

AMINZ

Adjudication Protocol



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AMINZ ADJUDICATION PROTOCOL

PREAMBLE

One of the purposes of the Construction Contracts Act 2002 is the *speedy resolution of disputes* arising in construction contracts. Adjudication under Part 3 of the Act is a process under which an independent adjudicator determines disputes.

The process is statutory and runs in parallel with litigation in court or any other dispute resolution process agreed by the parties or included in the construction contract. The determination, once issued, is binding and enforceable, but is not final.

All adjudicators who are members of AMINZ are bound by the AMINZ code of ethics and are required to provide services to parties which meet minimum standards of professional practice.

This Protocol provides an explanation of the adjudication process. Parties seeking to refer disputes to adjudication, and adjudicators determining disputes, should refer to and rely on the Act, rather than the guidance of this protocol.

SCHEME OF ADJUDICATION UNDER THE ACT

1. The Construction Contracts Act 2002 came into force on 1 April 2003, and adjudication under the Act applies to all construction contracts entered into after that date.
2. The Act was then amended by then Construction Contracts Amendment Act 2015, in the following respects:
 - General amendments to many aspects of the Act, which apply to contracts entered into from 1 December 2015.
 - The definition of *construction contracts* is extended to include contracts for the design, engineering and quantity surveying of *construction work* (contracts for *related services*) entered into from 1 September 2016.
 - A new regime for deducting and withholding *retentions* from 31 March 2017.
3. There are therefore potentially four different regimes under the Act, depending on when the contract was entered into:
 - *Pre-1 December 2015 contracts* – the Act applies, without the amendments which would otherwise have come into effect from 1 December 2015. Those amendments (in summary) are:
 - Removal of the distinction between *residential* and *commercial construction contracts* (save that charging orders are not available for *residential construction contracts* and the retentions regime applies only to *commercial construction contracts*).
 - The new notices are to accompany payment claims, notices of adjudication, adjudicators' notices of acceptance of appointment

and the determination apply to any adjudication, regardless of whether or not they are *residential* or *commercial*.

- The adjudication procedures have been modified.
 - Determinations in respect of rights and obligations of the parties are enforceable on the same basis as determinations in relation to liability for payment.
 - Determinations of *residential construction contract* disputes can be enforced in the same way as *commercial construction contracts*.
 - *Construction contracts entered into from 1 December 2015* – the amendments brought in by the 2015 Amendment Act apply (save for the new retentions regime).
 - *Contracts for related services entered into from 1 September 2016* – the Act as amended applies (save for the new retentions regime).
 - *Retentions* – the new regime for retentions applies from 31 March 2017.
4. Before embarking on adjudication, there are therefore a number of questions which must be asked:
- (1) Is the contract for *construction work* as defined in the Act? The definition of *construction work* in section 6 needs to be reviewed with considerable care.
 - (2) When was the *construction contract* entered into? If the contract pre-dates 1 December 2015, then the original 2002 Act generally applies without amendment (save for the retentions regime).
 - (3) If the contract is for *related services*, was it entered into after 31 August 2016? If so, do the services fall within the definition of *related services* in section 6(1A) and do those services relate to those parts of *construction work* identified in section 6(1A)?
 - (4) Is there a dispute between the parties?
5. Once the answers to those initial questions have been determined, then the adjudication may be commenced.

INITIATION OF ADJUDICATION

- 6. Adjudication is initiated by a party to the contract (*the claimant*) serving a *notice of adjudication* on the other party to the construction contract.
- 7. For contracts entered into from 1 December 2015, the notices set out in the 2015 Regulations apply, and the maximum and minimum times within which an adjudicator can be appointed have been changed.
- 8. Once the *notice of adjudication* has been served, the adjudicator can be appointed.

APPOINTMENT OF ADJUDICATOR

9. The time periods within which the adjudicator can be appointed will depend on whether or not the 2015 Amendments apply to the dispute.
10. Any natural person is eligible to be an adjudicator if that person meets the requirements relating to qualifications, expertise, and experience as may be prescribed (if any).
11. Any agreement about the choice of an adjudicator, or a nominating body, or an authorised nominating authority entered into before the dispute arose is not binding on the parties.
12. The adjudicator may be appointed by agreement between the parties or by a nominating body agreed between the parties. Note that there are time limits in the Act for the appointment of the adjudicator, which vary depending on whether or not the 2015 Amendments apply.
13. Alternatively, any party to the construction contract may apply to an *authorised nominating authority* (of which AMINZ is one) to appoint an adjudicator. No agreement is required for such an appointment, and the claimant may apply to have an adjudicator appointed as soon as the *notice of adjudication* has been served, and any time limits applicable to the contract have expired.
14. A person requested or appointed to act as an adjudicator must, within 2 working days of receiving the request indicate whether they are willing and able to act. AMINZ has a standard form of notice of willingness for adjudicators appointed by it.
15. The adjudicator must then outline the terms of its engagement, and issue a notice of acceptance of appointment on the parties.
16. The adjudicator's appointment will be complete upon serving a notice of acceptance, and once any preconditions identified by the adjudicator have been satisfied.

