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JBCC: SELECTED SUBCONTRACTORS ARE ESSENTIALLY APPOINTED IN COLLABORATION BETWEEN THE PRINCIPAL AGENT AND CONTRACTOR. WHAT HAPPENS IF THE CONTRACTOR UNILATERALLY TERMINATES THE SELECTED SUBCONTRACT AS A RESULT OF SUCH SUBCONTRACTOR'S POOR PERFORMANCE?

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We have recently been required to answer this question for one of our clients. The contract that they entered into was the JBCC 2007 Principal Building Agreement, a version of the Principal Building Agreement that is still widely used in the industry.

The text books available on the JBCC suite of contract say little on the topic, suffice to repeat the contractual terms already found in the Principal Building Agreement. While gathering our thoughts, we also found it necessary to perhaps expand a little on what the remainder of the contract prescribes when a selected subcontract is terminated by the

contractor. We all know that navigating these construction contracts can be likened to trying to escape a maze with a blind fold on!

A selected subcontractor is a party executing work provided for in a selected subcontract amount included in the contract sum or, in respect of additional specialist work, a subcontractor appointed as a selected subcontractor in terms of a contract instruction.¹

Clause 21.0 of the 2007 Principal Building Agreement deals with the appointment of selected subcontractors. Clause 21.1.3 provides:

“the principal agent shall ...

Prepare tender document in conformity with the n/s agreement and this agreement for work intended to be executed by a selected subcontractor. Such preparation shall be carried out in consultation with and to the reasonable approval of the contractor ..

the principal agent shall In consultation with the contractor, choose the successful tenderer to be appointed as the selected subcontractor in terms of the n/s agreement and other tender requirements...”

There is quite a lot of consulting going on between the principal agent and the contractor for the appointment of the selected subcontractor. It's a collaborative process and neither of the parties can act unilaterally. Seems fair – after all, the contractor does accept the majority of the risk in the appointment of the selected subcontractor.²

All goes well and the selected subcontractor is appointed by the contractor in terms of a 2007 n/s subcontract agreement (well, that would be in an ideal world – we have seen some strange instances of appointments being made on other contract forms, which normally ends in disaster). The n/s subcontract agreement contains provisions that specify when and how a contractor may terminate the n/s subcontract agreement.

Clause 36.1 is such a clause. This clause provides that a contractor may terminate a selected subcontract agreement where the subcontractor:

“36.1.1 Fails to comply [3.2; 15.1,3]”³

36.1.2 Refuses to comply with a contractor's instructions subject to 17.2”⁴

If the contractor is of the opinion that the subcontractor is in breach of any of its obligations as may be referred to in the above clauses, the contractor is required to notify the subcontractor of its intention to terminate the agreement and provide the subcontractor 5 working days' notice to remedy the default situation that the subcontractor finds himself in.⁵

If we jump back at this point to the Principal Building Agreement, Clause 21.7 provides that *“Where the selected subcontractor is in default of a material term of the n/s agreement the decision of whether or not to terminate the n/s agreement is that of the contractor”*. The principal agent is not involved in the contractor's decision to terminate the selected subcontract. He does get involved in the process though ... let's take a look at Clause 36.5 of the n/s subcontract agreement:

“Where the n/s agreement is terminated the following shall apply:

36.5.1 The employment of the subcontractor shall be terminated and the execution of the n/s works shall cease...

36.5.2 *The principal agent shall forthwith compile a report on the status of the portion of the n/s works executed by the subcontractor and shall issue such report to the employer, contractor and subcontractor.*

36.5.3 *The principal agent shall timeously commence and complete a n/s final account*

36.5.5 *The employer or the contractor may employ other parties to safeguard the n/s works, complete the outstanding works and to rectify defects in that portion of the n/s works executed by the subcontractor. The cost of the work thus carried out shall be certified by the principal agent or determined by the contractor and paid directly to such parties [35.0]*⁶

36.5.9 *The contractor shall determine the delay to practical completion of the works which such termination caused and the subcontractor shall be liable to the contractor for damages [30.1] for such delay.*

In our view, two things happen vis-à-vis the appointment of a “new” subcontractor. Firstly, other parties **may be** employed (by employer or the contractor) to a) safeguard the n/s works, b) complete the outstanding works and c) rectify defects. Secondly, if such other parties are employed, payment will be made directly to such parties. This is interesting. And I’m talking specifically about the phrase in Clause 36.5.5 “complete the outstanding works”.

