



Date: December 2002

ADVISORY NOTE INDEX

- Note:**
- 1 All PN notes relate only to clauses common to both agreements using the Principal Building Agreement wording. The note applies *mutatis mutandis* to the N/S Subcontract Agreement
 - 2 EDITION "July 1999" The note applies only to the edition referred to
"All" The note applies to all editions
 - 3 The current release of Advisory Notes are highlighted in **bold italics**

All 1998 edition documents that have a further edition date are superseded as they are no longer compatible with current editions

MAIN CLAUSE	EDITION	CODE	SUBCLAUSE/SUBJECT	ISSUED
Principal Building Agreement + N/S Subcontract Agreement (PN)				
1.0 Definitions and Interpretations	All	PN01-02	"Lump Sum Document"	12.1999
	All	PN01-04	1.6 Giving of notice	12.2001
	All	PN01-05	"Direct Contractor definition"	12.2001
	All	PN01-06	Fixed Price Contract	12.2001
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3.0 Documents	All	PN03-01	3.8 Is the change necessary?	12.2000
14.0 Security	All	PN14-01	14.2.6 Deposit ownership	12.1999
		PN14-02	14.1 Security selection	12.2000
17.0 Contract Instructions	All	PN17-01	17.1 Contract Instruction Book	06.2001
25.0 Works Completion	All	PN25-01	25.1 Time limitation?	12.2002
29.0 Revision of Date for Practical Comp..	All	PN29-01	29.1.1 Inclement weather	12.1999
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31.0 Interim Payment to the Contractor	All	PN31-03	31.6 Transfer Form	06.2001
	All	PN31-04	31.6 Materials - Cash advance	12.2001
36.0 Cancellation by Employer - Contract..	All	PN36-02	36.6 Material breach	12.2001
38.0 Cancellation by Contractor - Employ..	All	PN38-01	38.6 Material breach	12.2001
Principal Building Agreement (P) only				
3.0 Documents	All	P03-01	3.1 Payment Guarantee Exp..	06.2001
4.0 Design Responsibility	All	P04-01	4.2 Rogue design indemnity	06.2002
5.0 Employer's Agents	All	P05-01	5.4 Instruction authority	06.2000
14.0 Security	All	P14-01	14.7.1 Creating of cash deposit	06.1999
17.0 Contract Instructions	All	P17-01	17.3 Oral instructions	06.2001
21.0 Selected Subcontractors	All	P21-01	21.0 Appointment	06.1999
22.0 Direct Contractors	All	P22-01	22.0 Risk and Responsibility	12.2000
31.0 Interim Payment to the Contractor	All	P31-01	31.9 Provision of tax invoice	06.2002
Nominated / Selected Subcontract Agreement (N) only				
3.0 Documents and Principal Agreement	All	N03-01	3.1+ Payment Guarantee	06.2001
	All	N03-02	F2125 N/S Payment Guarantee	12.2001
	All	N03-03	3.3+ Appointment by reference	06.2002
4.0 Design Responsibility	All	N04-01	4.2 <i>Rogue design indemnity</i>	06.2002
14.0 Security	All	N14-01	14.7.1 Cash deposit	06.1999
31.0 Interim Payment to the Subcontractor	All	N31-01	31.9.2 Provision of tax invoice	06.2002
				(Continued)

MAIN CLAUSE	EDITION	CODE	SUBCLAUSE/SUBJECT	ISSUED
Minor Works Agreement (M)				
2.0 Security and Guarantees	All	M02-01	2.5+ Guarantee expiry date	06.2001
3.0 Risk and Insurance	July 1999	M03-01	3.2+ Insurance deductible	06.2001
13.0 Valuation and Payment to the Contra..	July 1999	M13-01	13.9.2 Wording correction	06.2001
16.0 Cancellation by contractor	July 1999	M16-01	16.3+ Wording correction	06.2001
General (J)				
Document Edition Dates	n/a	J01-01	<i>Replaces previous issue</i>	06.2002
Quick Guide to JBCC Series 2000	n/a	J01-02	<i>Precis of each document</i>	06.2002
Series 2000 – 3rd Edition	3rd	J03 - 01	<i>Earlier editions incompatibility</i>	12.2002

