



## Construction Contracts Amendment Regulations 2015

Jerry Mateparae, Governor-General

### Order in Council

At Wellington this 2nd day of November 2015

Present:

The Hon Bill English presiding in Council

Pursuant to section 82 of the Construction Contracts Act 2002, His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council, makes the following regulations.

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**Regulations**

**1 Title**

These regulations are the Construction Contracts Amendment Regulations 2015.

**2 Commencement**

These regulations come into force on 1 December 2015.

**3 Principal regulations**

These regulations amend the Construction Contracts Regulations 2003 (the **principal regulations**).

**4 Regulation 4 amended (Information that must accompany payment claim served on residential occupier)**

- (1) In the heading to regulation 4, delete “**served on residential occupier**”.
- (2) In regulation 4, delete “that is served on a residential occupier”.

**5 Regulation 5 amended (Information that must be set out in notice of adjudication served on residential occupier)**

- (1) In the heading to regulation 5, delete “**served on residential occupier**”.
- (2) In regulation 5,—
  - (a) replace “section 62” with “section 28(3)”; and
  - (b) delete “that is served on a residential occupier”.

**6 New regulation 5A inserted (Information that must be set out in adjudicator’s notice of acceptance)**

After regulation 5, insert:

**5A Information that must be set out in adjudicator’s notice of acceptance**

The information that, in accordance with section 35A of the Act, is required to be set out in an adjudicator’s notice of acceptance must be in form 2A.

**7 Regulation 7 amended (Application for review of adjudicator’s determination in respect of owner who is not respondent)**

In regulation 7(1), replace “section 52” with “section 71A”.

**8 Schedule 1, forms 1 and 2 replaced**

In Schedule 1, replace forms 1 and 2 with the forms 1, 2, and 2A set out in the Schedule of these regulations.

**9 Schedule 1, form 3 amended**

- (1) In Schedule 1, form 3, under the heading “**Determination**”, replace “**If the determination includes a requirement that you must make a payment, it is important that you read the statement of consequences set out at the end of**” with “**See below the statement of consequences of not complying with**”.
- (2) In Schedule 1, form 3, before the definition of **defendant**, insert:

If the adjudicator makes a determination about rights and obligations and any party fails to comply with the determination, the party who wishes to enforce the determination may apply for the adjudicator’s determination to be enforced by entry as a judgment in accordance with subpart 2 of Part 4 of the Construction Contracts Act 2002.
- (3) In Schedule 1, form 3, definition of **defendant**, revoke paragraph (b).
- (4) In Schedule 1, form 3, definition of **plaintiff**, revoke paragraph (b).

**10 Schedule 1, form 4 amended**

In Schedule 1, form 4, replace “*Section 52,*” with “*Section 71A,*”.

## Schedule

### Forms 1 and 2 replaced

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#### Form 1

#### Information that must accompany all payment claims

r 4

*Section 20, Construction Contracts Act 2002*

#### ***Important notice***

#### **What is this?**

This notice is attached to a claim for a payment (a **payment claim**) under the Construction Contracts Act 2002 (the **Act**).

The person who sent this payment claim (the **claimant**) is claiming to be entitled to a payment for, or in relation to, the construction work carried out to date under a construction contract.

Whether that person is entitled to a payment, and how much they are entitled to, will depend on whether you have a construction contract and what you have agreed between yourselves about payments. If you haven't agreed on payments, there are default provisions in the Act.

#### **What should I do with this payment claim?**

You can either—

- pay the amount claimed in the payment claim (in full) on or before the due date for payment; or
- if you dispute the payment claim, send the claimant a written payment schedule that complies with section 21 of the Act (a **payment schedule**) stating the amount you are prepared to pay instead (which could be nothing).

The **due date** for a payment is the date agreed between you and the claimant. That due date must be set out in the payment claim. If you haven't agreed on a due date, then the Act says that a payment is due within 20 working days after the payment claim is served on you. (For the purposes of the Act, a **working day** is any day other than a Saturday, a Sunday, a public holiday, or any day from 24 December to 5 January.)

#### **When do I have to act?**

You should act promptly. Otherwise, you may lose the right to object.

