



INDEPENDENT NOMINATING AUTHORITY

FOR THE NOMINATION OF MEMBERS OF DISPUTE ADJUDICATION BOARDS IN THE
CONSTRUCTION INDUSTRY

Overview of the Procedures and Guidelines for the Nomination of Adjudicators

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FOREWORD

Construction disputes have in the past often been very disruptive, time consuming and expensive. It is thus positive to note that *adjudication* as a means of alternative dispute resolution has been introduced in most construction contracts in Namibia, and internationally.

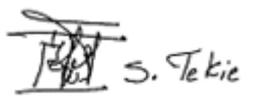
Increasing demand for adjudication – and the need to have a cheaper, more cost-effective dispute resolution procedure for SMEs, led the City of Windhoek, the Roads Authority as well as other larger employers in the industry to approach the Engineering Professions Association (EPA) with a proposal to establish and manage the National Adjudicators' List (NAL) to serve the whole construction industry in Namibia. The establishment of the NAL by the EPA was officially launched by the then Minister for Works, Transport and Communication, the Hon. Joel Kaapanda, on 27 November 2007, followed immediately by a workshop for Engineers and other Professionals to become familiar with the new tool.

It is well known that smaller construction firms and particularly SME contractors cannot afford the expensive and time-consuming dispute mechanisms used in the past. Adjudication will thus be of value especially on construction contracts designed for execution by SME contractors. In this way SME contractors can also have access to the significant knowledge base of NAL-registered adjudicators.

The EPA Council and NAL Committee embarked on a stake holder centred revision of the 1st Edition published in 2010. The 2nd Edition ensure that the relevant applicable procedures and guidelines as well as all supporting documents are relevant and current plus reflect on the past 10 years since the inception of establishing the NAL.

This compilation of the revised applicable procedures and guidelines as well as applicable documents for the nomination of adjudicators will be useful to all who are involved in construction contracts in Namibia, as it not only clarifies all aspects of the process, but also explains the other functions of the independent nominating authority, the NAL.

Lastly, I would like to thank all Stakeholders, NAL Committee and Adjudicators for the support and contributions to ensure that this remains a transparent an effective independent nominating authority.



Mrs. S. Tekie
PRESIDENT OF THE EPA

1 INTRODUCTION

1.1 What is Dispute Adjudication

Due to the complexity and size of construction contracts, it is not unusual that disputes arise between the parties. These disputes can be settled through litigation (a court procedure) or through alternative, often more efficient processes. There are several forms of alternative dispute resolution contained in modern construction contracts. One of these is dispute adjudication which is a process by which a party to a construction contract can refer a dispute arising out of the contract to an impartial third party for a decision. For this purpose, modern standard forms of contract such as the NEC or FIDIC, commonly used in Namibia, provide for a Dispute Adjudication Board (DAB) to be established for every construction contract. This usually happens at the time the parties enter into the contract. A DAB consists of one or three adjudicators, depending on project size and complexity, which must be agreed upon by both the Employer and the Contractor.

There are many benefits of adjudication when compared to other dispute resolution processes such as litigation or arbitration:

Cheaper: Practical experience suggests that adjudication costs about 10% of the amount that the same dispute would cost to litigate or arbitrate. Only mediation is comparable in cost.

Faster: Adjudication is usually somewhat faster than mediation, and much faster than litigation or arbitration. Whereas a relatively complex construction litigation or arbitration will take about 2 to 3 years, the adjudication of such a dispute, including preparation time before and enforcement afterwards, typically takes 2 to 3 months.

Fewer disputes: Adjudication leads to less disputation, and to a faster cash flow down the contractual chain. The speed and relative cheapness of adjudication soon dispel a climate where contractors up the contractual chain hold up the cash flow by spurious disputation.

Fewer insolvencies: Without a right to adjudication, many smaller contractors have become insolvent due to the burden of lengthy delays in receiving payment for their work and/ or legal costs.

Merits decide: In traditional litigation or arbitration, it is not uncommon for a case to be decided on legal technicalities regardless of the merits in the underlying dispute. In adjudication, a decision is typically given only on the dispute itself.

1.2 Adjudicator Nominating Authority

There are various ways in which adjudicators can be selected for the purposes of establishing a DAB, the most efficient remains the use of an independent Nominating Authority. This involves an uncomplicated process of the parties requesting an independent body to nominate an impartial, well qualified and experienced adjudicator. This is done with no interference of the parties and leads to a nomination within a few days.

