MDA PRESENTS

FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

Second Edition – February 2019

JBCC 2018 – EDITION 6.2 MAY 2018

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Keynote: In addition to providing revised and new definitions, the 2018 JBCC agreement includes new stipulations that are supposed to expedite payment, and rewording of clauses dealing with suspension, termination, penalties and dispute resolution. Will this new version be more user friendly?

We all love it when a new edition of a standard form contract comes out. Yes - it's a pain to have to "relearn" the contract, because we all get so comfortable with what we know. Be that as it may, we need to recognise that the updating of the standard form contracts is there for a reason. Our industry is dynamic and constantly changing. I therefore went on the hunt in the 2018 Principal Building Agreement ("PBA") to try and establish what justified a new release of the agreement so soon after the last one.

Unfortunately, the changes between the JBCC PBA (2014 Edition 6.1) and the latest edition of the JBCC PBA (2018 Edition 6.2) were not nearly as exciting nor drastic as the changes from the JBCC PBA (2007) version to the JBCC PBA (2014 Edition 6.1) version. That was a massive change! This one – not so much.

The first noticeable difference is the addition by the JBCC of a disclaimer on its introductory page.
"while the JBCC aims to ensure that its publications present best practice, it does not accept or assume any liability or responsibility for any events or consequences which derive from the use of the JBCC documents"

It has also added a *"copyright reserved clause"* which prevents reproduction of the documents, or their transmittal, photocopying, scanning etc. The JBCC threatens judicial proceedings to obtain relief and recover damages should this not be adhered to. I guess this is because its all too easy to scan a blank copy of the books and print them out when necessary. Saves one from having to fork out a couple hundred bucks to purchase one for each project, right?!

You may want to be aware of this – as they may start clamping down on the copying of the books to be used on projects. This does decrease their revenue stream, after all.

Unlike the dramatic change from the 2007 to the 2014 versions, at first glance of the table of contents, nothing much has changed in terms of structure. It is set out in the same fashion and if you are familiar with the 2014 version you will find your way around the 2018 version pretty easily.

There are quite a few minor cosmetic changes in the 2018 version (such as rewording of certain clauses - but having a similar meaning). I'm not going to mention each and every change, but just the ones that are either interesting or significant.

Working Days and the Annual builder's Break

The 2014 JBCC PBA referred to calendar days as including Saturdays, Sundays, public holidays and the "recorded annual builders' holiday periods". The 2018 PBA has added the word the "**contractor's** recorded annual building holiday periods". It is presumed that this allows flexibility for the contractor to specify his own annual builder's break instead of the standard days prescribed by the industry. It also hints that the contractor should actually fill in these details.

I suppose it doesn't make much of a difference when you are looking at calendar days, but the same has been done to the definition of "working days". This definition is important as it is used in the contract to specify time periods for the submission of certain documents. Don't forget to fill in your (as the contractor's) annual building holiday period in the Contract Data! This will ensure clarity on, *inter alia*, whether or not you have complied with time frames in the contract for notice submissions. Time bars are still very much a reality and as an advisor to employers as well as contractors, that's the first place I would look when assessing whether or not a contractor's claim can be refused.

Notices

The next interesting change that I came across – there is a new definition of "**notice**". What makes it new? The exclusion of "**social media**" as being see by the contract as written communication which satisfies the requirement for such written communication to be a notice. This is definitely to move the contract form along with the times – I can't tell you how many problems "project whatsapp groups" have caused. Yes, you are all guilty!!

Completion in Sections

There must have been some confusion in the 2014 version regarding the issuance of a final completion certificate for each section. The new definition states specifically that **a final completion certificate is issued for each section that is finally complete**.

That being said, the clause that deals with sections in the documents (clause 20) had a name change. It went from being "sectional completion" to "completion in sections". The wording of the actual clause didn't change though.

In addition, clause 19.5 now makes it clear that the employer, on the issuance of a certificate of practical completion **of a section**, is entitled **to possession of such section**.

