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## Appendix 13

# Technology and Construction Solicitors' Association 2002 Version 2.0 Procedural Rules for Adjudication

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1. The following rules

(i) may be incorporated into any contract by reference to the "TeCSA Adjudication Rules" or the "ORSA Adjudication Rules", which expressions shall mean, in relation to any adjudication, the most recent edition hereof as at the date of the written notice requiring that adjudication.

(ii) meet the requirements of adjudication procedure as set out in section 108 of the Housing Grants, Construction and Regeneration Act 1996; Part I of the Scheme for Construction Contracts shall thus not apply.

### DEFINITIONS

2. In these Rules:

"Contract" means the agreement which includes the agreement to adjudicate in accordance with these Rules

"Party" means any party to the Contract

"Chairman" means the Chairman for the time being of the Technology and Construction Solicitors Association ("TeCSA"), or such other officer thereof as is authorised to deputise for him.

"days" shall have the same meaning as and be calculated in accordance with Part II of the Housing Grants, Construction and Regeneration Act 1996.

### COMMENCEMENT AND APPOINTMENT

3. These Rules shall apply upon any Party giving written notice to any other Party requiring adjudication, and identifying in general terms the dispute in respect of which adjudication is required.

4. Where the Parties have agreed upon the identity of an adjudicator who confirms his readiness and willingness to embark upon the Adjudication within 7 days of the notice requiring adjudication, then that person shall be the Adjudicator.

5. Where the Parties have not so agreed upon an adjudicator, or where such person has not so confirmed his willingness to act, then any Party shall apply to the Chairman of TeCSA for a nomination. The following procedure shall apply:-

(i) The application shall be in writing, accompanied by a copy of the Contract, a copy of the written notice requiring adjudication, and TeCSA's appointment fee of £100.

- (ii) The Chairman of TeCSA shall endeavour to secure the appointment of an Adjudicator within 7 days from the notice requiring adjudication.
  - (iii) Any person so appointed, and not any person named in the Contract whose readiness or willingness is in question, shall be the Adjudicator.
6. Within 7 days from the date of the Notice referred to in Rule 3:-
- (i) provided he is willing and able to act, any agreed Adjudicator under Rule 4 or nominated Adjudicator under Rule 5(ii) shall give written notice of his acceptance of appointment to all parties; and
  - (ii) the referring party shall serve the Referral Notice on the Adjudicator and the Responding Party.
7. The date of the referral of the dispute shall be the date the Referral Notice is received by the Adjudicator. The Adjudicator shall confirm to the Parties the date of receipt of the Referral Notice.
8. The Chairman of TeCSA shall have the power by written notice to the Parties to replace the Adjudicator with another nominated person if and when it appears necessary to him to do so. The Chairman of TeCSA shall consider whether to exercise such power if any Party shall represent to him that the Adjudicator is not acting impartially, or that the Adjudicator is physically or mentally incapable of conducting the Adjudication, or that the Adjudicator is failing with necessary dispatch to proceed with the Adjudication or make his decision. In the event of a replacement under this Rule, directions and decisions of the previous Adjudicator shall remain in effect unless reviewed and replaced by the new Adjudicator, and all timescales shall be recalculated from the date of the replacement. Any replacement Adjudicator shall give written notice of acceptance of his appointment.
9. Where an Adjudicator has already been appointed in relation to another dispute arising out of the Contract, the Chairman of TeCSA may appoint either the same or a different person as Adjudicator.
10. Notice requiring adjudication may be given at any time and notwithstanding that arbitration or litigation has been commenced in respect of such dispute.
11. More than one such notice requiring adjudication may be given in respect of disputes arising out of the same contract.

#### AGREEMENT

12. An agreement to adjudicate in accordance with these Rules shall be treated as an offer made by each of the Parties to TeCSA and to any Adjudicator to abide by these Rules, which offer may be accepted by conduct by appointing an Adjudicator or embarking upon the Adjudication respectively.

#### SCOPE OF THE ADJUDICATION

13. The scope of the Adjudication shall be the matters identified in the notice requiring adjudication, together with
- (i) any further matters which all Parties agree should be within the scope of the Adjudication, and
  - (ii) any further matters which the Adjudicator determines must be included in order that the Adjudication may be effective and/or meaningful.
14. The Adjudicator may decide upon his own substantive jurisdiction, and as to the scope of the Adjudication.

