



CONSTRUCTION PROCUREMENT

BEST PRACTICE GUIDELINE #C3

Adjudication

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1. Background

The white paper on *Creating an Environment for Reconstruction Growth and Development in the Construction Industry* (1999) argues that the conventional mechanisms and procedures for final dispute resolution currently in use, normally arbitration or litigation, are both costly and time consuming. It further argues that small and emerging contractors are disadvantaged – and even imperiled - in the event of a major dispute arising. The paper advocates the use of Alternative Dispute Resolution (ADR) mechanisms on contracts and recommends that the Latham report should be used as the point of departure in this regard.¹

Following the report of Sir Michael Latham, *Constructing the team*, the UK Government was persuaded that primary legislation was required to give all parties to construction contracts a statutory right to have disputes resolved in the first instance by adjudication, which was to be a rapid and relatively inexpensive process in all cases. That legislation (The Housing Grants, Construction and Regeneration Act 1996) is now in force in the UK and disputes are being referred to adjudication. Similar legislation has been adopted in parts of Australia and New Zealand. The World Bank is also advocating that such procedures be used on projects which it funds.

2. An overview

2.1 Defining 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 litigation².

1 Latham, M Sir (1994). *Constructing the Team. Final Report of the Government / Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry*, HMSO.

2 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.

An adjudicator is a third party intermediary appointed to resolve a dispute between the parties in dispute. The decision of the Adjudicator is binding and is final unless and until later reviewed by either arbitration or court proceedings, whichever the parties selected at the time of formalising the contract. It is intended that adjudication is a condition precedent to proceeding to either arbitration or litigation.

Adjudication is a form of dispute resolution that meets a need for a rapid, relatively inexpensive dispute resolving mechanism which provides a decision that can be implemented immediately.

It is anticipated that in certain circumstances the adjudicator will consult others to provide such expertise as the adjudicator does not have, to assist in making the correct decision. This is inevitable in disputes that cover a wide range of technical disciplines and legal issues, as no one person could be expected to possess all the necessary skills. In effect, the adjudicator in these circumstances 'manages' resolution of the dispute on behalf of the parties in dispute. The parties pay for the advice the adjudicator obtains as a reimbursable expense in terms of the adjudicator's contract with the parties.

2.2 UK experience

Mandatory adjudication was introduced in the UK in the Housing Grants Construction Regeneration Act of 1996 ("the Construction Act") on all prime contracts and subcontracts. Statistics reported on approximately 4850 adjudications up to September 2001 indicate that:

- 74% proceeded to a decision, the balance being settled or abandoned;
- 76% of referrals completed in less than 40 hours;
- 73% of disputes concerned non-payment, other significant factors being variations, loss/expense and points of law;
- 81% of adjudications involved a referral by a party lower in the construction chain;
- almost 50% of all referrals were by subcontractors against main contractors; and
- 68% of decisions were in favour of the referring party.

The UK courts have enforced adjudication decisions, the only exceptions being where:

- 1) the adjudicator had no jurisdiction to hear the dispute in the first instance or has not answered the question that was referred to him;
- 2) the adjudicator had breached the rules of natural justice (procedural fairness)³; or
- 3) the claimant was in liquidation or insolvent⁴.

3. Principles underpinning adjudication

Adjudication shall be governed by the following principles (see Annex J of SANS 294, *Construction procurement processes, methods and procedures*):

³ Under the Construction Act, the adjudicator is empowered to take the initiative in ascertaining the facts and the law, but he must do so fairly. He should not, for example, have telephone conversations with one party without letting the other party know that he has done so and the outcome of the discussion (*Discain*) and he should not prepare his own critical path analysis and base his decisions on his methodology without giving the parties an opportunity to make submissions on his methodology (*Balfour Beatty v London Borough of Lambeth*). His Honour Judge *Llyod in Balfour Beatty* emphasized the need to achieve a balance between the inquisitorial approach and adherence to the rules of natural justice- to treat the parties fairly.

