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ADJUDICATION

Despite the fact that adjudication, as a process, has been with us in South Africa since 1996 when ESKOM introduced the NEC forms of contract, quickly followed by the 1999 FIDIC suite, there is still today a woeful lack of knowledge how to present a case in adjudication in a way which will assist in obtaining the desired result. In this brief article I shall try and offer some guidance.

So, recently I received an adjudication submission accompanied by 23 annexures. Some of the annexures were copies of documents exchanged between the parties and others were excel spreadsheets with, occasionally, multiple pages within the spreadsheet.

The dispute concerned an extension of time and associated costs. Both the time and the cost had been evaluated by the Principal Agent and both of those evaluations had been disputed by the Main Contractor. The original value of the contract exceeded R75m.

By agreement I was appointed Adjudicator.

A referring party has usually been involved in the construction of the contract for a considerable time. Sometimes for several years. They are accordingly steeped in the myriad details making up the administrative side of the contract and know the construction details intimately. An adjudicator on the other hand is brought into the matter cold with no background. He or she relies entirely on the documentation submitted although could call for a meeting if required. Generally speaking, the adjudication process lends itself to a documents only approach and the choice of documents only or meetings with the parties is at the discretion of the Adjudicator. For this reason, submissions should be drafted, as a precaution, in the expectation there will not be the opportunity to further ventilate the respective party's position via a meeting with the Adjudicator.

In the adjudication I am referring to, this key factor was overlooked. Instead, in so far as the EOT dispute was concerned, the Contractor simply referred to its spreadsheet annexures which supposedly proved its entitlement to the EOT. No narrative was provided to augment and explain that which the spreadsheets were intended to convey. No expert report was included from a delay analyst describing the delaying events and explaining what techniques had been applied, prospective or retrospective analysis of time events, or whether the principles of the Society of Construction Law protocol had been applied, SCL. The Contractor clearly anticipated that the Adjudicator would; a) be capable of interpreting the spreadsheets without further assistance; b) was capable of coming to the desired conclusion in the absence of clear guidance; c) would appreciate the impact of the alleged delaying events; d) would be capable not only of interpreting the method of analysis of delays applied to justify the desired conclusion as to duration of EOT claimed but would also agree with the method.

Remember, it is not the function of an Adjudicator to make a case for either of the parties. Even where the Adjudicator has been selected as a consequence of known expertise, it is essential that the submissions **lead the adjudicator by the nose in the clearest possible way!**

Yes, of course, an Adjudicator can request further information. He can also appoint his own expert to assist in interpreting the documentation, but there is no certainty that such an approach would be applied and if it was

applied, that it would lead to the conclusion which the Contractor desires. Far better to provide the Adjudicator with a step by step analysis in the clearest possible terms which leads the Adjudicator to a favourable conclusion.

Do not take the Adjudicator's expertise for granted. By maintaining control of the documentation and guiding the Adjudicator you retain control of the outcome. The documentation also needs to be logically organised and paginated and cross referenced. The Adjudicator should not have to hunt through reams of paper to locate referenced information. A useful technique in an electronic submission is to embed hyperlinks to allow the Adjudicator to jump straight to the referenced document. Photographs need to be similarly cross referenced and a clear narrative describing each photograph and explaining what it is intended to depict.

The outcome is substantially in the hands of the referring party who, after preparing the submission should do two things, viz; ask the question, "have I done everything that is necessary in a clear and concise manner so as to persuade the Adjudicator to find in my favour", and; provide a copy to someone in the company who has not been involved in the contract and request them to read the submission, identify shortcomings and advise whether, overall, it is persuasive.

Finally, choose an Adjudicator who knows the process of adjudication well. It is far better to have a person who is experienced and skilled in the process as opposed to an Adjudicator with little experience of the process but highly knowledgeable about the subject matter. Timelines in adjudication are tight and proper control of the reference is essential if the benefits of adjudication are to be achieved.

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