

# **Construction Industry Security of Payment Ordinance**

## **Practice Note on Writing Determination**

### **1. Scope of Application and Interpretation**

- 1.1 This Practice Note applies to all adjudications under the Construction Industry Security of Payment Ordinance, Cap. 652 (the “**Ordinance**”) and the [ANB] Adjudication Rules (the “**Rules**”).
- 1.2 This Practice Note is intended to supplement the Rules. Where there is a conflict between the provisions of the Rules and this Practice Note, the Rules will prevail.
- 1.3 The [ANB] may interpret the terms as well as the scope of application of this Practice Note as it considers appropriate.

### **2. General**

- 2.1 The adjudicator must ensure that the Determination includes a cover page indicating the case reference number, date of the Determination and the names of the parties. There must also be a clear indication on the cover page that the Determination is made pursuant to Section 42 of the Ordinance.
- 2.2 The pages and paragraphs of the Determination must be numbered in running sequence, and the font size, margins and spacing must be harmonized across the Determination.
- 2.3 Pursuant to Section 42(1) of the Ordinance, the adjudicator must determine (i) the payment dispute; and (ii) the proportion and the amount of the costs of the adjudication proceedings payable by each party.
- 2.4 Pursuant to Section 42(3) of the Ordinance, if the adjudicator determines that a party is entitled to an extension of time for completing the construction work or the supply of related goods and services, the adjudicator must also determine (i) the number of days that the time for completing the construction work or the supply for related goods and services under the contract is to be extended; (ii) the amount payable based on the extension of time.
- 2.5 The adjudicator’s decision should be his/her own decision. Under no circumstances should the drafting of the Determination be delegated to another person.

### **3. Information to be contained in the Determination**

- 3.1 The following sections should be included in the Determination:
  - (i) Reference to and a general description of the underlying construction contract.
  - (ii) Description of the parties to the adjudication.
  - (iii) Procedural background including but not limited to:

- (a) The date(s) of service of the notice of adjudication on the Respondent and the [ANB];
  - (b) The date of the appointment of the adjudicator and the identity of the adjudicator; and
  - (c) Details of any jurisdictional issues.
- (iv) Background of the dispute and the parties' case:
- (a) How the payment dispute arose;
  - (b) Summary of the parties' contentions and claims;
  - (c) List of issues to be decided; and
  - (d) Summary of submissions and evidence received from the parties.
- (v) A dispositive section, which should include the following:
- (a) There must be a specific statement in the Determination stipulating who the paying party is and the amount to be paid (and interest if any); and
  - (b) There must be a determination of liability to the extent it is necessary for the adjudicator to determine the payment dispute.
- (vi) The Determination must be signed by the adjudicator.
- (vii) The Determination must contain the date on which the Determination is made.
- (viii) The Determination must set out the date on which the adjudicated amount must be paid in accordance with Section 43 of the Ordinance.
- (ix) The proportion and the amount of the costs of the adjudication proceedings payable by each party.
- (x) Where the parties' deposits in the [ANB] are insufficient to cover the costs of the adjudication proceedings, a remark that the adjudicated amount stated in the Determination shall be adjusted automatically if a party subsequently pays any costs of the adjudication proceedings on behalf of the other party after the adjudicator's service of the Determination on the [ANB] and before ANB's service of the Determination on the parties.
- 3.2 When determining the amount of interest payable by a party as noted in paragraph 3.1(v), the adjudicator should specify interest accrued up to and including the date of determination and post determination interest.
- 3.3 When determining the proportion and amount of the costs of the adjudication proceedings payable by each party as noted in paragraph 3.1(ix) above, the adjudicator may refer to Section 55 of the Ordinance which specifies consideration of the following matters:
- (i) The relative success of the party in the proceedings;
  - (ii) Whether the party initiated or participated in the proceedings –
    - a. For an improper purpose;
    - b. Vexatiously or frivolously; or

- c. Without a reasonable prospect of success;
  - (iii) Whether the party has acted unreasonably leading up to the proceedings;
  - (iv) Whether the party has acted unreasonably in the conduct of the proceedings;
  - (v) If the party is the respondent – the reasons given by the party for not making the progress payment that is the subject of the adjudication notice;
  - (vi) Whether the proceedings are withdrawn by the claimant under Section 40(1) of the Ordinance; and
  - (vii) Any other matter the adjudicator considers relevant in making the Determination.
- 3.4 Further to paragraph 3.3 above, when determining the costs of the adjudication proceedings payable by each party, the adjudicator is required to take into account the costs of the adjudication proceedings already paid by the parties by way of deposits to the [ANB].
- 3.5 Pursuant to Section 53 of the Ordinance, an adjudicator has no jurisdiction to order payment for costs or expenses incurred by the other party (other than the costs of adjudication proceedings) as a result of or in relation to the adjudication proceedings.
- 3.6 The form of the Determination is up to the individual adjudicator as long as the above points are included in the Determination. The adjudicator shall ensure that he/she has determined the payment dispute, and other matters that are necessary to determine the payment dispute. The adjudicator shall take care to not deal with any matters that are outside the adjudicator's jurisdiction.

#### **4. Reasons**

- 4.1 Pursuant to Section 42(6) of the Ordinance, the Determination made by the adjudicator must be in writing and contain reasons for the Determination.
- 4.2 The adjudicator will need to identify the relevant / material facts of the case in the Determination. If the dispute relates to events on site, the adjudicator will need to, in the Determination, refer to the submissions of the parties and the relevant documents to indicate the source of such information.
- 4.3 If the adjudicator relies on any legal authority, reference should also be made to such legal authority in the Determination.
- 4.4 The reasons should be sufficient to show that the adjudicator has dealt with the relevant issues and explain the adjudicator's conclusion on those issues.
- 4.5 The reasons should be coherent for a reasonable reader to understand.
- 4.6 To the best of the adjudicator's ability, the reasons should be written in plain language and avoid the use of overly legal or technical terms.

## **5. Conveying the Determination**

- 5.1 The determination must be made by the adjudicator and served on the [ANB] within 55 days working days after the date on which the adjudicator is appointed unless agreed by the parties.
- 5.2 The adjudicator must not serve the Determination directly on the parties. In all cases, the adjudicator shall serve the Determination on the [ANB] that appointed the adjudicator.
- 5.3 As soon as reasonably practicable, and subject to Section 42(8) of the Ordinance, the [ANB] will serve the determination on each party.

## **6. Corrections to the Determination**

- 6.1 Pursuant to Section 45 of the Ordinance, an adjudicator may on its own initiative, or at the request of a party, correct any computational or typographical error or error of similar nature in the determination.
- 6.2 When requested to make any correction to the Determination by a party, the adjudicator must first consider whether the alleged error is genuine computational or typographic error or error of a similar nature. If not, the adjudicator should decline to make such correction.
- 6.3 When setting the payment deadline for an adjudicated amount in the Determination, the adjudicator must consider the time required for a party to make any requests for correction and for the adjudicator to make any corrections to the Determination as set out in the [ANB]'s adjudication rules.
- 6.4 The adjudicator shall not charge additional fees for making any corrections to the Determination.
- 6.5 Any corrections made under Section 45 of the Ordinance do not affect the validity of the Determination.