ADJUDICATION PROCEDURE

17. The claimant must refer the dispute by serving the *adjudication claim* on the adjudicator and the respondent(s) within 5 working days of receiving the adjudicator's notice of acceptance.
18. This time period cannot be extended.
19. The adjudication claim must be consistent with the notice of adjudication, clearly specify the nature and grounds of the dispute and must be accompanied by any witness statements and other documents relied upon by the claimant, including the *notice of adjudication*, to the extent that it remains relevant.
20. The respondent may serve on the adjudicator and every other party to the adjudication its *response* to the *adjudication claim* within 5 working days of receipt of the *adjudication claim*.
21. The time period for the provision of a *response* may be extended by agreement between the parties, or by the adjudicator for such period as may be "reasonably

required” on application of the respondent (before the time for the provision of a response has expired).

22. The *response* must be accompanied by all witness statements and supporting documents intended to be relied upon by the respondent.
23. If the response raises defences to the claim which have not been addressed in the claim, the adjudicator may seek further submissions on the issue from one of the parties, and must then give the other parties the opportunity to comment on such further submissions.
24. For pre-1 December 2015 contracts, there is no right of reply.
25. For contracts entered into from 1 December 2015, there is a right of reply, and if the adjudicator permits it, a right of rejoinder.
26. The claimant may withdraw the claim, and terminate the adjudication process, at any time.

ROLE OF THE ADJUDICATOR

27. The adjudicator is an independent decision maker and is not an advocate for any party. The adjudicator will act independently, impartially, comply with the rules of natural justice, disclose any conflict of interest to the parties and resign from office if a conflict of interest arises unless the parties agree otherwise.
28. The adjudicator will not discuss the issues or any matter relating to the dispute with one party in the absence of the other party.
29. The adjudicator is to conduct the adjudication in a timely manner and will avoid incurring unnecessary expense.
30. There is no provision for a hearing, taking sworn testimony or cross-examination, though the adjudicator may call a conference, arrange a site visit, seek further documentation or submissions and may appoint an expert.
31. The adjudicator’s power to determine a dispute is not affected by the failure by any party to comply with timetabling requirements or any other thing that the adjudicator may reasonably request or require and the adjudicator may draw any inferences from such failure that he or she thinks fit.
32. The adjudicator shall not determine a dispute having regard to the respondent’s response if that response is served late.

JURISDICTIONAL CHALLENGES

33. The adjudicator should ensure that all jurisdictional and procedural requirements for the dispute to be referred to adjudication have been met as soon as possible following appointment. If there appears to be any jurisdictional or procedural issues identified, these should be clarified by seeking submissions from one party and a response from the other as a matter of urgency.

34. If a party raises a jurisdictional challenge, then this should be dealt with by seeking submissions on the point as soon as possible. There is no provision for interim determinations or rulings by the adjudicator in the Act, however the adjudicator must either proceed with the adjudication, or accept that the jurisdictional challenge is upheld, as a matter of urgency.
35. Any such jurisdictional finding should then be formally recorded by the adjudicator in the determination. Adjudicators should avoid continuing with the adjudication without first resolving any jurisdictional challenges, unless such challenges are integral to the dispute and cannot be determined without fully considering the *claim* and *response* and determining the dispute.
36. The parties may extend the adjudicator's jurisdiction by agreement.

CONFIDENTIALITY

37. Adjudication is a private procedure.
38. The adjudicator and any party to a dispute must not disclose any statement, admission, or document created or made for the purposes of the adjudication and, any information that for the purposes of the adjudication is disclosed in the course of the adjudication to anyone.
39. Any disclosures of such information can only be made with the consent of the other parties, and this includes any reference of a complaint to AMINZ under its complaints procedures.

THE ADJUDICATOR'S DETERMINATION

40. In determining a dispute, the adjudicator must consider only:
 - the provisions of the Act
 - the provisions of the *construction contract* to which the dispute relates
 - the *notice of adjudication*
 - the *adjudication claim* together with all submissions and supporting documents provided by the claimant
 - the *response* (if any and only if provided in time) together with all submissions and supporting documents provided by the respondent
 - the report of the experts appointed to advise on specific issues (if any)
 - the results of any inspection carried out by the adjudicator
 - any further submissions from the parties sought by the adjudicator and
 - any other matters that the adjudicator reasonably considers to be relevant

41. The determination must be provided within 20 working days of the last day for the provision of a *response*. This time period may be extended by the adjudicator by a further 10 working days, and for such further period as the parties agree.
42. Once the determination has been issued, it may be enforced as if it were a judgment of the court. There are grounds for opposing entry, however they are limited.
43. The determination of the dispute by an adjudicator does not, however, prevent the parties from referring the dispute to court or arbitration, where the dispute is heard *de novo*. This means that while the adjudicator's determination may be persuasive, the court or arbitral tribunal is not bound by that determination, and the parties are limited to the arguments raised in the adjudication.

COSTS AND FEES

44. The default position is that the parties share equally in the adjudicator's fees and expenses and they bear their own costs
45. In exceptional circumstances, one party may be required to pay a greater proportion of the adjudicator's costs and to contribute to the other parties' own costs of the adjudication.