

Adjudicator's Contract (AC)

INTRODUCTION

The first edition of the NEC Adjudicator's Contract, published in 1994, was written for the appointment of an adjudicator for any contract under the New Engineering Contract family of standard contracts.

The second edition incorporates changes and improvements which have been found necessary after experience of its use. It also incorporates changes arising from the need to harmonise with the NEC standard contracts and further editions which have been issued since 1994.

One of the main changes has been the deletion of detailed procedures on the conduct of the adjudication. These procedures are included in the other contracts in the NEC family. In these cases there is no conflict between the Adjudicator's Contract and the contract between the Parties.

However, this Adjudicator's Contract may also be used for the appointment of an adjudicator under forms of contract other than those in the NEC family. If so, there may be conflict between the Adjudicator's Contract and the contract between the Parties e.g. Expenses, payment arrangements, termination. Since clause 1.7 gives priority to the Adjudicator's Contract for the reasons explained below, it may be necessary to amend either contract to resolve such conflict.

In the UK, the Housing Grants, Construction and Regeneration Act 1996, has made adjudication mandatory as a means of resolving disputes in construction contracts. Parties to a contract which does not provide for adjudication as required by the Act, have a right to adjudication under the 'Scheme for Construction Contracts'. At the time of writing, two such schemes have been published, namely

- The Scheme for Construction Contracts (England and Wales) Regulations 1998
- The Scheme for Construction Contracts (Scotland) Regulations 1998

These are substantially similar schemes. The Regulations which apply are those which relate to the particular country of the United Kingdom. In these notes, reference is limited to 'the Scheme'. It is possible that the parties may wish to use this Adjudicator's Contract for appointing an adjudicator under the Scheme. Two Forms of Agreement have been provided with the conditions of contract, namely

- Form of Agreement (Not to be used when a United Kingdom Scheme for Construction Contracts applies)
- Form of Agreement (To be used only when the United Kingdom Housing Grants Construction and Regeneration Act 1996 Scheme for Construction Contracts Regulations 1998 applies)

The appropriate Form should be selected according to whether or not the adjudicator is appointed under the Scheme.

The second of the above Forms of Agreement has the additions identified as 3(a) and 3(b). 3(a) incorporates the Scheme by reference and 3(b) empowers the adjudicator to decide the apportionment of fee and Expenses between the Parties. This therefore supersedes the fall-back position of clause 3.1 whereby the Parties pay equal shares.

The NEC contracts require an adjudicator to be named in the contract. No procedures have been specified for appointing a suitable person, and in practice a number of different methods have been used. Whatever method is used, it is important that both Parties have full confidence in his impartiality, and that a genuine joint appointment is made. The Adjudicator should be a person with experience in the type of work included in the contract between the Parties and who occupies or has occupied a senior position dealing with disputes. He should be able to understand the viewpoint of both Parties.

The purpose of these guidance notes is to explain the reasons for the provisions in the Adjudicator's Contract and to provide guidance on how to use it. The How charts are for reference in conjunction with the guidance notes. Neither the guidance notes nor the How charts are part of the Adjudicator's Contract and should not be used for legal interpretation of its meaning.

FORM OF AGREEMENT

This contract uses a separate Form of Agreement, available in two versions as explained above. It is provided as a convenient means for the two Parties and the Adjudicator to record their agreement to the appointment of the Adjudicator. It is drafted as a simple contract.

Where a contract requires an adjudicator to be named in the contract, as in the NEC standard contracts, the Form of Agreement should be completed and signed by both Parties and the Adjudicator as soon as possible after the contract between the Parties comes into being.

Where a contract requires an adjudicator to be appointed only after a dispute has arisen, as in many other forms of contract, the Form of Agreement should be completed and signed by the Parties and the selected or nominated Adjudicator as soon as possible. Until (his is done, the adjudication may be delayed.

Where an Adjudicator is appointed under the Scheme, by one of several methods, no specific provision has been made in the regulations for a contract between the Adjudicator and the Parties. The Adjudicator is required to make his decision within 28 days or other period provided for in paragraph 19 of the Scheme, the period to run from the 'date of the referral notice'. Thus the Adjudicator must proceed with the adjudication, whether or not the Parties sign an Agreement. It would seem to be expedient for the Adjudicator to seek the agreement of the Parties to sign an Adjudicator's Contract Agreement. If this is not forthcoming, the Adjudicator will probably make clear to the Parties that he has accepted the appointment on [he terms of the Adjudicator's Contract and associated Contract Data. This will safeguard the Adjudicator in respect of such matters as fees, Expenses, liability and payment.

