

# Top 10 Tips

## For Adjudication

Please note that this guidance is designed to give general guidance on best practice; it is not intended to provide legal advice. NSCC and the organisations responsible for its content do not accept any liability arising in any way from relying on this guidance. If you require advice on a specific issue, you should seek your own independent legal advice; NSCC Specialist Contractors can contact the NSCC legal and contractual helpline provided by Wedlake Bell on 020 7395 3000.

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# What is Adjudication?

**Adjudication** is a quick and usually relatively inexpensive way of resolving **disputes** arising in the construction industry, whereby an impartial third party **adjudicator** decides the issues referred to him by the parties. The adjudicator's **Decision** is binding and enforceable unless and until it is overturned by a higher authority such as an arbitrator or the courts. Adjudication is a 28-day process unless the parties agree to extend this period. Due to its tight timescales, it can be slightly 'rough and ready'; however, it is quite straightforward and, if used properly, can be an effective method of securing your entitlements.

Under the Housing Grants, Construction and Regeneration Act 1996 (**Construction Act**), you have the right to refer to adjudication a dispute arising under a **construction contract** at any time. However, you should always consider the financial position of the other party before committing any resources to adjudication. If the other party becomes insolvent, you will still not get paid (even if the adjudicator decides in your favour) and you will be liable for the adjudicator's fees as well as any costs of your own.

This guidance is designed to help you conduct your own adjudications on simple disputes without the need for legal representation; it may also help save you time and money in the event of more complex disputes. As adjudication is a legal process with some precise terminology, there is a glossary on page 14 to reduce the risk of you being caught out on a technicality. If you have a complex or high value dispute, it is recommended that you seek legal advice prior to embarking on adjudication.

**For advice on adjudication, NSCC Specialist Contractors can contact the NSCC legal and contractual helpline provided by Wedlake Bell on 020 7395 3000.**

**Wedlake Bell**



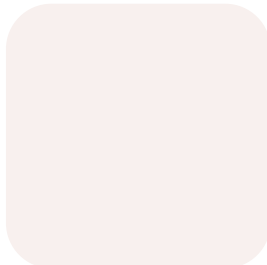


# 1

## Ensure you have a dispute

In order to refer a matter to adjudication, you have to actually be in dispute with the other party. In other words, you must be able to show that the issues have been raised with the other party *before* the adjudication and each of you has taken a position on them. If there is no 'dispute', the adjudicator will have no **jurisdiction** to consider the matter.

- Make a genuine effort to resolve the dispute before referring it to adjudication by discussing and negotiating with the other party, keeping evidence of the exchanges.
- Write to the other party stating that, if you have not received a response to your claim within a reasonable time (specifying a date), you will consider that a dispute exists and refer the matter to adjudication. It is advisable to send the letter by registered post, so that the other party cannot deny having received it. No response or a rejection of your claim can be used to show that a dispute exists.

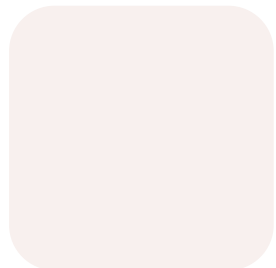


### 2

### Check you have a construction contract in writing

To be able to refer your dispute to adjudication, you must have a construction contract in writing as defined by the Construction Act. The definition of 'in writing', in particular, is quite wide and does not mean that the 'contract' has to be in a document entitled 'contract' nor signed by both parties. However, you must make sure that all the terms you have agreed are evidenced in writing; if there are any terms which have been agreed but not documented in some way, you will not have a contract 'in writing' and you will be unable to adjudicate under the Construction Act.

- Ensure you have evidence of a contract in writing in the form of one or more of the following:
  - ✓ a contract document
  - ✓ a written order
  - ✓ correspondence referring to the subject matter of the work
  - ✓ acceptance of your offer to do the work
  - ✓ a letter from you confirming that you are doing the work and on what basis.
- Check whether your contract is with a residential occupier – if your contract is for work on a dwelling which the other party intends to occupy as his residence, you will not be able to refer the dispute to adjudication unless the contract includes a contractually enforceable adjudication provision.
- Make sure you are not affected by any other exclusions defined in the Construction Act (at sections 104-105) – if you are unsure whether a dispute arising under your contract can be referred to adjudication, you are advised to take legal advice before proceeding further.





