

**Fourth Annual Report
of the Chairperson of the Construction Contracts Adjudication Panel,
since the commencement of the Construction Contracts Act, 2013**

1. Introduction

- 1.1** My role as the Chairperson of the Construction Contracts Adjudication Panel includes a requirement to report annually to the Minister of State at the Department of Business, Enterprise and Innovation, who is responsible for the Construction Contracts Act, 2013.
- 1.2** The following is the Fourth Annual Report since the commencement of the Construction Contracts Act, 2013, which covers the period from 26th July 2019 to 25th July 2020.

2. Enactment and commencement of the Construction Contracts Act, 2013

- 2.1** The Construction Contracts Bill was signed into law by the President, Michael D. Higgins, on 29th July 2013. In October 2014, the Government approved the transfer of responsibility for the implementation of the Construction Contracts Act, 2013 to the Department of Business, Enterprise and Innovation from the Department of Public Expenditure and Reform.
- 2.2** Following a national information campaign undertaken by the Department of Business Enterprise and Innovation, the Construction Contracts Act, 2013 came into force for certain construction contracts entered into after 25th July 2016 in accordance with the 'Construction Contracts Act, 2013 (Appointed Day) Order 2016' (Statutory Instrument No. 165 of 2016).

3. Summary of the main provisions of the Construction Contracts Act, 2013

- 3.1** The purpose of the Construction Contracts Act, 2013 is to regulate payments under a construction contract covered by the Act. It applies to both written and oral contracts. Certain contracts are exempt under the Act. These exemptions are: a contract of less than €10,000 in value; a Public Private Partnership contract; and a contract for a dwelling of less than 200 square metres, where one of the parties occupies or intends to occupy it. The Act provides new legal rights and obligations on the parties to a relevant construction contract. The Act imposes minimum contractual provisions relating to payments - particularly with regard to the timing of payments - and the parties to a relevant construction contract may not opt out of its provisions. The Act also prohibits the practice of 'pay-when-paid', with the exception of a third party to a contract becoming insolvent.
- 3.2** A construction contract covered by the Act shall include:
- the amount of each interim and final payment or an adequate mechanism for determining those amounts;
 - the payment claim date for each amount due or an adequate mechanism for determining those dates; and
 - the period between the payment claim date and the date on which the amount is due.

- 3.3** If a main construction contract does not include the above information, the following payment claim dates will apply to the contract:
- 30 days after the commencement date of the construction contract;
 - 30 days after the payment claim date referred to above and every 30 days thereafter up to the date of substantial completion; and
 - 30 days after the date of final completion.
- 3.4** In addition, the date on which payment is due in relation to an amount claimed under the contract shall be no later than 30 days after the payment claim date.
- 3.5** The Act provides important statutory protections for subcontractors in the construction industry. Subcontracts must at least include the following payment claim dates:
- 30 days after the commencement date of the construction contract;
 - 30 days after the payment claim date referred to above and every 30 days thereafter up to the date of substantial completion; and
 - 30 days after the date of final completion.
- 3.6** The date on which payment is due in relation to an amount claimed under a subcontract shall be no later than 30 days after the payment claim date.
- 3.7** The Act requires an Executing Party to deliver a payment claim notice to the Other Party (or to a person specified under the construction contract who is acting for the Other Party), no later than 5 days after the payment claim date. If that Other Party contests that the amount claimed by the Executing Party is due and payable, the Other Party (or person acting for the Other Party) is required to respond to the Executing Party, not later than 21 days after the payment claim date setting out the following:
- the reason(s) why the amount claimed by the Executing Party in the payment claim notice is disputed, including any claim for loss or damage arising from an alleged breach of any contractual or other obligation of the Executing Party; and
 - the amount, if any, that is proposed to be paid to the Executing Party and the basis of how that amount is calculated.
- 3.8** It may be possible for the parties to the construction contract to reach agreement as to the amount to be paid to the Executing Party. However, if no such agreement is reached by the payment due date, the Other Party is required to pay the Executing Party the amount, if any, which the Other Party proposed to pay in its response to the contested payment claim notice.
- This payment shall be made by the payment due date in accordance with Section 4(3)(b) of the Act.
- 3.9** Section 5 of the Act stipulates that if any amount due under a construction contract is not paid in full by the Other Party by the payment due date, the Executing Party may suspend work under the construction contract by giving a notice in writing to the Other Party.

3.10 The Act introduced, for the first time in Ireland, a new right for a party to a construction contract, as defined under Section 1 of the Act, to refer a payment dispute for adjudication as a means of resolving that dispute. The Act envisages that an adjudication will be concluded within a short timeframe, i.e. 28 days from the date of referral of the dispute to an Adjudicator. This period may be extended in certain circumstances. If the parties to the construction contract cannot agree as to whom to appoint as Adjudicator, one or other may apply to me, in my capacity as the Chairperson of the Ministerial Panel of Adjudicators seeking the appointment of an Adjudicator.

3.11 Further detailed information on the Construction Contracts Act, 2013 Act is available on the website of the Department of Business, Enterprise and Innovation (www.dbei.gov.ie).

