

# CONSTRUCT

The contractor's entitlement to a claim for  
an adjustment to the contract value and  
recovering expense and loss in the JBCC  
Principal Building Agreement Edition 6.2  
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PART 1



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Having considered the contractor's entitlement to additional payment when there is an adjustment to the time for practical completion, we now move onto unpacking the contractor's right to an adjustment to the contract value for factors which may fall outside of the contractor's entitlement to an extension to the date for practical completion. Clauses 26 and 27 of the Joint Building Contracts Committee ("JBCC") Principal Building Agreement Edition 6.2 May 2018 (the "JBCC 2018 PBA") deal with this entitlement. We will examine this contractor's entitlement in this article.

In the JBCC 2018 PBA, there is a difference between the "contract sum" and the "contract value". The contract sum is the accepted tender amount inclusive of tax (as stipulated in the contract data), which is not subject to an adjustment. This amount therefore remains fixed as the planned cost budgeted for. However, the contract value is the monetary value initially equal to the contract sum, which is subject to an adjustment. This amount constitutes what is actually owed to the contractor (i.e.: the employer's actual liability towards the contractor).

### What gives rise to an adjustment to the contract value?

#### a) Contract instructions

The first right for an adjustment to the contract value applies to variations. Clause 26.2 of the JBCC 2018 PBA specifically refers to "Adjustments to the contract value resulting from a contract instruction". In turn, the contract instruction is given pursuant to Clause 17.1. This means that any of the instructions given (from 17.1.1 to 17.1.20 – where appropriate) entitle the contractor to an adjustment to the contract value that is calculated in accordance with Clause 26.2.

Clause 17.2 requires the contractor to comply with and duly execute all contract instructions. A contract instruction is a written instruction issued by or under the authority of the principal agent to the contractor that includes drawings, photographs and other construction information. A contract instruction can be issued for additional work.

Such instructions can therefore come about during the execution of the works, constituting variations to the work. Clause 26.2 of the JBCC 2018 PBA sets out the following in respect of the determining of the adjustment to the contract value:

- i. Work of a similar character under similar conditions is to be priced at the rates in the priced document.
- ii. Work not of a similar character is to be priced at rates based on those in the priced document and adjusted to suit changed circumstances.
- iii. If the above methods do not apply, work is to be priced at rates based on the necessary use of labour, construction equipment and/or materials and goods for executing the work plus an allowance of 10% mark-up.
- iv. Work omitted will be valued at rates in the priced document. However, if the omission alters the remaining work's circumstances, the value of the remaining work shall be determined at rates based on those in the priced document and adjusted to suit changed circumstances.

#### b) Prime cost amounts, provisional sums and budgetary allowance items

For adjustment to prime cost amounts, provisional sums and budgetary allowance items, the actual values for work done must first be ascertained.

Thereafter, the provisional amounts provided for in the priced document/s are removed and replaced with the actual values. This is necessary where there is provision of allowances for items with costs which may not be accurate at the conclusion of the contract for the works and is in accordance with clauses 26.9.1 and 26.9.2 of the JBCC 2018 PBA. The said clauses respectively allow for the:

- i. Omission by the principal agent of the prime cost amounts and budgetary allowances from the contract sum and determination the actual value of such work to be added to the contract value, and
- ii. Omission by the principal agent of the provisional sums from the contract sum and determination the actual value of such subcontractors' work to be added to the subcontract value.
  - a) If the contractor makes payment for items which are not included in the priced document, as per the contract instruction (approved by the principal agent), the actual amounts will be paid with an additional mark-up of 10% (added to the contract value).
  - b) Such payment will be limited to charges to charges by authorities, the cost of opening up and testing where work is in accordance with the agreement and the cost of insurances where applicable. These provisions are in terms of Clauses 26.3 and 26.4 respectively.

### c) Preliminaries

We have already assessed circumstances as defined under Clause 23, which entitle the contractor to a claim for an extension of time with an adjustment to the contract value. When there is a delay to construction works, there needs to be a way for the contract value to be adjusted to account for such delay. This is where preliminary costs come into play. These are costs for items which do not form part of the construction works but are required to carry out and complete such works. For example, this could be costs for management and administration, site offices or accommodation.

When there are delays, the costs for such preliminaries will not have been sufficiently provided for in the contractor's tendered sum and will therefore need to be adjusted, consequently adjusting the contract value. Hence, the principal agent will be obligated to adjust the preliminaries in accordance with the method specified in the contract data (Clause 26.9.4).

### d) Expense and Loss

We now need to consider what is expense and loss and what gives rise to a claim for expense and loss? In the 2005 edition of the JBCC, expense and loss is defined as that "*arising from a circumstance for which provision was not required in the contract sum and for which reasonable compensation has not been made in terms of 32.2 and 32.12*" [adjustments due to a contract instructions or JBCC Preliminaries alternatives]. The 2007 edition of the JBCC defines expense and loss as that "*due to no fault of the contractor for which reasonable compensation has not been made*" [32.2.12 adjustment to preliminary and general amounts]. Both of these definitions are in terms of Clause 32.5, which also lists the specific instances where claims for expense and loss would apply. The claims procedure follows in Clause 32.6.

