

# CONSTRUCT

**The role of the Principal  
Agent in the JBCC Principal  
Building Agreement**

Edition 6.2 May 2018



Construction & Technology Attorneys

In the first issue of our series, we will examine the role of the Principal Agent in the Joint Building Contracts Committee (“JBCC”) Principal Building Agreement (“PBA”) Edition 6.2 May 2018, hereinafter the *JBCC Edition 6.2*. This commentary will illustrate that the said role is not only highly developed but is crucial to the overall success and completion of the works. Attention will be briefly drawn to differences between the JBCC Edition 6.2 and editions which came before it, specifically pertaining to the role of the Principal Agent.

### **Who is the Principal Agent?**

The Principal Agent is, as defined in clause 1.1 of the JBCC Edition 6.2, an entity appointed by the employer with full authority to act in terms of the agreement. Such entity then appoints a natural person to act in its stead (the details of whom are recorded in the contract data). The Principal Agent is not a party to the agreement but acts in a representative capacity and does so with reasonable care and skill required from persons in its industry. The JBCC Edition 6.2 agreement makes no mention of a specific industry from which the entity must be practicing (although in our experience the entity is usually a firm of architects, or quantity surveyors).

Clause 6.6 prohibits the employer from interfering with the Principal Agent’s ability to exercise fair and reasonable judgment in performing obligations in terms of the agreement. Thus, even though it is the employer’s agent, the Principal Agent is expected to be impartial and fair in the execution of its duties.

The employer warrants that the Principal Agent has the full authority to act on behalf of, and to bind the employer, however, Principal Agent does not have the authority to amend the agreement (from a practical point of view, the Principal Agent is not actually a party to the agreement – this is reserved for the employer and contractor).

### **Can their powers be delegated?**

The entity appointed as the Principal Agent may, in terms of clause 6.2, appoint agents and delegate the authority to issue contract instructions and perform duties for specific aspects of the works to such agents. This clause is aimed at delegating authority to persons who are equipped and competent to perform duties in which the Principal Agent lacks specialty. The agent may not sub-delegate the delegated authority without prior written consent of the employer and notice to the contractor. Thus, the powers delegated solely vest in appointed agents.

### **What are the Principal Agent’s duties?**

The Principal Agent plays a pivotal role in the operations on site and timeous completion of the works. The duties include, but are not limited to:

- a) Monitoring the contractor’s progress at various stages of the works;
- b) Providing adequate construction information to the contractor;
- c) Meeting with the contractor to deal with any technical and coordination issues;
- d) Preparing tender documents and scrutinizing tenders received for the appointment of nominated and selected subcontractors;

- e) Appointing another subcontractor where the appointment of a subcontractor has been terminated (including nominated subcontractors);
- f) Certifying payment certificates and issuing same and the certificate of practical completion; and
- g) Assessing claims for extension of time (EOT) / adjustment to Contract value / claims for expense and loss.

### Can the Principal Agent be the Employer?

As alluded to above, the Principal Agent must exercise fair and reasonable judgement when performing his duties in terms of the JBCC Edition 6.2. The implication of this is such that they must act independently and fairly and therefore in accordance with the terms of the contract. Clause 6.3 requires the Principal Agent to declare any interest of involvement in the works other than a professional interest. The JBCC Edition 6.2 does not expressly provide that that a Principal Agent cannot be the employer. However, it has been held that:

*The principal agent represents the employer, is not a party to the JBCC agreement and is a key independent professional role player with extensive authority to bind the employer ...The principal agent issues instructions on behalf of the employer (presumably in good faith) and binds the employer. In the course of the works the employer is not precluded from appointing other professionals for additional oversight.*<sup>1</sup>

The position therefore appears to be unclear in respect of the correctness of the employer itself acting as Principal Agent under the JBCC Edition 6.2.