1.3 The National Adjudicators' List of Namibia (NAL)

Since modern standard forms of contract have been introduced in Namibia some twenty years ago, the value of adjudication as a most effective form of dispute resolution became evident. However, the need arose for competent adjudicators was recognised by some of the larger employers in the construction industry. The City of Windhoek, later joined by the Roads Authority of Namibia, embarked on accrediting persons with the necessary experience for their own use. Further training in contracts and dispute resolution was also offered. However, it was soon realised that this was of national interest and the process should be managed on a national scale. It would further be necessary that an independent Nominating Authority be established, that could nominate as well as register suitably qualified adjudicators, provide training and development opportunities, and ensure that an adequate standard is maintained.

The Engineering Professions Association (EPA) has since established the National Adjudicators' List and acts as a national Nominating Authority. The establishment of the NAL by the EPA was officially launched by the then Minister for Works, Transport and Communication, the Hon. Joel Kaapanda, on 27 November 2007.

The NAL is overseen by the **NAL Committee**, the members of which include representatives from major role players in the construction industry, as well as representative/s from the EPA Council.

The NAL currently provides a service to the industry through the accreditation, registration and development of adjudicators and the impartial, rules-based nomination of adjudicators to a DAB, normally at the request of an Employer. The nomination service is provided at a fee that contributes towards making the NAL self-sustaining.

The NAL can further be approached to nominate knowledgeable persons in the construction industry that can assist contractors or junior staff of employers in dealing with contractual matters, or simply to give advice for purposes of dispute avoidance.

1.4 Forums

The **NAL Committee** has set up two forums described in more detail below, for the purpose of interfacing with key role players in the industry. It has appointed a 'Forum Convener' to facilitate communications on both forums, mainly by means of electronic mail.

1.4.1 The DAB FORUM

All registered adjudicators are enrolled as members of the DABFORUM. This forum is used by the NAL Committee to communicate matters to registered adjudicators, and may be used by members to raise any matter of common interest, but particularly:

- Submissions of adjudicators for continuous learning credits (refer to section 2.4).
- Matters of common interest such as applicable remuneration structures or similar.

1.4.2 The NATDAB

The NATDAB was initially formed by the City of Windhoek and Roads Authority to communicate with other industry role players (particularly larger employer organisations with an interest in the construction industry). The NATDAB is constituted by representatives of some 15 such organisations, all having an interest in the availability of local adjudicators.

2 REGISTERED ADJUDICATORS

2.1 Evaluation and Accreditation

The evaluation and accreditation of Adjudicators is done in accordance with a strict set of requirements.

APPLICABLE DOCUMENT

- i* Evaluation Criteria – attached as Appendix B1
- ii* Rules for Scoring Accreditation – Attached as Appendix B2

The NAL requires Adjudicators to possess, among others, a professional qualification and statutory registration relevant to the field of expertise in which the Adjudicator is to be employed. Extensive experience in the administration of contracts and application of contract law is required, but a qualification in law is not.

The evaluation and accreditation of Adjudicators is done by the **Evaluation Committee** of the NAL, the members of which are representatives of major employer organisations in the construction industry, banks, and the EPA.

21 June 2013 The NAL Committee decided to allow for Registration as Adjudicators not residing in Namibia. Adjustments have been adopted to accommodate such applicants upon registration with amendments to the scoring and rule criteria attached as Appendix B1 and B2.

2.2 Registration Categories

Accreditation provides for a career path, beginning at Trainee Adjudicator and progressing to Senior Adjudicator. Accreditation is dependent on relevant qualifications, training, experience, and Continuing Professional Development credits.

The following registration categories are available:

Registration Categories	Credits Required
Minimum score for NAL adjudicator panel: Trainee Adjudicator	10
Minimum score for NAL adjudicator panel: Junior Adjudicator	25
Minimum score for NAL adjudicator panel: Adjudicator	40
Minimum score for NAL adjudicator panel: Senior Adjudicator	65

Maximum Contract Value* per Category

	Construction/Bid Value (N\$)
Junior Adjudicators:	Up to 50,000,000
Adjudicators:	Between 50,000,001 & 300,000,000
Senior Adjudicators:	Between 300,000,001 & 750,000,000
Senior Adjudicators - Exceptionally large projects	From 750,000,001 and above

* these are merely guidelines and may differ for some employers

2.3 Memorandum of Understanding

Accredited persons that wish to be registered on the NAL must enter a Memorandum of Understanding with the EPA.