In contrast to the above, the JBCC 2018 PBA does not necessarily define expense and loss, but such definition can be inferred from Clause 26.5. This clause refers to an "*expense and/or loss for which provision was not required in the contract sum*". Under Clause 27.1 of the JBCC 2018 PBA, the contractor is entitled to amounts for expense and loss resulting from:

- i. Default interest
- ii. Compensatory interest
- iii. Damages
- iv. Expense or loss caused by a direct contractor
- v. Advance payments
- vi. Termination of a n/s subcontract agreement due to default of the employer, the principal agent and/or agents

Certain circumstances which were previously listed as specific expense or loss items in the pre-2014 editions have been removed from the list containing specific circumstances. However, this does not necessarily mean that the remedy to such expense and loss has been removed from the contract. We find these remedies for such expense and/or loss elsewhere in the contract.

These remedies appear to fall under the Clause 27.1 heading “damages” as there are, as mentioned above, clauses which entitle the contractor to an adjustment to the contract value. The JBCC defines damages as “an amount of money that puts an injured party into the same position had no loss been sustained or expense incurred”.<sup>1</sup> Coupled with this, there is clause 26.5 which makes provision for the contractor to claim expense and loss:

*“The contractor shall give notice to the principal agent within twenty (20) working days of becoming aware, or ought reasonably to have become aware or expense and/or loss for which provision was not required in the contract sum failing which such claim shall be forfeited.”*

For instance, under the 2007 JBCC suspension is listed as a specific circumstance entitling the contractor to a claim for expense or loss. In the JBCC 2018 PBA it is not. However, Clause 28.4 states:

*“Where the works has been suspended by the contractor [23.2.13] the principal agent shall revise the date for practical completion on resumption of the works with an adjustment to the contract value.”*

Another instance is where the 2007 JBCC lists insolvency of a nominated subcontractor as a specific circumstance entitling the contractor to a claim for expense or loss. Again, in the JBCC 2018 PBA, this circumstance is not listed. However, Clause 23.2 states:

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<sup>1</sup> JBCC Support Document - Terminology not defined in JBCC agreements – ‘damages’ . <https://jbcc.co.za/documents/jbcc-support/>

*“The contractor is entitled to a revision of the date for practical completion by the principal agent with an adjustment of the contract value [26.7] for a delay to practical completion caused by one or more of the following events:*

*23.2.10 Insolvency or termination of a nominated subcontractor.”*

Hence and for example, damages (Clause 27.1.7 of the JBCC 2018 PBA) would be an expense or loss suffered by the contractor due suspension of the works or insolvency of a nominated subcontractor (circumstances set out in clause 32.5 of the 2007 JBCC).

Expense and loss as adjustments to the contract value include the accrual of compensatory and/or default interest (Clauses 27.1.4 and 27.1.5). Compensatory interest is that which is due to the contractor at the ruling rate of interest on amounts certified after 31 calendar days of the date of practical completion, compounded monthly until the date of payment. Default interest is that which is also due to the contractor, accrued at 6% per annum above the ruling rate of interest where payment has not been received from the employer within the stipulated period, compounded monthly from the due date for payment until the date of payment.

Advance payment is listed under Clause 27.1 as a circumstance entitling the contractor to expense and loss. In the context, advance payments enable the contractor to make an advance payment (a loan) to the subcontractor for materials or equipment to be ordered in advance of their requirement on site. The employer indemnifies and holds the contractor harmless from, *inter alia*, expense and loss arising as a result of such advance payment being made.

The JBCC 2018 PBA envisages a situation where the termination of a n/s subcontract agreement results in a variation in the cost of subcontract works for that contract. Where a n/s subcontract agreement is terminated due to default of the employer, the principal agent and/or agents, Clause 14.7.1 provides that a variation in the cost for completing these subcontract works will be for the account of the employer.

Hence, a contractor must ensure that it keeps record of its proven costs and we advise that such proof be in the form of written documents such as instructions, invoices or relevant payment advice. The contractor must demonstrate its proven expense, loss or damage and thus have the option to recover the cost. We will examine the claim procedure in our next article.

#### **e) Further adjustments**

In addition to the adjustment of the contract value arising out of contract instructions, should the principal agent issue an instruction in respect of Clause 17.1.1, he is then obligated to correct discrepancies, errors in a description, quantity or omission of items in the contract for the works (other than those in the JBCC 2018 PBA), therefore allowing for an adjustment of the contract value where such corrections have been made. This is in terms of Clause 26.9.6.

While the contractor has a claim for expense and loss under the contract, it should be remembered that the employer, under Clause 27.2, is also entitled to recover expenses and/or losses incurred or to be incurred resulting from:

- i. Paying charges [clause 2.1]
- ii. Effecting insurances due to the contractor's default [clause 10.0]
- iii. Work executed by others due the contractor's default [clause 17.3]
- iv. Recoupment of advance payment [clause 9.2.10 and 11.3]
- v. The contractor not paying amounts due to the employer [clause 25.7.3]
- vi. Termination of the contract by the employer [clause 29.1]
- vii. Amounts paid directly to subcontractors on default by the contractor [clause 14.5 and 15.5]

- viii. Default by the contractor where not less than five working days notice detailing such default has been given before the issue of the next recovery statement to allow the contractor the opportunity to remedy such default
- ix. Adjustment of the n/s subcontract preliminaries due to the subcontractor as a result of a default by the contractor

#### **Conclusion**

It is again evident from the above why contractors need not be afraid of the contract. The question remains however - how does an adjustment to the contract value make its way into a payment certificate? The contractor's entitlements referred to above may be subject to further compliance with the dreaded claim procedures of the contract. In our upcoming commentary, we will have a thorough review of what the procedure for claiming the adjustment to contract value entails. At the end of the day, it is the principal agent who decides whether the claim submitted by the contractor justifies any adjustment and we need to be sure that we can give him the tools to find in our favour.

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