4. Enforcement of Adjudicator Decisions

4.1 The Rules of the Superior Courts were broadened to incorporate a provision for the enforcement by the High Court of Adjudicators' decisions under the Construction Contracts Act, 2013 - 'Rules of the Superior Courts (Construction Contracts Act, 2013) 2016' (Statutory Instrument No. 450 of 2016).

5. Applications to the Chairperson of the Construction Contracts Adjudication Panel for the appointment of an Adjudicator under Section 6(4) of the Construction Contracts Act, 2013

5.1 As the Chairperson of the Construction Contracts Adjudication Panel, I am required to assign an Adjudicator from the Ministerial appointed Panel of Adjudicators following an application made under Section 6(4) of the Construction Contracts Act, 2013 and which complies with paragraph 15 of the 'Code of Practice Governing the Conduct of Adjudications'. The appointment of an Adjudicator usually takes place within 7 days of receipt of a written application, unless the application fails to comply with paragraph 15 of the Code of Practice or if further information is required from the applicant relevant to the nature of the dispute, in accordance with paragraph 16 of the Code of Practice.

5.2 During the period which is covered by this Report, 54 applications seeking the appointment of an Adjudicator were received by the Construction Contracts Adjudication Service of the Department of Business, Enterprise and Innovation, which provides me with the necessary administrative support in processing such applications.

5.3 I appointed an Adjudicator from the Ministerial Panel of Adjudicators in 46 of the 54 applications received. A number of these adjudications were ongoing at the time of the compilation of this Report.

5.4 Out of the 46 appointments, 9 Adjudicators resigned and 7 of these cases resulted in another application to me on the same payment dispute. I then appointed a different Adjudicator in each case. These appointments are included in the total of 46 appointments referred to above.

- 5.5 In total, there were 13 cases re-entered after an Adjudicator had been appointed by me to an earlier application on the same payment dispute. These cases arose either from the resignation of the first appointed Adjudicator or the applicant failed to observe the deadline to refer the dispute to the first appointed Adjudicator. In these cases, the adjudication could not proceed with the first appointed Adjudicator. These cases were processed on the basis that the payment dispute still existed between the parties to the construction contract and a new application was submitted to me in relation to the payment dispute.
- 5.6 There were eight applications which were deemed not to be non-compliant with the application requirements for the appointment of an Adjudicator under Section 6(4) of the Act. The applicants in 3 of these 8 cases submitted revised applications and an Adjudicator was then appointed by me in each case. These appointments are included in the total of 46 appointments referred to above.
- 5.7 It is important to note that when appointing an Adjudicator under Section 6(4) of the Act, I must consider the nature of the payment dispute, as referred to me, to determine who, in my opinion, would be suitable to be appointed as Adjudicator from the Ministerial Panel of Adjudicators for such a dispute. I nominate three suitable candidates and, subject to their availability, as well as their impartiality and independence, I select one of those candidates to act in the capacity as the Adjudicator. I do not consider the merits of the application, as I have no statutory role in deciding such matters.

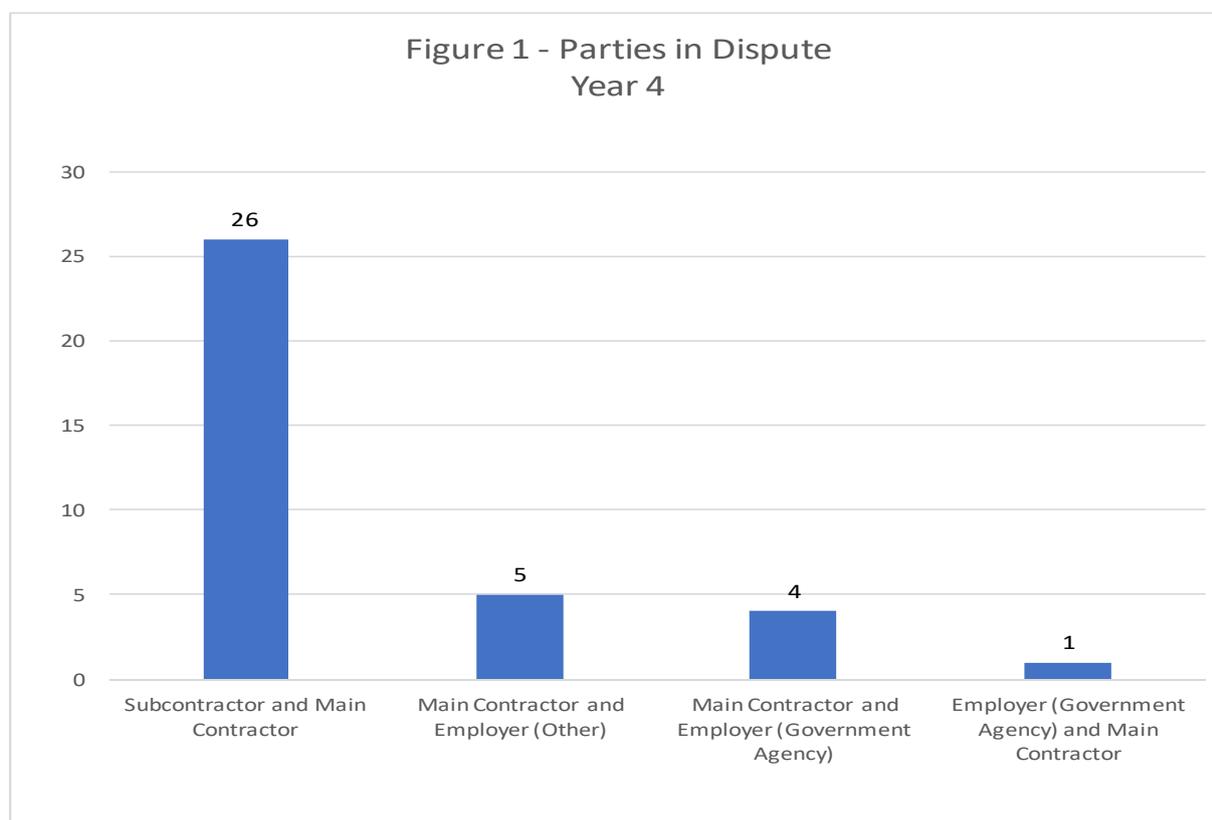
6. Statistical data returns from Adjudicators