⁴ The argument against the enforcement of an adjudicator's decision is based on the notion that a paying party, which feels that they have received the wrong end of rough justice imparted by an adjudicator in favour of a party in severe financial difficulties, may not be able to recover monies wrongly paid at a later stage through litigation or arbitration.

- a) Adjudication shall be applied to all categories of construction contracts, (viz engineering and construction works, services and supplies) at both prime and subcontract level, and be a mandatory requirement for the settlement of disputes before the completion of a contract.
- b) There shall be no restriction on the issues arising from, or in connection with, the contract capable of being referred to adjudication.
- c) Adjudicators shall settle the dispute as independent adjudicator and not as arbitrator. Their decision must be enforceable as a matter of contractual obligation between the parties and not as an arbitral award.
- d) Adjudicators must answer the question(s) put to them, provide written reasons for their decisions, base their decisions on the subject of the dispute and only the dispute at hand and should avoid the conducting of hearings to resolve disputes.
- e) Adjudication must be conducted with no bias or apparent bias i.e. in a manner which favours or seems to favour one party or in a manner which is seen as supporting one party to the detriment of another. The adjudicator shall be impartial, act independently and not have, or appear to have, a personal relationship with any of the parties or an interest in the outcome of the adjudication.
- f) Each party shall be given a reasonable opportunity to state his case without a hearing, i.e. he shall have a reasonable opportunity of presenting his case, know what the case against him is and be in possession of all the evidence and information adduced against it of obtained by the adjudicator.
- g) The adjudicator shall, as a general rule, communicate in writing simultaneously with both parties, not offer advice, not accept telephone calls from the parties, not argue the case for one of the parties, ensure that any information which is relied upon is known to both parties and that each party has had an opportunity to respond to information.
- h) The party requesting adjudication shall submit the dispute for resolution within the time period specified in the contract of becoming aware of it, failing which that party forfeits the right to dispute the matter.
- i) The decision of the adjudicator shall be implemented immediately, whether or not the dispute is to be referred for final resolution to arbitration or litigation.
- j) The adjudicator shall have the right, after notifying the parties, to retain legal and technical experts to assist in areas in which the adjudicator does not possess the necessary expertise.
- k) The adjudicator may be named in the contract or appointed by agreement between the parties by means of a procedure agreed to at the time of signing of the Contract.
- l) The adjudicator shall comply with the rules of adjudication provided for in the contract, and in the agreement covering the adjudicator's appointment, but in all other respects may determine the procedures and conduct of the adjudication, save for the conducting of hearings where this is unavoidable.
- m) Submissions by the parties to the adjudicator shall be in writing.

Note: Whilst it is expected that the adjudicator will ask for more information (in writing) for clarification and understanding and ask questions about what the parties have submitted, any form of 'hearing' should be discouraged. Hearings can seriously disadvantage those not proficient at adducing argument in front of experienced dispute resolution specialists and there is always a tendency for those more experienced to use 'gamesmanship' to influence the adjudicator and introduce additional information that deflects from the real issues in dispute.

- n) The rules of adjudication shall be very brief so as to avoid disputes and delaying tactics about the rules, but should include strict time periods for the actions within the adjudication process.
- o) As a general rule:
 - i) a single adjudicator shall be appointed to decide on disputes;
 - ii) adjudicators shall not be required to familiarize themselves with the work as the contract proceeds (i.e. continuous monitoring is not necessary);
 - iii) adjudicators shall be remunerated on a basis of hourly fees and be reimbursed for all disbursements;
 - iv) adjudicators shall have the right to receive security or up front deposits against their fees; and
 - v) decisions shall be made within 42 days of a dispute being referred to an adjudicator.
- p) Final resolution of the dispute may only be referred to arbitration or litigation after a “cooling down” period of at least 28 days has lapsed.

