

JBCC ADVISORY NOTE: EDITION 6.2

DOCUMENT/S

Principal Building Agreement N/S Subcontract Agreement Minor Works Agreement (Clause 16.0)

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*

21.0 DEFECTS LIABILITY PERIOD AND FINAL COMPLETION – Defects before and after final completion

- 21.1 The defects liability period for the **works** shall commence on the **calendar day** following the date of **practical completion** and end at midnight (0.00) ninety (90) **calendar days** from the date of **practical completion** [CD] or when the work on the **list for completion** has been satisfactorily attended to [21.6] whichever is the later
- 21.2 Where **defects** become apparent during the defects liability period the **principal agent** may instruct the **contractor** [17.1.1] to progressively attend to such items, whilst at all times minimising inconvenience to the occupants
- 21.12 A **certificate of final completion** shall be conclusive as to the sufficiency of the **works** and that the **contractor's** obligations [12.2.7] have been fulfilled other than for **latent defects**

INTERPRETATION

Before Final Completion

Before looking at the express provisions for completion and the rectification of defective or non-conforming materials and workmanship it is relevant to see what exactly is covered by the definition of practical completion in the JBCC. Practical completion is defined as:

“The stage of completion as certified by the **principal agent** where the **works** or a **section** thereof has been completed and is free of patent **defects** other than minor **defects** identified in the **list for completion** and can be used for the intended purpose.”

The date for practical completion is the most important “performance date” after which the employer may occupy the building in accordance with the pre-set timeline. The JBCC places great emphasis on the standard of work required at practical completion and that the principal agent, other agents and the contractor must work “as a team” towards achieving this milestone date. The construction period is defined in the contract data of the tender documentation. The contractor generally requires subcontractors to complete their work before practical completion, referred to as the interim completion date. These dates must be agreed between the contractor and the subcontractors. The principal agent monitors progress and, together with other agents, provides regular direction to the contractor and subcontractors on the building standards and the state of completion of the works to be achieved. The contractor brings the works to completion by the due date, but before that date timeously invites the principal agent to inspect the works in accordance with the programme and the (revised) date for practical completion. Where the work does not conform to the set standard for practical completion, the principal agent shall issue one comprehensive list of defects to be rectified.

The employer is obliged to give a willing and able contractor the opportunity to rectify defective work. The employer may have the rectification of the works carried out by another contractor and the costs incurred

thereto may be recovered from the contractor if the contractor fails to rectify the defective work within the period of five working days from notification by the principal agent (see clause 17.3). However, the employer must be mindful of his obligation to mitigate the contractor's loss. If the employer acted unreasonably in not giving the contractor a fair opportunity to remedy the defects for which it was responsible, the employer would probably have failed to mitigate that loss. The employer is generally limited to what it would have cost the original contractor to remedy the defects had it had the opportunity to do so.

Final completion is defined as:

"The stage of completion of the **works** as certified by the **principal agent** where the **works**, or a **section** thereof, has been completed and is free of **defects**."

A certificate of final completion issued by the principal agent shall be conclusive as to the sufficiency of the works and that the contractor's obligations to bring the works to practical completion and to final completion have been fulfilled other than for latent defects. A careless signature by the principal agent may result in a claim for professional negligence by the employer¹. There is no further recourse for the employer to bring a defective work claim as the final completion certificate followed by the final payment certificate (see clause 25.15), once issued, cannot be withdrawn or amended. The certificate can only be challenged on limited grounds. For example, where the act of the agent involves fraud or where he acts outside the scope of his authority.

After Final Completion

It is the nature of construction projects that faults and defects caused by failure in design, workmanship or materials may only become apparent many years after completion and it is not always evident whether they are caused by a design, workmanship or materials defect. These defects are known as latent defects. A typical example is misplaced reinforcement in concrete which will take time to show visible defects but eventually will damage the structure.