### 3

## Read and understand the adjudication provisions in your contract

Having established that you have the right to adjudicate, you need to study your contract to see whether it includes any adjudication provisions. All your contracts should provide for adjudication and a suggested clause is included on page 12 for your use. Whatever the clause(s), ensure that you follow the correct procedure – any procedural errors could mean that the adjudicator does not have jurisdiction to deal with your dispute.

- Check your contract to see whether a particular adjudicator or **Adjudicator Nominating Body (ANB)** has been named. Sometimes the adjudicator or ANB must be chosen from a list in the contract; in this case, there is usually a ‘default provision’, which names one of the adjudicators or ANBs in the list if none is specifically chosen by the parties. If an adjudicator or ANB has been named, even by default, make sure you approach that adjudicator or ANB.
- If no adjudicator or ANB is specified, you can approach any ANB of your choice. NSCC’s ANB is **AICA** – for information regarding a nomination from AICA, contact AICA on **0870 429 6353**.
- Ensure you follow the adjudication procedure carefully and look out for any unusual clauses (such as a limit on the number of pages permitted for the **Referral**). Failure to follow the correct procedure could result in the adjudicator’s Decision being challenged. If there are clauses which require the referring party to pay all the costs of the adjudication (including the adjudicator’s fee and expenses and the other party’s costs), or any award to be placed with a trustee or stakeholder, you should take legal advice before proceeding further.
- To comply with the Construction Act, your contract must contain certain adjudication provisions (as listed at section 108 of the Construction Act). If your contract does not contain all of these provisions, or doesn’t include any adjudication provisions at all, the Construction Act will impose a fallback procedure in the form of the **Scheme for Construction Contracts**. To view the Scheme adjudication procedure, visit [www.opsi.gov.uk/si/si1998/19980649.htm](http://www.opsi.gov.uk/si/si1998/19980649.htm).

### 4

**Make** sure you have adequate resources to deal with the dispute

Even simple disputes need proper care and attention if you are to be successful in adjudication. Good preparation and presentation of your case will assist the adjudicator in deciding the strength of your arguments, and you must make sure that you allocate enough staff time to put together your submissions. You will also need to be able to respond promptly to any requests for further information from the adjudicator.

- Appoint a single person to manage the adjudication.
- Ensure that everyone involved in the subject matter of the dispute is available to provide information and evidence, particularly in the 2 to 3 weeks following the issue of your Referral.
- If you decide to employ third party support, make sure it is used appropriately e.g. to give advice and support, provide any expert evidence or offer an objective view of documents prepared in-house. Keep your costs down by avoiding the use of consultants/lawyers for things that you can do yourself. You should also attempt to negotiate a fixed fee – it may be possible to agree a ‘contingency fee’ where the amount you pay to the third party is linked to the success of the adjudication.
- The period between issuing your Referral and receiving the adjudicator’s Decision can be quite intense – be prepared for some hard work!





## 5

### Prepare the Referral before issuing the Notice of Adjudication

**Your Referral should contain all the information that you wish the adjudicator to consider. Although it is common for the adjudicator to allow you to submit further information later on, he doesn't have to. Once the Notice of Adjudication has been issued, you only have 7 days until your Referral is due. It always takes longer to prepare your Referral than you think, so it is advisable to prepare it before you issue the Notice of Adjudication. This will ensure you do not leave any important issues out of the Notice of Adjudication or miss the deadline for submission of the Referral which would mean having to restart the whole process.**

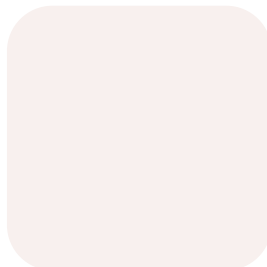
- Prepare your case clearly and concisely, stating what you want and why you are entitled to it – an adjudicator cannot make your case for you and, if it is unclear, you are far less likely to be successful.
- Include all the aspects of the dispute in the Referral; the adjudicator will know nothing about either the contract or your dispute, so the Referral should be a clear statement of your case.
- Remember you can only adjudicate in relation to one contract at a time but the dispute may involve several heads of claim or 'issues'.
- Identify each of the issues you want the adjudicator to decide together with the remedy sought in each instance. Keep it simple: list the issue(s) in dispute, set out the facts that prove you are right, and point to the evidence that supports those facts.
- Provide evidence to support your claims – adjudicators need evidence to make decisions. As the referring party, it will be up to you to prove your case, and, if you cannot produce evidence to do so, you will lose. Evidence can include anything that supports the facts that you are relying on to prove your entitlement such as records, correspondence, diary notes, photographs, and invoices. If you have no written evidence on an important issue, get a witness statement from someone who has first-hand knowledge of the event concerned.
- Don't include unrelated issues – at best, they will simply add unnecessarily to the adjudicator's costs and at worst they will confuse and deflect the adjudicator from the real issues. It is advisable, however, to consider the other party's position and rebut its defences before it offers them.
- Never get personal!