#### **What if I do nothing?**

If you don't pay the amount claimed by the due date for payment or send a payment schedule indicating what you will pay instead, the claimant can go to court to recover

the unpaid amount from you as a debt owed. In addition, the court may decide that you have to pay the claimant's costs for bringing the court case.

**Can I say that I will not pay, or pay less than, the claimed amount?**

Yes, by sending a written payment schedule.

**Note:** If you do not send a written payment schedule, the claimant can bring court proceedings against you or refer the matter to adjudication (or both).

**How do I say I will not pay, or pay less than, the claimed amount?**

To say that you will pay nothing or indicate what you will pay instead, you must send the claimant a written payment schedule.

You must indicate the amount that you are prepared to pay, which could be nothing. This amount is called the **scheduled amount**.

If the scheduled amount is less than the claimed amount, you must explain in the payment schedule—

- how you calculated the scheduled amount; and
- why the scheduled amount is less than the claimed amount; and
- your reason or reasons for not paying the full amount claimed.

**Note:** The written payment schedule must also state which payment claim the payment schedule relates to.

**Note:** If you state in the payment schedule that you will pay less than the claimed amount or pay nothing at all, the claimant may refer the dispute about how much is owing for adjudication.

**How long do I have?**

You must send a payment schedule by the date agreed in the contract or, if no date was agreed, within 20 working days after the payment claim was served on you.

**If I say I will pay another amount instead, when do I have to pay it?**

You must still pay the scheduled amount by the due date for payment.

**What if I don't pay the scheduled amount when I say I will?**

If you send a payment schedule but do not pay the scheduled amount by the due date, the claimant can go to court to recover the unpaid amount from you as a debt owed or refer the matter to adjudication (or both).

**Note:** A court may also require you to pay the claimant's costs.

**Advice**

**Important: If there is anything in this notice that you do not understand or if you want advice about what to do, you should consult a lawyer immediately.**

## Form 2

## Information that must be set out in all notices of adjudication

r 5

*Section 28(3), Construction Contracts Act 2002****Important notice***

This is a notice of adjudication under the Construction Contracts Act 2002 (the **Act**). The person who sent the notice (the **claimant**) has a dispute with you and is giving you notice that they are going to refer the dispute for adjudication.

**What should I do with this notice of adjudication?**

You should read the notice thoroughly. This notice provides a brief explanation of the adjudication process and your rights and obligations in the adjudication.

This notice summarises the Act, but is not a substitute for the Act.

**Important: If there is anything in this notice that you do not understand or if you want further advice about what to do, you should consult a lawyer immediately.**

**What sort of process is an adjudication?**

An adjudication is intended to produce a quick decision (called a determination) on the dispute. It is different from going to court, mediation, or arbitration and it is intended to be quicker and less formal than most other dispute resolution processes.

However, an adjudicator's determination is binding and can be enforced in court by entry as a judgment.

**Can we choose other methods of resolving our dispute?**

Yes, you can still take your dispute to court, arbitration, mediation, or any other dispute resolution process (as well as to adjudication).

If a court makes a decision on the dispute, the court's judgment will stop the adjudication (if it is still underway) or override the adjudicator's determination.

Until a court gives a judgment, court proceedings will not prevent an adjudicator from making a determination or prevent the claimant from enforcing an adjudicator's determination against you.

**What kinds of things can an adjudication resolve?**

The adjudication process may be used for any dispute arising under a construction contract.

However, an adjudicator's role is limited to the following (unless you and the other parties to the dispute agree in writing otherwise):

- if the claimant is claiming money, determining whether you or any of the other parties to the adjudication are liable to make a payment under the contract; and

- determining any questions in dispute about a party's rights and obligations under the contract; and
- determining any other matter that is necessary to determine who is liable to pay or the dispute about rights or obligations.

**Note:** If your dispute does not arise under a construction contract, an adjudicator cannot determine it. If you think that the dispute does not arise under a construction contract, you should immediately tell the other party or parties and the adjudicator (if one has been nominated), and consult a lawyer.

