

MDA PRESENTS



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JBCC: A FEW WORDS FROM THE ACTING CEO OF THE JBCC ON THE NEW EDITION OF THE PRINCIPAL BUILDING AGREEMENT

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In February this year, our Senior Associate, Natalie Reyneke, reviewed the latest edition of the JBCC Principal Building Agreement – 2018, 6.2 edition, May 2018 (the “6.2 edition”). It is always exciting when new editions of standard forms of contract are released, however, Natalie did not consider the changes to be significant (or at least not as significant as the changes between edition 5.0 (2007) and 6.1 (2014)). So why the need for the publication of a new edition? I spoke to Professor Tinus Maritz, the acting CEO of the JBCC, to find out.

According to Prof. Maritz, the 6.1 edition had several flaws in it that needed to be attended to. It took the drafting committee more than two years to put together the 6.2 edition and he is quite proud of the result. It has been in circulation for almost a year

Subcontract Agreement.

Prof. Maritz advises that the most significant changes to the PBA include the following:

- The definition of “agreement” – The definition under the 6.1 edition merely referred to the PBA and the contract data. The panel considered that there may be documents other than the PBA itself and the contract data which should be included in the definition without the need to specifically list them in the contract data. For example, those post-tender annexures that are agreed upon at the last minute. Accordingly, the definition in the 6.2 edition has been broadened to include contract drawings, the priced document and any other documents reduced to writing and signed by the authorised representatives of the parties.

- Definitions for compensatory and default interest are now included in the definitions section.
 - Formal notices now expressly exclude notices using social media.
 - Sub-clause 5.6 has been deleted – This sub-clause provided that in the event of a discrepancy, the “agreement” (only the PBA and contract data at that stage) should prevail over all other contract documents, namely the contract drawings, priced documents and other documents identified in the contract data. The panel considered that documents that are project specific should take precedence over the PBA and accordingly agreed to delete the sub-clause.
 - Sub-clause 12.1.5 has been deleted – This sub-clause provided that the employer is obliged to identify access to water, sewer, stormwater and / or electricity connections. The panel considered the major claims directed at employers who did not realise the hidden implications of this clause. Accordingly, the panel decided to delete this clause because they felt the contractor is aware of the temporary services it will require and should thus be the party responsible for obtaining this information from the local authority.
 - Sub-clause 12.1.6 has been deleted – This sub-clause provided that the employer is obliged to list statutory and other notices the contractor must submit and/or comply with before possession of the site can be given. The panel considered the major claims directed at employers in respect of this clause. Accordingly, the panel decided to delete this clause because they felt that each party should be individually responsible for any notices required.
 - The days prescribed for the issue and acceptance of the final account are now working days rather than calendar days – The panel made this change to overcome difficulties where the final account is being prepared near or during the annual builders break.
 - Sub-clause 26.12 has been amended (new sub-clause 26.11) – Under the 6.1 edition, the contractor was not obliged to give reasons for its objection to the final account. The panel felt this was unacceptable and accordingly added the words “with reasons”.
 - The panel wished to make the agreement more appropriate for international use as parties in countries such as Namibia frequently use the JBCC forms of contract - The words “or right of continuing possession of the works” has been added after the word “lien” as the panel considered that in some countries the concept of a lien is not understood. Also, reference to the Association of Arbitrators, a South African organisation, has been removed. More neutral wording is used, and the parties are entitled to state who the nominating body should be in the contract data.
- Prof. Maritz informed me that another concern was the user friendliness of the contract data. It was not always clear what was required and there was limited writing space. These issues have been attended to.

Prof Maritz advises that other significant changes to the contract data include the following:

- The introductory statement under “Changes made to the JBCC® documentation” has been replaced – The 6.1 edition stated that only amendments listed in that section of the contract data shall be of any force and effect. The panel considered that often conditions of contract are included in the Preliminaries, drawings or specifications and that it is not acceptable for such changes to be of no “force and effect”. Accordingly, item B15.0 of the 6.2 edition includes the introductory statement, *“Reference may be made to other documents forming part of this agreement”*.
- The insurances item has been revised – Provision has been made for contract works insurance taken out by the employer to cover either new works, works with practical completion in sections or works with alternations and additions. Further, provision has been made for contract works insurance to cover direct contractors.
- The payment of preliminaries clause and adjustment of preliminaries clause have been revised – The panel felt that the previous wording was unclear, so this has been tidied up. Importantly, the agent is now entitled to revise the contractor’s monthly payment for preliminaries when the contractor falls behind programme. Also, payment and adjustment of preliminaries in lump sum contracts has been provided for by stating, *“Where the total amount of preliminaries is not identified (in a lump sum contract) it shall be taken*

as 7.5% of the contract sum, excluding contingency sums and any provision for contract price adjustment (cost fluctuation)”.

- Item 4 on page 10 of the 6.1 edition has been deleted – This item stated, *“Any provision in this agreement that may confer any benefit or right in favour of any subcontractor shall be binding on the parties and be capable of acceptance by such subcontractor at any time”*.

Prof. Maritz advises that there are no plans to replace the 6.2 edition in the immediate future. However, a new panel has already been established to start considering the addition of contracts that have not been part of the suite of JBCC contracts in the past such as a small works contract, a design and construct contract and a simplified subcontract document for instances where contractors do not wish to enter into a n/s agreement but rather rely on the main agreement with a set of bespoke conditions for subcontractors.

Another item of great importance on the panel’s agenda is articulating clauses that could be included in the next edition to deal with the current issues in the industry, including the poor financial state of contractors and the abuse of subcontractors. The JBCC recognises, for example, that guarantees may no longer be a viable form of security as cash-strapped contractors are struggling to obtain them and that paid when paid clauses are crippling subcontractors.

We look forward to seeing what the JBCC comes up with in this regard as these issues are certainly ripe right now.