

MDA CONSULTING



FIRST AID FOR CONTRACTS



Fourth Edition – April 2014

JBCC

Introduction

Where a JBCC n/s Subcontract agreement sets the time for completion “*in accordance with the contractor’s programme*”, does the subcontractor automatically get an extension of time when the contractor is granted an extension to the Time for completion of the Works and changes his programme accordingly?

Time for Completion and the JBCC - Generally

‘*Time for completion*’ in the JBCC Series 2000 Principal Building Agreement (Edition 5.0) (“PBA”) refers to the date for practical completion (ie. when the employer can take occupation and use the works for the purposes intended), where after the Contractor will be required to remedy any defects identified in the practical completion list.

The Contract Data [41.2.8] of the PBA refers to an “*intended practical completion date*” and records penalties per day for not achieving practical completion by such date.

On the other hand, the Contract Data for the JBCC Series 2000 n/s Subcontract Agreement Edition 5.0

(“n/s Subcontract”) refers to “*intended dates of completion*” and provides for “*interim completion*” and for “*practical completion*” [41.2.8].

For the purposes of this article, it is assumed that the Contract Data for the n/s Subcontract does not provide a specific date for intended and/or practical completion, but provides that such dates are “*in accordance with the contractor’s programme*”, as happens in practice all too often.

The Programme

Clause 15.2 of the n/s Subcontract states that:

“*The contractor shall:*

...

15.2.2 *prepare, implement and where necessary, modify the programme allowing sufficient time for the subcontractor to achieve stage completions and interim completion of the n/s works all as agreed with the subcontractor to enable the contractor in turn to achieve practical completion...*”

Clause 15.6 of the n/s Subcontract states:

“*The contractor in consultation with the subcontractor shall:*

OPENING THE CAN OF INTERPRETATION WORMS - Implications of automatic extensions of time for subcontractors when the subcontract sets the time for completion “*in accordance with the contractor’s programme*” – a contractor’s perspective.

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- 15.6.1 *regularly update the subcontractor's programme in relation to the n/s works together with a schedule of outstanding construction information in sufficient detail to enable the principal agent to assess the progress of the n/s works and timeously provide the information required; and*
- 15.6.2 *coordinate the subcontractor's programme with his own; and*
- 15.6.3 *continuously revise and modify the programme and the schedule of outstanding construction information and issue copies timeously to the subcontractor and principal agent."*

The programming clauses in both the PBA and the n/s Subcontract do not specifically state that the parties must adhere to any programme. The purpose of the programme is to demonstrate how the parties intend to execute and complete the works, and to enable a principal agent to monitor the progress of the works. There are obligations on both the contractor and the subcontractor to modify the programme, however, the modification of the programme in itself does not change the contractual dates for completion.

So if the contractor and the subcontractor have a discussion regarding revisions to the programme, is this discussion and subsequent revision to the programme enough to entitle the subcontractor to any extension to the time for completion that he may require as a result of such revision? Most certainly not. There are no automatic extensions of time under the n/s Subcontract .

The n/s Subcontract has very specific conditions (found in Clause 29) regarding revisions to the interim date for completion. Clauses 29.1 and 29.2 set out the circumstances where the subcontractor is entitled to a revision of the date for interim completion, either where the n/s Subcontract value shall not be adjusted, or the n/s Subcontract value shall be adjusted. Should there be **any** requirements for the subcontractor to extend the interim completion date, he has to follow the process contained in Clause 29. It is not an option. This is confirmed by the provisions of Clause 29.4.3, which requires a claim for revision to the interim completion date to be submitted. If the claim is not submitted timeously, such claim lapses and there shall be no revision to the interim date for completion.

As soon as the subcontractor becomes aware of an event that in his opinion, will cause a delay to interim completion, he has to comply with Clause 29.4.

