obtain technical assistance when his own technical knowledge does not cover the matter in dispute
 - 6 The ability to obtain up-to-date information about construction

costs when he does not have access to relevant cost data

- 7 An appreciation of construction risks and how allowances for them should be set

In addition to these qualities, a sound knowledge of the law as it affects engineering and construction contracts is essential.

Applicants are required to complete the application for admission (see www.jointcivils.co.za) and follow the procedures contained on the division's website www.jointcivils.co.za.

Applicants who do not satisfy all the abovementioned requirements are nevertheless invited to apply and to motivate to the reviewers why any of the requirements should be waived.

Adjudicator's contract

The parties to the dispute are required to appoint an adjudicator in terms of the NEC3 adjudicator's contract. This can be readily done by completing the template for the adjudicator's contract which is available on the division's website (www.jointcivils.co.za) or the CIDB website (www.cidb.org.za). ■