

JBCC ADVISORY NOTE: EDITION 6.2

DOCUMENT/S

Principal Building Agreement Nominated/Selected Subcontract Agreement

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7.0 DESIGN RESPONSIBILITY – “N/S Subcontract Agreement”

- 7.1 Unless otherwise stated [CD], the **subcontractor** shall not be responsible for the design of the **subcontract works** other than the **subcontractor’s** temporary works. The **subcontractor** shall not be responsible for the coordination of design elements
- 7.2 Where the **subcontractor** is appointed to design, supply and install an element [CD]:
- 7.2.1 The **subcontractor** shall submit design documentation to suit the dates in the **programme** to the **contractor** for review by the **principal agent** or relevant **agent** for conformity with this **subcontract agreement**
- 7.2.2 The **principal agent** and/or **agents** shall be responsible for review and coordination of design documentation [23.2.8]
- 7.2.3 The **subcontractor** indemnifies the **contractor** for consequences of such design and shall cede such indemnity, warranties, and other rights to the **employer** [9.1; 12.3.20 & 22]
- 7.2.4 The **subcontractor** shall provide proof of professional insurance, where required [CD] [10.1.5]

INTERPRETATION

Subcontractors are frequently appointed to design, supply and install an element in accordance with design parameters laid down by the principal agent and/or agents in the subcontract tender documents. The contractor is indemnified by the subcontractor for consequences of such design and cedes to the employer his right to take action against the subcontractor for loss or damages arising out of the defective design. A separate indemnity form to be signed by the subcontractor is not required, as it is clearly stated in sub-clause 7.2.3 that the contractor is indemnified for consequences flowing from a defective design by his subcontractor. This position is different from earlier JBCC editions where the parties to the contract, and particularly subcontractors, were advised to oppose the imposition of design indemnities in favour of the contractor, principal agent and/or agents.

In general terms when an employer appoints an architect or engineer to design a building or work of a civil engineering nature, he is entitled to expect the architect or engineer to be responsible for design work as appointed for and outlined in their respective employer/consultant agreements. Where, in their terms of engagement, it permits them to use a specialist subcontractor or supplier to design any part of the works, the respective agent will have no responsibility if the design undertaken by others contains a defect. It is, therefore, in the employer’s interest to obtain some form of design warranty from the subcontractor or supplier.

The question that is often asked is where the principal agent and/or agents have delegated their design responsibility to others in terms of their appointment then have to approve, check or inspect the design of the subcontractor or supplier, do they then take on responsibility for any failure of the design? To avoid any liability for defective design the erstwhile ISAA in its Architects Practice Manual, Client/Architect agreements clause 5.6.5 “Checking of shop drawings and approval of samples” expressly provided:

Checking of shop drawings and/or approving of samples or equipment, materials or workmanship by the Architect is precautionary and does not relieve a contractor or subcontractor of responsibility for installation coordination, erection fit, patent errors or defects contained in the shop drawings or latent/patent defects in equipment, materials or workmanship, nor does it place responsibility upon the Architect for the foregoing

Edition 6.2 has added a new clause 7.2.4 that instructs the subcontractor to provide proof of professional indemnity insurance, where a design of the subcontract works is to be undertaken. Such requirement is to be recorded in the subcontract CD.

The contractor must facilitate the timeous acceptance by the principal agent and/or relevant agent where the subcontractor is responsible for design of the subcontract works – see sub-clause 12.2.16. See also item 6.3 **Shop drawings** in the JBCC General Preliminaries.

COMMENT

The subcontractor is only responsible for design of the subcontract works where specifically recorded in the subcontract CD, and then only to the extent that the NSSA provides. For example, coordination of the design of the subcontract works with other elements of construction does not follow automatically. It is however advisable to consult with the main contractor to assess the design impact that the subcontract works may have on the overall design and execution of the works in order for such information to be incorporated in the tender documentation for the subcontract works.

Whoever is responsible for timeous submission of design proposals, time should be allowed in the programme for:

- Preparation of design proposals
- Consideration and review by the principal agent/agent
- Revision and re-submission where initial proposals are referred back for good reason – this will not include the introduction of new or increased requirements.

In the programme it will be necessary to establish dates by when the principal agent is required to have submitted the design brief to the contractor and subcontractor, the time allowed for the subcontractor to submit his design proposals for approval, the time allocated to the principal agent to examine and respond to the design proposal, and a period allowed to resolve any queries or shortcomings in the submitted design proposal. The time required for these design steps should be included in the contractor’s programme and be part of the critical path if that subcontractor’s work is on the critical path. Without all this information allocating responsibilities for delays and assessing due extension of time will be problematic. Although this primarily relates to selected subcontractors, common sense and the requirements of good business practice demand the same approach where nominated subcontractors are concerned. The exact same approach with the timelines in the programme applies to nominated subcontractors. The only difference being that the contractor is not responsible for any delays caused by a nominated subcontractor.

The principal agent and/or relevant agent shall remain responsible for review and coordination of design documentation but must make it clear that they do not accept any responsibility for design errors (it is suggested that shop drawings be stamped and signed with a stamp containing appropriate wording to make this clear).