### **How long will an adjudication take?**

The key steps to an adjudication and the indicative time limits are as follows:

- |   |   |
|---|---|
| • choosing an adjudicator                   | 2 to 5 working days after a notice of adjudication has been served*   |
| • claimant serves adjudication claim on you | within 5 working days of receipt of the adjudicator's notice of acceptance  |
| • you serve a written response              | within 5 working days of receiving the adjudication claim or the adjudicator's notice of acceptance (whichever is the later), but this time limit may be extended |
| • adjudicator's determination               | within 20 working days after the end of the period during which you can serve a written response, but this time limit may be extended.**†                         |

\*An adjudication will take less time if you and the claimant can agree earlier on who should be an adjudicator or on who can select an adjudicator. (However, note that any agreement that was made before the dispute arose about the choice of an adjudicator will not be binding on you or any other party to the adjudication.)

\*\*The adjudicator can extend the time limit by up to 10 working days.

†The parties can agree to extend the time limit for any period of time.

For the purposes of the Act, **working day** is any day other than a Saturday, a Sunday, a public holiday, or any day from 24 December to 5 January.

### **When will I have to pay any money?**

If the adjudicator determines that you must pay an amount to the claimant, you must pay that amount within 2 working days of being given a copy of the determination, or by a later date specified by the adjudicator.

### Summary of rights and obligations

**It is important that you—**

- **read the following statement of your rights and obligations; and**
- **act promptly (and within the stated times) to exercise your rights or perform your obligations.**

**Do I get a say in the choice of adjudicator?**

The claimant may contact you to discuss the choice of adjudicator for the dispute. You and the claimant can agree on an adjudicator. If the person you and the claimant have chosen indicates that he or she is unwilling or unable to act, you and the claimant can agree on another adjudicator.

If you and the claimant cannot agree on an adjudicator, you and the claimant can still agree on a nominating body to appoint an adjudicator.

If you and the claimant do not agree on a nominating body, then the claimant can ask an authorised nominating authority to nominate an adjudicator.

**Note:** A party to the construction contract cannot be the adjudicator.

If a proposed adjudicator has a conflict of interest (whether financial or not), that person must advise you and must not act as the adjudicator unless all of the parties to the adjudication agree.

A person who agrees to act as an adjudicator must serve a notice of acceptance on all parties. The notice of acceptance must confirm that the adjudicator has no conflict of interest that he or she has not disclosed (if not, the notice is ineffective).

An agreement that was made before the dispute arose about the choice of an adjudicator, nominating body, or authorised nominating authority is not binding on you or any other party to the adjudication.

**What happens once an adjudicator is appointed?**

The claimant must serve an adjudication claim on you no later than 5 working days after receiving the adjudicator's notice of acceptance. The claim must set out the nature or grounds of the dispute and, to the extent that it is still relevant, be accompanied by a copy of the notice of adjudication.

**What should I do once I receive an adjudication claim?**

If you want to dispute the adjudication claim, it is essential that you respond promptly, setting out your side of the case.

You can serve a written response on the adjudicator. Your response can be accompanied by any other documents that you consider useful.

You can serve your response by delivering or posting it to the adjudicator at his or her last known place of residence or business in New Zealand or by fax. You may also serve your response by email if the adjudicator has agreed to receive the response electronically.

You have 5 working days in which to do this after receiving the adjudication claim or the adjudicator's notice of acceptance (whichever is later). You may also have any further time that you and the other parties to the adjudication agree to or that the adjudicator allows. (The adjudicator can only give you an extension if you ask within the 5-working-day period.)

If you do not serve a written response within that time, the adjudicator may draw inferences from that failure and may decide the dispute on the basis of the information that is available to him or her without the benefit of your response.

You must also serve a copy of the response and any accompanying documents on the claimant and any other party to the adjudication either before or immediately after they are served on the adjudicator.

You can serve a copy of your response by delivering or posting it to the claimant or other party to the adjudication at their last known place of residence or business in New Zealand or by fax. You may also serve your response by email if the recipient (ie, the claimant or other party) has agreed to receive the response electronically.

### **Can I be represented?**

Yes, all parties can be represented by legal (or other) representatives. However, the adjudicator may limit the number of representatives at any meeting so that the meeting can be conducted efficiently.

