

# CONSTRUCT

The procedures for claiming 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 2



Construction & Technology Attorneys

We have carried out an assessment of the contractor's right to an adjustment to the contract value for factors which may fall outside of the entitlement to an extension to the date for practical completion. We now need to set out the claim procedures which may be applicable and how exactly the contractor's entitlement makes its way into a payment certificate in accordance with the Joint Building Contracts Committee ("JBCC") Principal Building Agreement Edition 6.2 May 2018 (the "JBCC 2018 PBA").

The Contractor, in terms of clause 25.1, submits payment valuations to the principal agent and provides all of the required documents and quantified amounts of work, duly executed. The principal agent then issues payment certificates to the Contractor. The payment certificate is required to contain, inter alia, a fair value of the work executed and amounts due to either party in a recovery statement. The recovery statement is described in more details below.

#### **A) Claiming adjustment of the value of work executed**

The JBCC 2018 PBA sets out the procedures to be followed by the contractor when claiming an adjustment to the contract value and the considerations to be applied by the principal agent when determining the value of the adjustment. Once done, the principal agent undertakes to:

- a) Adjust the preliminaries,
- b) Adjust the provisional sums to the actual value of the work done,
- c) Adjust the items on the bill to the actual quantities,
- d) Adjust the prime cost amounts,
- e) Adjust the contract value to include contract price adjustments (cost fluctuations) if applicable,
- f) Correct discrepancies, errors in description or quantity or omission of items other than in the JBCC 2018 PBA.

There is no specific claims procedure relating to the above. The claim is made in accordance with the payment valuations submitted under Clause 25.1.

#### **B) Recovery statement**

The principal agent issues a recovery statement to the parties with each payment certificate. This is coupled with explanatory documentation, endorsing the amounts due to the employer or the contractor (Clause 27). The standard requirement is that a recovery statement must be issued by the principal agent in conjunction with each payment certificate.<sup>1</sup> This must be done using the "JBCC Recovery Statement format to keep track of financial transactions between the employer and the contractor on a "before tax" basis as tax (where applicable) is dealt with in the Payment Certificate..."<sup>2</sup> Additionally, "if the principal agent fails to issue a recovery statement this is not a reason for suspension or termination – but there is case law that this may constitute a breach of contract by the employer who is responsible for the actions of his appointed agents".<sup>3</sup>

The recovery statement details the contractor's claim for:

- a) Compensatory interest
- b) Default interest
- c) Damages (for instance, expense or loss suffered by the contractor due suspension of the works or insolvency of a nominated subcontractor)
- d) Advance payment
- e) Expenses or losses caused by a direct contractor
- f) Termination of a nominated subcontract agreement as a result of the default of an employer, the principal agent and/or agents

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1,2,3 JBCC Support Documentation – Recovery Statement  
<https://jbcc.co.za/documents/jbcc-support/>.

The expense and loss portion of the recovery statement is subject to a claims process. Let us consider this claims process in a bit more detail. We note that the procedure for claiming an adjustment to the contract value for expense and loss is two-fold and characterised by time limits.

Firstly, the contractor is required to give the principal agent a notice within twenty (20) working days of becoming aware or when it ought to have reasonably become aware of an expense and/or loss that is not provided for in the contract sum. We can call this the “*notice of adjustment claim*”. Should the contractor fail to give such notice within the specified period, clause 26.5 provides that its claim is forfeited. From this, we see the importance of the contractor knowing when such notice is to be given and under which circumstances notice is to be given. A hint for the Contractor, is that there is a list in Clause 27.1 (clauses 27.1.4 – 27.1.9) of what the JBCC PBA considers to be expense and loss items. It does get a little confusing in that the claims for default interest and compensatory interest already appear to be automatic (as set out in clauses 25.7.4 and 25.7.5) however, the fact that these entitlements are contained with clause 27.1, makes us believe that in order to be entitled to such interest, a claim needs to be made in terms of clause 26.5.

To be on the safe side therefore, we would recommend that any claims made for adjustments to the contract value that are listed in clause 27.1, be made in accordance with the claim provisions in clause 26.5.

Once the contractor has submitted its notice of adjustment claim, clause 26.6 requires that the contractor must, within 40 working days of such notice, provide the principal agent with a detailed and substantiated claim for the adjustment. This is the second leg of the claim procedure. The JBCC 2018 PBA is not prescriptive on what would constitute a “*detailed and substantiated claim*” and it is therefore advisable for the contractor to submit all the supporting information regarding its claim. To do so, the contractor must keep proper records of all expenses and losses it incurs while carrying out the works.

When the contractor has submitted both its detailed and substantiated claims, the principal agent would then be obliged to determine the value of the adjustments to the contract value in cooperation with the contractor as prescribed in clause 26.1. This determination must be carried out within 20 working days and entails a fair assessment of the contractor’s claim. If the principal agent fails to conduct the assessment within the stipulated period, the claim is deemed to be refused. The contractor may then give its notice of a disagreement on this basis.

It is imperative to note that this “two-fold procedure” only applies to expenses and/or loss which has not been provided for in the contract sum and for which there is no other mechanism within the contract for receiving payment. Further, the contractor will note that the employer, while there is a rather long list of instances where the principal agent is allowed to adjusted the contract value in favour of the employer, is not obliged to follow any such claims process. Should the contractor be issued with a recovery statement showing amounts owed to the employer, the contractor should double check that the principal agent has made any such assessment in accordance with the list of the employer’s expense and loss entitlements under clause 27.2.

## Conclusion

As already mentioned in our introductory article of the MDA Construct JBCC, it is vital for contractors to stay abreast with contract provisions where specific time periods are stipulated. Where the contract provides that a notice or claim must be submitted within a certain number of working days, contractors must know what these days are as stipulated in the contract data. This is particularly due to the fact that clause 26.5 states that the claim is forfeited if not submitted timeously. Equally, it is important for a contractor to substantiate its claims with records of its proven costs, which we advise should 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 in order to recover such costs.