4. Provisions for adjudication in standard forms of contract

4.1 General

Adjudication should be introduced as a means of dispute resolution in all the CIDB recommended forms of contracts (supplies, services and engineering and construction works) identified in Best Practice Guideline #C1, *Preparing procurement documents*, and in all the forms of subcontract identified in Best Practice Guideline #D1, *Subcontracting arrangements*.

GCC 2004 makes use of the CIDB Adjudication Procedures. The Adjudication procedures under FIDIC and NEC3 differ significantly. Some modification is, however, required in the NEC3 and FIDIC (First Edition 1999) forms of contract to align the adjudication with the principles underpinning adjudication outlined in section 3 of this guide.

4.2 NEC3 adjudication procedures

The adjudication procedure in the NEC3 Engineering and Construction Short Contract and Engineering and Construction Short Sub-contract is included in Section 9 of the Core Clauses or under clause W (Dispute Resolution). In all the other contracts within the family two adjudication procedures are provided because of UK statutory requirements for adjudication. Option W2 is the Act compliant procedure for use in contracts subject to the UK's Act and Option W1 is the NEC procedure for use in all other contracts including South African applications.

Resolution of a dispute by adjudication is mandatory in all NEC3 contracts. There are strict time bars for the 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 Arbitration or Litigation. Provision is made for the remuneration of adjudicators on the basis of an hourly fee.

Provision is made for the naming of an adjudicator in the contract data. Alternatively, an Adjudicator can be appointed when necessary in terms of a procedure whereby the parties jointly choose an Adjudicator, failing which an Adjudicator nominating body is called upon to do so. The Adjudicator is appointed in terms of the NEC3 Adjudicator's Contract.

“Localisation” (if necessary) of the adjudication process in NEC3 can be effected by inserting additional conditions in Contract Data along with any other additional conditions the Parties intend to use. Such

localised clauses could accommodate matters such as exclusion from Adjudication of issues relating to contractor's lien, or non-payment of a certified amount due.

Users of NEC3 should consult the respective Guidance Notes published for use with each NEC3 contract for further details on the adjudication process.

The recommended manner in which adjudication should be provided for in NEC3 contracts is set out in Annexure 3.

4.3 FIDIC adjudication procedures

Clause 20 in each of the three main Red, Yellow and Silver FIDIC 1st Edition, 1999, documents sets out the procedures to be followed for claims, disputes and arbitration. The general conditions and procedural rules for adjudication are included in each of the three Contracts. There is no separate adjudicator's contract other than the Dispute Adjudication Agreement itself.

The documents recommend that the Dispute Adjudication Board, consisting of either one, or three, members be appointed at the outset of a contract and, by paying regular visits to Site, remain appraised of progress. The process for appointing the Dispute Adjudication Board is established. Provision is made in the Red Book for the remuneration of adjudicators on the basis of a retainer fee per calendar month and a daily fee for each day or part thereof for traveling to the site or meetings, each working day on site visits, hearings or preparing decisions and each day spent on reading submissions in preparing for a hearing.

FIDIC provide in their Guidance for the Preparation of Particular Conditions an example of amendments which in effect allow the Engineer (in the Red Book) to take the role of the Dispute Adjudication Board. This is, clearly unacceptable in view of the requirement for immediate implementation of the Adjudicator's decision.

The FIDIC Short Form of Contract 1st Edition 1999, in Clause 15, on the other hand does make adjudication mandatory. The Rules for Adjudication and a format for the Adjudicator's Agreement are included in the published Short Form. They are different to those in the three main contracts referred to above.

Rather lengthy time period are stipulated for the implementation of the adjudication process and it may be considered desirable to reduce these. The general conditions do not state expressly that, whether or not a Party has indicated dissatisfaction with the Adjudicator's decision and wishes to refer the matter to Arbitration, the decision should be implemented without delay. This requirement should be included in the contract data.

The general conditions provide for final reference of a dispute only to Arbitration. Where reference to court is required this should be covered in the contract data.

Users of FIDIC documents should consult the relevant handbooks for further information on how adjudication under FIDIC is intended to operate.