### Is it mandatory for the Principal Agent to issue a contract instruction?

The contractor, in terms of clause 2.0, is under an obligation to comply with the law specified in the agreement. In terms of clause 17.0, the Principal Agent **may** issue contract instructions to the contractor regarding the compliance with the laws, regulations, and by-laws. According to the JBCC Advisory Note: Edition 6.2, the implication of this is that *“the principal agent therefore enjoys a specific discretion in this regard. To the extent that the contractor/subcontractor has an overarching statutory obligation to comply with the law ... it is unnecessary for the principal agent to issue a contract instruction regarding compliance with the imposition of laws imposed.”*<sup>2</sup>

There are numerous additional contract instructions mentioned under clause 17.0. However, as stated above, the use of the word “may” suggests that the exercise of such a duty is discretionary. The Principal Agent enjoys a specific discretion in respect of issuing the listed contract instructions to the contractor.

In contrast to the above, clause 17.2 states that the contractor must comply with and duly execute all contract instructions (unless for addition work issued after practical completion). It can therefore be concluded that the discretion afforded to the Principal Agent is not afforded to the contractor as they must comply with all contract instructions.

### The crucial role played in achieving Practical Completion

The Principal Agent must inspect the works within the period stated in the contract data and issue a certificate of practical completion. This is where the works or a section thereof has been completed and is free from patent defects other than minor defects identified in the list for practical completion and can be used for the intended purpose.

1. Aveng Grinaker v MEC Department of Human Settlements (EL459/15) [2018] ZAECELLC 3; [2018] 3 All SA 466 (ECLD, East London) (5 June 2018) para 6.

2. [http://jbcc.co.za/advisory\\_notes/JBCC\\_ADVISORY\\_NOTE\\_23.0Ed6.2\\_Coronavirus\\_2.pdf](http://jbcc.co.za/advisory_notes/JBCC_ADVISORY_NOTE_23.0Ed6.2_Coronavirus_2.pdf)

Where the works has not reached practical completion, the Principal Agent will issue one complete and concise list with the defects to be remedied and work to be completed for practical completion.<sup>3</sup> It is important to note that the list is comprehensive and conclusive and the Principal Agent may not add to the list nor update it once it has been issued. The Principal Agent can however issue a contract instruction, for instance, an instruction for repair work.<sup>4</sup>

A subsequent and updated list for practical completion may be issued but such a list will be limited to the items on the list for practical completion which have not been attended to in a satisfactory manner. Hence, this process is repeated until all items on the list for practical completion have been attended to satisfactorily. Thereafter, the certificate of practical completion is issued by the Principal Agent.

The position above is different under the JBCC Edition 4.1 and the JBCC Series 2000 Edition 5.0 Code 2101 July 2005. Under these said editions, the Principal Agent issues a practical completion list. The editions make no mention of such a list being comprehensive and conclusive. The amendments in the later JBCC Edition 2018 regarding the restrictions on the issuance of practical completion list was probably necessitated due to the Principal Agent being able to constantly update the practical completion list with new items, which in turn made it difficult for the contractors to achieve practical completion. Now, the Principal Agent will have to apply his mind at the outset. It is noted further that the JBCC Edition 2018 allows the parties to agree on the works to be completed in order for the contractor to achieve practical completion. This further places the Principal Agent in his box.

Other appointed agents may assist with the inspection of the works taken possession of by the employer. However, the issuing of the certificate practical completion is solely the responsibility of the Principal Agent.

The JBCC Edition 2018 is quite clear about what needs to be done should the Principal Agent not do what he supposed to do under the agreement. For example, should the Principal Agent not issue an updated list for practical completion within 5 working days of his inspection of the works, notice may be given to do so by the contractor. The Principal Agent has 5 working days to comply and if he doesn't, practical completion will be deemed to have occurred on expiry date of such notice. This may be a bitter pill for the employer to swallow and he should be able to hold the Principal Agent accountable in terms of his professional services agreement should the employer suffer any loss / damage as a result.

