

# CONSTRUCT

A revision of the date for practical  
completion in the JBCB Principal Building  
Agreement Edition 6.2 May 2018



Construction & Technology Attorneys

In our introductory article to our MDA Construct JBCC Series of articles on the Joint Building Contracts Committee Principal (“JBCC”) Building Agreement (“PBA”) Edition 6.2 May 2018 (hereinafter the “JBCC 2018 PBA”) we unpacked the role of the Principal Agent under such contract. In continuing with our MDA Construct JBCC series, we will have a further look at significant topics which play a pertinent role in the success of JBCC projects. Clause 23 of the JBCC 2018 PBA deals with the contractor’s entitlement to a revision of the date for practical completion, subject to certain circumstances. We will examine the contractor’s entitlement along with the claim procedure.

Practical completion is “*the stage of completion as certified by the principal agent where the works or a section thereof, has been completed and is free of patent defects other than minor defects identified in the list for completion and can be used for the intended purpose.*” The achievement of practical completion triggers significant changes to the obligations of the parties, for example, the employer takes over the works (and hence the risk in and to the works) from the contractor, the security provided by the contractor reduces, and the contractor’s liability for delay damages ceases. The date for practical completion (or the date for completion of certain sections of the works – which sections will each have their own practical completion date) is agreed up front between the parties and recorded in the contract data.

There are two ways in which this recorded practical completion date is changes – either by written agreement between the employer and contractor, or by the principal agent through the claims mechanisms found within the contract.

#### **Circumstances entitling the contractor to make its claim**

In terms of Clause 23.1, a contractor is entitled to a revision of the date for practical completion, without an adjustment to the contract value (in other words, no prolongation costs are payable by the employer), for a delay caused by one of the following circumstances:

- a) Adverse weather conditions
- b) Inability to obtain materials and goods where the contractor has taken all reasonable steps to avoid the delay
- c) Making good physical loss and repairing damage to works where such risk is beyond the control of the parties
- d) Late supply of a prime cost amount item
- e) Exercise of statutory power by a body of state that directly affects the execution of the works
- f) Force Majeure

The idea behind this clause is that because the events of delay listed are not within the parties’ control, that the time risk is taken by the employer and the cost risk is taken by the contractor.

Clause 23.2 of the JBCC 2018 PBA provides that a contractor is entitled to a revision of the date for practical completion, with an adjustment to the contract value (payment of preliminaries / P&G), for a delay caused by one of the following circumstances:

- a) Delayed possession of the works
- b) Making good physical loss and repairing damage to the works where the contractor is not at risk

- c) Contract instructions not occasioned by the contractor's default
- d) Opening up and testing of work and materials and goods
- e) Late or incorrect issue of construction information
- f) Late supply of free issue, materials and goods for which the employer is responsible
- g) Late appointment of a subcontractor
- h) Late acceptance of a design undertaken by a selected subcontractor
- i) An act/omission of a nominated subcontractor or direct contractor
- j) Insolvency or termination of a nominated subcontractor
- k) Suspension or termination by a subcontractor due to default of the employer, principal agent or any agent
- l) Execution of additional work for which the quantity in the bill of quantities is not sufficient
- m) Suspension of the works

Hence, in terms of the above entitlement, the contractor will be entitled to additional time and additional payment.

#### **What happens when another type of delay event occurs that is not listed as an event of delay under Clauses 23.1 and 23.2?**

Our next consideration pertains to what happens when a delay does not fall into one of the categories under Clauses 23.1 and 23.2. In this instance, Clause 23.3 becomes particularly important. This clause provides for further circumstances which entitle a contractor to claim a revision of the date for practical completion and, where applicable, an adjustment to the contract value. These include delays to practical completion due to any other cause beyond the contractor's reasonable control, that could not have reasonably been anticipated and provided for.

In this instance, where the contractor can prove an entitlement to an extension to the date for practical completion, the principal agent is to adjust the contract value – but only where such delay is due to the employer and/or agents. An example is where a contractor suffers delay due to site disruptions occasioned by the interference of a local business forum. This could be where it was agreed that the employer was to consult with a local business forum at the design phase of a project, and not once the contractor is already on site. Notwithstanding such agreement, the employer then fails to consult with a local business forum as agreed, resulting in the same local business forum being disgruntled and disrupting the progress of the works once the contractor is on site. Such a claim, made in terms of Clause 23.3, would nevertheless need to be properly raised and supported, to ensure that there is no reason for the principal agent to disallow it.