The recommended manner in which adjudication should be provided for in the various FIDIC contracts is set out in Annexure 2.

4.4 CIDB Adjudication procedures

The CIDB procedure is based on a procedure that is based on "The Institution of Civil Engineers Adjudication Procedure, 1997" and is used with kind permission of the Institution of Civil Engineers (ICE). Minor changes have been made to suit South African requirements and to remove inapplicable references to the UK's Housing Grants, Construction and Regeneration Act 1996, and the ICE.

The CIDB Adjudication Procedure can be used in any form of contract including supplies, professional service, joint ventures and subcontracts. GCC 2004 adopts the CIDB procedure as do all the CIDB forms of Contract save for the supply contracts based on the NEC.

The recommended manner in which adjudication should be provided for in contracts that make use of the CIDB Adjudication Procedure, is set out in Annexure 3.

4.5 JBCC Adjudication Procedure

The JBCC Series 2000 Principal Building Agreement and Nominated / Selected Subcontract Agreement make provision for the resolution of disputes by adjudication. Clause 40.2.1 requires that the adjudication be in terms of the JBCC Adjudication Rules. No proforma appointment is, however, provided for the appointment of the adjudicator. It is recommended that the form in Annexure 1 be used for this purpose and be included as document C1.4 in all procurement documents where the JBCC Series 2000 Principal Building Agreement is used..

5. Selection, appointment and use of adjudicators

5.1 Establishment and management of a list of adjudicators

The following actions are necessary and desirable to establish and manage a list of adjudicators:

- Set up of a panel of experts capable of interviewing candidates and deciding whether an application for admission to the list should be accepted or rejected. The panel may also have to decide on the removal of listed persons, for whatever reason, which may render them no longer suitable to act as an adjudicator.
- Set criteria to be used by the panel for acceptance (and rejection) of candidates wishing to be included in the List, and review these from time to time.
- Provide the necessary secretarial services and means of compiling the list, making it available for use and updating it on a regular basis.
- Manage and deal with all communication required between organizations wishing to use the list, and other bodies required to nominate adjudicators in the event contracting parties cannot agree on a choice.

Note: This service needs to be manned by persons with a sound knowledge of dispute resolution techniques. Responses are often required within hours in order to comply with the applicable adjudication procedure.

- Provide a profile of the adjudicators on the list (qualifications, contact details, fields of expertise, experience etc) to facilitate the selection process.
- Monitor the process of adjudication as intended by the principles established in 3 without breaking confidences, including recording of feedback from completed adjudications.

Note: There may be a need for regional selection panels and lists reporting to the national panel of experts.

5.2 Appointment of an adjudicator

Because of the problem of reaching agreement on the selection of an adjudicator once a dispute arises and relationships have soured, as well as needing to comply with the strict and short time periods for doing so, it is good practice to select the adjudicator at the same time as the contracting parties conclude their agreement, and certainly before any work is undertaken. This is not, however, always practical,

particularly where adjudicators are not paid a retainer for their services and are only paid a fee for work performed in adjudicating a dispute.

At the same time, where institutions let a considerable number of contracts, it is often impractical to appoint an adjudicator for every single contract, especially for contracts of lower value and for straightforward work or services. In this case each institution may need to set up its own 'mini panel' or put in place a procedure whereby panels run by industry associations can be accessed. Contracts would then include a provision that the party raising the dispute, usually the contractor or service provider, select a suitable and available adjudicator from the agreed mini panel as and when the first dispute arises. The other party by virtue of contracting to accept the mini panel of adjudicators is obliged to then accept the person selected. Alternatively, the party, which raises the dispute, should be responsible for selecting three adjudicators from a panel, confirming that these adjudicators are available to adjudicate the dispute in question and to ascertain their hourly rates. The other party will then select one of the three nominated adjudicators.

It may be desirable for the adjudicator appointed in the main contract to also be appointed to adjudicate matters between the main contractor and the subcontractor to facilitate the resolution of disputes between the subcontractor and the employer. Where this is desirable, the same process for the appointment of the main contractor should be extended to the subcontract.

