

JBCC March 2014 AGREEMENTS

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1. TEXT BOOKS

1.1. At this stage (March 2016) There is only one text book that is known to have been published. This is “JBCC 2014 AND ALL THAT”, by JR (Jim) Garner.

1.2. This book covers the three Agreements published by JBCC (see 2.1 below) and the MBSA 2014 Domestic Subcontract Agreement.

1.2.1. The book contains a clause by clause analysis of each of these Agreements, a synopsis of the most important changes from the JBCC 2007 and MBSA 2008 Agreements.

1.2.2. It includes copies of the 2014 Agreements and the related Contract Data documents, advice and comment on possible amendments, seventy standard letters for use with the Principal Building Agreement (PBA) and sections on related subjects such as the Construction Industry Development Board.

1.2.3. There are also Flow Charts illustrating procedure relating to major clauses such as payment and completion.

2. GENERAL

2.1 CONTRACT DOCUMENTS

The following contract Agreements are produced by JBCC:

- Principal Building Agreement (PBA): The latest edition of this is the 6th Edition, March 2014;
- Nominated/Selected Sub-contract Agreement: The latest edition of this is the 6th Edition, March 2014;

- Minor Works Agreement: The latest edition of this is the 5th Edition, March 2014.
- Additionally MBSA have published a 2014 Domestic Subcontract Agreement for use with the JBCC 2014 PBA.

3. SYNOPSIS OF IMPORTANT CHANGES TO THE PRINCIPAL BUILDING AGREEMENT FROM EDITION 5.0 JULY 2007 TO EDITION 6.1 MARCH 2014

| 2007 Clauses | 2014 Clauses | Comments |
|--------------------|--------------------------|---|
| 1 to 40 | 1 to 30 | The first change that will be noticed is that the arrangement of clauses has been revised. There are now only 30 clauses instead of the previous 40 clauses. |
| 1.8 general | Agreement general | The non-variation clause is now in the Agreement Language has been adjusted in a number of places to give greater certainty. For example the requirement for updating the programme is now 'regularly' rather than 'continuously', as in edition 5.0, removing any suggestion that the contractor must be in a process of updating the programme every day. |
| 1.6 | 2.5 | Provisions relating to delivery of notices have been changed. Most important is that the delivery date is now "deemed", not "presumed" as in edition 5.0 and fax is no longer a permitted means of delivering notices. |
| Nil | 3.4 | Clause 3.4 provides that failure by a party to enforce its rights shall not constitute waiver or affect such party's rights |
| Nil | 5.6 | A new provision has been introduced that the " agreement ", in the event of conflict, shall take priority over other contract documents. This is an improvement, but it would be even better if priority of all contract documents were allocated priority. CD also provides for them being recorded in the single place provided for recording amendments and that amendments recorded elsewhere are of no force or |

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| 25 | nil | <p>effect</p> <p>The concept of Works completion has been deleted, eliminating a need for a Works Completion clause. This has further implications including the defects liability period commencing at the date of practical completion instead of on the date of Works Completion. It has been considered that other provisions giving the employer various possible means of dealing with a dilatory contractor are sufficient. There is still a requirement for a list of outstanding work at practical completion (now called the list for completion), but no certificate is to be issued when this work has been completed.</p> <p>The provisions for Works completion were introduced in the 1998 Edition and adjusted in successive previous editions, but never worked well.</p> <p>The insurances provisions have been consolidated into a single clause, as have the termination provisions.</p> |
| 10 to 12 | 10 | <p>The requirement for the practical completion list to be finite, with no provision for adding new items, is further clarified. The period required by the principal agent for inspection(s) must be recorded in Contract Data.</p> |
| 24 | 19 | <p>An important change has been made to the clause relating to extension of time. In Edition 5.0 there is a time bar both in relation to the period allowed to notify the intention to claim and in relation to the time allowed to submit the detailed and evaluated claim. In Edition 6.1 the second time bar has been removed, though a permitted time to submit the detailed claim is given.</p> <p>A further notable change is that delay by a nominated subcontractor has been moved from the category for which extension of time, but not adjustment of the contract value is granted, to the category that includes adjustment of the contract value.</p> <p>The period, from date of certification has been lengthened</p> |
| 29 | 23 | |