#### **What does the claim procedure entail?**

It is important to note that should circumstances listed under Clauses 23.1, 23.2 and 23.3 occur, which could cause a delay to the date for practical completion, the contractor must take reasonable steps to avoid or reduce such delay. Moreover, the contractor is to give notice to the principal agent of the intention to submit a claim for a revision to the date to practical completion. The contractor must do this within 20 working days of becoming aware, or having reasonably ought to have become aware of such delay. Should the contractor fail to do this, they forfeit their claim. This is all in accordance with Clause 23.4. Let's call this the *"notice of claim"*. The idea surrounding the submission of the notice of claim is to bring attention to the possibility that the programme / contract price may be impacted so that the principal agent can himself take steps himself to mitigate the impact of the event of delay. This is probably why there is a *"time bar"* on the number of days that the contractor has to submit his claim.

Within 40 working days from when the contractor is able to quantify the delay in terms of the programme (once the delay event has ceased), the contractor is to submit a claim for the revision of the date for practical completion. Let's call this the *"fully detailed claim"*.

For those of you who are struggling to envisage what a contractor's claim would look like, the provisions of the contract actually list, in point form, what information the claim document must contain. This is always a good place to start and if one uses the provisions of Clause 23.6 of the JBCC 2018 PBA, you really cannot go wrong. The headings of your claim document will be as follows:

- a) The relevant clause relied upon
- b) The cause of the delay on the current date for Practical Completion
- c) The effect of the delay on the current date for Practical Completion (illustrating the change to the critical path on the programme)
- d) The number of working days claimed
- e) The calculation of the number of working days claimed

It is vital for contractors to stay abreast with contract provisions where specific times are stipulated. For instance, where the contract provides that a notice or claim must be submitted within a certain number of working days, contractors must know that these are "*calendar days which exclude Saturdays, Sundays, proclaimed public holidays and recorded contractor's annual holiday periods*" as stipulated in the contract data. Hence, the contractor needs to be aware of provisions where working days are applicable as this will assist them in avoiding being time barred from submitting their claims. In addition to this, contractors must ensure that they stay abreast with who exactly their respective claims must be addressed and submitted to and the form of the claim. It is our experience that a contractor is more likely to receive a prompt and efficient response from the principal agent when the contractor's fully detailed claim is set out as required by the contract. It helps the principal agent to make his decision. Do not submit a "*one pager*" without all of the information as your claim will likely be ignored.

Notwithstanding this, however the contract does prescribe what the principal agent should do once he receives the contractor's fully detailed claim. Within 20 working days of receipt of the contractor's claim (the fully detailed claim and not the claims notice), the principal agent either grants, reduces or refuses the claim. The JBCC 2018 PBA states that the principal agent must additionally determine the revised date for practical completion where working days are granted, identify each event and the reference clause for each revision and provide reasons where the claim is refused or reduced. Where principal agent fails to respond, the claim is deemed refused. In the event the contractor is not satisfied with the principal agent's response, they must give a notice of disagreement, as envisioned in Clause 30.1 of the JBCC 2018 PBA.

### Conclusion

Having considered all of the above, it is apparent that contractor ought to be aware of which clauses to submit claims under as this impacts nature of their entitlement, being an extension of time, additional payment or both. Contractors are urged to not be afraid of the contract. The writing is small and its very overwhelming to read – but it does tell you what you need to do and how to do it. If you get stuck, read the relevant clause. You will be surprised at how capable you actually are.

In our next commentary, we will have a thorough review of the claims for adjustment to contract value (including the final account) and the recovery of both expense and loss.

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For contracting parties who are used to the JBCC 2005 PBA and the JBCC 2007 PBA, there are some minor changes in these editions when compared to the JBCC 2018 PBA. These differences can be summarised as follows:

	JBCC 2018 PBA	JBCC 2005 & 2007 PBA
Circumstances entitling the contractor to make its claim for an adjustment to the date for practical completion	<p>Clause 23.1</p> <ul style="list-style-type: none"> <li>Force majeure</li> <li>The exercising of statutory power by a body of state or public or local authority which directly affects the execution of the works</li> </ul>	<p>Clause 29.1</p> <ul style="list-style-type: none"> <li>An event that neither party could prevent, civil commotion, riots, strike, lockout and vis major</li> <li>A default by a nominated subcontractor where the contractor has taken all practical steps to avoid or reduce such delay</li> </ul>
Circumstances entitling the contractor to make its claim for an adjustment to the date for practical completion, with an adjustment to the contract value (payment of preliminaries / P&G), for a delay caused	<p>Clause 23.2</p> <ul style="list-style-type: none"> <li>Delayed possession of the works</li> <li>Late or incorrect issue of construction information</li> <li>Insolvency or termination of a nominated subcontractor</li> <li>An act or omission of a nominated subcontractor or a direct contractor</li> <li>Opening up and testing of work and materials and goods where such work is in accordance with the agreement</li> </ul>	<p>Clause 29.2</p> <ul style="list-style-type: none"> <li>Failure to give possession of the site to the contractor</li> <li>Failure to issue construction information timeously</li> <li>Insolvency of a nominated subcontractor</li> <li>A direct contractor</li> </ul>
Time in which the principal agent must make a determination regarding the contractor's claim for a revision of the date for practical completion	<p>Clause 23.7</p> <ul style="list-style-type: none"> <li>Within 20 working days of receipt of the contractor's claim (the fully detailed claim), the principal agent either grants, reduces or refuses the claim</li> </ul>	<p>Clause 29.7</p> <ul style="list-style-type: none"> <li>Within 15 working days of receipt of the contractor's claim (the fully detailed claim), the principal agent either grants, reduces or refuses the claim</li> </ul>