Jumping back again to the Principal Building Agreement, Clause 21.8 states:

“Where termination of the selected subcontract occurs the contractor shall appoint another subcontractor subject to approval of the principal agent”

Are you starting to see the problem? The Principal Building Agreement provides that the Contractor **shall** appoint another subcontractor, while the n/s subcontract agreement provides that the **employer or the contractor may** employ other parties to, *inter alia*, complete the outstanding work. I believe that there is a bit of a contradiction here. Let’s dig a little deeper.

Clause 21.9 of the Principal Building Agreement states:

“Where the n/s agreement is terminated due to default by the employer or his agents, any variation in the cost of carrying out and completing the selected subcontract shall be adjusted ...”

And Clause 21.10 states:

“Where the n/s agreement is terminated, other than due to employer default [21.9], any variation in the cost of carrying out and completing the selected subcontract works shall be for the account of the contractor.”

So in the situation we are investigating, ie, that the contractor terminates the subcontract due to a default of the subcontractor, any variation in the cost of carrying out and completing the selected subcontract works shall be for the account of the contractor. There does appear to be a remedy for the contractor to recover this amount from the defaulting subcontractor (see Clause 36.5.9), however, the situation is not clear should the employer appoint a party to complete the outstanding work. There is simply no other clauses in either the Principal Building Agreement or the n/s subcontract agreement that deal adequately with this scenario, particularly because the employer may pay such party directly. This would be tantamount to the appointment by the employer of a direct contractor.

So where does that leave contractors? I'm not entirely sure. It is perhaps questionable as to whether the employer can enforce Clause 36.5.5 against the contractor, as technically the employer is not a party to the n/s subcontract agreement. There is no corresponding obligation in the Principal Building Agreement which the employer can rely on. Maybe this is the answer. In my view the provisions of the n/s subcontract agreement are confusing and perhaps totally unnecessary. The Principal Building Agreement gives the answer in Clause 21.8 – the contractor appoints a new subcontractor (although it does not say whether or not this subcontractor is selected or domestic) subject to the approval of the principal agent.

Just as an aside – the fact that Clause 21.8 merely states that the contractor appoints a new subcontractor (without referring specifically to the word “selected”) could imply that the appointment is as a domestic subcontractor.

Too many unknowns if you ask me. The revised edition of the JBCC suite of contracts (the 2014 edition 6.1) was drafted with the intention of simplifying and clarifying the relationships between the various contracting parties. This specific issue does appear to have been addressed – for example Clause 15.7 states:

*“Where a n/s subcontract agreement with a selected subcontractor is terminated... the contractor shall appoint **another selected subcontractor [15.1.4]** to complete the n/s subcontract **works in consultation with the principal agent ...**”*

Problem number one sorted.

The 2014 n/s subcontract agreement at Clause 29.4 [termination by contractor] states:

*“**The contractor may employ others to safeguard the n/s subcontract works, complete the outstanding work and rectify defects on that portion of the n/s subcontract works executed by the subcontractor**”*

Problem number 2 sorted.

We are glad sanity prevailed in the 2014 JBCC suite of contracts, but for those contractors who have entered into 2007 JBCC agreements, be aware of this deficiency on the contract. For those with the opportunity to amend the 2007 JBCC agreement terms – it may be advisable to insist on amending the 2007 JBCC clauses to those of the 2014 JBCC clauses. We can help you with that, of course!

¹Clause 1.1 of the 2007 PBA – definition of “selected subcontractor”.

²Unlike the nominated subcontractor where the contractor is relieved from certain acts of default by the nominated subcontractor (for example, an entitlement to a revision to the date for practical completion should the nominated subcontractor default)

³Clause 3.2 refers to the provision by the subcontractor of the required performance / advance payment guarantees, while 15.1 and 15.3 refer to the subcontractor’s obligation to submit the priced document and other documents referred to in the contract data, and to proceed continuously, industriously and with due skill and appropriate physical resources to bring the n/s works to completion (be it interim, practical, works or final completion)

⁴Clause 17.2 (read with Clause 24.6) refers to the fact that the subcontractor is not obliged to carry out contract instruction for additional work issued after the date of practical completion

Clauses 36.2 and 36.2

⁶ie. The employer makes direct payment to the subcontractor