

JBCC ADVISORY NOTE: EDITION 6.2

DOCUMENT/S

Principal Building Agreement Nominated/Selected Subcontract Agreement

DISCLAIMER *The purpose of this publication is to give advice on the most effective use of the JBCC documents. Advice is given in good faith and JBCC disclaims all liability for any loss, damage or expense that may be incurred through acting on such advice*

15.0 SELECTED SUBCONTRACTORS - Appointment

- 15.1 The **principal agent** and/or **agents** shall:
 - 15.1.1 Prepare tender documents in conformity with the **n/s subcontract agreement** and this **agreement** for work intended to be executed by a selected **subcontractor** in consultation with and to the reasonable approval of the **contractor**
 - 15.1.2 Call for tenders from a list of tenderers agreed between the **contractor** and the **principal agent**
 - 15.1.3 Scrutinise the received tenders for compliance with the tender documents in consultation with the **contractor**
 - 15.1.4 In consultation with the **contractor**, choose the compliant tenderer to be appointed as a selected **subcontractor** in terms of the **n/s subcontract agreement**

INTERPRETATION

Edition 6.2 retains both *nominated* and *selected* **subcontractors**. This concept of two categories of subcontractors whose appointment is instigated by the **employer/employer's agent** is unique to JBCC forms of contract. The form of subcontract to be used is specified (14.1 and 15.1) and it is identical to both. The main differences are in the procedure leading to appointment and the degree of risk that the **contractor** and **employer** carry in respect of performance by the **subcontractor**

Employers and their **agents** invariably prefer to appoint a specialist subcontractor as a *selected* **subcontractor** rather than as a *nominated* **subcontractor**. The preference is understandable as the **employer's** potential exposure to the consequences of a selected **subcontractor's** defective performance, default or insolvency becomes the responsibility of the **contractor** as any variation in the cost of completing the subcontract works shall be for his account [15.7.2]

A **contractor** will generally not have a problem with such additional risk as he is regularly exposed to similar risks in relation to his 'domestic subcontractors'. This is also because he has been free to exercise his judgment and experience in his choice to appoint the **subcontractor** as he is entitled to be consulted about the choice of the successful tenderer and has not had it imposed on him [15.1.4]

It is therefore logical and fair that the **contractor** should be directly involved where the appointment of a selected **subcontractor** is contemplated as this will allow him to exercise some control over the extent of the risk that he is expected to assume. This is recognised in 15.1 - 3 which requires that the **contractor** be consulted about the preparation of the tender documents which are to be to his reasonable approval and issued to a list of tenderers agreed by the **contractor**

Employers and their **agents** who wish to call for tenders and appoint selected **subcontractors** simultaneously with calling for tenders for the principal contract and appointing the **contractor** have difficulty with the above procedure. They attempt to get around the problem by advising tenderers for the principal contract of the names of the subcontractors from whom tenders are being invited. This

15.0 SELECTED SUBCONTRACTORS (Continued)

approach forces tenderers that have an objection to any of them to either qualify their tender or to refrain from tendering – potentially to the disadvantage of both the **contractor** and the **employer**

Circumstances have arisen where a subcontractor is appointed to commence work before the appointment of the **contractor** and the principal contract tender documents will then state that the **contractor** is required to take over the appointed subcontractor as his selected **subcontractor**

COMMENT

From what has been said, it must be apparent that the **contractor** is exposed to potentially greater risks when work is performed by *selected subcontractors* in terms of clause 15.0 than when it is done by *nominated subcontractors* in terms of clause 14.0. He is liable for any variation in the cost of completing the subcontract works in the case of the *selected subcontractor*'s defective performance or default

The appointment procedure for *selected subcontractors* requires more involvement by the **contractor** in respect of the subcontract tender documents, selection of tenderers and selection of the tenderer to be appointed (compare 14.1 and 15.1). JBCC, therefore, considers the procedure to be unacceptable where the **contractor** has not been involved in the appointment procedure or where the **employer** himself employs a *selected subcontractor*, either simultaneous or before the appointment of the **contractor**, as the **contractor** cannot be expected to assume responsibility for a subcontractor in whose appointment he has had no involvement and in respect of whose operations he has no control. In such cases it is recommended that the **employer** appoints the subcontractor as a *nominated subcontractor* in terms of clause 14.0 or as a **direct contractor** in terms of clause 16.0