

# MDA PRESENTS



## FIRST AID FOR CONTRACTS



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### THE DIFFICULTY OF APPOINTING AN ADJUDICATOR WHERE A NOMINATING BODY IS NOT NAMED IN THE CONTRACT

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**All the standard form contracts recommended for use by the Construction Industry Development Board (CIDB) make provision for dispute resolution through adjudication.**

The appointment of the adjudicator either as a standing or as an ad hoc adjudicator can be a challenge.

Although the standard form NEC and FIDIC red book contracts anticipate that a standing Dispute Adjudication Board (DAB) of one or three persons depending on the magnitude of the contract, should be appointed, there appears to be a preference for appointing ad hoc DAB's in South Africa.

Once a dispute has arisen, an ad hoc DAB's will need

to be appointed either by agreement between the parties or, where agreement cannot be achieved, the DAB will be appointed by a nominating body that is required to be named in the contract.

The identity or source of the adjudicators to make up a DAB, varies from contract to contract but may be:

- Named in the contract;
- Chosen from a panel of adjudicators who are named in the contract;
- Chosen from a panel of adjudicators where the panel is named in the contract;
- Chosen at the volition and at the discretion of one of the Parties (usually the claiming Party).

The adjudicator nominating body attends to the appointment of the DAB/ adjudicator upon request by either of the parties to the dispute and the adjudicator they appoint will generally be from a panel of adjudicators that the nominating body has assembled.

Once disputes are entered into, the prospect of reaching agreement is greatly diminished and the appointment of an adjudicator is decided, as result, more often than not, by the adjudicator nominating body.

By way of example, the standard form GCC 2015 Third Edition, requires that adjudicators be drawn from the SAICE panel of adjudicators and where agreement is not reached, that the President of SAICE makes the nomination and appoints the adjudicator or the DAB.

All the standard forms of contract have similar provisions. We have noted however, an issue with the JBCC contracts.

### **The JBCC Contracts**

The Joint Building Contracts Committee (JBCC) Principal Building Agreement (PBA) Edition 4.1 of March 2005, Edition 5 of July 2007, Edition 6.1 of March 2014 and Edition 6.2 of March 2018 provides that a dispute must be referred to adjudication in terms of the JBCC Rules for adjudication (*“the rules”*) current at the time that the dispute is referred.

The current rules (at time of writing) provide that should the parties fail to agree to an adjudicator, the

nominating body (named in the contract data) must be approached to nominate the adjudicator.

The JBCC PBA Edition 5 of July 2007 provides that the adjudicator is to be appointed in terms of the rules. Importantly, and in difference with the abovementioned editions of the JBCC, the standard contract data of this contract does not include a place to insert the nominating body. This is replicated in the corresponding Nominated Subcontract (NS) Subcontract Agreement Edition 5 July 2007.

The issue that this causes is that this omission from the contract data has resulted in very few of these contracts being concluded without a nominating body having been selected.

The JBCC has, in what we presume to be an attempt to address this issue, included in the recently released versions of the JBCC a clause which allows the referring party to choose a local recognised body to appoint an adjudicator or arbitrator should the contract not include a specified nominating body.

The previous versions of the JBCC are still widely used and parties often encounter difficulties when the nominating body is not provided for.

Our suggestion to the JBCC would be to include an amendment to the adjudication rules which allows for a default nominating body or a discretionary right (for the referring party) to choose a nominating body where the nominating body has not been named in the contract.

In addition to the above, we have also experienced a situation where the agreed nominating body either does not exist or does not nominate adjudicators, for example we have seen examples of where the nominating body is named as the “*arbitration council of South Africa*” or “*UNCITRAL*” (this organization provides rules for arbitration but does not provide nominating services).

### **Dealing with this difficulty**

The remedies available to a referring party facing the abovementioned issues are limited.

At MDA, we have often proposed, and with some success, in the notice of disagreement or dispute, a nominating body to be agreed between the parties. This is obviously subject to the agreement to same with the party with whom the dispute lies. If the responding party does not intend to participate in the dispute resolution proceedings, it is unlikely that the parties will be able to agree to a nominating body.

An alternative option available to a referring party is to approach the court after the parties have failed to agree to an adjudicator or a nominating body. The failure of the responding party to participate in the dispute resolution provisions of the contract constitutes a breach of the agreement to which an available remedy is an order for specific performance. The relief sought by the referring party in approaching the court would need to be extremely carefully formulated due to the fact that that a court is unlikely to make an order which compels a party to enter into

an agreement with another party.

In the situation pointed out above, where the parties have not included a nominating body in the contract data as it does not provide for such or where the nominating body does not exist or does not attend to nominations, the referring party may be in a position to approach the court for a rectification of the contract should it be able to prove a mutual or common mistake.

Approaching the court to resolve these difficulties will be a difficult process with no guaranteed successful outcome and these alternatives unfortunately undermine the very purpose of adjudication as a speedy remedy to resolve disputes during the currency of the contract.

As an alternative to the above, a referring party may be forced to attempt to either refer their dispute to arbitration for hearing (if the contract allows for this) or to pursue its entitlement in court – however the referring party may have to navigate a special plea being raised.

### **In closing**

The potential difficulties highlighted above can be extremely costly, both in time and expense, for a party wishing to refer a dispute. Contracting parties are reminded that it is imperative to ensure that due care is taken when completing the contract data in order to avoid unfortunate difficulties such as has been detailed above.