

DIFFERENCES BETWEEN THE JBCC® PRINCIPAL BUILDING AGREEMENTS (PBA) EDITION 5.0 (2007) AND EDITION 6.1 (2014)

JBCC® published Edition 6.1 PBA in March 2014 (JBCC, 2014). The changes from the 2007 edition are extensive and involve major redrafting to, inter alia, shorten and tidy up the suite. The main modifications included:

- The removal, adding or rewording of some of the definitions
- The rewording and repositioning of certain clauses
- The removal or incorporation of a number of clauses (30 vs. 42)
- The reduction of default periods in a number of instances
- The omission of ‘domestic’ subcontractors - relationship managed by the contractor
- The compaction of the insurance and security clauses into fewer clauses but more sub-clauses
- The removal of ‘Works Completion’ as a completion stage
- The introduction of a ‘suspension’ clause
- The collapsing of the previous four ‘termination’ clauses into a single clause
- The complete redrafting of the Employer-Contractor and Contractor-Employer data documents into a single Contract Data document.

The redrafting and publication of the JBCC® 2014 edition had, as with previous redrafting exercises, endeavoured to serve the building industry better by providing a modern reconstructed suite of documents using contemporary simple English, splitting long clauses into sub-clauses resulting in greater clarity of the legal agreement and a more user-friendly contract administration tool.

Annexure A below provides a list of the more detailed changes between the 2007 and 2014 editions.

ANNEXURE A: LIST OF DIFFERENCES BETWEEN THE JBCC 2007 5.0 AND JBCC 2014 6.1 EDITIONS

DEFINITIONS and INTERPRETATION (Edition 5.0 = 1 clause, Edition 6.1 = 7 clauses)

Summary *The first seven clauses deal with administrative issues including definitions, and interpretations, identification of the parties, communication between the parties, acceptance of an offer, the composition of the contract documents, the authority of the principal agent and, where applicable, design by the contractor or subcontractor*

Clause 1.1 **Definitions:** Some existing terms have been redefined to group them alphabetically
Some definitions have been added or revised including ...

Construction Equipment ... provided and used by the contractor and subcontractors

Construction information ... includes all formal communications

Final Payment Certificate ... issued after completion when the final account has been agreed

Force Majeure ... circumstances beyond the control of either party

Free issue ... goods to be installed provided by the employer to the (sub)contractor

Mora Interest ... punitive interest defined in law where a wrongful call is made on a security

Notice ... regular communication record between the parties and agents

Provisional sum ... budget amount in the PBA work by a subcontractor

Status report ... compiled where a project is suspended or terminated, or sold

Suspension ... may be invoked by the contractor on default of the employer
and Edition 5.0 - cl 1.7 'provisional sentence' included in the payment clause
and Edition 5.0 - cl 1.8 'entire contract' included above the signature of the parties

Clause 2.0 **Law, Regulations and Notices** (Edition 5.0 cl 7.0)

Five sub-clauses deal with the law of the country and the street addresses of the parties; the current edition of a JBCC agreement; communications in the language of the agreement in a format that can be read, copied and stored, and the delivery of notices by hand, mail or email

Note: 'notice' has been emphasised in the agreement to create an auditable information trail for a project - for access when disputes arise

Clause 3.0 **Offer and acceptance** (Edition 5.0 cl 2.0)

Four sub-clauses deal with the offer and acceptance, the contract date, and the enforcement of contract conditions. Two clauses added

Clause 4.0 **Assignment and cession** (Edition 5.0 cl 13.0)

Three clauses deal with rights and obligations of the parties, and the cession of such rights with the permission of the other party. New cl 4.3 specifically deals with monies due to financial institutions

Clause 5.0 **Contract Documents** (Edition 5.0 cl 3.0)

Six clauses (was 11) deal with documents supplementary to the agreement that constitute the contract, authority of representatives of the parties, that tender documents are not necessarily correct for ordering and construction, confidentiality of the information provided, signing of the agreement, issue of documents to the contractor, and (new) that the agreement is deemed to override other documents

Clause 6.0 **Employer's Agents** (Edition 5.0 cl 5.0)

Six clauses deal with the authority of the principal agent, appointment of other agents, default of an agent and the possible replacement of an agent, the declaration by an agent of an interest in a project other than a professional appointment, and an undertaking that the employer will not interfere with an agent's obligations in terms of the contract (Same as edition 5.0)

