

NEC4 ECC – PRACTICE NOTE 5

Using a Dispute Avoidance Board for contracts covered by the Housing Grants, Construction and Regeneration Act 1996

This practice note has been prepared due to feedback from UK based users who would like to use an independent Dispute Avoidance Board (DAB), rather than using the parties' *Senior Representatives* to resolve disputes in a contract where W2 would normally be used. The DAB would be similar to that contained in Option W3 of the NEC4 Engineering and Construction Contract (ECC), as part of a consensual dispute resolution process.

Option W3 is not suitable for use in the UK if the work under the contract is covered by the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009 (the Act), as the Act requires that either party to the contract must be able to refer to adjudication any matter of dispute at any time.

NEC4 ECC contains Option W2 to resolve disputes in accordance with the Act via adjudication.

NEC4 ECC Option W3 does not feature adjudication and instead allows for a DAB, of 1 or 3 members to be appointed to work with the parties during the course of the contract to proactively identify and help to resolve disputes before they occur.

Option W3 has a number of specific characteristics these are.

- The DAB is appointed from the start of the contract and regularly attends site and receives updates from the parties on the progress of the works. This allows them to become familiar with the work under the contract and the issues / difficulties the parties encounter.
- They are able to proactively identify potential disputes and to raise these with the parties working in part as mediators, to help the parties resolve their potential disputes through negotiation, and if necessary as independent evaluators providing a recommendation on how disagreements should be resolved.
- The DAB makes recommendations only, which allows it greater flexibility in how it undertake its work as the recommendations will not be subject to challenge in a subsequent tribunal. This however also poses a disadvantage as a party cannot enforce the decision of the DAB and the process relies on the mutual consent of the parties. The expectation is that the parties will respect the members of the DAB and their decision and, that as a tribunal would likely come to the same decision, there would be no benefit in taking the matter further.
- Either party can take a matter referred to the DAB to the tribunal named in the Contract Data for a final and binding decision if they disagree with the recommendation made.

Due to the costs involved in having a standing DAB for the life of the contract, whilst still, maintaining the ability of the parties to take a dispute to adjudication at any time, it is recommended that a DAB is used in conjunction with Option W2 only on projects where the value or complexity / risk of disagreement is sufficient to justify the cost.

The DAB process can be included as a Z Clause and the following example sets out the wording for such a clause, prepared for the Engineering and Construction Contract.

Example Z Clause for the ECC

Delete clause W2.1 and replace with the following.

Dispute Avoidance Board **W2**
W2.1

(1) The Dispute Avoidance Board consists of one or three members as identified in the Contract Data. If the Contract Data states that the number of members is three, the third member is jointly chosen by the Parties.

(2) The Parties appoint the Dispute Avoidance Board under the NEC Dispute Resolution Service Contract current at the *starting date*.

(3) The Dispute Avoidance Board acts impartially.

(4) If a member of the Dispute Avoidance Board is not identified in the Contract Data or if a member of the Dispute Avoidance Board is unable to act, the Parties jointly choose a new member. If the Parties have not chosen a Dispute Avoidance Board member or a replacement, either Party may ask the *Dispute Avoidance Board nominating body* to choose one. The *Dispute Avoidance Board nominating body* chooses a Dispute Avoidance Board member within seven days of the request. The chosen member becomes a member of the Dispute Avoidance Board.

(5) The Dispute Avoidance Board visits the Site at the intervals stated in the Contract Data from the *starting date* until the *defects date* unless the Parties agree that a visit is not necessary. The purpose of the visit is to enable the Dispute Avoidance Board to inspect the progress of the *works* and become aware of any potential disputes. The Dispute Avoidance Board makes additional visits when requested by the Parties.

(6) The agenda for the Site visit is proposed by the Parties and decided by the Dispute Avoidance Board.

(7) The members of the Dispute Avoidance Board, their employees and agents are not liable to the Parties for any action or failure to take action in resolving a potential dispute unless the action or failure to take action was in bad faith.

Resolving potential disputes

(8) The Dispute Avoidance Board assists the Parties in resolving potential disputes before they become disputes.

(9) A potential dispute arising under or in connection with the contract is referred to the Dispute Avoidance Board.

(10) Potential disputes are notified and referred to the Dispute Avoidance Board between two to four weeks after notification of the issue to the other Party and the *Project Manager*.

(11) The Parties make available to the Dispute Avoidance Board

- copies of the contract,
- progress reports and
- any other material they consider relevant to any difference which they wish the Dispute Avoidance Board to consider in advance of the visit to the Site.

(12) The Dispute Avoidance Board

- visits the Site and inspects the *works*,
- reviews all potential disputes and helps the Parties to settle them,

- prepares a note of their visit and
- unless the Parties have resolved the potential dispute by the end of the Site visit, provide a recommendation for resolving it.

(13) The Dispute Avoidance Board can take the initiative in reviewing potential disputes, including asking the Parties to provide further information.

(14) A Party does not call a member of the Dispute Avoidance Board as a witness in an adjudication or tribunal proceedings.

Delete clause W2.2(1) and replace with the following.

The Adjudicator	W2.2	(1) A dispute arising under or in connection with the contract is referred to and decided by the <i>Adjudicator</i> . A Party may refer a dispute to the <i>Adjudicator</i> at any time whether or not the dispute has been referred to the Dispute Avoidance Board as a potential dispute.
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Example Entries for the Contract Data for the ECC

PART ONE – DATA PROVIDED BY THE CLIENT

Resolving and avoiding disputes

The number of members of the Dispute Avoidance Board is **one/three** (delete as applicable)

The *Client's* nomination for the Dispute Avoidance Board is

Name

Address for communications

Address for electronic communications

The Dispute Avoidance Board visit the Site at intervals no longer than months

The *Dispute Avoidance Board nominating body* is

The *Adjudicator* is

Name

Address for communications

Address for electronic communications

The *Adjudicator nominating body* is

The *tribunal* is

If the *tribunal* is arbitration The *arbitration procedure* is

The place where arbitration is to be held is

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

PART TWO – DATA PROVIDED BY THE CONTRACTOR**Resolving and avoiding disputes**

If the number of members of the Dispute Avoidance Board is three

The *Contractor's* nomination for the Dispute Avoidance Board is

Name

Address for communications

Address for electronic communications