

JBCC ADVISORY NOTE: EDITION 6.2

DOCUMENT/S Principal Building Agreement Nominated/Selected Subcontract Agreement Minor Works Agreement (Clause 22.0)

DISCLAIMER *The purpose of this publication is to give advice on the most effective use of the JBCC documents. Advice is given in good faith and JBCC disclaims all liability for any loss, damage or expense that may be incurred through acting on such advice*

30.0 DISPUTE RESOLUTION - Appointment of adjudicator/arbitrator

Settlement by the parties

- 30.1 Should any disagreement arise between the **employer** (or the **principal agent** or an **agent**) and the **contractor** arising out of or concerning the action or inaction of the **employer** (or the **principal agent** or an **agent**) or the **contractor**, or any other matter concerning this **agreement** (including the validity thereof), either **party** may give **notice** of a disagreement to the other. The **parties** shall attempt to resolve such disagreement between them and record such resolution in writing signed by them
- 30.2 Where the disagreement is not resolved within ten (10) **working days** of receipt of the **notice** of disagreement, the disagreement shall be deemed to be a dispute
- 30.3 The dispute shall be referred to adjudication within ten (10) **working days** of the expiry of the period [30.2] by means of a **notice** of adjudication by the **party** (the referring party) which gave the **notice** of disagreement
- 30.4 The **notice** of adjudication shall clearly define the scope of the dispute and the relief sought by adjudication
- 30.5 Failure to comply with the procedure described [30.3-4] shall cause the dispute to be resolved by arbitration and not by adjudication

Adjudication

- 30.6 Where a dispute is referred to adjudication:
- 30.6.1 The adjudicator shall be nominated by the nominating body [CD] and shall be deemed to have been appointed by the **parties**
- 30.6.2 The applicable rules shall be stated [CD] or shall be by agreement between the **parties** and the adjudicator, failing which the rules shall be determined by the adjudicator. Neither **party** shall be entitled to legal representation, unless otherwise agreed in writing by the **parties**

Arbitration

- 30.7 Where the dispute is referred to arbitration:
- 30.7.1 Arbitration shall not be construed as a review or appeal of an adjudicator's determination. Any determination by the adjudicator shall remain in force and continue to be implemented unless and until overturned by an arbitration award
- 30.7.2 The resolution of the dispute shall commence anew
- 30.7.3 The referring **party** in the adjudication shall be the claimant in the arbitration
- 30.7.4 The arbitrator shall be nominated by the nominating body [CD] and shall be deemed to have been appointed by the **parties**
- 30.7.5 The applicable rules shall be stated [CD] or shall be by agreement between the **parties** and the arbitrator, failing which the rules shall be determined by the arbitrator

INTERPRETATION

According to the above extract from clause 30.0 the adjudicator [30.6.1] or arbitrator [30.7.4] shall be nominated by the nominating body [CD] where a dispute is referred to either adjudication or arbitration. This should not be strictly interpreted to exclude appointment of either the adjudicator or arbitrator by the parties themselves should the disputing parties agree who to appoint at the outset of the dispute resolution process

IMPLEMENTATION

Appointment of an adjudicator or arbitrator when an agreement exists on who to appoint is dealt with in the JBCC Adjudication Rules of January 2020 and the Association of Arbitrators (Southern Africa) Rules for the conduct of Arbitrations (7th Edition, 2013) respectively as follows:

JBCC Adjudication Rules

2.2 *“The parties shall appoint the adjudicator by mutual agreement within five (5) working days after the date on which the disagreement was deemed to be a dispute in terms of the Dispute Resolution clause of the respective agreement(s). Where the parties have failed to make an appointment within such period, either party may request the nominating body to appoint the adjudicator within five (5) working days from date of such request. Neither party shall have the right to object to such an appointment”*

AArb(SA) Rules for the conduct of Arbitrations

Article 3

3. (c) *“The name and contact details of an arbitrator already agreed upon by the parties”*

See also *Article 8* item 1, which deals with the appointment of a sole arbitrator if the parties have not agreed on the arbitrator