- 6.1 There are requirements set out in the 'Code of Practice Governing the Conduct of Adjudications' for Adjudicators to provide information to the Construction Contracts Adjudication Service following an appointment (paragraph 12); following a resignation (paragraph 30); and on the outcome of adjudication cases (paragraph 39), for the purpose of compiling anonymised statistical data on the operation of the Act.
- 6.2 This Section of the Report provides detailed information on the outcome of the adjudication cases, on which anonymised information was provided by the appointed Adjudicators. This information was received by the Construction Contracts Adjudication Service in the period covered by this Report. This includes information on cases where the parties agreed on the appointment of an Adjudicator, as well as cases where I appointed an Adjudicator under Section 6(4) of the Act to the payment dispute. As the data received on these cases is anonymised, it should be noted that the information set out in this part of the Report does not refer exclusively to cases where the Adjudicator was appointed by me under Section 6(4) of the Act.
- 6.3 During the period covered by this Report, the Construction Contracts Adjudication Service received 36 data returns from Adjudicators.
- 6.4 The principal site locations of the payment disputes concerned are listed in Table 1 and the primary professional qualifications of the Adjudicators are set out in Table 2.

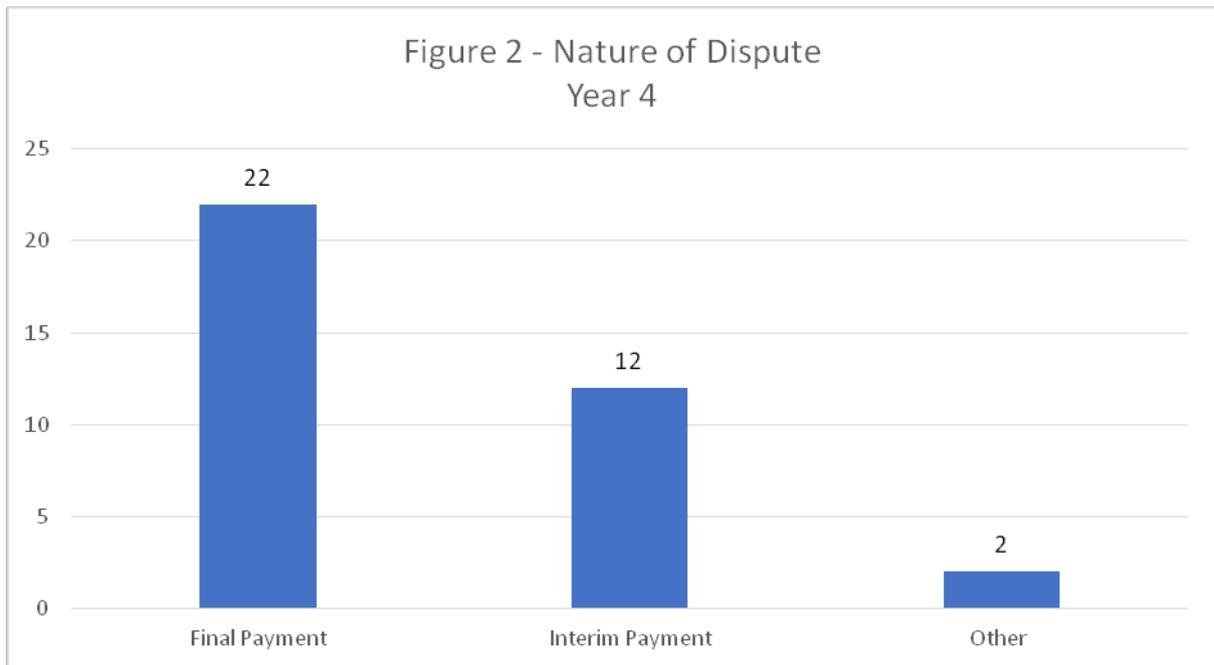
Dublin	16
Wicklow	4
Cork	3
Kildare	3
Wexford	3
Monaghan	2
Laois	2
London	2
Tipperary	1
Total	36