### 6

### Take care in preparing the Notice of Adjudication

The Notice of Adjudication defines the issues that the adjudicator will consider, so make sure it contains all the items covered in the Referral. If you omit an issue from the Notice of Adjudication, you will not be able to introduce it at a later stage in the adjudication. Remember, an adjudicator can allow you to provide further information to support the issues referred to him in the Notice of Adjudication, but he can't permit you to refer new issues.

- Keep the Notice of Adjudication simple, taking care to be precise as to the nature of the dispute (see template on page 13).
- Avoid limiting the adjudicator's jurisdiction by asking for a specific sum as a remedy – give the adjudicator the ability to decide an alternative sum if he does not agree with yours by including the words 'or such other sum as the adjudicator may decide'.
- Request that interest is awarded on outstanding sums under either the applicable contract provision or the Late Payment of Commercial Debts (Interest) Act 1998.
- Ask the adjudicator to award his own costs between the parties in whatever proportion he sees fit (some adjudicators simply adopt a 50:50 approach). The adjudicator has no power under the Construction Act to award parties' costs – it can only be given by a specific contract term or agreement of the parties.
- Make sure the Notice of Adjudication arrives at its destination. Unless your contract says otherwise, it is advisable to send the Notice of Adjudication by registered post to the address for service. The 'address for service' should be in your contract; however, if there is any doubt, send it to the registered office as well as the working office address for communications.



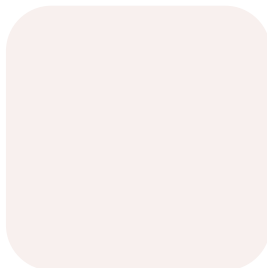


# 7

**Provide** the ANB with as much information as possible

**In order to ensure that the ANB nominates an appropriate adjudicator for your dispute, you need to provide the ANB with as much relevant information as possible.**

- Complete the ANB application form carefully, ensuring that you have the correct names of the parties and have provided telephone and fax numbers for both of the parties and their representatives.
- Give information about the nature of the dispute and provide details of any experience or qualifications required of an adjudicator.
- Consider the type of adjudicator that would be appropriate for your dispute e.g. QS, Architect, Solicitor etc.
- List any adjudicators who should not be nominated and the reason(s) why e.g. those who have a conflict of interest or those with a high fee rate relative to the value of the dispute.





### 8

## Anticipate the other party's reaction

On receiving your Notice of Adjudication, the other party may react in a number of ways. However, you must make sure that you do not allow the adjudication timetable to slip and you still submit your Referral within the required time even if you decide to enter into negotiation.

#### Request for negotiation

- ✓ Be prepared to listen but do not allow yourself to be bullied into a settlement.
- ✓ Insist on a meeting at your office not theirs!
- ✓ Ensure beforehand that their representative has authority to settle.
- ✓ Do not agree to anything unless it is in writing.
- ✓ If you agree a settlement, insist on a banker's draft delivered by courier.
- ✓ Do not dismiss the adjudicator until an agreement has been reached.

**Challenge(s) to the adjudicator's jurisdiction** – Below are a number of issues that the other party may raise once the adjudication starts. If you are on the receiving end of a Notice of Adjudication, you can consider raising these issues yourself. Make sure you raise them as early as possible because, if the adjudicator proceeds despite your challenge, they will be relevant should you wish to contest his decision at **enforcement**.