### **Can more than 1 dispute be dealt with at the same time?**

If 2 or more related adjudications are pending and all of the parties consent, it is possible for the adjudicator to determine all of the adjudication proceedings at the same time.

### **What are the rules about adjudication proceedings?**

Adjudicators are required to act independently, impartially, and in a timely manner. They must avoid incurring unnecessary expense and must comply with the principles of natural justice.

If an adjudicator becomes aware that he or she has a conflict of interest, the adjudicator must advise the parties to the adjudication and resign (unless all of the parties agree to the adjudicator acting anyway).

As long as an adjudicator complies with these requirements, he or she may conduct the adjudication in any manner he or she thinks fit.

For example, an adjudicator may—

- request additional (written) submissions from the parties to the adjudication:
- ask the parties to provide copies of any documents that the adjudicator might reasonably require:
- set deadlines for further submissions and comments by the parties:
- appoint expert advisers to report on specific issues (as long as the parties are notified before the appointments are made):
- call a meeting of the parties:
- carry out an inspection of any construction work, or any other thing to which the dispute relates:
- issue reasonable directions relating to the conduct of the adjudication:

- request that the parties do any other thing during the course of an adjudication that the adjudicator considers reasonably necessary to determine the adjudication.

**Are adjudicators and expert advisers otherwise responsible to me?**

Neither the adjudicator nor any expert adviser that the adjudicator appoints is under any liability to you for anything that they do or fail to do in their capacity as adjudicator or expert adviser (unless they act in bad faith).

**Are adjudications confidential?**

All information that is disclosed during an adjudication, for the purposes of the adjudication, is confidential (to the extent that it is not already public). Any statement, admission, or document made or created for the purposes of an adjudication is also confidential.

Neither the adjudicator nor any party to the dispute may disclose that information except—

- with the consent of the relevant party; or
- to the extent that disclosure is necessary to the adjudication or for the enforcement of the adjudicator's determination; or
- in statistical or summary form in a way in which no particular person can be reasonably identified; or
- where the information is to be used for statistical or research purposes (and will not be published in a way in which any particular person can reasonably be identified).

**How will the adjudicator make a decision?**

The adjudicator's determination must—

- be in writing; and
- be in the form prescribed in the Construction Contracts Regulations 2003; and
- contain the reasons for the decision (unless you and the other parties to the adjudication agree that reasons do not have to be given).

The adjudicator must give you a copy of the determination as soon as practicable after making it.

If the adjudicator decides that any party is liable to pay money, the adjudicator must also decide the amount payable, when it is payable, and whether any conditions must be met before it is payable.

**Who has to pay the costs of adjudication proceedings?**

In most cases, the parties to the adjudication must meet their own costs and expenses.

However, an adjudicator may decide that costs and expenses must be met by one of the parties to the adjudication if that party has caused those costs and expenses to be incurred unnecessarily.

**Note:** An agreement made by the parties before a dispute arose about how the costs and expenses in adjudication proceedings will be apportioned is not binding.

### **Who has to pay the adjudicator's fees and expenses?**

The adjudicator's fees and expenses must usually be met equally by the parties to the adjudication.

However, an adjudicator may decide that—

- one party must bear a greater share of the adjudicator's fees and expenses if that party behaved in a contemptuous or improper manner during the adjudication; or
- the claimant must bear a greater share of the adjudicator's fees and expenses because the claim was (substantially) without merit; or
- the respondent must bear a greater share of the adjudicator's fees and expenses because the respondent's written response was (substantially) without merit.

The adjudicator's fees and expenses are payable only if the adjudicator determines the dispute within the required time.

If an adjudication claim is withdrawn or terminated, or the dispute is resolved without adjudication, an adjudicator is still entitled to be paid fees and expenses incurred to date.

**Note:** An adjudicator may require you to pay his or her fees before communicating his or her decision.

Form 2A  
Notice of acceptance

r 5A

*Section 35A, Construction Contracts Act 2002*

Date of service:

**Acceptance of appointment as adjudicator**

I [*insert adjudicator's name*] accept appointment as adjudicator under section 35 of the Construction Contracts Act 2002 to determine a dispute between [*insert claimant's name*] and [*insert respondent's name*].