Annexure 4 provides an example of how the nomination of adjudicators can be addressed in the Contract Data.

5.3 Admission criteria

5.3.1 General

The nature of Adjudication requires the highest standard of competent and qualified adjudicators. An adjudicator's decision is binding on the Parties and cannot be revised except by arbitration or litigation. This means that if a dispute was not resolved in an employer's favour and the employer wishes to take the matter further, he has to settle the debt with the other party first, and then become the plaintiff in any subsequent legal or arbitration process to recover amounts to which he believes he may be legally entitled. This is the reverse of the role employer bodies may have previously found themselves in.

It is intended that adjudicators are usually not practicing lawyers but rather senior engineering and construction industry persons, with a sound knowledge of the technology of the industry, cost analysis and programming techniques. Competence in contract law and general legal rights will be a requirement for an adjudicator.

Note:

- 1) Whilst it is important that the chosen adjudicator should be skilled and experienced in the type of work required by the contract, the adjudicator's main function is to solve the dispute.
- 2) Personal qualities and experience of dealing with people are often more important than outright professional qualifications. Such qualities are usually to be found in persons over 45 who are specialising in dispute resolution, or who are at the end of their career in senior positions and wishing to return some of their knowledge back to the industry.
- 3) The chosen adjudicator needs to be a person who is at least able to:
 - a) listen carefully, and be able to detect a culture of relationships between the members of the project team and the project client;
 - b) know when his or her own expertise is inadequate and not be hesitant to consult with others who do have the necessary expertise, particularly on legal issues;
 - c) demonstrate excellent administrative discipline and communication abilities, preferably electronic because of the speed of events and industry reliance on e communications;
 - d) be able to ascertain the facts and the law, understand the rules of natural justice, and always act in good faith;
 - e) understand the consequences of the Adjudicator's decision, yet still be able to command respect from parties who may not receive a decision in their favour.

5.3.2 Accreditation of adjudicators

Candidates applying to be accredited and admitted to a panel should be able to demonstrate through a written application and a final accreditation interview, that they are able to perform an adjudication. Annexure 5 indicates outcomes that such candidates should be able to demonstrate.

Annexure 1: Adjudicator Agreement for use with the JBCC 2000 contracts

This agreement is made on the day of between:

..... (name of company / organisation)
of

..... (address) and
..... (name of company / organisation)

of

..... (address)

(the Parties) and

..... (name)
of

..... (address)

(the Adjudicator).

Disputes or differences may arise/have arisen* between the Parties under a Contract dated
and known as.....

and these disputes or differences shall be/have been* referred to adjudication in accordance with the JBCC 2000 Adjudication Rules, (hereinafter called "the Procedure") and the Adjudicator may be or has been requested to act.

* Delete as necessary

IT IS NOW AGREED as follows:

- 1 The rights and obligations of the Adjudicator and the Parties shall be as set out in the JBCC 2000 Adjudication Rules.
- 2 The Adjudicator hereby accepts the appointment and agrees to conduct the adjudication in accordance with the JBCC 2000 Adjudication Rules..
- 3 The Parties bind themselves jointly and severally to pay the Adjudicator's fees and expenses as set out in the Contract Data.
- 4 The Parties and the Adjudicator shall at all times maintain the confidentiality of the adjudication and shall endeavour to ensure that anyone acting on their behalf or through them will do likewise, save with the consent of the other Parties which consent shall not be unreasonably refused.
- 5 The Adjudicator shall inform the Parties if he intends to destroy the documents which have been sent to him in relation to the adjudication and he shall retain documents for a further period at the request of either Party.

