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PRESENTS

FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

Fourth Edition – April 2015

JBCC: THE JBCC PBA 2014

Introduction

After a bit of a false start, which necessitated some slight redrafting, the JBCC 2000 6th edition (Edition 6.1 March 2014) suite of contracts has been released for use in the building industry. The 6th edition was initially released in September 2013 however some concerns over the drafting of clause 17 prompted a recall of the contract for further redrafting.

The JBCC PBA 2014:

A Case of "out with the old and in with the new"- but in whose favour?

After an intense discussion with one of the members of the drafting committee of the 6th edition, it became apparent that contractors have been continuously picking apart the previous editions of the JBCC as being too friendly to employers. The 6th edition therefore attempts to placate these contractors by presumably making the contract more 'contractor friendly'. Seeing as the employers are the ones in the driving seat with regards to the selection of the contract form to use for their projects, one wonders why on earth they would propose the 6th edition for any of their projects? After a closer examination of the 6th edition however, the employer may find comfort in knowing that there may just be one or two benefits for them in the use of the 6th edition.

The 6th edition has been shortened significantly from its predecessors. Numerous clauses have been removed, or should we say, absorbed into other clauses where they may seem to fit, instead of standing on their own. Some clauses have been removed altogether.

One significant change under the 6th edition is the eradication of the concept of works completion, the works completion list and the certificate of works completion. Why was this necessary and what has this achieved?

Contractors generally believed that the works completion process led the way for principal agents to abuse the process – to issue practical completion certificates too early with too much work still to be done. Having the works completion process at a stage of completion that principal agents could fall back on if they failed to apply their minds to the practical completion list meant that items that were supposed to have been completed prior to practical completion, were not. Contractors found themselves in the position of having numerous items on the works completion list to finalise, when employers or their tenants had already occupied their buildings. This unnecessarily dragged out the completion process, due to a lack of access to the buildings to complete their works and remedy defects. Hence, a decision was taken to try and tighten up the practical completion process.

In our experience employers were equally dissatisfied with the works completion process – having

outstanding work to be attended to with little or no hold over the contractor was equally unsatisfactory to the employers.

The extent of the changes to the 6th edition is summarised below:

Practical Completion is now defined as the stage of completion as certified by the principal agent where the works or a section thereof has been completed free of patent defects other than minor defects identified in the list for completion and can be used for the intended purpose. This definition ensures that only minor works are permitted to be outstanding as at the time of practical completion. The difficulty here is that the term "minor work" will still permit a degree of subjectivity.

The 5th edition makes provision for one practical completion list to be drawn up however this process was often abused as works completion lists could (and often were) added to. The principal agent is now required, when inspecting the works to issue a comprehensive and conclusive list for practical completion. This is backed up by the provisions of clause 19.3.2, which states quite categorically that any updated list for practical completion is "limited to the items on the list for practical completion..". The motivation behind such a list is obvious – the drafters are seeking to avoid situations where such lists are not properly drawn up and grow as time passes.

The defects liability period now commences on the date of practical completion and ends upon the expiry of a 90-day period, or when the work on the list for final completion is attended to.

The works completion process under the previous editions of the JBCC commenced on the date of practical completion. Within 7 days of the date of practical completion, the principal agent was entitled to issue a works completion list to the contractor, defining the incomplete works and defects apparent at the date of practical completion, to be completed or rectified to achieve works completion. This implied that any incomplete works or defects that were on the original practical completion list could appear on the works completion list, along with other defects that manifested themselves prior to the list being issued. It was not clear as to whether or not the principal agent was entitled to "add" items of incomplete or defective work that had not been noticed on a previous occasion, and based on such lack of clarity, the principal agent did, in fact do so.

So what exactly is the difference between a works completion list and the list for completion? If the intention of the drafting committee was to ensure that a list for completion only contains minor items that were in the original "*comprehensive and conclusive*" list for practical completion, it has not achieved this. Further, the inclusion of the words "minor" in front of "defects" doesn't take the matter much further. It means that only items of work which may be lesser in importance, seriousness or significance may be included in the list. As stated above, this in itself is subjective.

In addition, under the previous editions of the JBCC, only defects (that manifested after works completion) were dealt with during the defects liability period. Under the 6th edition, for the defects liability period, the contractor is not only remedying defects that manifest after practical completion, but he is also remedying outstanding items of work and defects that manifested prior to practical completion.

Under the previous editions of the JBCC, the inclusion of a works completion process gave the contractor another bite of the proverbial cherry to attend to items that may have been on the practical completion list, under the guise

of the works completion list. Yes, perhaps the principal agent benefitted as he could "push" practical completion. The employer benefitted too and was protected against unfinished works when he was eager to take possession of his premises. Once the works completion certificate was issued, only defects that manifested themselves after works completion were required to be rectified by the contractor. This provided the contractor with a "line drawn in the sand" at works completion, in other words, once the works completion certificate was issued, there could be no items of outstanding work to be attended to. This has now altogether disappeared, and the contractor is required to make good and rectify all of the items on the list for completion at least 10 days prior to the expiry of the defects liability period.

The 6th edition, while it intends to shorten the completion process by entitling the parties to only one comprehensive and conclusive list for practical completion, and thus forcing the principal agent to apply his mind to the practical completion inspection process properly, the inclusion of a list for completion which is limited to a subjective interpretation of what "minor" defects are, may scupper what the drafting committee has tried to achieve.