#### THE PURPOSE OF THE ADJUDICATION AND THE ROLE OF THE ADJUDICATOR

15. The underlying purpose of the Adjudication is to resolve disputes between the Parties that are within the scope of the Adjudication as rapidly and economically as is reasonably possible.

16. Unless the Parties agree that any decisions of the Adjudicator shall be final and binding, any decision of the Adjudicator shall be 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.

17. Wherever possible, any decision of the Adjudicator shall reflect the legal entitlements of the Parties. Where it appears to the Adjudicator impossible to reach a concluded view upon the legal entitlements of the Parties within the practical constraints of a rapid and economical adjudication process, any decision shall represent his fair and reasonable view, in light of the facts and the law insofar as they have been ascertained by the Adjudicator, of how the disputed matter should lie unless and until resolved by litigation or arbitration.

18. The Adjudicator shall have the like power to open up and review any certificates or other things issued or made pursuant to the Contract as would an arbitrator appointed pursuant to the Contract and/or a court.

19. The Adjudicator shall act fairly and impartially, but shall not be obliged or empowered to act as though he were an arbitrator.

#### CONDUCT OF THE ADJUDICATION

20. The Adjudicator shall establish the procedure and timetable for the Adjudication.

21. Without prejudice to the generality of Rule 20, the Adjudicator may if he thinks fit:

- (i) Require the delivery of written statements of case,
  - (ii) Require any party to produce a bundle of key documents, whether helpful or otherwise to that Party's case, and to draw such inference as may seem proper from any imbalance in such bundle that may become apparent,
  - (iii) Require the delivery to him and/or the other parties of copies of any documents other than documents that would be privileged from production to a court,
  - (iv) Limit the length of any written or oral submission,
  - (v) Require the attendance before him for questioning of any Party or employee or agent of any Party,
  - (vi) Make site visits,
  - (vii) Make use of his own specialist knowledge,
  - (viii) Obtain advice from specialist consultants, provided that at least one of the Parties so requests or consents,
  - (ix) Meet and otherwise communicate with any Party without the presence of other Parties,
  - (x) Make directions for the conduct of the Adjudication orally or in writing,
  - (xi) Review and revise any of his own previous directions,
  - (xii) Conduct the Adjudication inquisitorially, and take the initiative in ascertaining the facts and the law,
  - (xiii) Reach his decision(s) with or without holding an oral hearing, and with or without having endeavoured to facilitate an agreement between the Parties.
22. The Adjudicator shall exercise such powers with a view of fairness and impartiality, giving each Party a reasonable opportunity, in light of the timetable, of putting his case and dealing with that of his opponents.

23. The Adjudicator may not:

- (i) Require any advance payment of or security for his fees,
- (ii) Receive any written submissions from one Party that are not also made available to the others,
- (iii) Refuse any Party the right at any hearing or meeting to be represented by any representative of that Party's choosing who is present,
- (iv) Act or continue to act in the face of a conflict of interest,
- (v) Subject to Rule 28, require any Party to pay or make contribution to the legal costs of another Party arising in the Adjudication.

24. The Adjudicator shall reach a decision within 28 days of referral or such longer period as is agreed by the Parties after the dispute has been referred to him. The Adjudicator shall be entitled to extend the said period of 28 days by up to 14 days with the consent of the Party by whom the dispute was referred.

#### ADJUDICATOR'S FEES AND EXPENSES

25. If a Party shall request Adjudication, and it is subsequently established that he is not entitled to do so, that Party shall be solely responsible for the Adjudicator's fees and expenses.

26. Save as aforesaid, the Parties shall be jointly responsible for the Adjudicator's fees and expenses including those of any specialist consultant appointed under Rule 19(viii). In his decision, the Adjudicator shall have the discretion to make directions with regard to those fees and expenses. If no such directions are made, the Parties shall bear such fees and expenses in equal shares, and if any Party has paid more than such equal share, that Party shall be entitled to contribution from other Parties accordingly.

27. The Adjudicator's fees shall not exceed the rate of £1,250 per day plus expenses and VAT.

#### COSTS

28. If the Parties so agree, the Adjudicator shall have jurisdiction to award costs to the successful party.

29. Notwithstanding anything to the contrary in any contract between the Parties, the Adjudicator shall have no jurisdiction to require the Party which referred the dispute to adjudication to pay the costs of any other Party solely by reason of having referred the dispute to adjudication.

