# MDA CONSULTING

PRESENTS

# FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

**First Edition – January 2016**

## JBCC: Strikes and the JBCC Suite of Building Contracts

### Introduction

In previous editions of the First Aid For Contracts, it was noted how working on site often exposes contractors and employers alike to various incidents which may, or may not, be beyond such contractors' or employers' control. The examples that we have been examining relate specifically to incidents such as strikes, which disrupt and delay the works.

> The JBCC - a suite of contracts designed specifically for use in the South African building environment, where strikes have become more and more prevalent. Who bears the risk and cost of delays caused by strikes?

In this January edition of First Aid for Contracts, we will continue to shed some light on how strikes are dealt with under the JBCC suite of contracts – a suite of contracts designed specifically for use in the South African building environment, where strikes have become more and more prevalent in the last couple of years. The question will be asked – who bears the risk and cost of delays caused by strikes?

The JBCC released its updated suite of contracts in 2014. The market appears to have been pretty slow on the uptake regarding the use of this new suite, the only explanation being that employers already have a standard annexure that contains their preferred amendments to the standard principal building agreement (either the 2005 or 2007 versions), and the thought of paying those darn lawyers even more money to draft a new and updated set of amendments applicable to the 2014 version is not altogether appealing.

It is for this reason that we will not focus on the 2014 edition alone, but will provide insight of how the 2005 and 2007 editions deal with strikes (and the evolution from the 2005, to the 2007 and now the 2014 suite of contracts).

2005 and 2007 Editions:

Clause 29 of both the 2005 and 2007 editions of the principal building agreement provides that the Contractor is entitled to a revision of the date for practical completion (but not an adjustment of the contract value) where delays are caused *inter alia* through civil commotion, riot, strike or lockout.

The 2005 JBCC Principal Building Agreement states at clause 29.1:

*"The circumstances for which the contractor is entitled to a revision of the date for practical completion and for which revision the principal agent shall not adjust the contract value in terms of 32.12 are delays to practical completion caused by:*

….

*29.1.4 Vis major, civil commotion, riot, strike or lock-out … "*

The 2007 edition has wording similar to that of the 2005 edition, save for amendment of the words "*Vis major*" to the words "*an event neither party could prevent*". Same thing really, except that the drafters decided in this particular instance to exclude the use of Latin words, as we all know Latin a language as dead as dead can be (it killed off all the Romans after all).

2014 Edition:

The 2014 principal building agreement wording is a little different from its predecessors:

Clause 23.1 states:

*"The contractor is entitled to a revision of the date for practical completion by the principal agent without an adjustment of the contract value caused by one or more of the following events:*

*…*

*23.1.6 Force majeure"*

Force Majeure is a concept that does not exist in South African common law and hence if a party seeks to rely on an event of force majeure to help them escape the performance of their obligations under the contract, such concept needs to be specifically written into the contract. This is what the 2014 edition does. Force majeure is defined in clause 1.1 as:

*"An exceptional event or circumstance that:*

*a) could not reasonably have been foreseen*

*b) is beyond the control of the parties, and*

*c) could not reasonably have been avoided or overcome*

*Such and event may include but is not limited to:*

- *acts of war (declared or not), invasion and hostile acts of foreign enemies*
- *Insurrection, rebellion, revolution, military or usurped power, was (whether declares or not), terrorism*
- *Civil commotion, disorder, riots, strike, lockout by persons other than the contractor's employees or his subcontractors*
- *…." [our emphasis]*

One can see a pattern of evolution from the 2005 and 2007 editions, through to the 2014 edition. In the 2005 and 2007 editions, the requirement for the entitlement to an extension to the practical completion date, is that

the "*strike*" had to be beyond the control of the parties. This implies that the strike should not have been caused by, for example, failed wage negotiations with the contractor's employees by management, resulting in the employees laying down tools. However, it was arguable that even a strike by the contractor's own workers was beyond the contractor's control.

The 2014 edition has specifically stated that the strikes must be by persons "*other than the contractor's employees or his subcontractors*" as well as having to satisfy that the event is a force majeure event, as defined. In other words, it:

a) could not reasonably have been foreseen
b) is beyond the control of the parties, and
c) could not reasonably have been avoided or overcome.

Only then will the contractor be entitled to a revision of the date for practical completion.

This clause has taken a similar shape as the FIDIC clause that deals with force majeure, and as was described in last month's article, this could prove to be problematic in the South African context. The employer often prescribes the use of local labour / communities / local suppliers when awarding the contract to a contractor. He will have no choice but to employ these people / suppliers otherwise he will be in breach of his contract – and even worse, it is generally the employer who makes promises to these people / communities – promises that the contractor now has to keep!

Although the building industry where the JBCC is predominantly used may come across this kind of situation less than other infrastructure type projects, it still remains a concern for contractors that they would fall foul of the definition of force majeure and not be entitled to their extra time.

I suppose the best way to deal with this would be on a project-by-project basis. If the contractor has the ability to appoint his own staff / contractors / suppliers, then he would be a lot more open to accepting the definition in its current form. If however, the employer is forcing the hand of the contractor to employ certain employees / subcontractors, the contractor should not accept the risk of those particular appointees striking. All it would take would be a teeny tiny amendment to the standard form principal building agreement to specifically shift the risk of such employees / subcontractors back to the employer. Whether the employer accepts this amendment or not is another story – but at least you will know where you stand and can make the required contingencies before you enter into the contract.

One cannot forget that just because there may be an entitlement to claim under the contract, that such claim is automatic. Clause 29.4 of the 2007 principal building agreement states:

*"Should a circumstance as listed [29.1-3] occur which could, in the opinion of the contractor, cause a delay to practical completion the contractor shall:*

| | |
|---|---|
| *29.4.1* | *Give the principal agent reasonable and timeous notice of such circumstance, and* |
| *29.4.2* | *Take all reasonable steps to avoid or reduce the delay* |
| *29.4.3* | *Within twenty (20) working days from the date upon which the contractor became aware or* |

*ought reasonably to have become aware of the potential delay notify the principal agent of his intention to submit a claim for a revision to the date for practical completion or any previous revisions thereof resulting from such delay, failing which the contractor's right to claim shall lapse." [our emphasis]*

There is a second time bar hoop in clause 29.5:

*"The contractor shall, within forty (40) working days of the delay ceasing, submit such claim to the principal agent, failing which the contractor shall forfeit such claim". [our emphasis]*

Save for a few words that have been amended, and the time for submission of the detailed claim (to 40 days from the initial 60 days in the 2005 edition) the meaning of the clause is pretty much the same in the 2005 and 2007 editions.

We have seen that in all 3 editions of the JBCC principal building agreement, the contractor will be entitled to his time, but not to his money when a strike affects the progress on the project (as long as its not the contractors employees / subcontractors!). This is a good example risk sharing - the employer takes the risk of time delay, and the contractor takes the risk of the cost of those delays.

However, while it seems as though the parties have reached this agreement on who takes what risk during a strike – the contractor still has to jump through the claims provision hoops in the contract before he is entitled to his additional time.

The 2014 edition is a little more lenient on the contractor, removing the time bar from the detailed claim submission clause (23.5), however, the time bar in respect of the initial claim notification remains 20 days.

Consider the effects of the possibility of strikes on each project that you encounter. Cater for them if they are foreseen, prevent them if possible, but don't let the employer shift the risk of his angry local community on to you!

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