THE CONSTRUCTION PAYMENTS ADJUDICATION BILL, 2025

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THE CONSTRUCTION PAYMENTS ADJUDICATION BILL, 2024

A Bill for

AN ACT of Parliament to provide a mechanism for dispute resolution through adjudication in the construction industry, to facilitate the recovery of payment and other remedies for disputes in the construction industry; and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

PART I—PRELIMINARY

Short title.

1. This Act may be cited as the Construction Payments Adjudication Act, 2024.

Interpretation.

2. In this Act unless the context otherwise requires—

"adjudicator" means an individual appointed by the Construction adjudication body to adjudicate a reference under this Act;

"adjudication certificate" means a certificate issued by an adjudicator under section 15(1);

"adjudication decision" means the decision made by an adjudicator under section 14;

"Adjudicator's expenses" means money paid to the adjudicator for costs incurred in the course performing the functions of an adjudication;

"Adjudicator's fees" means fees paid to the Adjudicator for services rendered.

"adjudication agreement" means an agreement by the parties to refer to adjudication, payment disputes which have arisen or which may arise between them in respect of a construction contract;

"construction adjudication body" means a legal person accredited as such under section 26;

"construction contract" means an agreement to—

(a) carry out construction works;

(b) procure the services of another person to carry out construction works, whether or not through a sub-contract;

(c) provide labour, or procure labour from another person, to carry out of construction works;

(d) procure construction materials or equipment required for construction works;

(e) prepare the architectural design to conduct a survey;

(f) advise on building, engineering, interior decoration, exterior decoration or laying out of landscape, in relation to construction operations;

"construction works" means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of—

(a) a building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;

(b) a road, harbour works, railway, cableway, canal, or aerodrome;

(c) a drainage, irrigation, or river control works;

(d) an electrical, mechanical, water, gas, oil, petrochemical, or telecommunication work;

(e) a bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel, or reclamation work; and

(f) works which form an integral part of, are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping;

"Council" means the National Dispute Resolution Council established under section 5 of the Dispute Resolution Act;

"payment claim" means a claim issued under section 5(1);

"payment schedule" means a schedule submitted under section 5(4);

"principal" means the party to a construction contract who is liable to pay another party to a construction contract whether or not the other party is liable to pay a further person in a chain of construction contracts;

"responding party" means the person on whom a notice of adjudication or adjudication claim has been served; and

"site" means the location where construction works is undertaken.

Application of the Act.

3. (1) This Act applies to a construction contract whether or not the construction works are carried out wholly or partly within Kenya.

(2) Despite sub section (1), this Act shall not apply to a construction contract whose terms provide for a procedure other than adjudication for payment disputes, or adjudication of payment disputes otherwise than provided under this Act.

(3) Where a construction contract does not fall within the scope of this Act by dint of subsection (2), the parties to the construction contract may by consent elect to have the payment dispute adjudicated under this Act.

PART II— AGREEMENT TO ADJUDICATE AND THE ADJUDICATION PROCESS

Agreement to adjudicate.

4. (1) A construction contract shall contain an agreement to adjudicate payment disputes arising under that contract.

(2) An agreement to adjudicate under sub section (1) shall be in writing.

(3) An agreement to adjudicate shall be deemed to be in writing if—

(a) the contract is signed by the parties; or

(b) there is an exchange of letters, telex, telegram, facsimile, electronic mail, or other means of telecommunications between the parties in relation to the construction works being undertaken under the contract.

(4) An agreement to adjudicate shall nominate an adjudication body or provide for a procedure for appointment of an adjudicator.

Payment claim and payment schedule.

5. (1) A party to the construction contract shall issue a payment claim to the other party to the construction contract in respect of the construction works undertaken by the initial party that have become due and payable.

(2) The payment claim under sub section (1) shall be issued in accordance with the terms of the construction contract but not later than thirty days from the date the claim arises, becomes due and payable or from the date of completion of the construction works.

(3) The payment claim referred to in sub section (1) shall state the amount claimed and shall be accompanied by supporting documents.

(4) Upon receipt of the payment claim issued under sub section (1), the other party to the construction contract shall respond by providing a payment schedule or a schedule to pay less, within twenty-one days from the date of receipt of the payment claim.

(5) The schedule to pay less referred to in subsection (4) shall specify the amount payable, if different from the amount stated in the payment claim and the reasons for the difference.

Consideration of the payment schedule.

6. (1) Upon receipt of the schedule to pay less, the initial party shall—

(a) accept in whole the amount in schedule to pay less;
(b) accept in part the amount in the schedule to pay less; or
(c) reject the amount in the schedule to pay less.