#### DECISIONS

30. The Adjudicator may in any decision direct the payment of such compound or simple interest as may be commercially reasonable.

31. All decisions shall be in writing. The Adjudicator shall provide written reasons for any decision if any or all of the Parties make a request for written reasons within seven days of the date of the referral of the dispute. If requested by one Party, reasons are to be delivered to all Parties.

32.

- (i) The Adjudicator may, on his own initiative or on the application of a Party, correct his decision so as to remove any clerical mistake or error arising from an accidental slip or omission;
- (ii) Any application for the exercise of the Adjudicator's powers under paragraph (i) shall be made within 5 days of the date that the decision is delivered to the Parties or such shorter period as the Adjudicator may specify in his decision;
- (iii) Any correction of a decision shall be made as soon as possible after the date that the application

was received by the Adjudicator or, where the correction is made by the Adjudicator on his own initiative as soon as possible after he becomes aware of the need to make a correction.

#### ENFORCEMENT

33. Every decision of the Adjudicator shall be implemented without delay. The Parties shall be entitled to such reliefs and remedies as are set out in the decision, and shall be entitled to summary enforcement thereof, regardless of whether such decision is or is to be the subject of any challenge or review. No party shall be entitled to raise any right of set-off, counterclaim or abatement in connection with any enforcement proceedings.

#### IMMUNITY, CONFIDENTIALITY AND NON-COMPELLABILITY

34. Neither TeCSA, nor its Chairman, nor deputy, nor the Adjudicator nor any employee or agent of any of them shall be liable for anything done or not done in the discharge or purported discharge of his functions as Adjudicator, whether in negligence or otherwise, unless the act or omission is in bad faith.

35. The Adjudication and all matters arising in the course thereof are and will be kept confidential by the Parties except insofar as necessary to implement or enforce any decision of the Adjudicator or as may be required for the purpose of any subsequent proceedings.

36. In the event that any Party seeks to challenge or review any decision of the Adjudicator in any subsequent litigation or arbitration, the Adjudicator shall not be joined as a party to, nor shall be summoned or otherwise required to give evidence or provide his notes in such litigation or arbitration.

#### LAW

37. These Rules shall be governed by English law and under the jurisdiction of the English Courts.

38. No Party shall, save in case of bad faith on the part of the Adjudicator, make any application to the courts whatsoever in relation to the conduct of the Adjudication or the decision of the Adjudicator until such time as the Adjudicator has made his decision, or refused to make a decision, and until the Party making the application has complied with any such decision.

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#### *These notes do not form part of the TeCSA Adjudication Rules*

These rules may be incorporated into contracts, including contracts contained in correspondence, by suitable wording along the following lines:

“Any dispute arising under this agreement shall in the first instance be referred to adjudication in accordance with the TeCSA Adjudication Rules. [Current at the date of this Contract] [Version 2.0]”  
N.B. Delete as appropriate.

The Housing Grants, Construction and Regeneration Act 1996 gives parties to a construction contract other than with a residential occupier or an excluded contract entered into after 1st May 1998 a right to refer a dispute arising under the contract to adjudication. If the contract does not incorporate the TeCSA Adjudication Rules or other provisions meeting the compliance criteria set out in the Act, then the terms of Part I of the Scheme for Construction Contracts become applicable.

If the contract does not incorporate the TeCSA Adjudication rules or otherwise comply with the compliance criteria such that there is no agreed adjudication or nominating body, then a party in dispute may yet ask TeCSA to appoint an adjudicator; TeCSA is an “adjudicator nominating body” within the meaning of paragraph 2(3) of The Scheme for Construction Contracts (England and Wales) Regulations 1998. An adjudicator so appointed will conduct the adjudication in accordance with the Scheme, or if the parties so agree, the TeCSA Adjudication Rules.

If the contract contains an arbitration clause, then in order to prevent enforcement difficulties arising out of Section 9 of the Arbitration Act 1996, TeCSA recommends that the arbitration clause should contain wording along the following lines:

“Provided always that the enforcement of any decision of an adjudicator is not a matter which may be referred to arbitration.”

Applications to the Chairman of TeCSA should be addressed to:

Mr Peter Rees  
Technology and Construction Solicitors Association  
Kempson House  
Camomile Street  
London EC3A 7AN  
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***TeCSA and its members take no responsibility for loss or damage caused to any user of these Rules or these Notes.***