The latent defects liability period for the works is restricted and shall commence at the start of the construction period and end five years from the certified date of final completion (see clause 22.1). This limitation of liability varies the common law position in which the contractor would remain liable for latent defects for all time – or at least until the building is demolished. Latent defects are defects that cannot be identified during normal inspections. It manifests after the final completion certificate has been issued. The issuing of a final completion certificate under a building and construction contract does not terminate the contractor's obligation for damages arising out of defective work claims. The contractor is obliged to remedy all latent defects that appear up to the date of expiry of the latent defects liability period. In other words, the certificate of final completion as to the sufficiency of the works does not derogate from the common law right of the building owner to claim in respect of defects or faults in the execution of the works which only become apparent thereafter.

COMMENT

Prudent contractors protect themselves from liability arising out of their work on a construction project by maintaining "construction all risk" insurance cover. However, such insurance policy generally does not provide coverage for claims by discontented owners for the cost to repair or replace allegedly defective work. Such claims, which can present a significant exposure to a contractor, instead are governed by the contract between the contractor and client. As a result, the terms of the warranty and indemnification language in construction contracts are very important and frequently misunderstood. The purpose of a warranty is to limit the contractor's responsibilities in the event the work does not meet the owner's expectations. Similarly, indemnification clauses can be used to shift the risk of defective work to others and to allocate the risk among multiple parties who may be responsible for the final product. It is therefore essential for contractors to understand the limitations of their liability insurance coverage, and to pay particular attention to the drafting of their contracts, seeking professional legal assistance where needed. Proper drafting on the front end can save substantial expense on the back end.

¹ *Hoffman v Meyer* 1956 2 SA 752 (C); *Sutcliffe v Thackrah* 1974 AC 727; *Smith v Mouton* 1977 3 SA 9 (W); *Cone Textiles (Pty) Ltd v Mather & Plant (SA) (Pty) Ltd* 1981 3 SA 565; *Ocean Diners (Pty) Ltd v Golden Hill Construction CC* 1993 3 SA 331 (A) 342C; *Van Immerzeel & Pohl v Samancor Ltd* 2001 2 SA 90 (SCA).

From a contractor's perspective, defending a defective work claim can be expensive and often the nature and extent of the damage are hotly disputed, leading to an expensive and time-consuming process in defending the claim. This is regardless of the timing of the making of the defective work claim by the building owner and/or the principal agent/engineer. For the sake of practicality and in preparation for a possible defective work claim it is necessary to:

- (a) establish the ambit of contractual responsibility in relation to the design;
- (b) be clear as to any express and/or implied representation made in the documentation relating to any part of the contract as to the quality of workmanship;
- (c) be aware of any express and/or implied statements in the contract as to the purpose of the works;
- (d) be clear as to any express, implied and/or actual reliance on the part of the owner as to any of the contractor's obligations, skill or expertise; and
- (e) establish a contemporaneous documentation procedure to ensure that all directions, instructions, notifications, possible waivers, et cetera are recorded in a timely and relevant manner.

CONCLUSION

Uncertainty often prevails regarding the assessment of damages in respect of claims that employers have against contractors for defective work. The employer is entitled to have the defective work rectified and/or claim damages in terms of the contract and/or common law. Standard-form contracts generally provide for specific procedures related to defective work claims made during the pre-determined contractual completion stages and after the issuing of the final completion certificate. The success of a defective work claim after the issuing of the final completion certificate is complicated by various factors, inter alia that the contractor may no longer be in business; there is no financial hold on the contractor because of the expiration of the construction guarantee; and the difficulty often to establish whether the defective work is as result of a design or specification shortcoming/oversight, normal wear and tear or caused by the contractor or his subcontractors.

The systems, tools and techniques are available for an industry willing to embrace good practice in order to improve industry performance and project outcomes. Vigilance on the part of the principal agent appointed to represent the employer is required to avoid later arguments as built environment professionals often fail to enforce the contractual requirements. In so doing they leave the building owner/employer with no other option but to institute a claim for damages for breach of contract due to delivery of defective work by the contractor.

Continuous professional development for professionals practising in the construction industry is therefore vital to understand and correctly apply the provisions contained in the particular contract. This will not only assist in the ability to correctly execute procurement requirements, but also the ability to effectively manage contracts from a supply chain management and built environment perspective.