SIGNED by: _____
Name: _____
who warrants that he / she is
duly authorised to sign for and
on behalf of the first Party in
the presence of _____

SIGNED by: _____
Name: _____
who warrants that he / she is
duly authorised to sign for
and behalf of the second
Party in the presence of _____

SIGNED by: _____
Name: _____
the Adjudicator in the
presence of _____

Witness: _____
Name: _____
Address: _____

Witness: _____
Name: _____
Address: _____

Witness: _____
Name: _____
Address: _____

Date: _____ Date: _____ Date: _____

Contract Data

1	The Adjudicator shall be paid at the hourly rate of R. in respect of all time spent upon, or in connection with, the adjudication including time spent travelling.
2	The Adjudicator shall be reimbursed in respect of all disbursements properly made including, but not restricted to: (a) Printing, reproduction and purchase of documents, drawings, maps, records and photographs. (b) Telegrams, telex, faxes, and telephone calls. (c) Postage and similar delivery charges. (d) Travelling, hotel expenses and other similar disbursements. (e) Room charges. (f) Charges for legal or technical advice obtained in accordance with the Procedure.
3	The Adjudicator shall be paid an appointment fee of R This fee shall become payable in equal amounts by each Party within 14 days of the appointment of the Adjudicator, subject to an Invoice being provided. This fee will be deducted from the final statement of any sums which shall become payable under item 1 and/or item 2 of the Contract Data. If the final statement is less than the appointment fee the balance shall be refunded to the Parties.
4	The Adjudicator is/is not* currently registered for VAT.
5	Where the Adjudicator is registered for VAT it shall be charged additionally in accordance with the rates current at the date of invoice.
6	All payments, other than the appointment fee (item 3) shall become due 7 days after receipt of invoice, thereafter interest shall be payable at 5% per annum above the Reserve Bank base rate for every day the amount remains outstanding.

* Delete as necessary

Annexure 2: Adjudication in FIDIC contracts

Note: Users of the FIDIC family of contract documents will find the General Conditions of Dispute Adjudication Agreement and its Procedural Rules are contained in each copy of the relevant Conditions of Contract (Red, Yellow, and Silver Book). The FIDIC Short Form of Contract also contains its own Rules for Adjudication.

FIDIC SHORT CONTRACT

Amend Sub-Clause 15.1 in the contract data as follows:

Delete "Unless settled amicably" in the first sentence and add 'if the Party has notified the other Party of the dispute within 28 days of becoming aware of it' to the end of the first sentence.

FIDIC Red Book Silver Book and Yellow Book

Note: There are minor differences between the three books in the provisions for adjudication.

1 Amend Sub-Clause 20.4 in the contract data as follows:

- a) Delete the word "may" in line 4 (red book) / line 5 (silver book) / line 6 (yellow book)* and replace with "shall first".
- b) Replace "84" in the forth and fifth paragraphs with "42".

*Delete the wording that is not applicable and the text in brackets

2 Insert the following in section C1.4 of the procurement document or make use of the following form as the basis of the appointment.

CONTRACT Agreements and contract data	Adjudicator's appointment FIDIC Redbook
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(For a One- Person DAB)

Name and details of Contract
Name and address of Employer
Name and address of Contractor
Name and address of Member

Whereas the Employer and the Contractor have entered into the Contract and desire jointly to appoint the Member to act as sole adjudicator who is also called the "DAB".

The Employer, Contractor and Member jointly agree as follows:

1. The conditions of this Dispute Adjudication Agreement comprise the "General Conditions of Dispute Adjudication Agreement", which is appended to the General Conditions of the "Conditions of Contract for Construction" / "Conditions of Contract for Plant Design and Build" / "Conditions of Contract for the EPC/ Turnkey Projects" First Edition 1999 published by the Fédération Internationale des Ingénieurs-Conseils (FIDIC), and the following provisions. In these provisions, which include amendments and additions to the General Conditions of Dispute Adjudication Agreement, words and expressions shall have the same meanings as are assigned to them in the General Conditions of Dispute Adjudication Agreement.