APPLICABLE DOCUMENT

Memorandum of Understanding - Adjudicators – attached as Appendix B3

In essence the understanding is that the Adjudicator will conform to the procedures and requirements of the NAL, for example:

Upon nomination of a candidate for appointment as an adjudicator to the Dispute Adjudication Board of an Employer’s project, the conclusion of such appointment is at the discretion of the Adjudicator, the Employer, and his Contractor for the project; subject to the EPA making such nomination in accordance with the applicable rules and procedures for the nomination of adjudicators registered on the NAL.

Recommending to the Employer such Adjudicator’s professional and retainer fees as the EPA may from time to time determine as recommended fees; the negotiation and ultimate acceptance of fees being at the discretion of the Adjudicator, the Employer, and his Contractor for the project.

A nomination establishes no contractual relationship between the EPA, the Adjudicator and/or the Employer and Contractor, and any contractual relationship will, if at all, only exist between the Adjudicator, the Employer, and the Contractor, as may be provided for in any Dispute Adjudication Agreement applicable to the Employer’s project.

Adjudicators are issued with formal registration certificates indicating their registered category as well as the period for which they shall remain registered. The period of registration is usually two years, after which Adjudicators must prove that they have fulfilled certain continued learning requirements.

Non- Residents Adjudicators registered on NAL the following specific set of conditions would apply as follows:

- That the contracting Parties (Contractor and Employer) would need to agree and indicate in their form, that such foreign adjudicators be considered.
- That the onus of compliance with the Namibian law in regard to work permits and professional registration (as required) would be on the contracting Parties and the non-resident adjudicator, and they would indemnify the EPA accordingly.

- Non-Resident Registered Adjudicators are only considered and reserved for Senior Adjudicator in terms of value.
- Where a DAB is a 3-member DAB, and the other two members are resident in Namibia.

2.4 Continued Learning Requirement

The NAL Committee has adopted a policy requiring registered adjudicators to earn continuous learning credits for the purpose of maintaining the currency of their registration. The intention is to ensure regular exposure of adjudicators to this field, ensuring that the adjudicator stays up to date with industry trends and the law pertaining to construction contracts. The relevant requirements are compiled in a specific document which must be returned by adjudicators usually on an annual basis.

APPLICABLE DOCUMENT

- i Continued Learning Rules – attached as Appendix B4*
- ii Continued Learning Return form – Attached as Appendix B5*

Adjudicators are required to keep track of their own points and to report these points to the Convener of the **DAB FORUM** (a platform used for publication of continued learning submissions) at specified intervals. Such report is made available to the Evaluation Committee to reconfirm the Adjudicator's registration status.

The continued learning credits are to be earned for the purpose of the adjudicator's registration **remaining current**. Therefore, the credits do not count towards the credits required for getting registered in, or upgraded to, a specific adjudicator category unless the credits happen to be scored for an item that is also included under the adjudicator application form's scoring rules

The process will be facilitated by means of a scorecard template, which Adjudicators will need to keep up to date themselves.

2.5 Adjudicator Performance Evaluation

To conforming to its commitment of ensuring an adequate standard of registered adjudicators the NAL is interested to monitor adjudicator performance. This is done by means of requesting information from employers and contractors that make use of adjudicators. This is done by means of the following document:

APPLICABLE DOCUMENT

- Adjudicator Performance Report – attached as Appendix B6*

3 EMPLOYERS

3.1 Employer Categories

Employers are usually the initiators of construction contracts, and prescribe the type of contract to be used. Since most larger employer bodies in Namibia, such as parastatals and municipalities, use modern forms of contract, it has become necessary for them to have access to adjudicators.

Not all employers have the same need for adjudicators, or to the same extent. Some smaller employers, for example in the private sector, may let only a few contracts every year, while others may let numerous contracts. The NAL has made provision for three categories of 'Employer', depending on the individual needs. Employers requiring several adjudicator nominations annually can register with the NAL and enjoy reduced fees per nomination.

Categories of Employer:

- Employer not registered with the NAL (once off nomination for a standing DAB)
- Employer not registered with the NAL (once off nomination for a ADHOC DAB)
- Registered Employer

Registered Employer have a unique annual fee (not applicable for employers that are not registered), and corresponding nomination fee.

3.2 Memorandum of Agreement

Employers that wish to have reduced nomination fees need to register as Employers, and must enter into a Memorandum of Agreement with the EPA.

