

MDA PRESENTS



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HOW DOES A SUBCONTRACTOR CLAIM AND GET PAID FOR PRELIMINARIES (ADJUSTMENT TO THE SUBCONTRACT VALUE) UNDER THE 2018 EDITION JBCC WHERE THE CONTRACTOR IS RESPONSIBLE FOR THE DELAY

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Recently we have come across more and more instances where Subcontractors are delayed due to the default of the Contractor. In instances such as these the Subcontractor may be entitled to an extension of time for interim completion and the process to claim for this extension is relatively well-known. In some instances, however, the Subcontractor is entitled to an extension of time and to an adjustment to the contract value (i.e. time and money). We have noted that the process of how a Subcontractor claims for preliminaries, or an adjustment to the contract value, is unclear. This is mainly because the JBCC contract suite makes provision for the Principal Agent to certify amounts due to each Subcontractor.

In this article we will set out the Subcontractor's entitlement to claim preliminaries due to a delay

caused by the Contractor, and the steps that need to be followed to successfully claim therefor.

The events described in clause 23.2 and 23.3 of the N/S Subcontract Agreement ('the Subcontract') allow the Subcontractor to claim for an extension of time and an adjustment to the contract value. Whilst it is the Contractor who will determine the Subcontractor's entitlement to an extension of time, it is the Principal Agent that will determine the Subcontractor's entitlement to an adjustment of the subcontract value.

Clause 23.2 and 23.3 should be read with clause 26, which clause allows for adjustments to the contract value and the final account. The applicable sub-clauses under clause 26 reads as follows:

“26.5 The subcontractor shall give notice to the contractor within fifteen (15) working days of becoming aware, or ought reasonably to have become aware of expense and/or loss for which provision was not required in the subcontract sum failing which such claim shall be forfeited. The contractor shall forthwith submit such claim to the principal agent.

26.6 Following notice [26.5], the subcontractor shall submit a detailed and substantiated claim for the adjustment of the subcontract value to the contractor to submit to the principal agent within twenty (20) working days or such period as the principal agent may allow.

26.7 The principal agent shall make a fair assessment of the claim and adjust the subcontract value within twenty (20) working days of receipt of such details.

26.9 The principal agent shall:

...

26.9.4 Adjust the preliminaries amounts in accordance with the method selected [CD].

...”

Clause 26.9 specifically provides for an adjustment to the preliminaries of the Subcontractor. Clause D4.0 of the Contract Data determines how the preliminaries would be adjusted.

It should be noted that the Subcontractor will be entitled to an extension of time and an adjustment to its preliminaries even in circumstances where the delay is not critical to the completion of the Contractor’s works in terms of the Principal Building Agreement (“*the PBA*”), just as long as the

Subcontractor demonstrates a change to the critical path on the current Subcontract programme.

It is clear that a Subcontractor would be entitled to an adjustment to its preliminaries due to a delay caused by the Contractor (in certain instances), for example when there is delayed access to the Subcontract Works. I will now deal, step by step, how a Subcontractor must go about this claim for preliminaries after a delay is caused by the Contractor, and the process of adjusting same.

Step 1:

The Subcontractor must give notice to the Contractor within 15 working days after becoming aware, or ought to have become aware, of the expense and/or loss caused by the Contractor’s delay. The Contractor shall then submit this notice to the Principal Agent. [Clause 26.5]

We are of the opinion that the Subcontractor only becomes aware of the expense and/or loss after the Contractor has determined, in terms of clause 23.6, the Subcontractor’s entitlement to a revision of the date of interim completion due to the delay caused by the Contractor, but we would suggest that the Subcontractor submit its notice in terms of clause 26.5 together with its notice of its intention to claim for a revision of the date for interim completion in terms of clause 23.4.2.