In reality, it is likely that employers and principal agents alike will still favour the expedition of practical completion, using the benefit of the list for completion. While contractors may be happy with this state of affairs, be warned - liability to complete all outstanding work will remain until the certificate of final completion is issued, unlike in the past when only defects were required to be remedied once works completion had been achieved.

Another change under the 6th edition that warrants mentioning is the claims provisions. The claims provisions in construction contracts are probably the most important provisions of a contract in the contractor's mind, because the majority of claims clauses in standard form construction contracts contain a time bar. The time bar essentially means that a contractor will not be entitled to an extension of time nor any extra compensation under the contract if it does not submit its claim for such within a defined period of time.

There is not much difference between the 5th and 6th editions with regards to a contractor's entitlement to the revision of the date for practical completion. The contractor's entitlement to such revision is split up into 2 types of revision – the first being a revision WITHOUT an adjustment to the contract value, and the second being a revision WITH an adjustment to the contract value. The entitlement to the revision is subject to the provision, by the contractor, of notification of such entitlement. This is where it gets interesting.

The dreaded time bar clause is found at Clause 29.4.3 of the 5th edition and Clause 23.4.2 of the 6th edition. There are some significant changes to this clause which require closer examination. In this regard, the differences between the 5th and 6th editions are highlighted below (note that where words have been deleted in the 6th edition, these are struck through and where words have been added, these are italicised – the result of which is the transformation of Clause 29.4.3 of the 5th edition, into Clause 23.4.2 of the 6th edition):

> "… the contractor shall … within twenty (20) **working days** ~~from the date upon which the contractor became aware~~ *of becoming aware* or ought reasonably to have become aware of ~~the potential~~ *such* delay, ~~notify~~ *give notice to* the principal agent of ~~his~~ *the* intention to submit a claim for a revision to the date ~~for~~ *of* practical completion ~~or any previous revision thereof resulting from such delay~~, failing which the contractor~~'s right to claim shall lapse~~ *shall forfeit such claim*.

In addition, Clause 29.5 of the 5th Edition has been somewhat amended as follows:

> "… the contractor shall, *submit a claim for the revision of the date of practical completion to the principal agent* within forty (40) working days, *or such extended period the principal agent may allow* ~~of the delay ceasing, submit such claim to the principal agent, failing which the contractor shall forfeit such claim~~ *from when the contractor is able to quantify the delay in terms of the programme."*

The first significant change to Clause 29.4.3 is ~~"from the date upon which the contractor became aware~~ *of becoming aware* or ought reasonably to have become aware of ~~the potential~~ *such* delay". By changing the word "potential" delay to "such" delay, this implies that the time for submission of the notice of claim only starts running from the time that the delay is actually felt by the contractor, and not from when he foresees the delay happening.

This is somewhat similar to clause 8.4 in the FIDIC Red Book, where the entitlement to an extension to the time for completion arises if and to the extent that the completion "*is or will be delayed by*" the various listed events. There has recently been an English court decision (*ObrasconHuarte Lain SA v Her Majesty's Attorney General for Gibraltar)*[1] where, in the judge's view, this suggested that the extension of time can be claimed either when it is clear that there will be delay (a prospective delay) or when the delay has been at least started to be incurred (a retrospective delay). While this decision is not a JBCC related decision, the principles appear to be consistent with the amendment of the JBCC to the use of the words "*such delay*" – in other words, a retrospective delay instead of a prospective delay.

The 5th edition essentially contained 2 time bars for the same claim – found in clauses 29.4.3 and 29.5. A failure to submit the notice of claim within 20 days resulted in the contractor's claim lapsing. Once the contractor had jumped through this hoop, however, he stood to fall foul of the requirements of clause 29.5, which would result in the forfeiting of a contractor's claim (which was validly submitted under clause 29.4.3). The 6th edition removes the potential forfeiture of the contractor's claim, for a failure to submit his claim to the principal agent within 40 working days of the delay ceasing. There is, in fact, no specific remedy to the principal agent if the contractor fails to timeously submit his claim[2] (bar that the contractor will be in breach of his obligations under clause 23.5, allowing the principal agent to potentially recover expense and loss under clause 27.2.9). This will, however, require that the principal agent is pretty switched on when it comes to the issuing of notices of breach on the contractor's default in terms of clause 27.2.9.

The remainder of the amendments to the Clause are relatively insignificant and it should be noted that the basic principles to the lodgement of claims by the contractor have remained largely unchanged.

In conclusion, the claims provision for a revision to the date for practical completion has been somewhat relaxed. While the time bar for the submission of the initial claim has not been removed altogether, it appears as though the drafters of the 6th edition wanted the clause to read as wide as possible and only have the time for commencement of the 20 days period for submission of the notification commence once the delay is actually being felt by the

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[1] [2014] EWHC 1028 (TCC)

[2] Such as the Engineer's opportunity in Clause 20.1 of the FIDIC Red Book to take into account the extent, if any, to which the failure of a contractor to timeously submit its detailed claim has prevented or prejudiced the proper investigation of the claim

contractor. In addition, the removal of the time bar for the submission of the fully detailed claim certainly takes the pressure of contractors, although it is surprising that as a compromise for employers, no alternative consequences for late submission was provided.

If you are a contractor who is provided with a copy of the 6th edition JBCC principal building agreement by a prospective employer, you can take comfort in knowing that it is **your** rights that the drafting committee was seeking to protect when it came up with the 6th edition as we know it. However, any amendments to the 6th edition would have been made with specific reasons in mind on the part of the employer, and if you are not sure what these amendments mean for you in the bigger scheme of things, get on the phone with your trusted advisor and get clued up, before signing on the dotted line.

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