

# MDA CONSULTING



## FIRST AID FOR CONTRACTS



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JBCC

### 1. INTRODUCTION

- 1.1 The scene is all too familiar – the Contractor notifies the Principal Agent of the date upon which he anticipates practical completion shall be reached. Where, in the Principal Agents' opinion, the works have not reached the stage of practical completion the Contractor is issued with the practical completion list.
- 1.2 As soon as the Contractor is of the opinion that the items on the list are complete he notifies the Principal Agent accordingly and the Principal Agent conducts his inspection.
- 1.3 If the Principal Agent is of the opinion that the items on that list are satisfactorily completed, then he will issue the Contractor with the practical completion certificate.
- 1.4 If, however, the Principal Agent is not satisfied with the works he will identify those items on the list that are not yet complete and inform the Contractor accordingly. The above-mentioned process is repeated until the practical completion certificate is issued. The achievement of the practical completion certificate is the catalyst to achieve both Works and Final completion.

TO INFINITY AND BEYOND...

Can the Principal Agent perpetually add new snag items to the Practical Completion List?

- 1.5 Accordingly, and at each progressive stage, the original practical completion list issued by the Principal Agent is the basis on which the Principal Agent determines whether the “incomplete” Works are sufficiently completed for him to issue the Works completion certificate and finally the Final completion certificate.
- 1.6 Why then is it that the Principal Agent is of the opinion that he has an unfettered discretion to *add new items*? By this I mean adding snags that were never identified and / or placed on the original list of incomplete Works, when he is called back by the Contractor for the purposes of inspecting the completeness of the original list.
- 1.7 This places a heavy burden on the Contractor whereby he could be subjected to remedying snags, in the memorable words of Buzz Lightyear, “*to infinity and beyond*”<sup>1</sup> thereby preventing him from either ever obtaining the practical completion certificate, or if he does obtain it, it would be at his prejudice.
- 1.8 The Contractor stands to suffer considerable financial prejudice, for example where he carries the cost of guarantees, whether retention or performance, while the Principal Agent acting, either ignorantly or intentionally, bottlenecks the process that would ordinarily flow in terms of the Agreement.

<sup>1</sup> Toy Story, produced by Pixar Animation Studios, released by Walt Disney Pictures, 1995

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## 2. RELEVANT CONTRACTUAL PROVISIONS

- 2.1 If we refer to Clause 24.0 (Practical Completion) of the general provisions of the JBCC Principal Building Agreement<sup>2</sup>, sub-clause 24.3.2 of the Agreement on page 16 provides that after the Contractor has given the Principal Agent notice to inspect the works, to achieve practical completion, the Principal Agent shall issue a practical completion list to the Contractor defining the incomplete work and defects to be rectified to achieve practical completion.
- 2.2 Later on in the Agreement, sub-clause 24.4.2 goes on to state that if the list has not been satisfactorily completed the principal agent shall forthwith identify the items on the **practical completion** list that are not yet complete and inform the Contractor accordingly.

## 3. CONCLUSION

- 3.1 Clause 24.0 places an obligation on the Principal Agent to identify those items that are in his opinion not satisfactorily completed. In other words he must exercise reasonable skill and due care when inspecting the Works, and identify and list the patently incomplete Works.
- 3.2 Nowhere in that clause does it indicate that the original list can be added to. The reason for this may be because the Agreement provides other mechanisms to manage defects that were not initially identified by the Principal Agent so the Contractor is not completely off the hook.
- 3.3 In this regard a latent defect, which is defined in the Agreement as:
- “a defect that a reasonable inspection of the works by the principal agent would not have revealed before the issue of the defects list”.*
- 3.4 The Agreement creates an equitable distribution of reciprocal obligations between the Principal Agent and Contractor so that neither party suffers unreasonable prejudice and also so that they are accountable in the performance of their respective obligations.
- 3.5 After the Contractor has achieved final completion and the Employer has use or occupation of the Works latent defects may arise.
- 3.6 The management tool available to the Principal Agent to hold the Contractor accountable for defects that may not have been identified in the original list is to enforce Clause 27.0 (Latent Defects Liability Period).
- 3.7 In this way, the Contractor has peace of mind and is able to confine himself to remedy the original snag list items without the threat of unforeseen “additional” snags preventing him from progressing past the stage of practical completion so he can achieve final completion.
- 3.8 Objectively viewed the continued threat of growing the snag list would act more as a deterrent rather than encouraging the Contractor to diligently complete the list.

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<sup>2</sup> JBCC Principal Building Agreement series 2000 Edition 5.0 (Reprint 1) CODE 2707 © July 2007

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