In all cases, the Contract Data should be carefully checked. The number of copies to be made, and who should keep the original, should be agreed by the signatories.

1. GENERAL

1.1 Actions

This clause states the general obligations of the Parties and the Adjudicator, in terms of two contracts viz. the Adjudicator's Contract and the contract between the Parties. In the event that there is conflict between these two contracts, the former has priority as stated in Clause 1.7. Where the Scheme applies, the various obligations outlined in the Scheme are also included.

The requirement for the Adjudicator to act impartially is fundamental to the whole system of adjudication. Any failure by the Adjudicator to do so, would be a serious breach of his obligations.

The contract between the Parties may include procedures and timing requirements to be followed by the Parties and the Adjudicator in the adjudication process. Such procedures are, for instance, in the adjudication clauses of the NEC Engineering and Construction Contract and Subcontract and the NEC Professional Services Contract. These procedures and requirements are incorporated by reference into this Adjudicator's Contract. The procedures and requirements in the Scheme are similarly incorporated when applicable.

The duties and procedures to be followed are stated in the present tense, for simplicity, as in other NEC documents. Where actions are permitted but not obligatory, the term 'may' is used.

1.2

The purpose of this clause is to identify any matter which may affect the Adjudicator in carrying out his duties. The consequences of the notification are not stated since they will vary according to the circumstances.

For instance, a contractor may enter into a subcontract with a subcontractor with whom the Adjudicator may have some connection. The Parties on being so informed may decide that the conflict of interest is so small, that they are content for the Adjudicator to continue and to rely on his duty to act impartially. On the other hand, they may decide to terminate his appointment under the termination clause.

Identified and defined 1.3 terms

The conventions described are those generally followed throughout the NEC contracts. The Adjudicator and the Parties are those named in the Form of Agreement. For clarity, the same conventions of italics and capital initials are used in these guidance notes.

1.4

This clause lists the Expenses to which the Adjudicator may be entitled in addition to his fee.

Interpretation 1.7

The contract between the Parties may conflict with provisions in the Adjudicator's Contract. This clause establishes priorities where there is such conflict. Priority has been given to the Adjudicator's Contract in order to ensure that the protection of the Adjudicator provided by clauses 4.1 and 4.2 is preserved. Where an adjudication takes place under the Scheme, because of the statutory nature of the Scheme's provisions, the latter must automatically have priority over the Adjudicator's Contract and the contract between the Parties.

1.8

If the contract between the Parties has a 'joinder' clause, it may be that a dispute in a subcontract may also comprise a dispute in the main contract. The 'joinder' provisions permit the subcontractor to be joined as a party involved in the dispute in the main contract adjudication. Thus, the Adjudicator's Contract is interpreted such that the term 'Parties' includes the subcontractor.

Communications 1.9

The phrase 'in a form which can be read, copied and recorded' includes a letter sent by post, telex, cable, electronic mail, facsimile transmission, and on disc, magnetic tape or other electronic means. Communications are effective only when they have been received.

2. ADJUDICATION

2.1

It is important that the Adjudicator clearly identifies the issue which is in dispute and then gives a decision only on that dispute. In everything he does he must follow any procedures laid down in the contract between the Parties and in the Scheme where applicable. It follows that the Adjudicator should be aware of all the relevant provisions in the contract between the Parties and in any relevant Scheme. Any departure from these may give a Party grounds for challenging his decision. No timing is stated in this clause. If the contract between the Parties does not include timing for an adjudication, and if there are no relevant statutory requirements, the Parties and the Adjudicator should seek to agree appropriate times, in order to avoid delay.

2.2

This clause gives the Adjudicator a power in addition to those he may have in the contract between the Parties. The purpose in giving the Adjudicator this power is to enable him to arrive at a fair settlement of the dispute within the time available. However, any decision he makes must be his own. Any payments he makes to specialists under this clause are part of Expenses as defined in clause 1.4.