- No dispute – you have not raised the issues with the other party before referring them to adjudication.
- Contract not in writing – you have failed to document all the agreed terms in writing and therefore the Construction Act does not apply.
- Not appointed properly – you have not followed the correct adjudication procedure as set out in your contract or the Scheme (whichever applies).
- Threat of no more work** – If you have been forced to go to adjudication to get what you are entitled to, you have to ask yourself whether you actually want to work for these people again anyway! However, whether you decide to proceed in this situation is a decision that only you can make.
- No reaction at all** – Sometimes the other party will do absolutely nothing. If this happens, the adjudicator must make his Decision based on your evidence alone. However, you should encourage the adjudicator to make every effort to persuade the other party to participate as you will need to show that the adjudication was fair if you have to enforce the Decision in the courts.

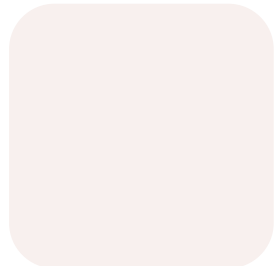


## 9

### Respond positively to the adjudicator's directions

Unless dictated by your contract, it is up to the adjudicator to decide the procedure to be followed and he will issue directions with which you and the other party will be required to comply. You are encouraged to respond promptly and accurately to these directions to avoid jeopardizing your case. If you do not and cannot provide a good reason for not doing so, the adjudicator can continue with the adjudication, draw such conclusions as may be justified and issue his Decision on the basis of the information before him.

- Ensure you comply with all dates and times for submissions.
- Allow the adjudicator to set the timetable – don't object to reasonable requests for extensions of time...you may need one later!
- Answer the adjudicator's question – not the one you would like to answer!
- Don't always seek the last word.
- Ask for reasons – they will help you understand the adjudicator's Decision if it is different to what you expected and may be useful in either reaching a final conclusion or determining a future course of action.





10

### Seek legal advice on enforcement

If the other party refuses to comply with the adjudicator's Decision which is in your favour, you can enforce the Decision by going to court and applying for 'summary judgment'.

- If you are considering going to court to enforce an adjudicator's Decision, you are strongly advised to seek legal advice. NSCC Specialist Contractors can obtain free advice and assistance from the NSCC legal and contractual helpline provided by Wedlake Bell on **020 7395 3000**.
- Adjudicators' Decisions are usually enforced by the courts.
- The enforcement process should not take more than 28 days and will involve a short hearing of up to half a day (depending on the number of issues raised).
- The costs of enforcement are relatively low but will depend on the issues raised by the other side. If you are successful, you should recover about 70% of your legal costs from the other side, provided they have the financial means to pay.

## Suggested Adjudication Clause

If at any time a dispute arises between the parties to this contract concerning any matter in connection with and arising from this contract, such dispute may be referred to adjudication for resolution provided that written notice of such intention shall first have been given by the referring party in accordance with the requirements of the Housing Grants, Construction & Regeneration Act 1996.

The nominating body will be the Association of Independent Construction Adjudicators (AICA) (Carthusian Court, 12 Carthusian Street, London, EC1M 6EZ, 0870 429 6353). The rules governing any adjudication arising out of this contract shall be those set down in the Scheme for Construction Contracts (England and Wales) Regulations 1998.

# Notice of Adjudication Template

To download the NSCC Notice of Adjudication template, go to the NSCC website at [www.nsc.org.uk](http://www.nsc.org.uk)

## NOTICE OF INTENT TO REFER TO ADJUDICATION

between

<<Insert your company name in full as it appears in the contract giving rise to the dispute>> Referring party

and

<<Insert the name of the company you are in contract with as it appears in your contract>>  
 Note: Take care to name the correct entity; if you don't, you may have to restart the adjudication. Responding party

The applicant hereby gives notice of its intention to refer to adjudication the following dispute, arising under its contract with the responding party.

### a) Details of the contract

Set out the form and date of contract, which could be a reference to one document or a series of documents. If the date is not clear, state 'on or around dd/mm/yyyy'. Some ANBs will require a copy of the contract to be served with the Notice of Adjudication, so be prepared to enclose this.

### b) Brief description of the dispute

Keep it brief and to the point e.g.  
*The responding party has deducted monies from sums due to the referring party for alleged delays which the referring party denies.*  
 or  
*The responding party has failed to certify and pay the correct value for works carried out up to dd/mm/yyyy.*

### c) Details of where and when the dispute has arisen

Where – usually the site address.

When – the date when the dispute crystallizes e.g.

- the date that a certificate should have been issued and wasn't
- the date that a set off notice was given
- the date that a deadline for a response passed.

Note: It is usually best to say the dispute arose "on or around" to avoid the risk of losing out on a technicality.