(2) Where the initial party accepts in part the amount in the schedule to pay less or rejects the amount in the schedule to pay less in accordance with

section 6 (1)(b) and 6(1) (c) respectively, the initial party shall issue a notice of reference for adjudication for the amount in dispute to the other party and the adjudication body within seven days from the date of receipt of the schedule to pay less.

Failure to issue a payment schedule.

7. Where the other party fails to respond to the payment claim in accordance with section 5(4), the initial party shall issue a notice of reference for adjudication as though the schedule to pay less had been issued by the other party.

Application for adjudication.

8. (1) A referring party shall make a reference to the construction adjudication body, for adjudication of a payment dispute.

(2) A reference made under subsection (1) shall—

(a) provide the particulars of the parties to the construction contract;

(b) identify the payment claim and any payment schedule to which it relates; and

(c) be accompanied by the—

(i) fees specified by the adjudication body;
(ii) a brief description of the dispute;

(iii) the remedy sought;

(iv) a copy of the construction contract;

(v) notice to refer for adjudication; and

(vi) such other supporting documents relevant to the dispute.

(3) Upon receipt of the reference under subsection (2), the construction adjudication body shall appoint an adjudicator within seven days and notify the parties of the appointment.

Substituion of adjudicator

9. An adjudicator appointed under section 8(3) may be substituted where the adjudicator—

(a) dies;

(b) Is incapacitated by physical or mental illness;

(c) withdraws in writing to the construction adjudication body;

(d) Is removed on account of conflict of interest.

Service of the reference.

10. The referring party shall serve the reference under section 8(2) upon the responding party and the adjudicator within seven days from the date of receipt of the notice of appointment of an adjudicator.

Adjudication response.

11. (1) A responding party shall submit a response to the reference to the referring party and the adjudicator within seven days from the date of receipt of the reference.

(2) The response to the adjudication application under subsection (1) shall—

(a) be in writing;

(b) be accompanied by relevant supporting documents.

Adjudication procedure.

12. (1) An adjudicator shall not determine a reference unless the response has been made or the period for response specified under section 10 has lapsed.

(2) An adjudicator shall determine a reference within fourteen days after—

(a) the date when the adjudicator receives the response to the reference; or

(b) the date when a responding party should have submitted a response to the reference in accordance with section 10(1).

(3) The adjudicator may with the agreement of the parties extend the time to determine the reference.

(4) Where the time to determine the reference is extended under subsection (3), the adjudicator shall determine the reference within the time agreed by the parties.

(5) When determining a reference, the adjudicator may require—

(a) additional written submissions from the parties;

(b) to hold a conference of the parties;

(c) to hear a party or any person relevant to the dispute; or

(d) an inspection of any matter related to the claim.

(6) Where a party submits a further written submission pursuant to sub section (6)(a), the adjudicator shall allow the other party to comment on the submission.

(7) The determination of a reference shall not be affected by the failure of a party to—

(a) make submissions within the specified time;

(b) comment on submissions within the specified time; or

(c) appear for a conference of the parties.

Adjudication of disputes from the same construction contract

13. An adjudicator may, with the consent of all the parties to an adjudication application, determine more than one dispute arising under the same construction contract.

Evidence Act Cap. 80.

14. The Evidence Act shall not apply to the determination of a reference under this Act.

Adjudication decision.

15. (1) In deciding a reference, the adjudicator shall consider—

(a) the construction contract to which the reference relates;

(b) the payment claim to which the reference relates, together with any submission and document submitted by the parties;

(c) grounds for the reference;

(d) payment schedule to which the reference relates, together with any submission and document submitted by the parties; and

(e) any other matter under the construction contract which the adjudicator considers necessarily connected to the reference.

(2) Upon the determination of a reference, the adjudicator shall make an adjudication decision specifying —

(a) the amount to be paid;

(b) the currency in which the amount is payable;

(c) the rate and type of interest, if any, payable on the amount; and

(d) the day on which the amount became or becomes payable.

(3) Unless otherwise agreed with the parties, an adjudicator shall deliver an adjudication decision in the presence of the parties to the reference.

Adjudication certificate.

16. (1) The adjudication decision made under section 14, shall be accompanied by an adjudication certificate.

(2) An adjudication certificate shall state—

(a) the name of the referring party;

(b) the name of the responding party;

(c) the amount to be paid;

(d) the date when amount payable became due or is due;

(e) where part of amount payable has been paid, the outstanding to be paid;

(f) the party required to pay the amount adjudicated; and

(g) any other remedy granted in the adjudication decision.

Correction of a decision of an adjudicator.