	<b>JBCC 2018 PBA</b>	<b>JBCC 2007 PBA</b>	<b>JBCC 2005 PBA</b>
Time allowed for submitting claim for revision of date for practical completion	<p>Clause 23.5</p> <ul style="list-style-type: none"> <li>The contractor is to submit a claim for the revision of the date for practical completion within 40 working days from when the contractor is able to quantify the delay in terms of the programme</li> </ul>	<p>Clause 29.5</p> <ul style="list-style-type: none"> <li>The contractor is to submit their claim to the principal agent within 40 working days of the delay ceasing</li> </ul>	<p>Clause 29.5</p> <ul style="list-style-type: none"> <li>The contractor is to submit their claim to the principal agent within 60 working days of the delay ceasing</li> </ul>
Time in which the principal agent must make a determination regarding the contractor's claim for a revision of the date for practical completion	<p>Clause 23.7</p> <ul style="list-style-type: none"> <li>Within 20 working days of receipt of the contractor's claim (the fully detailed claim), the principal agent either grants, reduces or refuses the claim</li> </ul>	<p>Clause 29.7</p> <ul style="list-style-type: none"> <li>Within 15 working days of receipt of the contractor's claim (the fully detailed claim), the principal agent either grants, reduces or refuses the claim</li> </ul>	<p>Clause 29.7</p> <ul style="list-style-type: none"> <li>Within 15 working days of receipt of the contractor's claim (the fully detailed claim), the principal agent either grants, reduces or refuses the claim</li> </ul>

## REVISION OF DATE FOR PRACTICAL COMPLETION – CLAUSE 23

Contractor is entitled to a revision of the date for practical completion (without an adjustment to the contract value) for a delay caused by one or more of the following:

I.E → **Time but no money**

- Adverse weather conditions
- Inability to obtain materials and goods where the contractor has taken all reasonable steps to avoid the delay
- Making good physical loss and repairing damage to works where such risk is beyond the control of the parties
- Late supply of a prime cost amount item
- Exercise of statutory power by a body of state that directly affects the execution of the works
- Force Majeure

Contractor is entitled to a revision of the date for practical completion and an adjustment to the contract value for a delay caused by one or more of the following:

I.E → **Time AND Money**

- Delayed possession of the works
- Making good physical loss and repairing damage to the works where the contractor is NOT at risk (see Clause 8.5)
- Contract instructions not occasioned by the contractor's default
- Opening up and testing of work and materials and goods
- Late or incorrect issue of construction info
- Late supply of free issue, materials and goods for which the employer is responsible
- Late appointment of a subcontractor
- Late acceptance of a design undertaken by a selected subcontractor
- An act/omission of a nominated subcontractor or direct contractor
- Insolvency or termination of a nominated subcontractor
- Suspension or termination by a subcontractor due to default of the employer, principal agent or any agent
- Execution of additional work for which the quantity in the BOQ is not sufficient
- Suspension of the works

**Your delay does not fall into one of these categories?!**

**NOTE:** Further circumstances for which a contractor may be entitled to a revision of the date for practical completion and an adjustment to the contract value = Delays to practical completion due to **any other cause beyond the contractor's reasonable control that could not have reasonably been anticipated and provided for.**

The **contract value** will be adjusted when → The employer / agents caused the delay

## CLAIM PROCEDURE

Within **20 working days** from date of **becoming aware or ought reasonably to have become aware** of the delay, the contractor shall give notice to the principal agent of the intention to submit a claim.

**NOTE: IF YOU DO NOT DO THIS, YOU FORFEIT YOUR CLAIM!**

Within **40 working days** from when the contractor is **able to quantify the delay** in terms of the programme, the contractor shall submit a claim.

The claim must state:

- The relevant clause relied upon
- The cause of the delay
- The effect of the delay on the date for practical completion (illustrating the change to the critical path on the programme)
- The number of working days claimed
- The calculation of the number of working days claimed

Within **20 working days** of receipt of the claim, the principal agent shall grant, reduce or refuse the claim and:

- Determine the revised date for practical completion where working days are granted
- Identify each event and the reference clause for each revision
- Reasons where the claim is refused or reduced

**NOTE:** Where principal agent **fails to respond**, claim is **deemed refused**

Dissatisfied with the principal agent's response? → Give a notice of disagreement