Note: Edition 5.0 cl 6.0 Contractor's Site Representative - included in cl 12.2.13

Clause 7.0 **Design Responsibility** (Edition 5.0 cl 4.0)

Three clauses deal with design - the contractor is not responsible for design, but a specialist subcontractor may be appointed for design, supply and installation skills (same as edition 5.0)

Note; Edition 5.0 cl 7.0 Compliance with Laws and Regulations incorporated in cl 2.1

PREPARATION (Edition 5.0 = 13 clauses, Edition 6.1 = 0 clauses)

INSURANCES and SECURITIES (Edition 5.0 = 6 clauses, Edition 6.1 = 4 clauses)

Summary *The 'insurance' clauses deal with the risk exposure of the parties, their respective indemnities and the insurable risks as well as the provision of monetary securities that may be called upon where the contractor fails to perform in terms of the agreement or where the employer fails to make payment of a certified amount*

Clause 8.0 **Works Risk**

No significant changes, cl 8.3.2 'free issue' added

Clause 9.0 **Indemnities**

Reworded: 9.1.1; 9.1.3 'excluding direct contractors' 'construction equipment' added; 9.2.5 replaced with "Proceeding with the **works** on instruction from the **employer** without the **employer** obtaining the required permission under the **law** in terms of this **agreement**" [2.1]; 9.2.7 ... added "Should such an event occur, the **contractor** shall forthwith give **notice** to the **principal agent**"; 9.2.8 new "A defect in free issue [CD]"; 9.2.9 = old 9.2.8; 9.2.10 no change; old 9.2.11 omitted

Clause 10.0 **Insurance**

'Old' clauses 10.0, 11.0 and 12.0 combined into one clause (10.0) incorporating reference to 'free issue'

Clause 11.0 **Security**

Re-written to be more concise

Added cl 11.8: The **parties** shall return the original or the replacement security form within ten (10) **working days** after the expiry date, or after the date of termination

Added cl 11.9: Where a **party** makes an unjustified call on a **security**, the amount paid and **mora interest** shall be paid to the other party

Added cl 11.10: The **contractor** shall waive his lien on receipt of JBCC® **Guarantee for Payment** from the **employer**

EXECUTION (Edition 5.0 = 9 clauses, Edition 6.1 = 6 clauses)

Summary *The 'execution' clauses deal with the duties of the parties, the appointment of nominated and/or selected subcontractors and direct contractors; the setting out of the works (or the subcontract works) and the issue of instructions by the principal agent to the contractor and consequently - but necessarily so - the issue of instructions by the contractor to the subcontractor. Omitted is the clause dealing with the appointment of domestic subcontractors*

Clause 12.0 **Duties of the Parties**

'New' clause listing the duties of the employer (14) and the contractor (21) that were spread throughout the agreement in previous editions, new = reference to '**free issue**'

Clause 13.0 **Setting Out** (edition 5.0 = clause 18)

No change, wording more concise using sub-clauses

Clause 14.0 **Nominated Subcontractors** (edition 5.0 = clause 20.0)

No change, wording more concise using sub-clauses

Clause 15.0 **Selected Subcontractors** (edition 5.0 = clause 21.0)

No change, wording more concise using sub-clauses

- Clause 16.0 **Direct Subcontractors** (edition 5.0 = clause 22.0)
Wording more concise using sub-clauses
- Clause - Contractor's domestic subcontractor (PBA edition 5.0 = clause 23.0)
Omitted as the employer has no relationship with a domestic subcontractor
- Clause 17.0 **Contract Instructions** (edition 5.0 = clause 17.0)
Sub-clauses have been grouped according to the subject: quality, subcontractors, etc. Sub-clause 17.1.11 added "Rectification of defects"
- Note Edition 5.0 Clause 19.0 Temporary Works and Plant has been omitted, incorporated in cl 12.2.18 &19; reference to advertising rights on hoardings etc. omitted

COMPLETION (Edition 5.0 = 10 clauses, Edition 6 = 8 clauses)

Summary *By renaming the defects lists as the list for interim completion, list for practical completion, list for completion and list for final completion the descriptions are grouped together in the definitions allow comparison of specific requirements. The omission of 'works completion' (as it did not achieve the faster and final completion of the works) requires the principal and other agents to specify the degree of completion required from the contractor and subcontractors for certification by the principal agent for the works as a whole and by the contractor of subcontractor's work.*

The Public Sector has accepted that the ninety calendar day defects liability period and the five year latent defects liability period will also apply to their work

The revision of the date for practical completion provisions are essentially the same but the period for the principal agent to assess a claim has been increased to twenty working days.