Quantity Surveyor	11
Fellow of the Chartered Institute of Arbitrators	9
Engineer	7
Barrister	6
Architect	2
Solicitor	1
Total	36

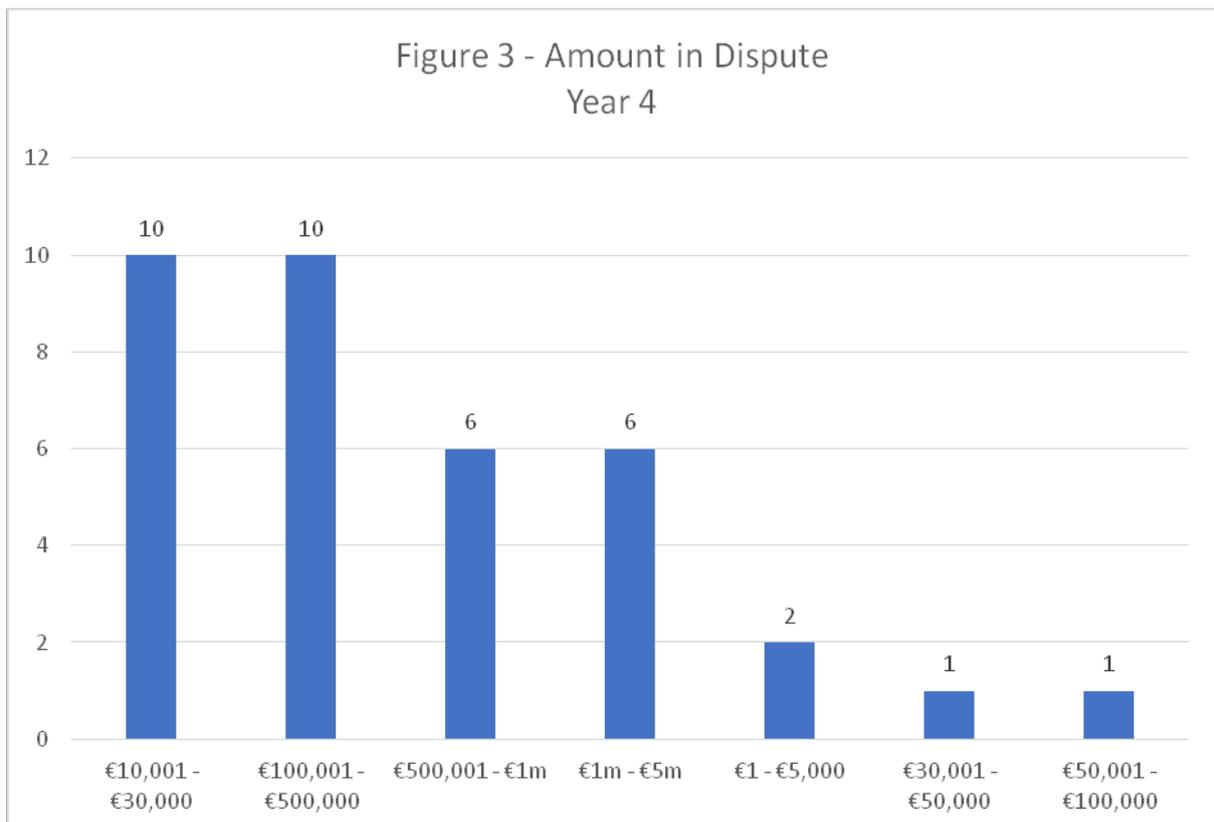
6.5 Figure 1 below sets out the categories of the parties in dispute. The most common dispute referred for adjudication involved a subcontractor in dispute with a main contractor, with the referral being made by the subcontractor.



