

AIAC CIPAA CIRCULAR 08

CIRCULAR BY AIAC ON PAYMENT OF ADJUDICATION COSTS IN CIPAA PROCEEDINGS

The AIAC understands that there are circumstances in which the Parties are unable to remit sufficient deposits for the cost of the adjudication proceedings. The overarching effect of this non-payment is that upon the Claimant's withdrawal of the adjudication proceedings prior to the Adjudicator's delivery of the Decision, the AIAC has collected insufficient deposits in the matter. This places the Parties, the Adjudicator and the AIAC in a difficult position for two reasons.

Firstly, pursuant to Section 17(2) of the Construction Industry Payment & Adjudication Act 2012 (the "CIPAA"), the Claimant shall bear the costs of the withdrawal. The costs of the withdrawal consist of a portion of the Adjudicator's fee and expenses as approved by the Director of the AIAC representing the work performed by the Adjudicator up until the withdrawal stage, and the AIAC's Administrative Fee. Pursuant to Schedule III, Paragraph 1.2 of the AIAC Adjudication Rules & Procedure, the Claimant is liable to pay the full amount of the AIAC's Administrative Fee notwithstanding the premature withdrawal of the matter. Hence, when there are insufficient funds, upon a withdrawal and in the absence of the Claimant's inclination to pay, the Claimant is in breach of the provisions of the CIPAA and the AIAC Adjudication Rules & Procedure.

Secondly, when a Decision is ready for delivery, if the funds are insufficient, the Adjudicator's and AIAC's services cannot be remunerated. This means that the Decision will likely be withheld until full payment of the deposits is made. This not only disadvantages the Parties but the Adjudicator and the AIAC alike.

In this vein, and to provide an abundance of clarity regarding prevailing procedures on this issue, the AIAC would like to draw your attention to the following:

1) Section 19(3) of the CIPAA – Parties to Equally Bear the Adjudication Costs

Pursuant to Section 19(3) of the CIPAA, the Parties are jointly and severally liable to pay the Adjudicator's fees. The Adjudicator may recover the fees and expenses due as a debt. This is subject to the Adjudicator's Decision in which the Adjudicator shall order the costs to follow the event (*cf.* Section 18(1) of the CIPAA).

2) Rule 9(4) of the AIAC Adjudication Rules and Procedure – Adjudicator's Power to Invite the Other Party to Pay the Outstanding Amount

In the event one of the Parties fails to pay, the Adjudicator has the power to issue a direction as the Adjudicator deems fit. This includes, but is not limited to, a direction inviting one Party to make such payment on behalf of the other.

3) Section 19(5) and (6) of the CIPAA – Withholding Release of Adjudication Decision

In the event the deposits are not paid in full, it is in the Adjudicator's discretion to withhold the release of the Adjudication Decision to the Parties. Should the Adjudicator choose this course of action, the Adjudicator is to deposit one (1) copy of the Adjudication Decision to the AIAC only, and issue the necessary notice to withhold (*i.e.*, Form 14) to the AIAC and the Parties. The Adjudication Decision will only be released to the Parties upon remittance of the full deposits payable.

4) Section 26(2) of the CIPAA – Setting Aside the Adjudication Proceedings

On the basis that there has been a failure to comply with the adjudication proceedings, including non-payment of the Advance Security Deposit, the Adjudicator may set aside the adjudication proceedings, wholly or partly, or make any order dealing with the adjudication proceedings as the Adjudicator deems fit.

In the event the Adjudicator sets aside the adjudication proceedings wholly, the CIPAA does not make provision for the Adjudicator to be reimbursed, whether in fees for work done or for expenses incurred.

The AIAC's Administrative Fee remains due and payable in full.

5) Rule 9(5A) of the AIAC Adjudication Rules & Procedure – Determining the Withdrawal Costs of the Adjudicator

Upon receipt of a Notice of Withdrawal, the Adjudicator is to consult the Director of the AIAC regarding the appropriate proportion of the Adjudicator's fee representing work done and also having regard to the stage of the proceedings. In this respect, the Adjudicator should provide the AIAC with their proposed withdrawal costs, supported by a statement of works estimating the number of hours expended on the proceedings, if possible, and proof of expenses incurred.


6) Schedule III, Paragraphs 1.1(c) and 1.2 of the AIAC Adjudication Rules & Procedure – 100% of the AIAC Administrative Fee Payable where Adjudication Proceeding is Set Aside or Withdrawn

The AIAC's Administrative Fee is due and payable in full *“even though the proceedings are prematurely ended, withdrawn, settled or the adjudication decision is void.”*

7) Clause 10 and 11 of the AIAC's Standard Terms of Appointment – Adjudicator's Appointment Terminated by Agreement of the Parties

In the event that both Parties agree to terminate the appointment of an Adjudicator, the Adjudicator is entitled to claim a reasonable fee and expenses, provided that it is the AIAC's Standard Terms of Appointment that have been agreed upon between the Parties and the Adjudicator. The proportion of the Adjudicator's fee to be disbursed will be determined by the Director representing work done and also having regard to the stage of the proceedings. All expenses claimed must be accompanied by their respective proofs, including but not limited to receipts, etc.

Dated this 1st December 2020.



Tan Sri Datuk Suriyadi Bin Halim Omar
Director