17. (1) Where a computation error, clerical or typographical error or any other errors of a similar nature is apparent on the adjudication decision the adjudicator may, on the adjudicator's own motion or on the application in writing of a party to the reference correct the error.

(2) Where the correction of an error under sub section (1) is on the motion of the adjudicator, the correction shall be made within seven days of the delivery of the adjudication decision.

(3) Where a party to a reference applies for the correction of an error in accordance with sub section (1), the application shall be made within five days of the delivery of the adjudication decision.

(4) An adjudicator shall determine an application made under subsection (3) within five days after the application is filed.

(5) Upon correction of the error under this section, the adjudicator shall deliver a copy of the corrected adjudication decision to each of the parties to the reference within three days of determination of the application under sub section (4).

(6) A correction of an error by the adjudicator shall form part of the adjudication decision.

Payment of adjudicated amount.

18. (1) Where an adjudication decision requires the payment of an amount, the party required to pay the amount shall pay the amount specified within seven days of delivery of the adjudication decision.

(2) Despite subsection (1) where the adjudication decision specifies the date of payment of an amount, the party required to pay the amount shall make the payment within the date specified in the adjudication decision.

(3) Where an adjudicator makes a correction of the adjudication decision pursuant to section 16, the party required to pay an amount, shall make the payment within seven days from the date of delivery of the corrected adjudication decision.

Enforcement of adjudication certificate.

19. An adjudication certificate issued under section 15 may be enforced as a judgement for a debt of the High Court.

Application for enforcement

20. (1) Where a party issued with an adjudication certificate fails to pay the whole or any part of the amount payable in the adjudication certificate within the time specified in the adjudication certificate, the party required to be paid shall make an application for enforcement to the High Court.

(2) An application for enforcement shall be accompanied by—

(a) a certified copy of the adjudication decision; and

(b) a certified copy of the adjudication certificate.

Enforcement proceedings

21. An application for enforcement under section 19 shall be supported by an affidavit by the party making the application stating the whole or a part of the amount in the adjudication certificate that is due at the time the application for enforcement is made.

Application for setting aside.

22. (1) A party aggrieved by the adjudication decision under this part shall within seven days from the date of delivery of the adjudication decision or corrected adjudication decision, make an application to the High Court to set aside the adjudication decision.

(2) An application under subsection (1) shall be on the grounds that —

(a) the adjudicator did not comply with this Act in making the adjudication decision;

(b) the making of the adjudication decision was induced or affected by fraud or corruption; or

(c) the adjudicator has acted in excess of the jurisdiction of the adjudicator.

(3) A party who makes an application under this section shall pay into the High Court as security for costs the unpaid amount in the adjudication certificate..

Extent of court intervention

23. Except as provided in this Act, no court shall intervene in matters governed by this Act.

Decisions of the High Court.

24. A decision of the High Court under this Act shall be final and not be subject to appeal.

PART III—ADJUDICATORS

Appointment of an adjudicator

25. A person may be appointed as an adjudicator if that person is registered as an adjudicator by a construction adjudication body accredited by the Council.

Impartiality and independence of adjudicator.

26. (1) An adjudicator shall—

(a) be impartial and independent of the parties to the adjudication application;

(b) declare any conflict of interest that arises in the determination of an application under this Act;

Construction Adjudication body.

27. (1) The Council may accredit a legal person to perform the services of a construction adjudication body.

(2) The Council shall establish the criteria for a legal person to qualify for accreditation as a construction adjudication body.

(3) A legal person shall not act as a construction adjudication body under this Act unless that legal person is accredited by the Council.

Report by a construction adjudication body.

28. (1) A construction adjudication body shall submit a report to the Council on request.

(2) A report referred to in subsection (1) shall specify—

(a) the activities of the construction adjudication body under this Act;

(b) costs and expenses charged by the construction adjudication body for any service provided in relation to an adjudication application; and

(c) any other information determined, in writing, by the Council.

Adjudicator's fees

29. An adjudicator shall be remunerated—

(a) the adjudicator fees in the manner provided by the construction adjudication body;

(b) such fees as may be agreed in writing by the parties; or

(c) a reasonable amount having regard to the work done and expenses incurred by the adjudicator, where an amount of costs and expenses is not agreed by the parties to the adjudication application

Adjudicator's expenses

30. An adjudicator shall be reimbursed by the parties to the reference, a reasonable amount having regard to the expenses incurred—

(a) in connection with administrative and support services;

(b) travel outside their usual place of business for purposes of the adjudication; and

(c) any other expenses incurred in connection with the adjudication.

Dispute on the fees and expenses.

31. Where there is a dispute as to the amount of fees or expenses payable to the adjudicator, the amount payable shall be determined by the construction adjudication body.