There are a couple of notable differences between the JBCC Edition 6.2 and the JBCC Edition 4.1. For example, under clause 19.0 of the JBCC Edition 6.2, certain wording has been amended and is different to clause 24.0 in the JBCC Edition 4.1. "*From time to time...*" has been amended to "*at appropriate intervals ...*". According to the JBCC Brief Summary of the Major Differences between JBCC Edition 4.1 and 6.2 Suite of Documents, the said change was effected to allow for supervision to differ from one project to another. Hence, in some projects the Principal Agent will have to visit the site more regularly than on others.

#### **How should the Principal Agent deal with revisions to the date for practical completion when there are multiple causes of delay?**

There are specific events under clause 23.1, which entitle the contractor to a revision of the date for practical completion by the Principal Agent without an adjustment of the contract value. This is for a delay to practical completion caused by the listed events. For instance, adverse weather conditions are listed as a delay causing event. Additionally, specific events under clause 23.2 entitle the contractor to a revision of the date for practical completion by the Principal Agent with an adjustment of the contract value for a delay to practical completion caused by the listed events.

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3. 21.0 Defects liability period and final completion – Defects before and after final completion December 2020 – JBCC Advisory Note: Edition 6.2 on page 1.

4. JBCC Guide to Completion and Payment November 2020 on page 9.

It is of great significance that the Principal Agent assess claims under the agreement for extensions of time correctly, as such assessments impact the completion date of the works as well as additional compensation that may be payable to the contractor.

As mentioned, adverse weather conditions are listed as an event which could cause delay under clause 23.1.1. According to the JBCC Advisory Note: Edition 6.2, a delay caused by adverse weather is not automatically granted. The Principal Agent must be satisfied that:

1. *The progress of the works towards practical completion was delayed*
2. *All reasonable practical steps were taken to avoid or reduce the delay (NOTE: This does not imply that the contractor was obliged or required to "make up time" or accelerate in any way)*
3. *The delay claimed would be a delay to practical completion (i.e. impact on the critical path of the contractor's programme)<sup>5</sup>*

In the event delays to practical completion are due to the employer and/or agents, the Principal Agent will adjust the contract value. The Principal Agent may exercise his discretion and extend the period allowed (40 working days) for the submission of a claim for the revision of the practical completion date. The Principal Agent is required to assess the claim and grant, reduce or refuse the working days claimed.

When assessing claims, the Principal Agent should take into account the time barring provisions of clause 23.4.2, as should the contractor be time barred, the contractor forfeits the claim. The employer would expect the Principal Agent to do so. The Principal agent is further required to determine a revised date for practical completion (which is a pretty important task as the would impact the employer's ability to levy delay damages on the contractor).

The JBCC Edition 2018 tells the contractor what happens if the Principal Agent fails to assess a claim within the time periods provided for. The claim is deemed refused. In this event, the contractor would then have the opportunity to submit a notice of disagreement to the employer – who will then get the heads up that the Principal Agent isn't doing his job.

### Payment and recovering expenses and losses

The Principal Agent plays a particularly robust role when it comes to payment. They must, regularly and by the due date, issue payment certificates to the contractor until and including the issue of the final payment certificate. The Principal Agent additionally provides written authority for the removal of materials and goods certified and paid for to be property of the employer. They may also request proof of payment for payment which has been effected by the contractor to subcontractors.

With each payment certificate, the Principal Agent must issue a recovery statement with amounts owing to the employer or contractor, a statement with certified amounts for all subcontractors and a n/s subcontract payment notification to all subcontractors. They must also issue determinations of default and compulsory interest. Under clause 24.3 (and when the employer elects to levy penalties), the Principal Agent must include the penalty in the interim payment certificate from the date on which the employer's entitlement to penalties commences. This was not provided for in the JBCC Edition 4.1.