2 The following clauses of the General Conditions of Dispute Adjudication Agreement are amended or deleted as follows:

- i) In Clause 4(i) (red book), insert before the words, "with the progress of the Works", "and if deemed necessary by the Employer and Contractor".
- ii) In Clause 6, 'Payment', delete paragraph (a) and (b) (red book) / (a) (yellow book and silver book), and replace with the following subclause:
 - a) an hourly fee in respect of all time spent upon, or in connection with, the adjudication including time spent traveling.
- iii) In Clause 6 'Payment' delete (red book) the words, "retainer and daily" in the second paragraph commencing 'The retainer and daily fees shall be ...' / delete (yellow book and silver book) the word "daily" in the second paragraph commencing 'The daily fee.....'
- iv) In Clause 6 'Payment' delete (red book) the third paragraph commencing 'The Member shall submit invoices' / the third and forth paragraphs commencing with 'Immediately after....' And 'Thereafter the Member' and replace with the following:

"The Member shall submit invoices for payment of expenses and fees at the conclusion of a decision given in terms of clause 20.4 of the General Conditions. The Member may invoice for a progress payment of his daily fees if for any reason the DAB is caused to extend the time for giving its decision beyond the 42 days stated in Clause 20.4 of the General Conditions. All invoices shall be accompanied by a brief description of activities performed during the relevant period and shall be addressed to the Contractor.

- v) With reference to the Annex, 'Procedural Rules'
 - a) The DAB (red book) is not required to visit the site during the course of the Works at the intervals stated in Rule 1 and further referred to in Rules 2 and 3. However, the Member at his discretion may visit the site in connection with any matter arising from the dispute referred to him.
 - b) The DAB shall not conduct any hearings in order to resolve a dispute as provided for in Rule 6 or referred to in Rule 7 (red book) / Rule 3 or referred to in Rule 4 (yellow book and silver book).
 - c) Add the following Rule 10 (red book) / Rule 7 (yellow book and silver book):

"The DAB may obtain legal or technical advice after first having notified the Parties of his intention.

- 2 In accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement, the Member shall be paid an hourly fee of R.
- 3 In consideration of these fees and other payments to be made by the Employer and the Contractor in accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement, the Member undertakes to act as the DAB (as adjudicator) in accordance with this Dispute Adjudication Agreement.
- 4 The Employer and the Contractor jointly and severally undertake to pay the Member, in consideration of the carrying out of these services, in accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement.
- 5 This Dispute Adjudication Agreement shall be governed by the law of South Africa

SIGNED by:

SIGNED by:

SIGNED

by:

who warrants that he/ she is duly authorized to sign for and on behalf of the Employer in the presence of

who warrants that he/ she is duly authorized to sign for and behalf of the Contractor in the presence of

the Member in the presence of

Witness _____
Name: _____
Address: _____

Witness: _____
Name: _____
Address: _____

Witness: _____
Name: _____
Address: _____

Date: _____

Date: _____

Date: _____

Annexure 3: Adjudication in all NEC3 contracts

CONTRACT Agreements and contract data	Adjudicator's appointment NEC3
<p>This agreement is made on the day of between:</p> <p>..... (name of company / organisation) of</p> <p>..... (address) and of</p> <p>..... (name of company / organisation) of</p> <p>..... (address)</p> <p>(the Parties) and</p> <p>..... (name) of</p> <p>..... (address)</p> <p>(the Adjudicator).</p>	
<p>1 The Parties appoint the Adjudicator in accordance with the conditions of contract stated in the NEC3 Adjudicators Contract (June 2005) and the Contract Data attached to this agreement.</p> <p>2 The Adjudicator accepts this appointment and undertakes to carry out the Adjudicator's duties as described in the conditions of contract.</p>	
<p>Signed jointly on behalf of the Parties by:</p> <p style="text-align: right;">(Signature:)</p>	
Name	
Position	
who warrants that he/ she is duly authorized to sign on behalf of	
<p>and</p> <p style="text-align: right;">(Signature:)</p>	
Name	
Position	
on behalf of	
<p>and signed by the Adjudicator</p> <p style="text-align: right;">(Signature:)</p>	