Joint responsibility for fees and expenses

32. (1) A referring party and a responding party shall be jointly and severally liable to pay an adjudicator's remuneration and expenses—

(a) in equal proportions; or

(b) where the adjudicator determines different proportions, the proportion so determined.

(2) Where a party is aggrieved by the determination of the adjudicator under sub section (1)(b), the aggrieved party may apply to the adjudication body for a review of the proportion and a determination of apportionment for payment.

(3) The decision of the adjudication body under subsection (2) shall be final and not subject to review or appeal.

Right of lien.

33. An adjudicator may withhold the delivery of an adjudication decision to the parties until full payment of the remuneration and expenses of the adjudicator is made by the parties.

Termination of adjudication.

34. (1) An adjudication reference is terminated when—

(a) the adjudication decision is delivered;

(b) parties consent to withdraw the reference; or

(c) parties consent to settle the payment claim.

(2) Despite subsection (1), sections 28,29,30 and 31 shall apply to this section in respect of the fees and expenses accrued as at the date of termination.

PART IV—MISCELLANEOUS PROVISIONS

Protection from liability.

35. An adjudicator or construction adjudication body shall not be liable as a result of any action or omission done or made in good faith and without negligence in the performance of any duty or power conferred by this Act

Conflict of interest.

36. (1) An adjudicator shall declare any conflict of interest in respect to the parties or the subject matter of the reference.

(2) An adjudicator shall not act in a reference if the adjudicator has a conflict of interest that may affect or be perceived by the parties to affect the independence or impartiality of the adjudicator, unless the parties are notified in writing of the conflict of interest, and they consent in writing to the appointment or continuation of that adjudicator in the reference.

Code of practice.

37. The Council shall, having due regard to the matters specified in this Act—

(a) prepare and publish a code of practice to set standards for the conduct of adjudicators exercising a function under this Act; and

(b) approve a code of practice prepared by a construction adjudication body for the conduct of adjudicators, party representatives and third parties undertaking adjudication in accordance with the rules of the respective adjudication body.

Power to make delegated legislation.

38.(1) The Attorney-General may make regulations generally for giving effect to this Act, and for prescribing anything required or necessary to be prescribed by or under this Act.

(2) Without prejudice to the generality of subsection (1), regulations made under that subsection may provide for—

(a) fees; and

(b) any other matter necessary for the proper administration of the Act.

MEMORANDUM OF OBJECTS AND REASONS

The principal object of this Bill is to provide a mechanism for dispute resolution through adjudication in the construction industry, to facilitate the recovery of payment and other remedies for disputes in the construction industry.

PART I (CLAUSES 1-3) of the Bill provides for the preliminary provisions.

PART II (CLAUSES 4-23) of the Bill seeks to provide for the agreement to adjudicate and the adjudication process. Clauses 4 and 5 of the Bill provide for an agreement to adjudicate and payment claim and payment schedule respectively. Clause 6 provides for consideration of the payment schedule while clause 7 provides for failure to issue a payment schedule. Clauses 8, 9 and 10 propose to streamline the adjudication process by setting out the application for adjudication, service of a reference, and adjudication response. Clause 11 further provides for adjudication procedure. Clause 12 provides for ssubstitution of adjudicator while clause 13 specifies that the Evidence Act shall not apply to the determination of matters under the Act. Clauses 14, 15 and 16 provide for adjudication decision, adjudication certificate and correction of a decision of an adjudicator, respectively. Clauses 17,18,19, 20,21, 22 and 23 provide for payment of adjudicated amount, enforcement of adjudication certificate and application for enforcement, enforcement proceedings, application for setting aside, extent of court intervention and decisions of the High Court.

PART III (CLAUSES 24-33) of the Bill seeks to provide for adjudicators. Clause 24 of the Bill seeks to provide for appointment of adjudicators and Clause 25 for impartiality and independence of adjudicators. Clause 26 of the Bill proposes for construction adjudication body. Clause 27 seeks to provide for reporting by a construction adjudication body while Clause 28 and 29 provides for adjudication fees and expenses to be paid to the adjudicator. Clause 30 provides for dispute on fees and expenses while clause 31 provides for joint responsibility for fees and expenses. Clauses 32 and 33 provide for the right of lien and termination of adjudication.

PART IV (CLAUSES 34-37) of the Bill seeks to provide for miscellaneous provisions. Clause 34 provides for protection from liability while clause 35 provides for conflict of interest. Clause 36 provides for the establishment of a code of practice by the Council, respectively, while Clause 37 gives the Attorney-General the power to make Regulations for the effective implementation of the Act.

Dated the……..2024.

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Attorney-General.