I confirm that I meet the eligibility criteria for adjudicators under section 34 of the Construction Contracts Act 2002.

**Contact details of adjudicator**

Organisation name (if applicable):

Address for service:

Telephone:

Email:

I was requested to act as adjudicator by—

\*agreement between the relevant parties under section 33(1)(a) or (b) of the Construction Contracts Act 2002.

\*[*insert name of nominating body*], a nominating body chosen by agreement between the relevant parties under section 33(1)(c) of the Construction Contracts Act 2002.

\*[*insert name of authorised nominating authority*], an authorised nominating authority chosen by the claimant under section 33(1)(d) of the Construction Contracts Act 2002, because the parties could not or did not agree on an adjudicator or a nominating body.

\*Select one.

**Next steps and time frames**

The time frames for the adjudication process have commenced. These include strict time frames for each party to give the adjudicator and the other party certain information.

*For the claimant*

You, [*insert claimant's name*], must **within 5 working days** of receiving this notice refer the dispute to the adjudicator by serving a written adjudication claim on the adjudicator. The adjudication claim—

- must set out the nature or the grounds of the dispute; and
- must be accompanied by a copy of the notice of adjudication (to the extent that it is still relevant); and

- may be accompanied by any other documents.

You must also serve a copy of the adjudication claim and any accompanying documents on every other party to the adjudication (either before or immediately after they are served on the adjudicator).

The adjudication claim can be served on the adjudicator and the other parties in the following ways:

- by delivering it to the recipient in person; or
- by leaving it at the recipient's usual or last known place of residence or business in New Zealand; or
- by posting it in a letter addressed to the recipient at the recipient's place of residence or business in New Zealand; or
- by fax; or
- with the consent of the recipient, by email or other means of electronic communication.

**Important: The 5-working-day period for providing the adjudication claim has already commenced. If you do not know how to write an adjudication claim, you should consult a lawyer immediately.**

If the respondent serves a written response to the adjudication claim on the adjudicator, you have 5 working days in which to serve the adjudicator with a written reply to that response.

A copy of the response and any accompanying documents must also be served on you and every other party to the adjudication either before or immediately after they are served on the adjudicator. A copy of the reply to a response and any accompanying documents must also be served on the respondent and every other party to the adjudication either before or immediately after they are served on the adjudicator.

**Note:** If your reply to a respondent's response raises any new material or issues, an adjudicator may refuse to consider the new material or issue.

#### *For the respondent*

You, [*insert respondent's name*], can serve a written response to the adjudication claim on the adjudicator within 5 working days after receiving the claim or the adjudicator's notice of acceptance (whichever is later).

The response may be accompanied by any other documents that you consider useful.

You must also serve a copy of the response and any accompanying documents on the claimant and every other party to the adjudication either before or immediately after these documents are served on the adjudicator.

The written response can be served on the adjudicator and the other parties in the following ways:

- by delivering it to the recipient in person; or

- by leaving it at the recipient's usual or last known place of residence or business in New Zealand; or
- by posting it in a letter addressed to the recipient at the recipient's place of residence or business in New Zealand; or
- by fax; or
- with the consent of the recipient, by email or other means of electronic communication.

**Important: If you do not know how to write a response to an adjudication claim, you should consult a lawyer immediately.**

**Note:** If you want to serve a written response but cannot meet the time frame of 5 working days, you can ask the adjudicator or the other parties to the adjudication for further time.

If a request for further time is made to the adjudicator before the end of the 5-working day period, the adjudicator must allow further time to serve a written response if the adjudicator considers it necessary, having regard to the size or complexity of the claim or because, in the adjudicator's opinion, the claim was served with undue haste and you have had insufficient time to prepare a response.

The adjudicator may also allow further time to serve a written response if the adjudicator considers further time is reasonably required for any reason.

The claimant may serve the adjudicator with a written reply to your response. If this happens, the adjudicator may allow you up to 2 working days to serve a rejoinder to the reply.

#### *Adjudicator's determination*

The adjudicator must make a decision within 20 working days after the end of the period during which the respondent can serve a written response.