With every payment certificate, the Principal Agent will issue a recovery statement. This includes explanatory documentation supporting the amounts due to the employer and contractor.

Should the Principal Agent fail to issue a payment certificate by the due date, the contractor may suspend the works or terminate the agreement. This may be disastrous to the employer and the works completion timelines as the contractor would then have a claim for an extension of time and money.

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5. [http://jbcc.co.za/advisory\\_notes/JBCC\\_ADVISORY\\_NOTE\\_23.0ED6.2.pdf](http://jbcc.co.za/advisory_notes/JBCC_ADVISORY_NOTE_23.0ED6.2.pdf)

Clause 28.0 sets out specifically what the contractor can do if the Principal Agent fails to issue a payment certificate by the due date – note that the notice gets sent straight to the employer – another check and balance that the employer has to make sure the Principal Agent is performing his duties.

### **Adjustment of the contract value and final account**

The Principal Agent determines the value of adjustments to the contract value in cooperation with the contractor in preparation of the final account. Similarly, to the above, the Principal Agent must again exercise fair and reasonable judgement by making a fair assessment of the claim and adjusting the contract value within 20 working days of receipt of such details. Another major change is the period for the Principal Agent to prepare and issue the final account to the contractor, which is now 60 working days and no longer 90 working days as provided for in the JBCC Edition 4.1.

Hence, the Principal Agent must prepare and issue the final account to the contractor within 60 days calendar days of practical completion. Thereafter, the contractor will either accept the final account or give notice objecting to the final account. Where no notice is given by the contractor, the final account will be deemed accepted. Where the objection is not resolved within 10 working days (or such extended period allowed upon request) the Contractor may deliver a notice of disagreement.

Finally, the Principal Agent will issue the final payment certificate to the contractor within 7 calendar days of acceptance of the final account. Failure to do so will take the contractor down the same road as applicable to failure to issue a payment certificate by the due date (as described above).

### **Termination**

On instruction from employer, the Principal Agent will give notice to the contractor of the identified default, requesting that the default be remedied within 10 working days. This takes place when the employer considers terminating the agreement.

Should the agreement be terminated, the Principal Agent prepares and hands over to the employer all compliance certificates. They assemble and issue a status report with works which have been complete and those incomplete. The Principal Agent subsequently continues to certify the value of the work executed and the materials and goods for payment by the employer or contractor until such time that the final payment certificate is issued.

Should the agreement be terminated, the Principal Agent prepares and hands over to the employer all compliance certificates. They assemble and issue a status report with works which have been complete and those incomplete. The Principal Agent subsequently continues to certify the value of the work executed and the materials and goods for payment by the employer or contractor until such time that the final payment certificate is issued.

Thereafter, the final account is prepared and issued by the Principal Agent, within the 60 working days of the date of termination. This includes the cost of materials and goods and those ordered before termination.

The contractor is entitled to give notice of their intention to terminate the agreement where the Principal Agent has failed (for example) to issue a payment certificate to the contractor by the due date (this is over and above the ability to suspend the works). In this instance, the contractor will give notice to the Principal Agent of the specified default and request that the default be remedied within 10 working days. Where the default is not remedied within the 10 working days, the contractor will be entitled to give notice of termination of the agreement to the Employer and the Principal Agent.

### **Conclusion**

Overall, the above has illustrated that the Principal Agent's role is extensive and can be compared to that of a senior project manager. Crucial to the success of the role is the orderly and timeous fashion in which the Principal Agent must carry out their respective duties. Fairness and impartiality are at the heart of such a role as the interests considered are not only those of the employer but also those of the other parties to the agreement. The agreement envisages a facilitatory and collaborative position whose output is the contractually envisaged completion of the works, however, unlike the other standard form contracts, the JBCC contract gives the contractor guidelines on what he can do if the Principal Agent is not performing in terms of the agreement. In addition, through the notification process, the employer is kept abreast of the Principal Agent's failures.

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