Clause 19.0 **Practical Completion:** Similar to Edition 5.0 but strong emphasis on regular guidance by the principal and other agents to the contractor and subcontractors of the standard of finish and completion required to achieve practical completion. The principal agent can only issue one list for practical completion, and updated lists where work has been completed ... but no list of items missed!

Clause 20.0 **Sectional Completion:** has been shortened to omit administrative duties

Clause 21.0 **Defects Liability Period and Final Completion**

The procedure to achieve final completion highlighted - similar process as practical completion - the list for final completion can be added to include latent defects that have become patent during the DLP

Clause 22.0 **Latent Defects Liability Period**

Same wording, but tidied up

Clause 23.0 **Revision of the date for Practical Completion**

Essentially unchanged except that the principal agent to assess a claim has twenty working days to assess a claim

Clause 24.0 **Penalty for late or Non-Completion**

Reference to prorate penalties for sections (not stated in the contract data) where the employer occupies the works before practical completion has been omitted

PAYMENT (Edition 5.0 = 5 clauses, Edition 6.1 = 3 clauses)

Summary *Payment conditions have remained unchanged except that the period for payment of the contractor by the employer has been increased to 14 calendar days to allow for administrative processes in many employer organisations. Where the contractor disputes a certified amount the undisputed amount must be paid forthwith whilst the balance of the amount is subject to adjudication and where the contractor is not paid within the specified period he may suspend the works In addition to exercising his lien or making issuing a demand in terms of the Guarantee for Payment*

Clause 25.0 **Payment**

Edition 5.0 cl 31.0, sub-clauses 31.1 and 31.2 reversed, other clauses reordered. The period for payment by the employer has been increased to 14 calendar days. Where the employer does not make payment of a certified amount the contractor may now suspend the works with the introduction of 'suspension'. Also new is the option where the contractor disputes a certified amount that the undisputed amount must be paid forthwith and the balance of the certified amount be referred to adjudication. The clause ends with Edition 5.0 cl 1.7 that provisional sentence may be obtained on a liquid document in a court of law

Clause 26.0 **Adjustment of the Contract Value and Final Account**

The clause has been reworded to make it more concise

Clause 27.0 **Recovery of Expense and Loss**

Similar to Edition 5.0 but more concise wording

SUSPENSION and TERMINATION

Summary *The right has been included in the PBA to allow the contractor to suspend the works where the employer or the principal agent is in breach. Four termination clauses have been merged into a single, admittedly long clause*

Clause 28.0 **Suspension by the contractor:** Five reasons have been identified why the contractor may suspend the works - where the employer has failed to provide a security for payment where specified, issue a payment certificate (payment advice) by the due date; where partial or no payment has been made by the due date; where no proof of specified project insurance by the responsible party has been provide, and failure to appoint a replacement agent / additional agent where required

Clause 29.0 **Termination:** The clause has been streamlined to reduce repetition;

The employer may terminate - where the contractor has not provided a security for construction, where specified, proceeded with the works or complied with a valid construction after notice to comply

The contractor may terminate - where the employer has not provided a security for payment, where specified, given possession of the site / access to

a portion the works, interfered with the independent judgement of the principal or other agents, effected specified insurances, paid certified amounts or appointed a (replacement) agent. In all cases the contractor's first remedy is to suspend the works before invoking the termination procedures

Either party may terminate - where execution of the works has become impossible

Termination procedures include the issue of a notice specifying a 'defect' so creating the opportunity to remedy the situation before following the termination procedure which will take some time to vacate the site in compliance with the health and safety provisions of the Construction Regulations

DISPUTE RESOLUTION

Summary This clause has not changed materially but the wording has been refined in places

Clause 30.0 JBCC agreements have been written to create a project administration tool - provided the procedures are followed by both parties and the principal agent, as well creating a binding legal agreement between the parties. In practice disagreements can and do occur - this clause provides four 'methods' of alternate dispute resolution among the parties without disrupting the exception of the works - failing which recourse to law is possible at any time

Note: With the imminent promulgation of 'prompt payment' regulations - provision is made for immediate adjudication of disputes relating to late, partial or no payment by the employer to the contractor or by the contractor to the subcontractor.