Nominated subcontractors

The n/s agreements are now required not only to be prepared in accordance with the N/S agreement, but also in accordance with the Principal Building Agreement.

There is a requirement in the 2014 PBA that the contractor notifies the subcontractor of the amount included in a payment certificate, using the n/s subcontract payment advice format and n/s recovery statement format to reconcile amounts due to the subcontractor. It is probable that this was not being attended to by contractors, and hence clause 14.4.4 of the 2018 PBA requires **not only a notification** to the subcontractor of the amount included in the payment certificate (in the form of a payment advice statement), there is an actual requirement for such payment advice statement to be **issued**. Hopefully this will kick the contractors into gear to ensure that they are actually issuing these documents, as it is an obligation of theirs in the contract.

Selected subcontractor

Selected subcontractors are chosen in consultation between the principal agent and the contractor. This requirement remains in place. The order of the sub-clauses of clause 15 have been swapped around a bit in the 2018 PBA, but this should not cause any concern as it seems as though they simply follow a more logical progression from one sub-clause to the next. A similar requirement has been added (as in the nominated subcontractor clause) regarding the contractor having **to issue** to the selected subcontractor a payment advice statement (**as opposed to simply notifying**). The contractor was, in the 2014 PBA **precluded** from making a reasonable objection against the appointment of a selected subcontractor where the circumstances have changed. The 2018 PBA brings back the contractor's rights to make such objection in the event of changed circumstances (clause 15.2.3 has been added in to the 2018 PBA). This would be helpful if, for example, the selected subcontractor has, between tender stage and selection stage, befallen some unfortunate circumstances and would not be able to complete the subcontract works in time, or may have entered into business rescue proceedings. In this day and age, it may be likely that this would happen.

Where a subcontractor is not appointed or where a selected subcontractor has been terminated, the 2014 version of the PBA stated that "the principal agent shall instruct the contractor to appoint a newly chosen selected subcontractor". The 2018 version (clause 15.3) specifies that this new selected subcontractor **must be chosen in consultation with the contractor**. This makes sense, as the original selected subcontractor was chosen through such consultation process.

The 2014 PBA probably gave principal agents a loophole to exclude the contractor from any consultation process, and hence the wording of the clause has given more direction in this regard.

Practical completion

The 2014 clause 19.1.3 has been deleted. This required the principal agent to inspect the works within a period stated in the contract data. The 2018 version simply moves this to a different place (to clause 19.3) meaning that it is still important to complete this particular date into the contract data. It places an obligation on the principal agent to act, and if he does not, the contractor would have a remedy.

As mentioned above, clause 19.5 now makes it clear that the employer, on the issuance of a certificate of practical completion of a section, is entitled to possession of such section. I have found that sectional completion remains a web of confusion for contractors using construction contracts. Hence the clarity that has been provided in the 2018 PBA.

Payment

As mentioned in the keynote, one of the aims of the updated 2018 PBA is to facilitate and expedite payments. The clause has been restructured in order to achieve this goal.

A new clause 25.4 has been added that deals with payment for materials and goods:

"the value of materials and goods (excluding materials and goods off site or in transit) shall be included in the amount certified only where:

25.4.1 not prematurely delivered of offered for delivery in terms of the programme

25.4.2 Stored and suitably protected against loss or damage

25.4.3 covered by insurances".

There was obviously some confusion around when the principal agent is required to certify payments to the contractor for materials and goods to be used in the works. This clause 25.4 sets out the requirements that need to be satisfied by the contractor in order to receive entitlement to payment. One wonders if this was not more to guide the principal agents?

In addition, clause 25.5 sets out when materials and goods stored off site or in transit may be included in the amount certified - "*only where covered by a guarantee for advance payment or such other security acceptable to the employer*". So there you have it. If a contractor wants to be paid for materials and goods stored off site or in transit, he needs to provide the employer with acceptable security. I have seen a couple of incidences of payment for materials before delivery (because contractors don't have sufficient cash flow to carry cost of deposits etc) and those materials never made it to site and the contractor disappears off into the sunset. If you are planning on requesting payment for goods not yet delivered to site, remember to build in to your contract sum the cost of a guarantee in this regard.