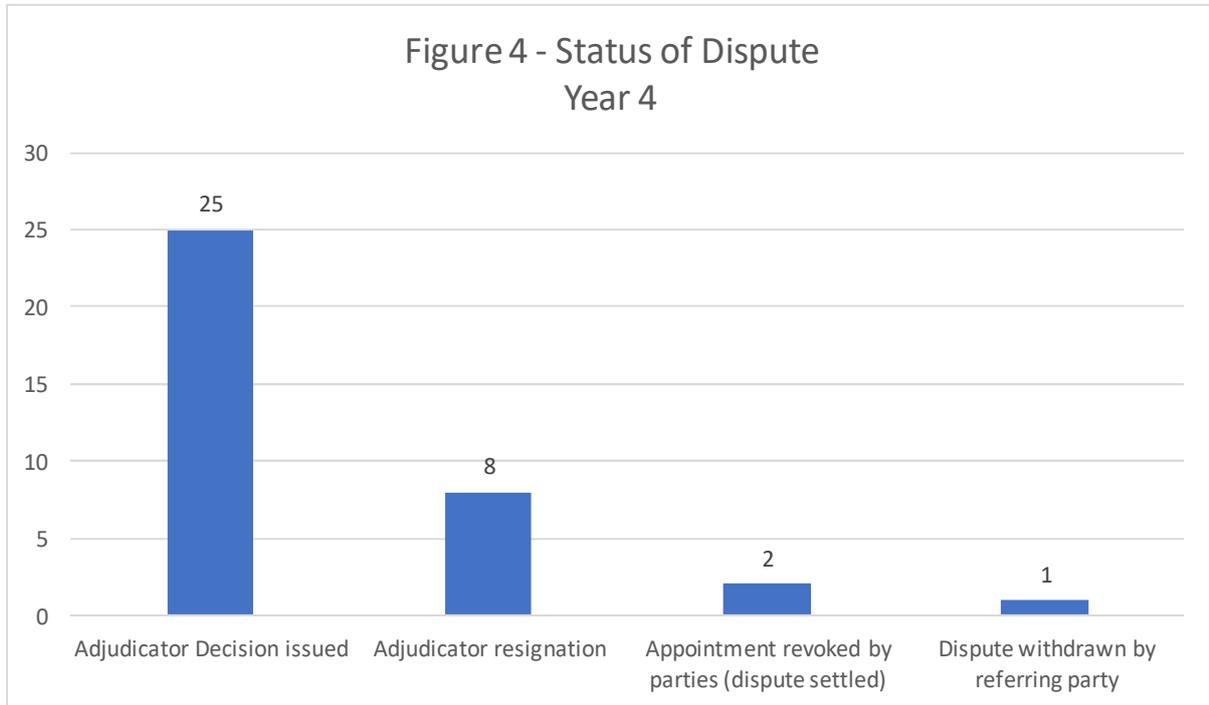
6.6 Figure 2 provides information on the nature of the disputes in these cases. Most disputes were categorised as final or interim payment disputes. The category ‘Other’ involved disputes concerning the release of retention money.



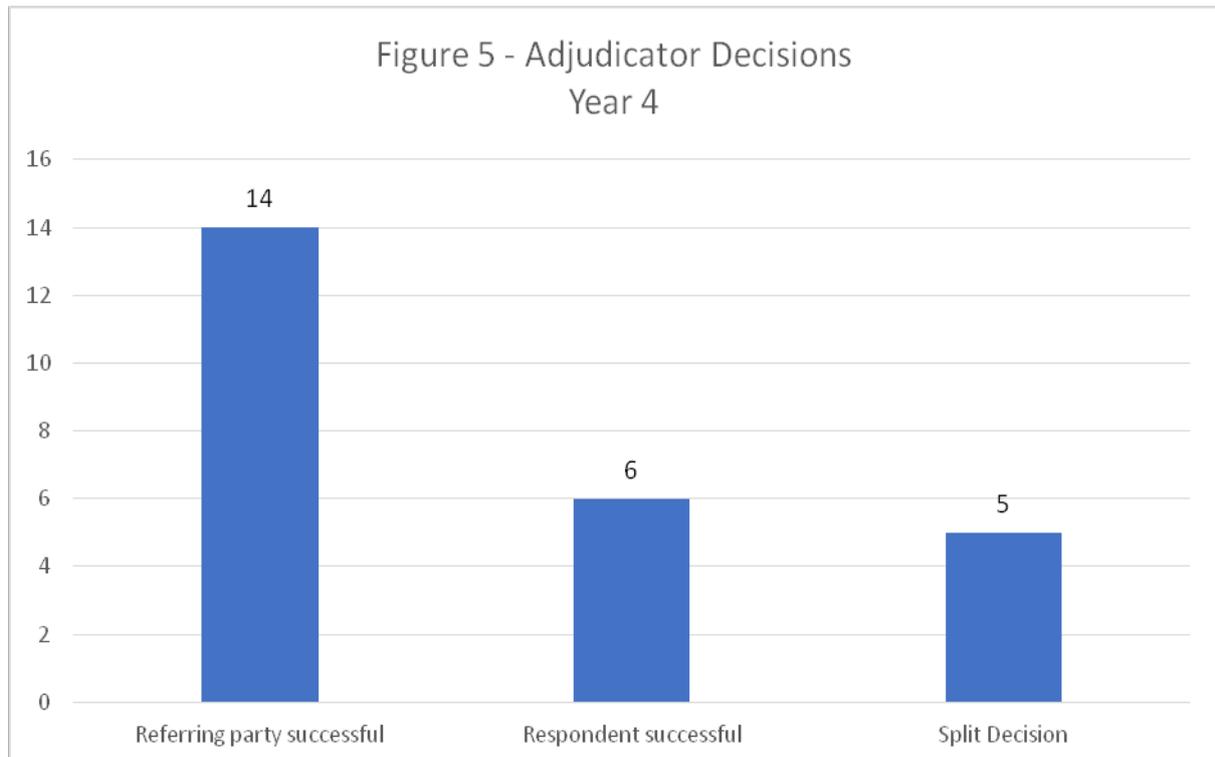
6.7 Figure 3 provides information on the amount in dispute between the parties. The highest number of cases involved amounts in the ranges of over €10,000 to €30,000 and over €100,000 to €500,000.



