

MDA PRESENTS



FIRST AID FOR CONTRACTS



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JBCC'S STATE PROVISIONS – OUT WITH THE PRINCIPAL AGENT, IN WITH THE EMPLOYER

+ Author: Kelly Meijers

Have you noticed that often when you contract with a municipality, or other government department, that it is still stuck in 2005? By this I mean still using edition 4.1 of the JBCC principal building agreement, despite several updated editions having been released thereafter. Well, this is likely because this edition includes the addition of “State Provisions” – provisions which substitute the standard provisions when the employer is an organ of state. So why is this something worth writing about? Here’s why.

One of the most astonishing state provisions is clause 5.1.2 which lists clauses where the employer retains its authority and does not give a mandate to the principal agent. These clauses include those which grant the principal agent the right to decide to revise the date for practical completion, adjust the contract value, determine expense and loss claims and issue the certificate of final completion.

The principal agent is meant to be an independent third party that acts as a decision-maker on matters where the contractor and the employer have opposing interests. The contractor’s claims provisions and whether final completion has been achieved are certainly two instances in which the parties have opposing interests and where the employer should not be the decision-maker.

In the English case of *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd*¹ Justice Fraser considered the role of the NEC3 contract’s decision-maker – the project manager. He classified the project manager’s role as falling into two broad categories – one, the agency function (for example instructing variations and acting on behalf of the employer) and two, a decision-making function.²

1 [2017] EWHC 1763 (TCC) (12 July 2017).

2 Para 128.

He stated how the decision-making function is quite different and is where the decision-maker has to reach decisions on matters where, at least potentially, the contractor and employer have opposing interests.³ When performing his decision-making functions, he is required to act in a manner which is independent, impartial, fair and honest. The decision-maker is to use his best endeavours to reach the right decision and not the decision which favours the interests of the employer.⁴ Justice Fraser - *“It is contrary to the whole way in which the contractual mechanism is structured, and intended to work, to have the employer seek to appoint itself (or one of its employees, or an employee of its parent) as the decision maker...the whole structure of the contract is built upon the premise that the employer and the decision maker are separate entities and endless anomalies arise if the employer and the decision maker become one and the same...”*⁵

The employer cannot act independently in carrying out the role of decision-maker. The employer will, by definition, be in agreement with his own decisions and the only party that would feel the need to challenge decisions would be the contractor.⁶ If the employer is the decision-maker, the contractor loses a layer of protection. The contractor will have to refer disputes for determination in order to have an independent person determine his claims.

But wait, the state provisions have essentially removed that right too by removing the option to refer disputes to adjudication...or even arbitration! The only mechanism of dispute resolution in edition 4.1 is litigation – and we all know that this certainly doesn't offer the contractor any affordable and efficient relief.

Given how ridiculously one-sided these provisions are and the consequences that come with that, it is not surprising that these provisions were deleted in the subsequent editions of the JBCC.

The moral of the story is – look out for this edition when tendering for a project with an organ of state. If the bid refers to this edition, what should you do about it? For starters, in your tender clarifications, request that clause 5.1.2 of the state provisions be amended with the effect that the principal agent does not lose his decision-making powers – i.e. delete clauses 26.2.1, 29.1, 29.2, 32.1, 32.6.1, 32.6.3 and 34.3 from clause 5.1.2.

If this is not acceptable to the employer and you're still willing contract with them, be prepared to never have a claim accepted and to continuously refer disputes. In such circumstances, it is vital that you ensure that clauses 40.2.1, 40.3 and 40.6 are included again so that disputes may be referred to adjudication. In fact, attempt to go a step further by having a standing adjudicator or an adjudicator already nominated so that disputes can be referred quickly.

If this is also not acceptable to the employer then I would seriously question going any further. Whilst securing work in this economic climate is fantastic, it's not worth the risk these state provisions place on contractors.

3 Para 128.

4 Para 130.

5 Para 134-135.

6 Para 131.