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| 31 and 34 | 25 and 26 | <p>from 7 to 14 calendar days. The subcontractor due payment date is also 7 calendar days later, but still 7 days after the contractor is due to be paid.</p> |
| N/S 31.15 | N/S 25.12 | <p>The meaning term 'default interest' has been changed to mean a rate of interest which is 6% per annum above the defined rate of 'interest' (effectively 3% above prime interest rate). This change is because the previous arrangement resulted in a default rate under prime interest rate in the low interest rates prevailing in 2012-13. That encouraged late payment, which is the reverse of the objective. The new basis ensures that the default rate will remain materially above prime.</p> <p>In the N/S Agreement the period by which the Contractor may defer payment to an n/s subcontractor, on payment default by the Employer, has been reduced from 90 to 30 calendar days. An affidavit of the Employer's default must also be issued to the subcontractors</p> |
| 32 & 34 | 26 | <p>Adjustment of the subcontract value and the final account are dealt with in a single clause.</p> |
| 31.16.3 | 25.12.1 and 28.0 | <p>The contractor's rights to suspend the works have been increased. They are now in clause 28 (also in 25.12)</p> |
| 40 | 30 | <p>In the dispute resolution clause the procedure for adjudication has been adjusted. Now, once the disagreement has become a dispute the party that declared the disagreement has only ten working days to refer it for resolution by adjudication, failing which the dispute is to be resolved by arbitration, not adjudication. Not all the committee were happy with this, but it was a compromise arising from a recommendation from the Association of Arbitrators for a dispute to <u>lapse</u> if it was not referred to adjudication within ten working days of it becoming a</p> |

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| 40.2.1 | 30.6 | <p>dispute. That was not accepted; it would have resulted in numerous disputes lapsing if the party declaring the dispute (the contractor with very few exceptions) permitted this period to pass without realising that this meant loss of their rights to pursue the dispute.</p> <p>It should also be noted that the JBCC Adjudication Rules were revised in 2013. A further revised set of Rules was issued in 2014. The rules that will apply will be the latest published Rules regardless of the Edition of the Agreement. The revised Rules eliminate a number of problem areas in the 2007 Rules, including the unreasonably short time given for the Defendant to lodge his response to the claim and to conclude the adjudication process.</p> <p>The non-variation clause has been moved from clause 1.8 to the Agreement.</p> |
| 1.8 | Agreement | <p>The Principal Agreement form now contains an assignment of rights provision which is of value to n/s subcontractors: <i>“Any provision in this agreement that may contain a right or benefit on a subcontractor shall be binding on the parties and be capable of acceptance by such subcontractor at any time.”</i></p> |
| Contract Data | Agreement Contract Data | <p>nil</p> <p>The requirement for contract specific data to be entered on Contract Data has been considerably extended. For example the street address of the site, and erf number are required. Company numbers, practice registration numbers, contract documents and drawings must be listed. Known nominated subcontractors and direct contractors must also be listed. Fuller details of insurance requirements are to be recorded.</p> <p>There is also a provision that the only amendments to the standard JBCC Agreement are those recorded in the relevant item of Contract Data, or in a single referenced annexure. It is hoped that this will terminate the bad and unprofessional practice that has been prevalent, of contract documents containing a number of sets of amendments, sometimes with one set being in conflict with another.</p> |

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| | | There is no good reason why all amendments should not be recorded in one place, and every reason why they should be. |
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The N/S Subcontract Agreement and the MBSA Domestic Subcontract Agreement have been similarly changed, but subcontracts have their own requirements. Any attempt to incorporate the PBA conditions into the subcontract conditions is ill-conceived.

4. **Contract Data Document for Use in Completing the Tender Process**

JBCC also provides a separate document for use in providing contract specific information such as the Contractor’s details, the Employer’s details, selection of security and other selections which relate to the specific contract and which vary from contract to contract. These are completed during the tendering and award process.

The 2014 editions combine CD into a single document; no longer separate documents for Employer and Contractor completion.

There is to be a separate Contract Data for public sector use, but efforts to reach a constructive agreement with CIDB have to date been unduly prolonged. Its contents can only be speculated on at this stage. This is the situation nearly 2 years after agreement was apparently reached with CIDB’s appointed representatives, from DPW Pretoria. Finally a meeting with the JBCC Task team has been arranged for 18 March 2016. It remains to be seen what will be achieved at this meeting, but JBCC must continue to strive for a constructive and reasonable conclusion.