Another addition to the payments clause relates to not only ownership of the materials and goods once paid for, but also the contractor's ability to remove such materials and goods from the site. Clause 25.6 of the 2018 PBA reads: "*Materials and goods when certified and paid shall become the property of the employer and* ***shall not be removed without the written authority of the principal agent***."

I haven't personally dealt with such an issue, but the addition of the words in bold means that there may have been instances where such materials and goods were being removed, for whatever reason, by the contractor. This clarifies the position that the materials and goods belong to the employer and no-one is allowed to removed them from the site without permission.

Adjustment to the Contract Value

The wording in this clause (clause 26 in both the 2014 and 2018 versions of the PBA has been tweaked slightly. I know exactly why this is. No-one knows how to use this clause properly! I have seen many disputes surrounding the valuation of "additional works". For example, the 2014 PBA states:

"*Adjustments to the contract value resulting from a contract instruction for additional work [17.1.2] shall be determined as follows*…"

Whereas the 2018 PBA states:

"*Adjustments to the contract value resulting from a contract instruction [17.1] shall be determined as follows*.."

Spot the difference??

Well, for starters, the words "*additional work*" have been removed, and the reference to clause [17.1.2] has been changed to [17.1]. All I can say is thank goodness. 17.1.2 in the PBA referred only to "*alteration to design, standards are quantity of the works*", whereas 17.1 refers to each and every instance of where the principal agent may issue an instruction. So now the contract value can be adjusted as a result of any contract instruction and not just for "additional work".

It also seems that the 2018 PBA reverts back to the 2007 way of measuring adjustments to the contract value where similar pricing is not contained in the BOQ. Clause 26.2.3 states:

"*If the above methods do not apply, work shall 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*."

Methinks that the principal agents were shafting the contractors a little during the calculations, alternatively, the contractors were not really aware of what the words "*rates based on the necessary elements*" from the 2014 PBA really meant. Now its pretty clear. I believe this amendment will go a long way in making sure variations are priced properly going forward – well let's hope so as this is a minefield for disputes!

Final account

In all of the JBCC's in history, the final account had to be submitted to the contractor within 90 calendar days of the date of practical completion. This time period coincides with the 90 calendar day defect liability period. Clause 26.10 of the 2018 PBA requires the final account to be issued within **60 working days of the date of practical completion**. Spot the change? There is no longer a calendar day period – perhaps the principal agents were getting stuck over the December period? Who knows. Whatever the reason is, the final account now has to be issued 60 working days from the date of practical completion.

Clause 26.11 of the 2018 PBA has quite a drastic change - "*the contractor shall accept the final account within 30 working days of receipt thereof or give notice of non-acceptance thereof with reasons* ***failing which the final account will be deemed to be accepted***. Yes - I have underlined and made this phrase in bold because it has a very important implication for the contractor if he fails to either accept or notify non-acceptance of the final account within 30 working days. No more messing about. You need to pay attention to that final account and act if you don't agree with it. If you don't, you may lose your right to dispute it at a later stage.

Recovery of expense and loss.

In the 2018 PBA there are 2 new headings under which a contractor may claim expense and loss. "*27.1.7 expense or loss caused by a direct contractor" and clause 27.1.9 now includes the ability for the contractor to claim expense and loss due to "termination of an n/s subcontract agreement*"

i.e., not only a nominated subcontractor (as in the 2014 PBA), but also a selected subcontractor "*due to the default of the employer, the principal agent and/or agent*". I guess this right was always there given clause 15.7.1, but now it's cast in stone where it is easier to find.

The employer is also allowed to claim expense and loss when a contractor terminates a nominated or a selected subcontract (14.7.2; 15.7.2). As above, while the right was contained (or hidden is a better word perhaps) in clauses 14 and 15, it has now been set out in no uncertain terms in the expense and loss clause.