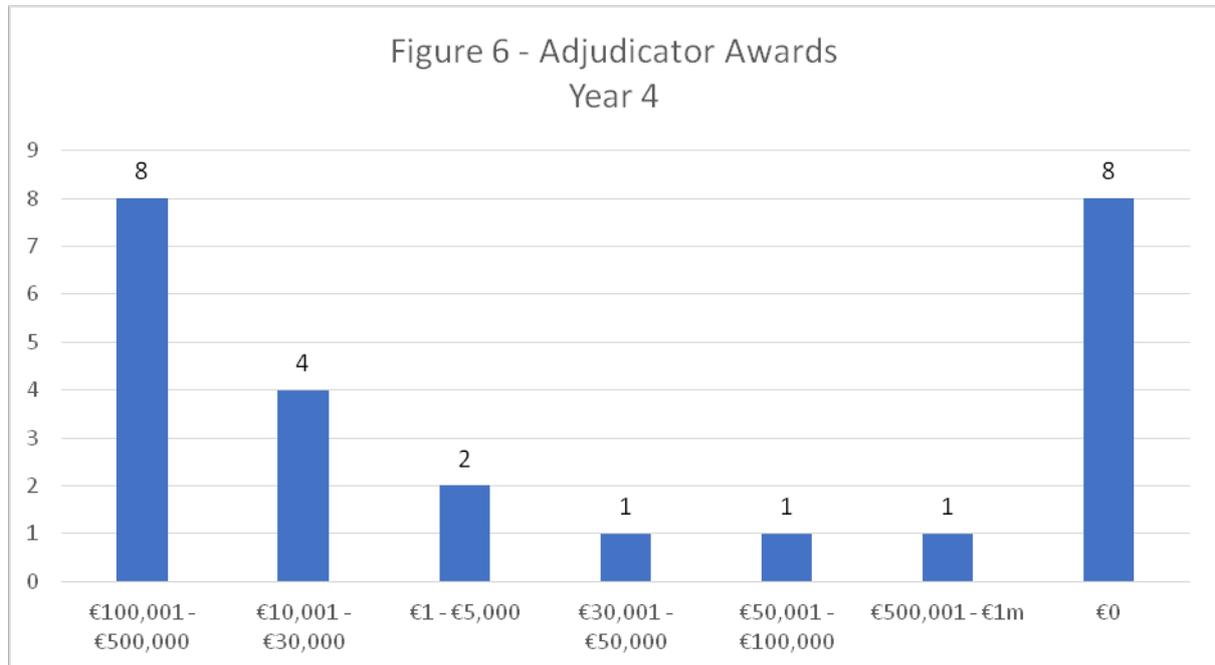
6.8 Figure 4 provides information on the status of the 36 disputes following the referral of these disputes to an Adjudicator. In total there were 25 Adjudicator decisions issued and 8 Adjudicator resignations were recorded.



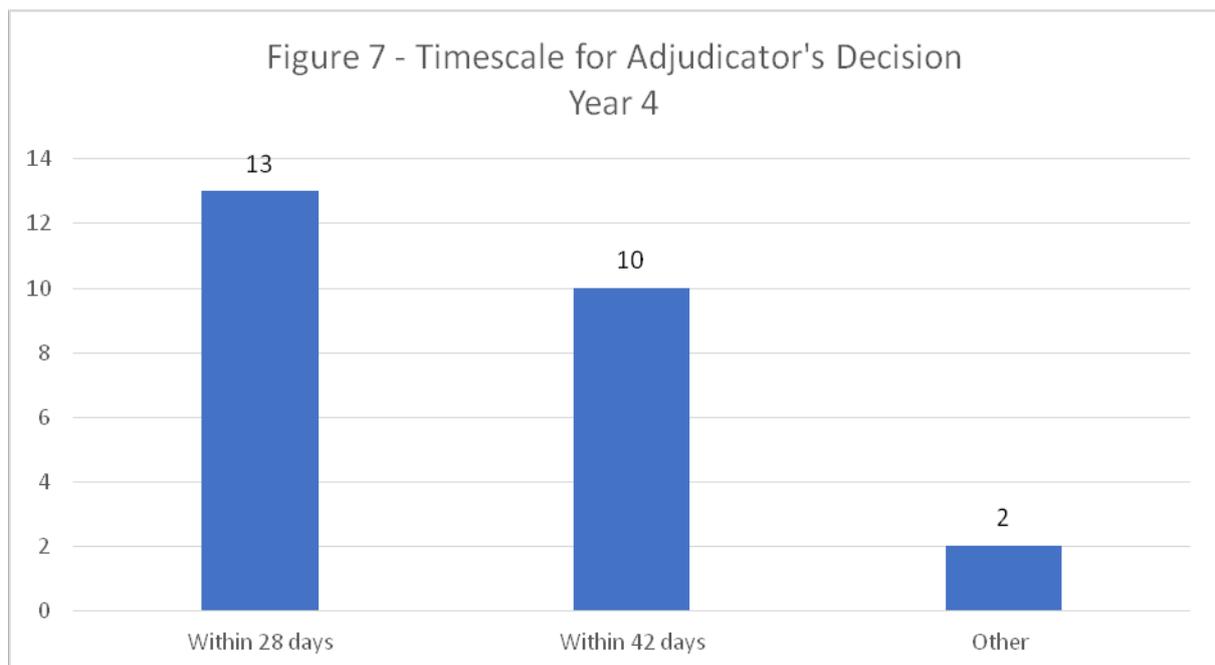
6.9 Figure 5 provides information on the outcome of the 25 Adjudicator decisions. The Referring Party was successful in 14 cases, the Responding Party was successful in 6 cases and there was a split decision between the parties in 5 cases.