Illustrate that a dispute has actually arisen by referring to any relevant correspondence.

### d) The remedy sought

State clearly and concisely what you want the adjudicator to decide – usually an amount of money, but it might be a length of time or a declaration of principle.

If you ask for money:

- remember to state whether the sum is inclusive or exclusive of VAT
- give the adjudicator the power to decide his own amount e.g.  
*The adjudicator is asked to decide that the value of the variations is £x or such other sum as the adjudicator may decide.*
- Request interest on the outstanding sum – you don't have to calculate the amount, the adjudicator will do that.

Ask the adjudicator to award his costs.

### e) The names and addresses of the parties

#### Referring Party

<<Insert the address to which you want correspondence sent. >>

#### Responding Party

Check your contract for clauses stating to which address notices are to be served. If there is an address for service, make sure you use this; if not, use the address in the contract or the last known address. If the responding party is a company, copy your notice to the company secretary at the registered office.

Date: <<Insert date on which issued to the other party>>

# Glossary

**Adjudication** – A statutory procedure for resolving disputes between parties to a construction contract evidenced in writing where a Decision is made by an independent adjudicator usually within 28 days (but see ‘Decision’).

**Adjudicator** – An independent person with appropriate experience who decides the matter referred to him, often on paper and without a hearing.

**Adjudicator Nominating Body (ANB)** – An organisation (often named in the contract) that appoints an adjudicator when asked to do so by one of the parties.

**AICA** – AICA is an Adjudicator Nominating Body, which acts for NSCC for the purpose of nominating adjudicators; for further information, call 0870 429 6353 or visit [www.aica-adjudication.co.uk](http://www.aica-adjudication.co.uk).

**Construction Act** – An abbreviation of the Housing Grants, Construction and Regeneration Act 1996. Part II introduced statutory adjudication giving parties to a construction contract (as defined in the Construction Act) a right to refer disputes to adjudication. The legislation became effective on 1 May 1998.

**Construction contract** – Defined in sections 104-105 of the Construction Act and required for a party to be able to refer a dispute to adjudication. A ‘construction contract’ as defined by the Construction Act has to involve directly or indirectly the carrying out of ‘construction operations’ or the supply of labour for the carrying out of construction operations. The contract must not fall into any of the categories which are excluded by the Construction Act e.g. manufacture or delivery to site of equipment, materials, plant or machinery (unless they are also to be installed); landscape gardening; or residential occupiers.

**Decision** – A ‘judgement’ given by the adjudicator after consideration of the facts and within 28 days of a dispute being referred to him. The 28-day period can be extended to 42 days with the agreement of the referring party and further extended by agreement of both parties. A Decision is binding unless and until the dispute is finally determined by legal proceedings, arbitration or agreement between the parties.

**Dispute** – Can only exist where a matter has been raised with the other party and no agreement was reached – there is no ‘dispute’ if the first time the other party hears of the matter is when it is referred to adjudication.

**Enforcement/Summary Judgment** – A court procedure by which the successful party in an adjudication seeks to enforce the adjudicator’s Decision when the other party has refused to comply with it. Under ‘summary judgment’, the courts are requested to change the Decision into a Court Order. Enforcement takes approximately 28 days and involves a short hearing of up to a half a day (depending on the number of issues raised).

**Jurisdiction** – The adjudicator’s authority to deal with the dispute which is governed by the Construction Act, the Notice of Adjudication, applicable contract terms and any adjudication rules that apply. The adjudicator’s jurisdiction is limited to the issues raised in the Notice of Adjudication. However, the parties can agree between themselves to give the adjudicator greater jurisdiction if they so wish.

**Notice of Adjudication** – A notice informing the other party that a dispute is to be referred to adjudication, which includes brief details of the contract, the dispute and the remedy sought (see template on page 13).

**NSCC** – NSCC is an umbrella organisation, which brings together specialist trade organisations within the construction industry representing over 7,000 Specialist Contractors.

**Referral** – A document setting out the claim in detail, which must be served within 7 days of the Notice of Adjudication unless the contract says otherwise.

**Scheme for Construction Contracts** – A fallback adjudication procedure, which applies if the contract does not include all the adjudication provisions specified in the Construction Act at section 108; it can be found at [www.opsi.gov.uk/si/si1998/19980649.htm](http://www.opsi.gov.uk/si/si1998/19980649.htm).



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