

MDA PRESENTS



FIRST AID FOR CONTRACTS



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CLAIMING AN ADJUSTMENT TO THE CONTRACT VALUE UNDER THE JBCC PBA (2018 EDITION)

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The contractor must claim a revision to the date for practical completion (i.e. an extension of time only) per clause 23 of the PBA. The events described in clause 23.2 and 23.3 also entitle the Contractor to an “*adjustment to the contract value*”. We know this adjustment allows for an adjustment in preliminaries, but does it allow for anything more? For example, what if the amount allowed by the Contractor for preliminaries is not sufficient to cover the loss incurred (e.g. his resources increased or, he under allowed at tender stage)?

Clause 23.2 refers you to clause 26.7. Clause 26 is the clause allowing for adjustments to the contract value and the final account. Clause 26.7 states, “*The principal agent shall make a fair assessment of the claim [26.6] and adjust the contract value within twenty (20) working days of receipt of such details*”. This does not

provide the answer to our query so let us consider clause 26 in the order in which it is written, starting with clause 26.5:

“26.5 The contractor shall give notice to the principal agent within twenty (20) working days of becoming aware or ought reasonably to have become aware of expense and/or loss for which provision was not required in the contract sum failing which such claim shall be forfeited.

26.6 Following notice [26.5], the contractor shall submit a detailed and substantiated claim for the adjustment of the contract value to the principal agent within forty (40) working days, or such additional period as the principal agent may allow.

26.7 *The principal agent shall make a fair assessment of the claim [26.6] and adjust the contract value within twenty (20) working days of receipt of such details.*

26.9 *The principal agent shall:*

...

26.9.4 *Adjust the preliminaries amounts in accordance with the method selected [CD]*

..."

Therefore, the “*adjustment to the contract value*” that the contractor is entitled to under clause 23.2 is any “*expense and/or loss for which provision was not required in the contract sum*”.

Note that this entitlement is provided the contractor has delivered a notice in terms of clause 26.5 and a claim in terms of clause 26.6. As clause 23 refers to an entitlement to an adjustment to the contract value, many contractors make the mistake of only notifying the intention to claim under clause 23. As the time periods under clauses 26.5 and 26.6 are the same as those provided for in clause 23, we suggest that when contractors notify an intention to claim a revision to the date for practical completion, they make sure that they also mention that they intend to claim an adjustment to the contract value under clause 26.

Clause 26.9 specifically provides for an adjustment to the preliminaries. What the contractor is entitled to in respect of an adjustment to the preliminaries is provided for in clause D4.0 of the Contract Data. There are two options provided for, namely Option A and B. If none is selected, then Option A applies.

In terms of Option A, the preliminaries are adjusted in accordance with the allocation of the preliminaries amounts provided by the contractor within 15 working days of the date of acceptance of the tender, alternatively (where this information was not provided), as follows:

- 10% shall not be varied
- 15% shall be varied in proportion to the contract value as compared to the contract sum
- 75% shall be varied in proportion to the number of calendar days extension to the date for practical completion to which the contractor is entitled with an adjustment of the contract value as compared to the number of calendar days in the initial construction period.

In terms of Option B, the preliminaries shall be adjusted in accordance with a detailed breakdown of preliminaries amounts provided by the contractor within 15 working days of possession of the site. The adjustment shall be based on the number of calendar days extension to the date of practical completion to which the contractor is entitled with an adjustment of the contract value as compared to the number of calendar days in the initial construction period taking into account the resources planned for the period of construction during which the delay occurred (not for the period added to the date practical completion). Where the contractor does not provide this detailed breakdown, Option A applies.

Note that clause D4.0 states, “*The amount of preliminaries shall be adjusted to take account of the effect of changes in time and/or value on preliminaries. Such adjustment shall be based on the particulars provided by the contractor for this purpose in terms of Options A and B, shall preclude any further adjustment of the amount of preliminaries and shall apply notwithstanding the actual employment of resources by the contractor in the execution of the works*”. The underlined portions indicate that the Contractor cannot claim extra preliminaries outside of the adjustments permitted by these options. This clause expressly states that these adjustments apply notwithstanding the actual employment of resources (i.e. such as an increase in resources). It is thus important to ensure that the breakdown of preliminaries provided in terms of Option A or B is accurate as it will determine the contractor’s entitlement going forward.

In respect of other adjustments that may not be catered for in the preliminaries, the contractor may claim these as a general “*expense and/or loss for which provision was not required in the contract sum*”. Previous editions of the JBCC listed what circumstances constituted expense and / or loss. The 2018 edition does not. What such an expense and/or loss is, is not defined.

Clause 26.7 requires the principal agent to make a fair assessment of this claim. This would mean that if the Contractor has genuinely incurred an expense and / or loss because of the delay event, the principal agent should adjust the contract value accordingly. Could the

Contractor attempt to claim additional preliminaries that he did not allow for under this general expense and/loss? Given that the 2018 edition is so broad, by not defining the circumstances that constitute such an expense and/or loss, the Contractor could attempt to do so. But ultimately, the Contractor’s fate lies in the hands of the principal agent. If the principal agent rejects such a claim, which he may likely do considering the entitlement is not clear, the contractor’s remedy is to refer the matter to dispute resolution proceedings.

In dispute proceedings, it will be a matter for interpretation. An adjudicator might rely on the express wording of clause D4.0 and limit the Contractor’s entitlement or, he/she may opt for an approach taking into consideration the broad definition of expense and/or loss and the principle of fairness.