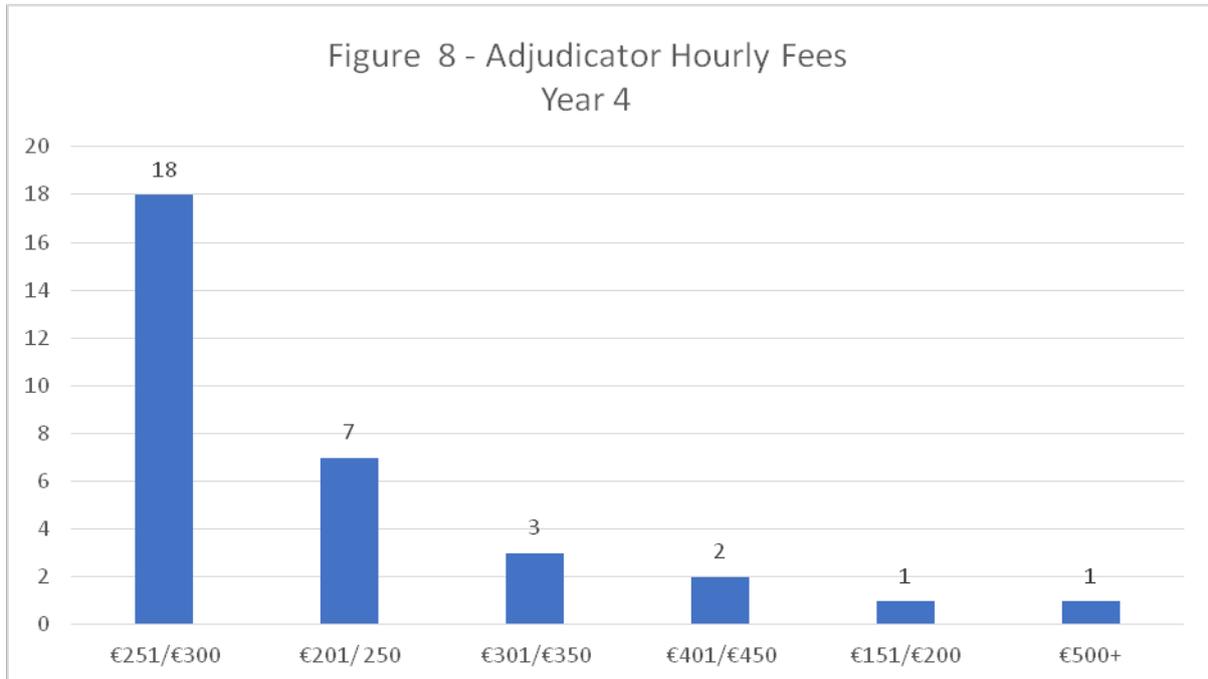
6.10 Figure 6 provides information on the amounts that were awarded in Adjudicator decisions. A total of 17 cases resulted in monetary awards made by the Adjudicator. In the other 8 cases, no monetary awards were reported as the Respondent Party was successful or there was split decision, which resulted in no monetary award.



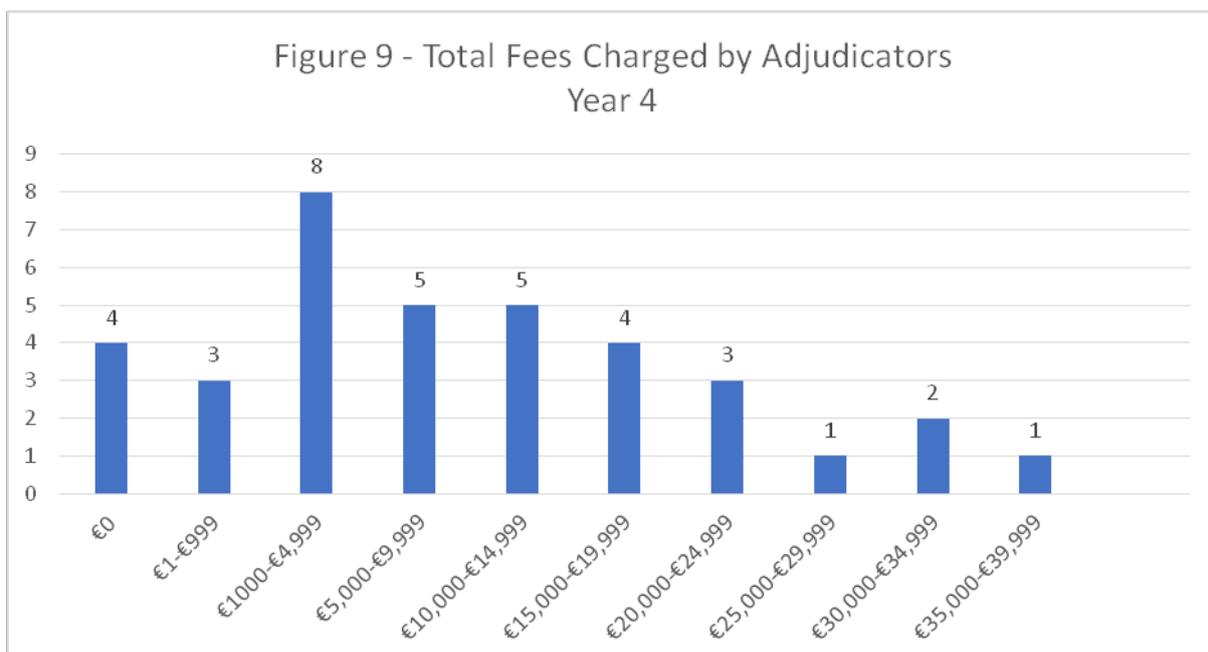
6.11 Figure 7 provides information on the timescale of issuing the Adjudicator’s decision in the above mentioned 25 cases. A decision was issued in most cases within either 28 or 42 days from the date of the referral of the payment dispute to the Adjudicator. There were 2 cases in which the decision was issued after a period of 42 days from the date of the referral of the payment to the Adjudicator, with the agreement of the parties.