Clause 29.4 provides that:

"29.4 Should a circumstance as listed ... occur which could, in the opinion of the subcontractor, cause a delay to interim completion, the subcontractor shall:

29.4.1 Give the contractor reasonable notice and timeous notice of such circumstance, and

29.4.2 Take all reasonable steps to avoid the delays,

*29.4.3 Within fifteen (15) working days from the date upon which the subcontractor became aware or ought reasonably to have become aware of the potential delay notify the contractor of his intention to submit a claim for the revision to the date for interim completion or any previous revision thereof resulting from such delay, **failing which the subcontractor's right to claim shall lapse.**" [Our emphasis]*

This means, that once it is established that any programme revisions will require a revision to the date for interim completion, the subcontractor has to submit his notice of intention to claim, within the time frames in Clause 29.4.3.

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This flies in the face of a presumed automatic extension of time. No amount of discussion, consultation or agreement on a programme can revise the subcontractor's date for interim completion. In fact, Clause 29.2.3 provides that delays to interim completion caused by "contractor's instructions not occasioned by the default of the subcontractor", entitle the subcontractor to a revision to the date for interim completion AND revision of the n/s Subcontract value. Any revisions to the subcontract programme can be read to be an instruction from the Contractor. A Clause 29.4.3 claim must be submitted by the subcontractor within 15 working days from the date upon which the subcontractor became aware, or ought reasonably to have become aware of the potential delay caused to its interim completion date as a result of such instruction.

What exactly would the date of interim completion be if the date in the Contract Data is recorded as being "in accordance with the contractor's programme"?

The first accepted programme usually represents a "baseline" against which the progress of the works and events of delay may be measured. This baseline programme represents the date for interim completion, and it is this date that should be revised, under the auspices of Clause 29.

So now that we have clarified that the programme and the date for interim completion and revisions thereof are two separate concepts under the JBCC and are administered very differently, can a subcontractor surprise the contractor with additional costs when he acts in accordance with the contractor's "extended" programme but fails to contractually revise the date for interim completion?

No, he may try, but the wording of clause 29.4.3 is clear: If no claim is submitted timeously in terms of Clause 29.4.3, the claim lapses. This clause may refer to a claim for a revision to the date for interim completion, but ultimately how would a subcontractor justify any adjustment to the Contract Value if no revision to the interim date for completion has been granted?

With regards to expense and loss of the subcontractor (for example for scaffolding erected that may have to remain erected for a longer period) has to be claimed under Clause 32.5. Clause 32.6 states that:

*"The subcontractor shall notify the contractor within thirty five (35) working days from becoming aware or from when he ought reasonably to have become aware of such expense and loss [32.5] **failing which no compensation will be made** ..."* [Our emphasis].

This, at least, puts the contractor in the position that he will be aware of the additional costs as they happen and may have the opportunity to mitigate such additional costs before they escalate out of control. No surprises for the contractor after the end of the project at least!

If, during the execution of the n/s works, the subcontractor suffers a delay and requires an extension to the time for completion in accordance with the contractor's programme, what then?

In this scenario, the time for completion of the subcontract works does not automatically extend. The n/s Subcontract contains specific procedures for a revision to the date for interim completion. Upon submission of a successful claim, the contractor will be forced to shift the time for completion of its programme to cater for the time for completion required by the subcontractor.

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Conclusion

In conclusion, when the interim completion date of a n/s Subcontract is "*in accordance with the contractor's programme*" it is a common misconception that the time for completion of the subcontract works shall automatically shift in accordance with such programme, as and when amended by the contractor. However, this is not the correct interpretation. The programming clause and the clause regarding revision of the date of interim completion are two separate and distinct clauses, each having their own administrative function.

Any revisions to the date for interim completion by the subcontractor have to be processed in accordance with clause 29. If an extension is granted in accordance with Clause 29.2 the sub contractor is entitled to Preliminaries in accordance with the option that he has chosen in accordance with clause 32.12. If he incurs unexpected Loss and Expense he has to comply with clause 32.6 and can claim in accordance with Clause 32.5

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