

# CONSTRUCT

NEC ECC CONTRACT

EDT. 6

DISPUTES, ADJUDICATION AND RELATED  
ISSUES



Construction & Technology Attorneys

The 2025 MDA Attorneys Construct Journal is focused on the NEC3 and NEC4 engineering and construction contracts (NEC ECC).

In this final edition, MDA Attorneys discusses disputes, adjudication and related issues under the NEC ECC.

The NEC ECC contains different dispute resolution options, option W1 which applies outside of the United Kingdom, option W2 which is used within the United Kingdom, and, under the NEC4, option W3, for dispute avoidance outside the United Kingdom.

This edition deals only with option W1.

### **What constitutes a dispute under the NEC ECC?**

The word “dispute” has been the subject of extensive litigation, the history of which will not be repeated here. Notwithstanding this extensive body of case law, and the legal definition of what constitutes a dispute, the NEC ECC prescribes its own unique descriptions of what constitutes a dispute, as set out in the adjudication table (NEC3) and the dispute reference table (NEC4). So, for example, an action or inaction of the project manager is considered to be a dispute under the NEC ECC – therefore, a failure by the project manager to issue the completion certificate is considered to be a dispute capable of being notified and referred to adjudication.

The clear observation that is made is that the NEC ECC description or test of what constitutes a dispute, is less stringent than the legal definition. In addition to dealing with traditional disputes, it clearly includes a mechanism to watch over the project manager. By doing this, should the project manager fail to comply with his obligations under the NEC ECC, there is a fast-track dispute resolution process to address such failure.

In addition to providing a definition of what constitutes a dispute, the NEC ECC also prescribes which party is the referring party. For the example provided above, where the project manager fails to act, the Contractor (under the NEC3) is the referring party. Where a compensation event or quotation (under the NEC4) is treated as accepted, the Client is the referring party.

In a further attempt to straight jacket the parties, the NEC ECC prescribes strict time periods for notifying and referring the dispute, which, if not complied with, result in a waiver of the right to refer the dispute to adjudication and arbitration.

The net result is that adjudications under the NEC ECC are commonplace, and in our experience, these adjudications are the most prevalent (by number) of all the standard form contracts (see the annual MDA adjudication survey). Although, it must be kept in mind that several of these disputes are not the traditional adjudication disputes under other forms of contract that would involve claims for time and/or money. A common example here is a dispute referred by the Contractor following the project manager’s decision that an event notified as a compensation event is not one of the compensation events in the contract.

### **The adjudicator’s jurisdiction under the NEC ECC**

The provisions of W1 provide the adjudicator with unique limits with regard to his/her jurisdiction.

The most recognised limit relates to the adjudicator's power to assess additional cost and delay caused to the Contractor. W1.3(7) states that in such a dispute, the adjudicator makes his/her assessment in the same way as a compensation event is assessed. Therefore, the adjudicator is bound by the concepts of defined cost, forecast defined cost and the accepted programme. This can create serious difficulty where the actual duration of the delay and/or the actual defined cost incurred is established after the compensation event to be substantially greater or less than what was included in the assessed quotation. What makes such a situation challenging for the adjudicator is that there is little doubt that should the dispute be escalated to court or arbitration, the powers of a judge or arbitrator would include the ability to assess the quantification of the dispute based on actual delay (for example using an as-planned vs as-built analysis) and/or actual costs incurred.

This is precisely what happened in the Healthy Buildings<sup>1</sup> case where the court overturned the contractual mechanism permitting the payment of forecasted cost for the removal of asbestos where such costs were not in fact incurred.

A common issue discussed previously is the situation where the project manager fails to accept programmes over a protracted period of time. Here, if a compensation event quotation is motivated against an outdated accepted programme, the prospects of that extension of time claimed and the resultant defined cost will most likely be inaccurate. If the assessment of such a compensation event (whether accepted/assessed by the project manager or treated as accepted) is disputed, the adjudicator is bound to assess the dispute based on the very same outdated accepted programme. Such a scenario could result in the adjudication merely being a steppingstone to arbitration. Although the non-acceptance of programmes has been addressed in the NEC4, if the Contractor does not issue reminder notices, the very same scenario set out above will apply.

Another topical issue is whether or not an adjudicator may alter a treated as accepted quotation when an employer has not notified a dispute.

<sup>1</sup> Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited (2014) NICA 27

The common scenario:

- Arises where the Contractor's quotation is treated as accepted, implemented, and no notice of dispute is issued by the Employer.
- Upon implementation, such treated as accepted quotation (or defined cost) is to be included in the payment certificates issued by the project manager.
- The project manager's failure to include such amounts in a payment certificate constitutes an inaction of the project manager, capable of being referred as a dispute to adjudication.

Can the Employer request an adjudicator to review and revise the treated as accepted quotation?

The express wording of W1 suggests that an adjudicator has such jurisdiction. However, such jurisdiction must necessarily be tied to the dispute that is notified and referred. Thus, if the Employer is permitted to request an adjudicator to review and revise a treated as accepted quotation in defence to a dispute arising from an inaction of the project manager, it would be permitted to bring a dispute to adjudication which it was required to notify and refer, creating jurisdictional uncertainty.

Our view is that an adjudicator should take a fairly strict approach to determining his/her jurisdiction based on the dispute which was notified and referred. This should exclude the Employer being permitted to have its unnotified dispute addressed in the same adjudication process. We must point out however, that in our experience, such view is not always accepted, and we have experienced disputes where such unnotified disputes are addressed by an adjudicator.

## Review by tribunal

Should either party be dissatisfied with the adjudicator's decision or should the adjudicator fail to hand down his/her decision within the time period allowed, then a notice of dissatisfaction must be issued within 4 weeks, failing which neither party may proceed to the tribunal. This is yet again another time bar included in W1 which fortifies the view that the dispute resolution processes are overly procedural and conducive to advancing of disputes. In making this point, it is important to recognise that not every notified dissatisfaction progresses to the tribunal.

The language in the NEC ECC speaks to the tribunal “*reviewing*” the decision of the adjudicator. The language used has given rise to controversy where the party who issues the notice of dissatisfaction has been unsuccessful in the adjudication and the successful party adopts the attitude that it is not the claiming party in the arbitration (on the basis that it was successful in the adjudication).

The usual procedure adopted when a dispute is referred by adjudication to arbitration is that the dispute process commences *de novo*. That is, the claimant remains the claimant.

This approach, where the successful party insists that the dissatisfied party is the claimant, has, in our experience, found favour with some arbitrators. There is a logic to this. Why should a successful claimant have to re-prove its claim where the other party is dissatisfied? However, if this were to occur, the dissatisfied party (who was the defendant in the adjudication) attracts the burden of proof, which some find problematic.

On the other side of the argument, this may not have been the intention of the drafters of the NEC ECC. W1.4 (4) speaks to the arbitral dispute being considered in the same manner as that decided in adjudication and suggests that the dispute process should commence *de novo* in arbitration.

However, it is clear that the language of W1.4 unfortunately includes the word “*review*”, which carries a particular understanding under legal procedures, and until the confusion is removed, this particular issue will remain as a potential preliminary stumbling block at the commencement of some arbitrations.

We sincerely hope that you have enjoyed all six editions of the NEC ECC Construct Journal and that you have found them both informative and thought-provoking. If you have any comments, suggestions or questions please feel free to email them at [info@mdalaw.co.za](mailto:info@mdalaw.co.za)