
Appendix 12

GC/Works/1 With Quantities 1998

59 Adjudication

- (1) The Employer or the Contractor may at any time notify the other of intention to refer a dispute, difference or question arising under, out of, or relating to, the Contract to adjudication. Within 7 Days of such notice, the dispute, may by further notice be referred to the adjudicator specified in the Abstract of Particulars.
- (2) The notice of referral shall set out the principal facts and arguments relating to the dispute. Copies of all relevant documents in the possession of the party giving the notice of referral shall be enclosed with the notice. A copy of the notice and enclosures shall at the same time be sent by the party giving the notice to the PM, the QS and the other party.
- (3)
 - (a) If the person named as adjudicator in the Abstract of Particulars is unable to act, or is not or ceases to be independent of the Employer, the Contractor, the PM and the QS, he shall be substituted as provided in the Abstract of Particulars.
 - (b) It shall be a condition precedent to the appointment of an adjudicator that he shall notify both parties that he will comply with this Condition and its time limits.
 - (c) The adjudicator, unless already appointed, shall be appointed within 7 Days of the giving of a notice of intention to refer a dispute to adjudication under paragraph (1). The Employer and the Contractor shall jointly proceed to use all reasonable endeavours to complete the appointment of the adjudicator and named substitute adjudicator. If either or both such joint appointments has not been completed within 28 Days of the acceptance of the tender, either the Employer or the Contractor alone may proceed to complete such appointments. If it becomes necessary to substitute as adjudicator a person not named as adjudicator or substitute adjudicator in the Abstract of Particulars, the Employer and Contractor shall jointly proceed to use all reasonable endeavours to appoint the substitute adjudicator. If such joint appointment has not been made within 28 Days of the selection of the substitute adjudicator, either the Employer or Contractor alone may proceed to make such appointment. For all such appointments, the form of adjudicator's appointment prescribed by the Contract shall be used, so far as is reasonably practicable. A copy of each such appointment shall be supplied too each party. No such appointment shall be amended or replaced without the consent of both parties.
- (4) The PM, the QS and the other party may submit representations to the adjudicator not later than 7 Days from the receipt of the notice of referral.
- (5) The adjudicator shall notify his decision to the PM, the QS, the Employer and the Contractor not earlier than 10 and not later than 28 Days from receipt of the notice of referral, or such longer period as is agreed by the Employer and the Contractor after the dispute has been referred. The adjudicator may extend the period of 28 Days by up to 14 Days, with the consent of the party by whom the dispute was referred. The adjudicator's decision shall nevertheless be valid if issued after the time allowed. The adjudicator's decision shall state how the cost of the adjudicator's fee or salary (including overheads) shall be apportioned between the parties, and whether one party is to bear the whole or part of the reasonable legal and other costs and expenses of the other, relating to the adjudication.

- (6) The adjudicator may take the initiative in ascertaining the facts and the law, and the Employer and the Contractor shall enable him to do so. In coming to a decision the adjudicator shall have regard to how far the parties have complied with any procedures in the Contract relevant to the matter in dispute and to what extent each of them has acted promptly, reasonably and in good faith. The adjudicator shall act independently and impartially, as an expert adjudicator and not as an arbitrator. The adjudicator shall have all the powers of an arbitrator acting in accordance with Condition 60 (Arbitration and choice of law), and the fullest possible powers to assess and award damages and legal and other costs and expenses; and, in addition to, and notwithstanding the terms of, Condition 47 (Finance charges), to award interest. In particular, without limitation, the adjudicator may award simple or compound interest from such dates, at such rates and with such rests as he considers meet the justice of the case—
- (a) on the whole or part of any amount awarded by him, in respect of any period up to the date of the award;
 - (b) on the whole or part of any amount claimed in the adjudication proceedings and outstanding at the commencement of the adjudication proceedings but paid before the award was made, in respect of any period up to the date of payment;
- and may award such interest from the date of the award (or any later date) until payment, on the outstanding amount of any award (including any award of interest and any award of damages and legal and other costs and expenses).
- (7) Subject to the proviso to Condition 60(1) (Arbitration and choice of law), the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the Contract provides for arbitration, or the parties otherwise agree to arbitration), or by agreement: and the parties do not agree to accept the decision of the adjudicator as finally determining the dispute.
- (8) In addition to his other powers, the adjudicator shall have power to vary or overrule any decision previously made under the Contract by the Employer; the PM or the QS, other than decisions in respect of the following matters—
- (a) decisions by or on behalf of the Employer under Condition 26 (Site admittance);
 - (b) decisions by or on behalf of the Employer under Condition 27 (Passes) (if applicable);
 - (c) provided that the circumstances mentioned in Condition 56(1)(a) or (b) (Determination by Employer) have arisen, and have not been waived by the Employer, decisions of the Employer to give notice under Condition 56(1)(a), or to give notice of determination under Condition 56(1);
 - (d) decisions or deemed decisions of the Employer to determine the Contract under Condition 56(8) (Determination by Employer);
 - (e) provided that the circumstances mentioned in Condition 58A(1) (Determination following suspension of Works) have arisen, and have not been waived by the Employer, decisions of the Employer to give notice of determination under Condition 58A(1); and
 - (f) decisions of the Employer under Condition 61 (Assignment).
- In relation to decisions in respect of those matters, the Contractors's only remedy against the Employer shall be financial compensation.
- (9) Notwithstanding Condition 60 (Arbitration and choice of law), the Employer and the Contractor shall comply forthwith with any decision of the adjudicator; and shall submit to summary judgment and enforcement in respect of all such decisions.
- (10) If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision. Such requests shall only be made within 14 Days of the decision being notified to the requesting party.
- (11) The adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator, unless the act or omission is in bad faith. Any employee or agent of the adjudicator is similarly protected from liability.