NEC Adjudicator's Contract

Contract Data

	Item	Data
1.1	The <i>contract between the Parties</i> is	
1.6	The <i>law of the contract</i> is the law of	South Africa subject to the jurisdiction of the courts of South Africa
1.9	The <i>language of this contract</i> is	English
2.6	The <i>period of retention</i> is	weeks
3.1	The amount of the advanced payment is	R
3.4	The Adjudicator's <i>fee</i> (which also applies to time spent traveling) is.	R per hour excluding value added tax
3.5	The period for payment of invoices (if it is not three weeks), is	weeks
3.6	The <i>currency of this contract</i> is	the South African Rand.
3.7	The <i>interest rate</i> is	% per annum above the prime rate of
4.3	The Adjudicator's appointment terminates	on (date)
	The <i>additional conditions of contract</i> are:	
	1	

Annexure 4: Nominating adjudicators in contracts

The following examples illustrate how the adjudicator can be nominated in the Contract Data associated with a particular contract. It is advisable to bind into the contract, the adjudicators appointment as set out in Annexures 1 to 3.

Example 1:

The Adjudicator is
Telephone: Fax: Email:

Example 2:

The Adjudicator is the person appointed as follows:

- In the event that a first dispute is referred to adjudication, the referring Party at the same time applies to the (name of body maintaining a list of Adjudicators)
- The application includes a copy of this definition of the Adjudicator.
- The referring Party pays the administrative charge made by the (name of body maintaining a list of Adjudicators)

The Parties accept the person appointed and this person is also Adjudicator for later disputes.

Example 3:

The adjudicator is the person appointed by the (name of an official within a body / association)
Tel Fax..... No.....

Example 4:

The adjudicator is the person appointed to adjudicate disputes in the contract for
between and

Example 5:

The party raising the dispute shall select a suitable and available adjudicator from the panel of adjudicators published on the website www...../.....panel of adjudicators as and when the first dispute arises.

Example 6:

The party, which raises the dispute, shall select three adjudicators from the panel of adjudicators published on the website www...../.....panel of adjudicators, determine their hourly fees and confirm that these adjudicators are available to adjudicate the dispute in question. The other party shall then select one of the three nominated adjudicators.

Annexure 5: Suggested outcomes that adjudicators should demonstrate

Outcome 1: Communicate the manner in which parties to a contract conduct themselves.

Assessment criteria:

- 1 The manner in which the parties operate in terms of the contract is described.
- 2 What motivates the Parties to a contract is identified.
- 3 The behaviour of Parties in the event of a dispute is communicated.

Guideline: Worked as a project manager, contract manager, or agent, preferably within the past 5 years, with appropriate disputes experience is essential.

Outcome 2: Communicate with experts in other professions regarding a 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 10 years standing and contacts with recognised experts, particularly on legal issues, is a recommendation.

Outcome 3: Adjudicate a dispute in a contract timeously

Assessment criteria:

- 1 The contractual position of the Parties to a dispute is ascertained.
- 2 Correct procedures in accordance with the provisions of a 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 in order to place them in a position that they would have been, had there not been a dispute, is calculated.
- 6 The impartiality to either Party, irrespective of the consequences, and which will not encourage either Party to continue the dispute through legal process, is demonstrated in the decisions made in a dispute.
- 7 Fair and independent judgment is presented in written arguments and decisions in a clear understandable form capable of in depth scrutiny.

Guidelines:

Detailed working knowledge of standard form contracts is essential.

Attendance and passing of courses associated with aspects of Adjudication is a recommendation.

The holding of senior positions in industry, but no longer acting in a corporate role and probably self-employed is a recommendation. Availability to be able to act at short notice in the event of a dispute arising is a prerequisite.

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 List of Adjudicators.

An appreciation of the following is essential:

- the factors that affect costs;
- investigations, design, construction and fabrication methods;
- programming and delay assessment;
- resource and risk management.