APPLICABLE DOCUMENT

Memorandum of Agreement - Employers – attached as Appendix B7

In such cases the EPA shall subscribe the Employer to the National Adjudicators' List for a period of one year, within which period the EPA will provide impartial adjudicator nomination services to the Employer / Contractors jointly for Adjudicators to be nominated to the Dispute Adjudication Boards of such projects, awarded to such Contractors, as the Employer may from time to time register with the EPA within the subscription period.

The agreements are based on the EPA's standard form but are subject to amendment upon discussion about employer's specific requirements.

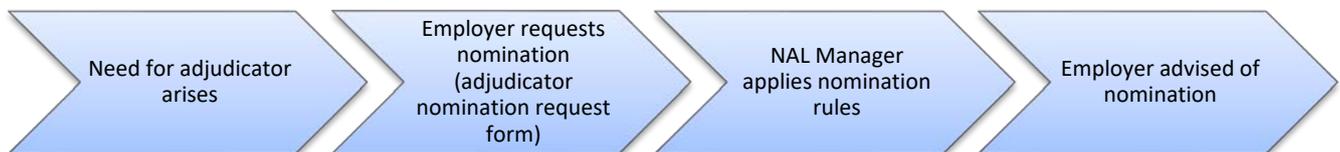
4 NOMINATION PROCESS

The EPA acts through the NAL as independent Nominating Authority. It fulfils this role by implementing a process that ensures impartiality and prevents interference or manipulation.

APPLICABLE DOCUMENT

Rules and Procedures for the Nomination of Adjudicators – attached as Appendix B8

Overview of the nomination process:



4.1 The Need for Adjudicator Arises

Most modern standard forms of construction contract prescribe the formation of a Dispute (Adjudication) Board upon conclusion of the Contract, i.e. as soon as the parties enter into the contract. At this point the need for adjudicator(s) arises.

4.2 Request for Adjudicator

The Employer will request the EPA - NAL for the nomination of one or three adjudicators (as the case may be). The request form is available on the EPA website at www.engineers-namibia.org.

APPLICABLE DOCUMENT

NAL Adjudicator Nomination Request Form – attached as Appendix A1

Certain project related information is included on the request form, as well as preferences or requirements that may be relevant, such as the discipline preferred, or the location of the office of the adjudicator for improved logistics, or the category of adjudicator required depending on contract value (Junior Adjudicator / Adjudicator / Senior Adjudicator).

4.3 Sourcing an Adjudicator

The NAL Manager and Registrar make use of a computerised spreadsheet that automatically selects a registered Adjudicator from the NAL List, taking the Employer's / Contractor's preferences into account.

The NAL Manager will then approach the selected Adjudicator and enquire his availability for the particular project, as well as obtain confirmation of the Adjudicator's impartiality of either the Employer or the Contractor.

APPLICABLE DOCUMENT

NAL Adjudicator Availability Enquiry Form – attached as Appendix A2

4.4 Nomination

The Registrar will inform the Employer of the nomination.

APPLICABLE DOCUMENT

NAL Adjudicator Nomination Form – attached as Appendix A3

The entire process usually takes around 7 days from receipt of the request form to submission of the nomination results to the Employer.

4.5 Nomination Fees for Adjudicator Nomination

The nomination fee charged by the EPA covers its cost of maintaining the NAL and administrating the nomination process. It varies for each category of Employer, and can be obtained upon request to the Registrar of the NAL.

5 REMUNERATION OF ADJUDICATORS

Remuneration of adjudicators is agreed between the parties of the dispute adjudication agreement, i.e. the Adjudicator, the Employer and the Contractor. The NAL Committee provide a recommended fee, which is agreed upon through consultation with the body of registered adjudicators and representatives of larger employer bodies.

At date of printing, the recommended hourly fee is as follows:

Hourly fee: as a percentage of Government Gazetted Fee (currently N\$1,577.00)

	% of gazetted fee	N\$* revised August 2021
Junior Adjudicator	120	1,892.40
Adjudicator	140	2,207.80
Senior Adjudicator	160	2,523.20
Senior Adjudicator-very large projects		3,750.00

THE END



APPENDIX A

- A1 NAL Adjudicator Nomination Request Form
- A2 NAL Adjudicator Availability Enquiry Form
- A3 NAL Adjudicator Nomination Form



APPENDIX B

- B1 Evaluation Criteria
- B2 Rules for Scoring
- B3 Memorandum of Understanding - Adjudicators
- B4 Continued Learning Rules
- B5 Continued Learning Return form
- B6 Adjudicator Performance Report
- B7 Memorandum of Agreement - Employers
- B8 Rules and Procedures for the Nomination of Adjudicators