MODEL FORM 8

ADJUDICATOR'S APPOINTMENT
(CONDITION 59)

THIS AGREEMENT is made the _____ day of _____ –

BETWEEN:

- (1) _____
of _____
(‘the Employer’, which term shall include its successors and assignees);
- (2) _____
[of] OR [whose registered office is at] _____
(‘the Contractor’); and
- (3) _____
of _____
(‘the Adjudicator’).

WHEREAS:

- (A) The Employer has entered into a contract dated _____ (‘the Contract’) with the Contractor for the execution of certain Works, and a copy of the Contract has been supplied to the Adjudicator.
- (B) The Adjudicator has agreed to act as [adjudicator] OR [named substitute adjudicator] in accordance with the Contract.

NOW THIS DEED WITNESSETH as follows:

- 1 The Adjudicator shall, as and when required, act as [adjudicator] OR [named substitute adjudicator] in accordance with the Contract, except when unable so to act because of facts or circumstances beyond his reasonable control.
- 2 The Adjudicator confirms that he is independent of the Employer, the Contractor, and the Project Manager and Quantity Surveyor under the Contract, and undertakes to use reasonable endeavours to remain so, and that he shall exercise his task in an impartial manner. He shall promptly inform the Employer and the Contractor of any facts or circumstances which may cause him to cease to be so independent.
- 3 The Adjudicator hereby notifies the Employer and the Contractor that he will comply with Condition 59 (*Adjudication*) of the Contract, and its time limits.
- 4 The Adjudicator shall be entitled to take independent legal and other professional advice as reasonably necessary in connection with the performance of his duties as adjudicator. The reasonable net cost to the Adjudicator of such advice shall constitute expenses recoverable by the Adjudicator under this Agreement.
- 5 The Adjudicator shall comply, and shall take all reasonable steps to ensure that any persons advising or aiding him shall comply, with the Official Secrets Act 1989 and, where appropriate, with the provisions of Section 11 of the Atomic Energy Act 1946. Any information concerning the Contract obtained either by the Adjudicator or any person advising or aiding him is confidential,

and shall not be used or disclosed by the Adjudicator or any such person except for the purposes of this Agreement.

- 6 The Employer and the Contractor shall pay the Adjudicator fees, expenses and other sums (if any) in accordance with the Contract and the Schedule, plus applicable Value Added Tax.
- 7 The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator, unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.
- 8 The proper law of this Agreement shall be the same as that of the Contract. Where the proper law of this Agreement is Scots law, the parties prorogate the non-exclusive jurisdiction of the Scottish courts.

IN WITNESS whereof the Employer, the Contractor and the Adjudicator have executed this Deed in triplicate on the date first stated above.

SCHEDULE

Adjudicator's Fees, Expenses, etc.

NOTE: Where the proper law of the above document is Scots law, the format will be subject to alteration to reflect the requirements of Scots law in relation to the execution of a document.