Suspension by the Contractor.

Nothing too exciting here. The 2014 version of the PBA afforded the employer only 5 working days' notice of the contractor's intention to suspend the works to remedy his breach. This time period has been extended to 10 working days.

Clause 28.4 of the 2018 PBA aims to make it clear that when the works are suspended under clause 28, the contractor gets time and money (it specifically states that there shall be an adjustment to the contract value). Another clarification of contractor entitlement.

Dispute Resolution

The Adjudication clause has been revised somewhat in the 2018 PBA. Clause 30.6.1 of the 2014 PBA states:

"*The adjudicator shall be appointed in accordance with the JBCC Rules for Adjudication current at the time when the dispute was declared, and the adjudication shall be conducted in terms of such rules*"

Clause 30.61 of the 2018 PBA states:

"*The adjudicator shall be nominated by the nominating body [CD] and shall be deemed to have been appointed by the parties*."

Clause 30.6.2 of the 2018 PBA goes on further to state:

"*The applicable rules shall be stated [CD] or shall be by agreement between the parties and the adjudicator, failing which the rules shall be determined by the adjudicator*….

What is clear is that the 2018 PBA does not prescribe which rules/ nominating body the parties to the contract have to prescribe to. This is not a bad thing as there are quite a few independent dispute resolution bodies being set up – such as CAASA (the Construction Adjudication Association of South Africa) which parties may prefer to use over the Association of Arbitrators.

Another interesting addition to the dispute resolution clause is the amendment to clause 30.6.3 of the 2014 PBA. The 2014 PBA states:

"*A determination given by the adjudicator shall be immediately binding upon, and implemented by, the parties*."

Whereas the 2018 PBA states:

"*A determination given by the adjudicator shall be immediately binding upon, and implemented by, the parties* ***notwithstanding that either party may give notice to refer the dispute to arbitration***."

The phrase highlighted in bold is so important. There are many instances of a losing party to an adjudication who simply refuse to act on the adjudicator's award because they have issued a notice of dissatisfaction and intend referring the matter to arbitration. Its rubbish. Hopefully this will prevent this situation from happening.

The 2018 PBA also contains an additional clause in the arbitration clause 30.7.7 - "The arbitrator's award shall be final and binding on the parties". This means that there is no right of appeal.

General

The new clause 30.9 of the 2018 PBA indicates the employer's consent to the joining of any subcontractor with the contractor as a party to the proceedings. I guess this is because the subcontractors may be affected by a decision from the principal agent and there is actually no way for the subcontractor to claim directly against the employer, except through the contractor.

Clause 30.10 introduces a catch all phrase:

"*Where the parties fail to specify a body to nominate the adjudicator or arbitrator, the referring party shall have the right to choose a local recognized body to suggest one or more persons with appropriate skills to be appointed as the adjudicator or arbitrator. Such nomination shall be binding on the parties*."

The addition of this clause will ensure there is no deadlock if the parties cannot agree on an adjudicator/ arbitrator, or if they simply forget to fill in the contract data (yes – this does happen – more often than it should).

And then I have saved the best for last. I don't like this one for obvious reasons, but hopefully this will encourage more parties to utilize the dispute resolution clause of the contract without fear or huge legal bills. The second part of clause 30.6.2 of the 2018 PBA states:

"…*Neither party shall be entitled to legal representation unless otherwise agreed in writing between the parties*."

It is recommended that for large or complex disputes that the parties agree to be represented.

Conclusion

Hopefully this article has given you some insight into the changes between the 2014 and the 2018 Principal Building Agreement. If anything, it's saved you from doing the comparison yourself which is always a bonus!

My feeling on the changes is that unlike the previous revision where the focus was on the contractor and ensuring his rights were protected by the contract, this latest revision appears to "give back" to the employer some rights and guide the principal agent more on what he is supposed to be doing under the contract.

Well, that's my feeling anyway. I'm looking forward to seeing the 2018 version in action!