

# MEA Annual Conference 2023 Sarnia

Adjudication

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Adjudicator, Mediator and Road Auditor

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# Who am I?

- ▶ MEA Life-Time Member
- ▶ County of Elgin Engineering Team from 1988 to 2017
- ▶ CD Watters Engineering Ltd. President started in 2017
- ▶ Adjudicator, Mediator and Road Auditor
- ▶ Complete Road Needs Studies
- ▶ Complete OSIM and Enhanced OSIM
- ▶ Peer Review of Capital Projects
- ▶ Short term experienced Civil Engineer for suitable assignments

# Overview

- ▶ Summary of Adjudication
- ▶ 5 Case Studies

# Adjudication - From an Adjudicators Perspective

- ▶ Ontario Dispute Adjudication for Construction Contracts (ODACC)
- ▶ Adjudication and Prompt Payment – implemented on October 1<sup>st</sup> 2019

# What is the ODACC Duties - Section 13.3(1)

- 1) Training of Adjudicators
- 2) Qualifying people who meet the requirements
- 3) Maintain a Registry
- 4) Appoint Adjudicators
- 5) Perform other duties (i.e.. Administration)

# Benefits of Adjudication

- 1) Help entities resolve construction related disputes in a timely and cost-effective manner
- 2) One party can bring an Adjudication without the other party's consent
- 3) An Adjudicator will review all evidence provided by the parties and provide a Determination, which will be filed with the Court for enforcement purposes
- 4) If the Adjudicator's decision is for one party to pay the other party, the payment must be made within ten days
- 5) Adjudication is less expensive than litigation or arbitration
- 6) Adjudication is a quick dispute resolution process

# Parties Can

- ▶ Create a Notice of Adjudication and Response of Adjudication on the ODACC System
- ▶ View and download all the Forms on the System
- ▶ Send Form to the other parties on the System

# Qualifications

- ▶ An Adjudicator must be qualified by the Authority – 13.9(1)
- ▶ Adjudicator must meet the following – 3(2)
  - 1) Ten years of relevant working experience, and
  - 2) Complete ODACC training
  - 3) And other minor requirements from ODACC



# Powers of an Adjudicator

- 1) Issuing direction in respect to the conduct,
  - 2) Taking the initiative in ascertaining the relevant facts and applicable law,
  - 3) Drawing **inferences** based on conduct of the Parties,
  - 4) Conduct an onsite inspect,
  - 5) Obtaining the assistance of other: lawyers, accountants, engineers etc,
  - 6) Making a Determination.
  - 7) Any other power as prescribed by ODACC.
- ▶ The Parties can select an Adjudicator or the ODACC System will select an Adjudicator **IF** the Parties cannot agree on an Adjudicator.

# Adjudication Process

Process	Writing / Oral	Submission / Additional Documents	Fee
1	Writing	2 pages / no	\$800
2	Writing	5 pages / no	\$1000
3	Writing	5 pages / 10 pages	\$2000
4	Writing / Oral	10 pages / 25 pages	\$3000

The Parties can recommend a type of Process for Adjudication

# Adjudication Fees

Claim Amount	Adjudication Fee
< \$10,000	\$800
\$10,000 to \$25,000	\$1,000
\$25,000 to \$35,000	\$2,000
\$35,000 to \$50,000	\$3,000
\$50,000 to \$250,000	Hourly rate \$250
\$250,000 to \$500,000	Hourly rate \$400
\$500,000 to \$1,000,000	Hourly rate \$500
\$1,000,000 plus	Hourly Rate \$750

Adjudication Fee Paid by the Parties

# What can be Referred to an Adjudication 13.5(1)

- 1) Valuation of services or materials (\*68)
- 2) Payment under contract (\*63)
- 3) Dispute subject to non-payment (\*20)
- 4) Amounts retained under Section 12, set-off by Trustee. Or Section 17(3) Lien set-off (\*0)
- 5) Payment of a Holdback on Section 26.1 or 26.2 (\*3)
- 6) Non-payment of a Holdback 27.1 (\*4)
- 7) Any other matters that both Parties agree to (\*3)

(\*In the last fiscal year, 269 total cases with a median amount claimed \$102,500)

# Proper Invoice 6.1

- 1) Contractor Name and Address.
- 2) Date and period where services and materials were supplied.
- 3) Information identifying the authority under which the services of materials were supplied.
- 4) Description of services or materials.
- 5) Amount payable and payment terms.
- 6) Name, title, telephone number, and mailing address.
- 7) Any other information that may be prescribed.

# Adjudication Process

Day 1	Adjudicator is selected
Day 2	Adjudicator sets meeting to determine: Process, Fee and Dispute to be Determined. Additionally, the Adjudicator indicates other administrative items: minimum font size (12pt), margin size (1.5in), and the Adjudicator will ONLY read the pages agreed!
Day 2	In the ODACC System the Adjudicator emails and posts in the System what was agreed to.
Day 5	Claimant submits: contract, submission and other documents as agreed to in the initial meeting. The information is submitted in the System.
Day 12	Respondent submits its arguments and other documents as agreed to in the initial meeting. The information is submitted in the System.
Day 30	Adjudicator submits a Draft Determination to ODACC.
Day 35	Final Determination is released.

The Adjudicator determines the Process after consultation with the Parties:  
pages for submission and other documents.

# Adjudication Unwritten Rules

1. Rule number 1: stick to the facts.
2. Rule number 2: don't go down the rabbit hole.
3. Rule number 3: this is almost always about Prompt Payment.

# Case 1 - Be Honest

- ▶ A general statement - significant delays
- ▶ A specific statement - one subtrade was at the site for 1.5 hours on one day, when the Claimant was on site.



## Case 2 - Crickets

- ▶ Even though one Party does not participate or is silent - complete process as if they were.

# Case 3 - Words Matter

- ▶ Claimant supplied labour as per Agreement.

# Case 4 - What does Maximum Mean

- ▶ Best available equipment – Really?
- ▶ It was in the drawings and Tender – YES!

# Case 5 - You're NOT Helping

- ▶ **Don't - pretend - to participate**
- ▶ Frivolous and Vexatious....

# Adjudication from an Adjudicators Perspective

- ▶ Q&A
- ▶ Contact me: [clayton@cdwattersengineering.ca](mailto:clayton@cdwattersengineering.ca)