5 **Individual clauses|**

5.1 **Clause 1.0 DEFINITIONS AND INTERPRETATION**

Most of the shortcomings of Edition 5.0 July 2007 relating to definitions have been eliminated in Edition 6.1. For Example the definition of ‘defect has been adjusted by eliminating the words ‘in the opinion of the **principal agent**’ thus making the test objective rather than subjective.

5.2 Clause 1.2.5 provides that the word “deemed” means that the thing deemed shall be conclusive that something is fact, regardless of the objective truth. This provision is the same as in Edition 5.0, and was the subject of criticism. However, provided the word ‘deemed’ is used advisedly, it has an important and justified result.

5.3 **Clause 2.0 LAW REGULATIONS AND NOTICES**

Clause 2.5 gives the time periods which are “deemed” for delivery of notices. Note that these periods are now “deemed” not “presumed as in the 2007 edition. This can have important implications on validity of notices.

5.4 Clause 3.0 OFFER AND ACCEPTANCE

A new provision (3.4) is that failure by a party to enforce its rights shall not constitute waiver or affect such party’s rights.

5.5 Clause 4.0 ASSIGNMENT AND CESSION

Permission of the other party is necessary, except for cession of the right to receive money (Cl 4.3), which only needs a notice to the other party.

5.6 Clause 5.0 CONTRACT DOCUMENTS

Clause 5.3 provides that the **priced document** may not be used as a specification. This is a change from previous editions where the priced document could be used as a specification provided this was recorded in Contract Data

The contract documents are deemed (note ‘deemed’) to be mutually explanatory, but, unlike in Edition 5.0, it is provided that in the event of any ambiguity, discrepancy, divergence or inconsistency between documents, the Agreement shall prevail. As to such differences between other documents, no direction is given. Common law principles may assist in this regard.

5.7 Clause 6.0 EMPLOYER’S AGENTS

The principal agent is the only agent authorised to act in terms of the Agreement, but he has full authority (cl 6.1). The principal agent may delegate certain authority to other agents, but must notify the contractor when this is done. Without such delegation no other agent has authority to issue contract instructions.

Delegating authority to issue contract instructions is considered to be bad practice; it often results in conflicting instructions. All required instructions should first be vetted by a co-ordination process designed to identify and eliminate conflicts. The principal agent is responsible for this; it is a design function and not a contractor’s responsibility.

5.8 Clause 7.0 DESIGN RESPONSIBILITY

The provisions of this clause are the same as those relating to design responsibility in Edition 5.0

5.9 Clause 8.0 WORKS RISK

Note that the liability extends to additional professional fees incurred in reinstatement and repair (8.3.3)

5.10 Clause 9.0 Indemnities

This clause lists indemnities given by both parties. Indemnities given by the Employer include liability for damages arising out of an act or omission by a direct contractor and design defects.

Clause 9.1 lists indemnities given by the contractor and 9.2 lists indemnities given by the employer. This includes (9.2.5) proceeding with the works on instruction from the employer (not the principal agent) without the employer obtaining the required permission under the law. This will apply despite the obligation of both parties to comply with the law (clause 2.0).

5.11 Clause 10.0 Insurances

The party responsible to take out works insurance and other insurance is to be recorded in CD.

Contract Works Insurance and public liability insurance are required as a minimum. The works insurance should cover, amongst other things, the contractor's liability for damage caused by him or those for whom he is responsible. This is particularly important where the employer elects to take out the insurance. It is also important to check insurance excesses where the employer takes out insurance.

The party taking out insurance must provide to the other party proof of insurance, and where required proof of extension or replacement of the policy, before expiry of the existing policy (10.3). The party taking out insurance must also, on request, provide a copy of the policy

5.12 Clause 11.0 Security

The contractor is required to give a Construction Guarantee (11.1), but it is the contractor's right to choose whether the guarantee to be provided is a fixed or variable guarantee.

5.13 Clause 12.0 DUTIES OF THE PARTIES

The provision in this clause have been grouped together from a number of clauses in Edition 5.0 (2007). The duty of the employer to provide a payment guarantee, where required in the accepted tender, is contained in this clause.

