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LAWYERS

What you need to know about Adjudication under the Construction Contracts Act 2002

Adjudication is a quick and relatively inexpensive way of resolving construction disputes, and is aimed at keeping building projects moving.

Most disputes are resolved in less than six weeks from the time that the process is initiated.

Under the Construction Contracts Act (CCA) any party to a construction contract is entitled to refer a dispute arising under that contract to adjudication.

What is a "Dispute" for the Purposes of the CCA?

A "dispute" is defined as "a dispute or difference that arises under a construction contract."

An example of a dispute might include a disagreement between the parties about whether an amount is payable under the contract, or whether there has been a breach of a contract term or an implied warranty under the Building Act 2004.

What will the Adjudicator decide?

The adjudicator must determine whether or not the parties to the construction contract are liable and any questions in dispute about the rights and obligations of the parties under the contract.

The CCA outlines the procedure to be followed when referring a matter to adjudication and the process to be followed by the adjudicator.

The adjudicator is expected to make a decision on the disputed matters (known as a "determination") within 20 working days of the dispute being referred by the parties (or longer if agreed between the parties).

How is an Adjudicator Chosen?

Within two working days of being asked, an adjudicator must either accept or decline the role.

There are three options for choosing an adjudicator:

a) The parties agree on a third party who is not conflicted from determining the matter;
b) The parties agree on a body or person to nominate an adjudicator for them (whether prior to or following the dispute arising); or
c) The parties apply to an Authorised Nominating Authority (or ANA), of which there are five: The Arbitrators' and Mediators' Institute of New Zealand, the Building Disputes Tribunal, the Adjudicators Association of NZ, the Royal Institution of Chartered Surveyors and Fairway Resolution Ltd.

Who pays?

The parties themselves will usually bear their own costs, unless the adjudicator determines that one has caused the other to incur costs due to bad faith, or allegations or objections that have little merit.

Is Adjudication the Only Option for Resolving a Dispute?

No. Disputed matters do not have to be referred to adjudication. Court proceedings, mediation and arbitration are all still options that can be used (if not prohibited by the contract) following, or even in conjunction with, adjudication.

Where adjudication is used in conjunction with other dispute resolution mechanisms, it will not necessarily achieve a final settlement of the dispute. However, an adjudication determination is binding in the interim.

Why Use the Adjudication Option?

Adjudication will almost certainly be quicker and less expensive than litigation through the courts and is now the most commonly used process for resolving building and construction disputes in New Zealand.

Avoiding Adjudication

The best way to manage the risk of adjudication is to avoid differences escalating into disputes by:

a) Documenting contracts, including scope, quality and performance in a way that is understood by both parties;
b) Choosing procurement methodologies that avoid cost-cutting and ensure that risks are fairly and appropriately allocated;
c) Communicating effectively throughout the contract, including programme, clarification of issues and keeping good records;
d) Documenting instructions properly and promptly identifying, pricing and settling any variations;
e) Presenting clear Payment Claims and Payment Schedules; and
f) Being willing to discuss and address differences before they turn into “disputes.”

If you are involved in a dispute and want to avoid one arising it pays to take advice from a professional experienced in the Construction Contracts Act.

Alan Knowsley