16.0 DIRECT CONTRACTORS

16.1 The contractor shall:

16.1.1 In accordance with a contract instruction [17.1.16] permit direct contractors [CD] to execute and/or install work as part of the works. Such access to the works shall not constitute deemed achievement of practical completion or occupation by the employer [19.6]

16.1.2 Make reasonable allowance in programme for such work or installation

16.1.3 Be entitled to claim expense and/or loss caused by direct contractors [23.2.9; 27.1.7]

16.2 Payment of direct contractors shall be responsibility of the employer outside this agreement

16.3 There shall be no privity of contract between the contractor and a direct contractor appointed by the employer

INTERPRETATION

This clause permits the employer to appoint certain persons or specialist contractors to execute work on site during the currency of the contractor’s contract for which a N/S subcontract would not be appropriate. Examples are:

- Work to be executed by artists or craftsmen related to the adornment of the building
- The installation of the manufacturing and processing plant in industrial buildings
- The installation of medical equipment in hospitals
- The installation of telephone and computer cabling, security and access systems
- ‘Tenant installations’ - the fitting-out of shop and office premises by tenants

The contractor has no right to object to such work being executed by direct contractors. The only limitation is that its type and extent must be described in the contract data of the pre-tender information. Accordingly this information must be supplied to the contractor in the tender documentation. Clearly sufficient detail should be given to enable the contractor to make allowances in terms of subclause 16.1.2 and in his tender price for any expense associated with the direct contractors

Although not stated, the contractor must allow direct contractors space on site to deposit their material and plant. However, the contractor is not obliged to permit the use of scaffolding, toilet facilities, electric power, water supply or any other facilities on the site which he is generally obliged to make available to subcontractors

If a direct contractor causes a delay to practical completion despite reasonable allowance having been made for his work in the contractor’s programme, the contractor is entitled to a revision of the date for practical completion with adjustment of the contract value in terms of subclause 23.2.9. This right must be interpreted as entitling the contractor to additional time only where the delay goes beyond the allowance reasonably made in his programme. Direct contractors must order
their activities so that they cause the least possible inconvenience and disruption - this is implicit in the requirement that they are subject to the reasonable controls required by the contractor.

Subclauses 8.5.3 and 9.2.2 place the risks associated with direct contractors on the employer. The employer should, in terms of his contracts with direct contractors, hold them liable for such risks. Further - damage caused by direct contractors to the contractor's work, would entitle the contractor to recover the cost of making good from the employer, who in turn would have to recover from the direct contractors concerned.

The definition of works in the Principal Building Agreement excludes work or installations executed by direct contractors. Works insurance and indemnities relating to direct contractor's work or installations are therefore not the responsibility of the contractor. Where work by direct contractors is substantial it would probably be in the best interests of the parties that insurances are taken out by the employer thereby avoiding the potential problems of split responsibilities.

The principal agent should ensure that the employer fully understands the nature of the risks associated with direct contract appointments and recommend to the employer that he obtains satisfactory indemnities from such contractors or the tenants making use of them. In subclause 9.2.2 the employer indemnifies the contractor against loss arising from an act or omission of direct contractors. The employer should seek an appropriate indemnity from the direct contractors, or the tenant employing them and ensure that the risks are covered by third party indemnity insurance.

In terms of the agreement the type and extent of work to be performed by direct contractors contemplates that this would be known by the employer at the time tender documents are prepared. Provision is made in the contract data for the extent of work to be provided (see B9.0). But what if the need for such work transpires only after the contract has been let? Provision in later editions of the JBCC agreements has been made for further work by direct contractors to be added after the contractor has been appointed (see subclause 17.1.16). If the need for such additional work arises, the employer may need to carefully manage such situation, as it has the potential for causing disruption and delay to the contractor, particularly in the closing stages of the construction period. The alternative open to the employer is to wait until after practical completion for such work to be done.

COMMENT

From what has been said, it must be apparent that the employer is exposed to potentially greater risks when work is performed by direct contractors in terms of clause 16.0 than when it is done by nominated or selected subcontractors. He is liable for the cost of making good loss or damage to the works. Where practical completion is delayed due to the default of nominated subcontractors or direct contractors, the contractor is entitled to additional time and the employer will be deprived of penalties for late completion due to such circumstances.

Where the employer himself employs direct contractors he would probably be able to recover such costs from the direct contractors, but where they are employed by anyone else such as a tenant, he would have no contractual nexus with them that would enable him to recover damages. His recovery of damages would be difficult and uncertain. He would be well advised to require direct contractors to provide him with satisfactory indemnity for any costs and losses that might arise from their actions or inaction.