The contractor's duty to prepare and submit a programme is contained in 12.2.6. The requirements in respect of the programme are still limited. Contractors should ensure that the programme is based on recognised construction programming software and is prepared by a person skilled and

experienced in preparing construction programmes. Without this extensions of time will be much harder to secure. The programme should also:

- Incorporate or have appended a schedule of information required, which should be regularly monitored so that delays are notified.
- Include allowance for design submission and approval procedures required in connection with n/s subcontracts
- Include for practical completion procedures, including notices, inspections and attending to the list for practical completion, all prior to practical completion being achieved.
- Be updated at least monthly and when material delays have been experienced.

5.14 Clause 13.0 SETTING OUT

The provisions are almost unchanged from Edition 5.0 (2007).

5.15 Clause 14.0 NOMINATED SUBCONTRACTORS and Clause 15. SELECTED SUBCONTRACTORS

As in the 2007 Edition both nominated and selected subcontractors may be appointed. The intention to appoint nominated subcontractors is covered by a requirement in Contract Data to list the subject matter of all intended nominated subcontractors. The default provision is that provisional sums are for selected subcontractors unless CD records otherwise.

Adjustment of subcontractors' preliminaries – clause 27.2.10 of the Subcontract Agreement

A notable addition to the 2014 Agreement concerns the effects of extension of time granted to the Subcontractor – by the Contractor. This may, depending on the reason, entitle then to an adjustment of their preliminaries, and possible to payment for expense and loss. Once the extension is granted the Principal Agent is required to adjust the subcontract value accordingly and certify their payments accordingly. Principal Agents have long since resisted this on the basis that the Employer should not be required to pay for extensions of the subcontractors time for reasons relating to default by the Contractor, such as delayed access to the Subcontractor. In the 2013 Agreement the clause covering the Recovery Statement has been adjusted to allow the Principal Agent to recognise the Subcontractor's rights, certify the additional payment to the Subcontractor, but recover the amount concerned (where it is caused by Contractor default) as a deduction recorded in the Recovery Statement.

5.16 DOMESTIC SUBCONTRACTORS

The clause in Edition 5.0 (2007) relating to domestic subcontractors has been excluded from Edition 6.0 (2014). Thus there is no longer a requirement for the Contractor to apply conditions of subcontract, for domestic subcontracts, that are equitable and consistent with the JBCC documents.

5.17 Clause 16.0 DIRECT CONTRACTORS

The Contractor is required to make reasonable allowance in the Programme for work by Direct Contractors. As the programme is to be submitted within 15 working days of the provision of construction information (cl 12.2.6), it follows that the scope of work to be executed by Direct Contractors must be included with the provision of construction information, so that the necessary provision for it can be included in the programme.

5.18 Clause 17.0 CONTRACT INSTRUCTIONS

As in previous editions, oral instructions are of no force or effect (17.5). In Edition 5.0 this provision also stated that neither party may rely on an oral instruction for any purpose; this part of the previous wording has been deleted. As such Instructions are “of no force or effect” the change probably only benefits the contractor, as it no longer excludes claims for work instructed orally.

5.19 Clause 18.0 INTERIM COMPLETION

Interim completion only applies to subcontracts, but is of considerable importance to both contractor and subcontractor.

Risk of damage to the subcontract works reverts to the contractor on achievement, or deemed achievement, of interim completion, so ‘deemed’ or certified interim completion may be of importance

5.20 Clause 19.0 PRACTICAL COMPLETION

With the omission of Works Completion the requirements for Practical Completion have been expanded. Contract Data is required to record both items required and items not required for Practical completion. The Principal Agent is still required to inspect and give guidance and instructions, as the Works proceed, on the state and standard of work required. The definition itself is more demanding.

5.21 Clause 20.0 SECTIONAL COMPLETION

The provisions remain substantially the same as in Edition 5.0 2007. There are many projects where there is a legitimate need for sectional completion, but it does extensively complicate administrative requirements. There needs to be a genuine

intention for the Employer to take possession of and utilise each section when practical completion of that section is reached.

Provisions relating to practical and final completion apply separately to each section, with the added complication that a delay to one section may or may not affect other sections. If other sections are affected notices and claims are required for each affected section. Similarly all the requirements for practical and final completion must be repeated for each section.

There will also be an effect on insurance requirements.

Be aware of 'false sections'. These are Sections that in reality are stage completions, intended to generate penalties, not for intended handover to the Employer. False sections would be such milestones as completion of the concrete structure to ground floor level, completion of the concrete structure to roof level, completion of external cladding, completion of the lift installation, and so on. Such false sections offer both dangers and opportunities to the contractor, and dangers for the employer.