The adjudicator can extend this time frame by up to 10 working days if the adjudicator thinks more time is reasonably required. The parties can also agree to extend the time limit for any period.

The adjudicator's decision is called a **determination**. The determination must be in writing and dated. The determination must contain the reasons for the decision, unless the parties agree in writing that reasons do not need to be given. The adjudicator must give a copy of the determination to all parties as soon as practicable after making it.

#### **Important procedural matters**

Prompt decisions are needed to ensure that certain procedural matters are dealt with within the time frame in which the adjudicator must make a determination.

#### *Representation*

All parties can be represented by legal or other representatives. However, the adjudicator may limit the number of representatives present at any meeting so that the meeting can be conducted efficiently.

*Multiple disputes*

If 2 or more adjudication proceedings are pending and all of the parties give their written consent, it is possible for the adjudicator to determine all of the adjudication proceedings at the same time.

*Confidentiality*

All information that is disclosed during an adjudication for the purposes of the adjudication is confidential (to the extent that it is not already public). Any statement, admission, or document that is created or made for the purposes of an adjudication is also confidential.

Neither the adjudicator nor any party to the dispute may disclose the information except—

- with the consent of the relevant party; or
- to the extent that the disclosure is necessary to the adjudication or for the enforcement of the adjudicator's determination; or
- in statistical or summary form where no particular person can be reasonably identified; or
- where the information is to be used for statistical or research purposes (and will not be published in a way in which any particular person can reasonably be identified).

*Costs and fees*

In most cases, the parties to the adjudication must meet their own costs and expenses.

However, the adjudicator can determine that costs and expenses must be met by one of the parties to the adjudication if that party has caused those costs and expenses to be unnecessarily incurred either by bad faith or by allegations or objections that are without substantial merit.

**Note:** Any agreement made before the dispute arose about how the costs and expenses in adjudication proceedings are to be apportioned is not binding.

The adjudicator is only entitled to be paid fees and expenses from the date of acceptance, subject to section 57(5) of the Act.

The adjudicator is entitled to be paid fees and expenses in connection with the adjudication only if he or she determines the dispute within the required time.

The adjudicator's fees and expenses must usually be met equally by the parties to the adjudication. However, the adjudicator may determine that—

- one party must bear a greater share of the adjudicator's fees and expenses if that party behaved in a contemptuous or improper manner during the adjudication; or
- the claimant must bear a greater share of the adjudicator's fees and expenses because the claim was (substantially) without merit; or

- the respondent must bear a greater share of the adjudicator's fees and expenses because the respondent's response was (substantially) without merit.

The adjudicator's fees and expenses will be calculated as follows:

*[Describe the method for calculating fees and expenses.]*

The adjudicator may require the parties to pay the adjudicator's fees and expenses before communicating his or her determination.

*Can other methods be used to resolve the dispute?*

Any party can submit the dispute to another dispute resolution procedure (such as to a court or tribunal or to mediation) at any time, as well as to adjudication. Another dispute resolution procedure can take place concurrently with the adjudication. However, if another dispute resolution procedure resolves the dispute before the adjudicator makes his or her determination, the adjudicator will have to terminate the adjudication proceedings.

Adjudication proceedings may also be withdrawn. The claimant can withdraw an adjudication claim by giving written notice to the adjudicator, unless—

- the respondent objects; and
- the adjudicator accepts that the respondent has a legitimate interest in obtaining a determination.

The parties to the adjudication can also agree to an adjudication claim being withdrawn.

Michael Webster,  
Clerk of the Executive Council.

### **Explanatory note**

*This note is not part of the regulations but is intended to indicate their general effect.*

These regulations, which come into force on 1 December 2015, amend the Construction Contracts Regulations 2003 to—

- make consequential changes as a result of the Construction Contracts Amendment Act 2015; and
- rewrite forms 1 and 2; and
- insert *new form 2A*.

*New form 1* sets out the information that must accompany a payment claim. *New form 2* contains information that must be set out in a notice of adjudication. *New form 2A* contains information that must be set out in an adjudicator's notice of acceptance.

Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*: 5 November 2015.

These regulations are administered by the Ministry of Business, Innovation, and Employment.