The Adjudicator would be well advised to inform the Parties that he is seeking help from others. The Scheme includes a similar power to 'appoint experts, assessors or legal advisers' provided the Adjudicator notifies the Parties of his intention.

2.3

It is possible that the Adjudicator's decision can be used to resolve other disputes between the Parties which have not been notified. This clause limits the further use which the Parties may make of the Adjudicator's decision. However, there may be many who need to be advised of the Adjudicator's decision. These may include a Party's bank or insurer, an auditor or a parent company. These are quite legitimate and permissible.

3. PAYMENT

3.1

The Adjudicator's fee is stated in the Contract Data. This will normally be in the form of an hourly rate. Time spent in travelling and preparation work is payable at the hourly rate. No specific provision has been made for an appointment fee, since the intention under NEC contracts is that he is paid only for resolving specific disputes. Any appointment fee which is required and agreed should be stated in the Contract Data. Under some forms of contract, the Parties may require the Adjudicator to do certain things before a dispute arises. For example they may require him to visit the site periodically, or to read contract documents to familiarise himself with the contract details and the progress being made. If this is the case details of the agreed arrangements should be incorporated into the Adjudicator's Contract, and the fee payable should be clearly stated. None of the NEC contracts cater for these additional duties since the Adjudicator's obligations are limited to dealing with specific disputes as they arise. The Parties are free to agree with the Adjudicator that he should decide apportionment of fees and Expenses, in a particular dispute. If they don't agree, the Parties pay equal shares. Adjudicators appointed under the Scheme decide the apportionment of fees and Expenses.

3.5

This clause describes the joint and several liability of the Parties for payment of the Adjudicator's fee and Expenses. Although the Parties are required to pay the amount due to the Adjudicator in equal shares, he can recover the full amount from the other Party if one defaults. This avoids the need for the Adjudicator to take legal action against the defaulting Party, possibly disqualifying himself from further adjudication under the contract. As between the Parties, the one in default is required to reimburse the other any payments made to the Adjudicator on his behalf. If under clause 1.8 there are more than two parties to a dispute, clause 1.5 applies as to 'Party' in the singular or plural.

3.6

The interest rate stated in the Contract Data should be based on an appropriate reliable annual base rate. The additional percentage is intended to reflect current commercial rates.

4. RISKS

4.1

This clause protects the Adjudicator from legal actions by one of the Parties, such as for breach of contract or negligence. It is important for achieving a successful adjudication that the Adjudicator should not be concerned that a disappointed Party may pursue him personally over the decision. Rather than taking action against the Adjudicator, a disappointed Party should refer the dispute to arbitration or other tribunal or dispute resolution procedure stated in the contract between the Parties.

If a Party believes that the Adjudicator has acted in bad faith, that is, dishonestly or with the intention of deceiving, then that Party is free to take legal action against the Adjudicator.

4.2 This clause protects the Adjudicator against legal actions against him by a third party, which may arise as a consequence of the Adjudicator's decision. Since third parties are not parties in the Adjudicator's Contract, such actions would be based on grounds other than breach of contract.

5. TERMINATION

5.1

The Parties are able to terminate the Adjudicator's appointment, on condition that they both agree to do so. Termination is effected by both Parties notifying the Adjudicator of their agreement to terminate. In the absence of any express provision regarding payment, the payment clauses in Section 3 apply i.e. the Parties pay the Adjudicator his fee and Expenses calculated in accordance with clause 3.1.

5.2

This clause states the circumstances which entitle the Adjudicator to terminate his appointment.

5.3

In some circumstances, adjudicable disputes may arise over a considerable period of time. In order to avoid lengthy appointments provision is made in this clause for a termination date to be stated in the Contract Data. In normal circumstances, a date of one year after completion of the work or services is recommended. If an adjudicator is required after this termination date, the Adjudicator's Contract may be extended by agreement, or a new contract negotiated. If a different person is appointed as Adjudicator, a new Adjudicator's Contract will be required. Alternatively the Parties may elect not to make an appointment at that stage on the basis that disputes are then unlikely to occur. Appointments of adjudicators under the Scheme are for particular disputes as they arise. Thus the duration of appointment is not relevant.