5.22 Clause 21.0 DEFECTS LIABILITY PERIOD AND FINAL COMPLETION

The Defects Liability Period remains at 90 calendar days, but now runs from Practical Completion (clause 21.1).

There are two mistakes in the third line of clause 21.1. The word “final” should be deleted. It is the list for completion that must be completed within the defects liability period, not the list for final completion, which is only issued on expiry of this period. The second mistake is in the given reference to clause 21.4.1; it should refer to clause 21.5. These errors are corrected in a reprint.

Notwithstanding the obligation to complete the list for completion within 30 working days of practical completion, clause 21.3.1 requires these items to be inspected by the contractor and be completed at least 10 working days prior to the expiry of the defects liability period. The contractor is then to give notice (21.3.2) to the principal agent to inspect within five working days of receipt of this notice.

5.23 Clause 22.0 LATENT DEFECTS LIABILITY PERIOD

This remains at five years from the date of Final Completion (as certified).

5.24 Clause 23.0 REVISION OF THE DATE FOR PRACTICAL COMPLETION

As in previous editions, this clause sets out the reasons for extension of time in three categories; without adjustment of the Contract Value, with adjustment of the Contract Value, and 23.3, a ‘catch-all’ for unspecified delays.

The big changes are that delays by nominated subcontractors moves to the second category (with adjustment of the Contract Value), and the second time bar, for late delivery of the detailed claim, has been deleted.

5.25 Clause 24.0 PENALTY FOR LATE COMPLETION

The Penalty provisions remain substantially unchanged from Edition 5.0 2007.

5.26 CLAUSE 25.0 PAYMENT

One change in Edition 6.1 is that payment intervals are not necessarily monthly, but are required to be at the intervals given in Contract Data.

The payment period has changed from 7 to 14 calendar days, and the default rate (for late payment from the Repo rate X 1.6 to the Repo rate +6%.

If the Employer defaults on payment the Contractor may defer payment for a maximum of 30 calendar days (previously 90 calendar days) and then only if notice to subcontractors is given by affidavit.

5.27 Clause 26.0 ADJUSTMENT OF THE CONTRACT VALUE AND FINAL ACCOUNT and Clause 27.0 RECOVERY OF EXPENSE AND/OR LOSS

These clauses are largely unchanged from Edition 5.0 2007

5.28 Clause 28.0 SUSPENSION BY THE CONTRACTOR

The Contractor is entitled to give five working days' notice of suspension for any of the five causes listed (28.1). The reasons are failure to:

- Provide or maintain a payment guarantee (where required)
- issue a payment certificate by due date
- payment default, and failure to issue or maintain a payment guarantee as required
- effect insurances where applicable
- appoint another principal agent/agent where applicable.

Where the Employer has not rectified the default within the notice period the Contractor may suspend the Works until the default has been rectified (28.2), and is required to instruct subcontractors also to suspend their work (28.3). The Contractor will be entitled to extension of time (28.4), but even though 28.4 doesn't expressly state this the contractor should still give notice of

intention to claim extension of time. Provided notice is given additional expenses can be claimed (additional 24 hour security for example).

5.29 Clause 29.0 TERMINATION

This clause deals with termination rights that both parties have, and also termination for neutral cause, such as substantial destruction of the Works and extended delays when work cannot proceed.

The four clauses in Edition 5.0 July 2007 have been consolidated into one clause, but cover the same situations.

Termination is an extreme and irreversible measure. It should only be undertaken with the authority of a designated senior executive, and preferably with assistance of legal advisers

5.30 Clause 30.0 DISPUTE RESOLUTION

The important change in this clause is that once a dispute is declared, the party declaring the dispute must take steps to proceed with the adjudication within 10 calendar days, failing which the right to refer the dispute to adjudication is lost, and the dispute is referred to arbitration.

6 AGREEMENT

The Agreement form is contained on page 32 of the PBA. It is important that this is completed and signed by the Parties.

The non-variation and sole memorial of contract provision, clause 1.8 in Edition 5.0 2007, is contained in the Agreement

7 CONTRACT DATA.

Contract Data is no longer in two documents, but still contains a part for completion as part of the tender documents and a part for completion of the contractor's options.

The Contract Data now contains, as part of tender information, the period required by the Principal Agent for practical completion inspections. Tenderers should allow accordingly in their programme.

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