Step 2:

The Subcontractor must within 20 working days of the date of the above notice in terms of clause 26.5, or such period as the Principal Agent may allow, submit a detailed and substantiated claim for the adjustment of the subcontract value to the Contractor. The Contractor shall then submit this claim to the Principal Agent. [Clause 26.6]

As the Subcontractor only becomes aware of the expense and/or loss after the Contractor has determined its entitled to a revision of the date of interim completion, we suggest that the Subcontractor request the Principal Agent, in its clause 26.5 notice, to extend the time period in which it must submit its detailed and substantiated claim for the adjustment to the subcontract value until such a time as the Contractor has determined the Subcontractor's entitlement to a revision of the date of interim completion.

Step 3:

The Principal Agent must, within 20 working days from the date of receipt of the above claim, make a fair assessment of the claim and adjust the preliminaries in accordance with the Contract Data (Option A or Option B). [Clause 26.7 and 26.9.4]

Step 4:

The Contractor must, in the normal course of the PBA and the Subcontract, apply for payment certificates which shall include work and materials included in the Subcontract. (Clause 25.1)

Step 5:

The Principal Agent must, in the normal course of the PBA and the Subcontract, issue payment certificates to the Contractor and the Employer. The Principal Agent must, concurrently with each payment certificate, issue a Subcontract Payment Notification that shows the amount due to the Subcontractor. (Clause 25.2)

Should the Principal Agent, in terms of clause 26.7, find that the Subcontractor is entitled to an adjustment of the preliminaries due to a delay caused by the Contractor (the period of the extension to the date for interim completion already having been assessed by the Contractor), the adjustment to the preliminaries will be added in the Subcontract Payment Notification.

Subcontract Payment Notification is defined as *“a document issued with each payment certificate by the principal agent stating the amount due and payable by the contractor to the subcontractor”*.

The Payment Certificate will contain a fair estimate of the value of the Subcontract Works executed, and a fair estimate of the value of Materials and Goods. The Subcontract Payment Notification will contain the amount certified in the Payment Certificate plus the adjustment to the preliminaries in terms of clause 26.7.

Step 6:

The Contractor must, within 7 days of the date of issue of the payment certificate, issue to the Subcontractor a Subcontract Payment Advice that should include, amongst other things, amounts due to the Contractor in the Subcontract Recovery Statement in terms of clause 27.1. (Clause 25.3 and 25.3.7)

The Subcontract Recovery Statement reconciles the amount certified in the Payment Certificate and the amount stated in the Subcontract Payment Notification issued by the Principal Agent. (Clause 14.4.4 and 15.4.4)

Clause 27.1 reads as follows:

“27.1 The contractor shall issue a subcontract recovery statement with each subcontract payment advice to the subcontractor with explanatory documentation to support the calculation of amounts due to:

...

The subcontractor resulting from:

...

27.1.11 Adjustment of the subcontractor’s preliminaries due to default by the contractor.”

Step 7:

The Contractor must pay the Subcontractor the amount certified in the issued Subcontract Payment Advice within 21 calendar days of the date of issue of the Subcontract Payment Advice (which must include the Subcontract Recovery Statement). (Clause 25.10)

Step 8:

Should the Contractor only make partial payment, or no payment at all, of the amount due in the Subcontract Payment Advice, the Subcontractor may give 5 working days notice to comply, failing which the Subcontractor may:

- Suspend the subcontract works;
- Exercise the lien, or any right of retention of the site, where this has not been waived; or
- Call up the guarantee for payment. (Clause 25.13)

Dispute Resolution:

Clause 30.1 of the Subcontract reads as follows:

“Should any disagreement arise between the employer (or the principal agent or and agent) and the contractor (or the contractor and the subcontractor) arising out of or concerning the action or inaction of the employer (or the principal agent or an agent) or the contractor, or any other matter concerning this subcontract agreement (including the validity thereof) either party may give notice of a disagreement to the other.”

Should the Subcontractor, or in this instance the Contractor, be dissatisfied with the Principal Agent’s determination, clause 30.1 and clause 30.2 entitles the Subcontractor/Contractor to dispute the Principal Agent’s determination. The normal dispute resolution procedures of the Subcontract will be followed.