6.12 Figure 8 provides information on the hourly fees charged by the Adjudicators in 32 cases. In 18 cases, the hourly fee charged by Adjudicators was in the range of €251/€300 and, in 7 cases, the hourly fee charged was in the range €201/€250. Adjudicators did not charge an hourly fee in 4 cases as an adjudication did not take place.



6.13 The ‘Code of Practice Governing the Conduct of Adjudications’ requires that the fees charged by an Adjudicator should be reasonable in amount having regard to the amount in dispute, the complexity of the dispute, the time spent by the Adjudicator on the dispute and other relevant circumstances. Figure 9 details the total amount of fees charged by Adjudicators. In 4 cases, no fees were charged as an adjudication did not take place.



7. Comment and Conclusions

- 7.1** This Fourth Annual Report since the commencement of the Construction Contracts Act, 2013 points to a further modest increase in the number of payment disputes referred to the statutory adjudication process provided for under the Act. However, as the Act does not carry an obligatory reporting provision in respect of adjudications carried out, it is not possible to accurately assess the instance of relevant payment disputes and of adjudications undertaken under the Act. Whereas I have reported on the data provided in circumstances where Adjudicators have chosen to provide such data, it is not possible to state definitively that this encompasses all cases.
- 7.2** In the period covered by this Annual Report, I appointed 46 Adjudicators under Section 6(4) of the Construction Contracts Act, 2013 to payment disputes with a combined value of just over €35.5 million. This figure excludes the value of cases which were re-entered a second time.
- 7.3** As identified in Figure 1 of this Report, the most common dispute referred for adjudication involved a subcontractor and a main contractor. One of the principal objectives of the Act is to provide statutory payment protection for subcontractors who have been considered vulnerable in the payment cycle of the construction sector. As can also be seen from Figure 5 of this Report, the Referring Party has been successful or partially successful in 19 of the 25 Adjudicator decisions reported.
- 7.4** However, it is also important to note that a main contractor can refer a payment dispute with their employer for adjudication under the Act, and there were 9 such cases reported by Adjudicators, as can be seen from Figure 1 above.
- 7.5** There are Judicial Review proceedings ongoing arising from 1 appointment of an Adjudicator under Section 6(4) of the Construction Contracts Act, 2013. As these proceedings are currently ongoing, it is not appropriate to comment any further on this case.
- 7.6** This Annual Report and my previous Annual Reports highlight that parties to construction contracts are pursuing their rights under the Construction Contracts Act, 2013 and seeking redress for non-payment or under payment. In order for payment disputes to be avoided in the first instance, it is important that employers, contractors and subcontractors adhere to the payment practice requirements set out in the Act. I would also point out that if a party to a construction contract, as defined under the Act, is contemplating referring a payment dispute for adjudication, all appropriate procedures required under the Act and the ‘Code of Practice Governing the Conduct of Adjudications’ should be followed. An information booklet on the Construction Contracts Act, 2013 is available on the Department’s website at www.dbei.gov.ie/en/ which includes information on the various stages in the adjudication process.
- 7.7** I would like to take the opportunity to record my thanks and appreciation to the former Director of the Construction Contracts Adjudication Service, Mr. Loughlin Quinn, who retired last year.

- 7.8** Furthermore, I would like to thank all of those working in the Construction Contracts Adjudication Service, responsible for processing all of the applications, especially during the difficult times of the COVID-19 pandemic.
- 7.9** Finally, I would like to also thank the members of the Ministerial Panel of Adjudicators who have accepted Adjudicator appointments under Section 6(4) of the Act, often at short notice.

Dr. Nael G. Bunni,
Chairperson of the Ministerial Panel of Adjudicators.
August 2020