Date: Dec 1999

JBCC ADVISORY NOTE

Nº: PN1-02

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	May 1998
N/S Subcontract Agreement	N	May 1998

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1.0 DEFINITIONS AND INTERPRETATION

“**LUMP SUM DOCUMENT**” means the document providing the lump sum amount priced by the **contractor** to reflect the **contract sum** and is based upon the **contract documents** where **bills of quantities** are not used. Such a document may include the **JBCC Preliminaries** and a schedule of rates drawn up according to the Standard System of Measuring Building Work or other measuring system as stated in the **schedule**

INTERPRETATION

Where tenders are invited without **bills of quantities** the provision of a document, herein referred to as a **lump sum document**, will be necessary to accompany the drawings for pricing purposes. This document will serve two purposes:

1. It will convey information necessary for tenderers to price the work, and
2. It will contain a schedule which the successful tenderer will, on the acceptance of his tender, be required to price to enable variations to be valued and interim **payment certificates** prepared

SUGGESTED ACTION

*The **lump sum document** should include the required Pre-tender Information, clauses 41.1 to 41.4 of the **schedule** to the **agreement**, as well as the **JBCC Preliminaries** with the applicable variables selected. A specification of workmanship and materials should also be included or, at least, reference should be made to standard specifications and codes of practice. Finally there should be a schedule of any **prime cost amounts**, provisional amounts and **budgetary allowances** to be included in the tender sum all in terms of the JBCC Form of Tender.*

*The document should also include a schedule appropriate to the **works** in which rates, unit prices or some other suitable means of identifying the cost elements of the tendered amount can be inserted by the successful tenderer on the acceptance of his tender*

Date: Dec 2001

JBCC ADVISORY NOTE

Nº: PN1-04

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	All
N/S Subcontract Agreement	N	All

1.0 DEFINITIONS AND INTERPRETATIONS

1.6 Any notice given in terms of this **agreement** may be delivered by hand, sent by prepaid registered post, telefax or e-mail. A notice shall be deemed to have been duly given when:

INTERPRETATION

The word "deemed" used in the second sentence of the above clause is open to misinterpretation when read with clause 1.5 which states:

1.5 In this document, unless inconsistent with the context:

1.5.1 The word "deemed" shall be conclusive that something is a fact, regardless of the objective proof

It is not intended that the above interpretation should be placed on the use of "deemed" in the case of giving notice. The party being given notice issued in terms of the **agreement** must have the right to contest the validity of such notice. Replacing "deemed" with "presumed" will ensure the receiving party's rights in this circumstance

SUGGESTED ACTION

Register in 41.4.7 the replacement of the existing 1.6 with the following:

1.6 Any notice given in terms of this **agreement** may be delivered by hand, sent by prepaid registered post, telefax or e-mail. A notice shall be presumed to have been duly given when:

COMMENT

Later printings of the July 2000 Principal Building Agreement and Nominated / Selected Subcontract Agreement incorporate this change

Date:	Dec 2001
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N°:	PN1-05
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JBCC ADVISORY NOTE

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	All
N/S Subcontract Agreement	N	All

1.0 DEFINITIONS AND INTERPRETATIONS

Addition of a definition for "Direct Contractor"

INTERPRETATION

In the May 1998 edition of the Principal Building Agreement and the Nominated / Selected Subcontract Agreement clause 22.0 referred to "Work by Others". The use of the word "others" was found to be an inadequate description and was replaced with "direct contractors" in the July 2000 edition of the documents. The term "direct contractor" is used in a number of instances outside of clause 22.0 and as it is not defined the term is open to interpretation as the reader see fit which will lead to unnecessary confusion. It is therefore appropriate that the term should be defined and highlighted in the style employed in all JBCC documents

SUGGESTED ACTION

Register in 41.4.7 of the Principal Building Agreement and the N/S Subcontract Agreement 1.0 Definitions and Interpretations the following definition:

"DIRECT CONTRACTOR" means a contractor appointed by the **employer** to perform work on the **site** which does not form part of the **works**

In the Principal Building Agreement only:

The use of the term "direct contractor" shall be deemed to be highlighted in terms of 1.1 in the following clauses:

8.3.8, 9.2.2, 17.1.17, 22.1, 22.3, 29.2.8, 32.5.4, 41.2.3

Change the term "direct contractors" in 32.2.2 to "other parties"

In the Nominated / Selected Subcontract Agreement only:

The use of the term "direct contractor" shall be deemed to be highlighted in terms of 1.1 in the following clauses:

8.3.8, 9.2.2, 17.1.17, 22.1, 22.2, 29.2.8, 32.5.4

COMMENT

Later printings of the July 2000 Principal Building Agreement and Nominated / Selected Subcontract Agreement will incorporate these changes

Date: Dec 2001

JBCC ADVISORY NOTE

Nº: PN1-06

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	All
N/S Subcontract Agreement	N	All

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“Fixed Price Contract”

1.0 DEFINITIONS AND INTERPRETATIONS

“**LUMP SUM DOCUMENT**” means the document providing the lump sum amount priced by the **contractor** to reflect the **contract sum** and is based upon the **contract documents** where **bills of quantities** are not used. Such a document may include the **JBCC Preliminaries** and a schedule of rates drawn up according to the measuring system as stated in the **schedule**

INTERPRETATION

Some users of the JBCC Series 2000 documents interpret the **lump sum document** definition as an intention to define a fixed price contract. This is not the case. The characteristics of a lump sum contract and a fixed price contract differ in the following respects:

LUMP SUM CONTRACT

- 1 The **contractor** tenders a single predetermined lump sum amount for the erection and completion of a building in terms of the tender requirements
- 2 The tender may be based on:
 - Schedule of rates, preliminaries, drawings and specifications, or
 - Drawings and specifications only
- 3 **Bills of quantities** are not included
- 4 The tenderer, in compiling his tender, makes provision for all labour, material, plant, risk involved, market conditions and mark-up *but not for escalation/cost fluctuations*. The **contract sum** will be subject to adjustment

FIXED PRICE CONTRACT

- 1 The **contractor's** tender is compiled in a similar manner as that for a **lump sum document**
- 2 **Bills of quantities** may be included
- 3 The **contract sum** will not be subject to any escalation/cost fluctuations in any form whatsoever where the date for **practical completion** is met or the extension thereof is due to the default of the **contractor**

COMMENT

*Both a **bills of quantities** and a **lump sum document** contract can be a fixed price contract.*

*The **Principal Building Agreement** and **N/S Subcontract Agreement** become fixed price contracts where the adjustment of the **(n/s) contract value** is excluded in terms of 41.4.6 of the **(n/s) agreement***

Date: June 2002

JBCC ADVISORY NOTE

N^o: PN01-07

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	All
N/S Subcontract Agreement	N	All

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“Electronic communications”

1.0 DEFINITIONS AND INTERPRETATIONS

1.6 Any notice given in terms of this **agreement** may be delivered by hand, sent by prepaid registered post, telefax or e-mail. A notice shall be presumed to have been duly given when:

1.6.3 Sent by telefax - one (1) **working day** after transmission

1.6.4 Sent by e-mail - one (1) **working day** after transmission

INTERPRETATION

There cannot be many building contracts being executed that do not make use of electronic communications - particularly by telefax

The trend to communicate electronically is becoming more and more prevalent and is likely to continue to do so. The Electronic Communications and Transactions Bill was tabled in Parliament earlier this year and will eventually result in an Act that will have implications to any entity that communicates and transacts electronically. The objects of the Act include to give legal certainty to electronic communications and transactions, to develop a safe, secure and effective environment for such communications and to promote online usage

The following are the more salient features of the intended Act as set out in the Bill as it pertains to building contracts:

- 1 Electronic communications will be given legal status. This means that such information is given the same legal status as physically written information
- 2 An electronic transaction is deemed to have been concluded at the time when and the place where the acceptance of the offer is received by the offeror. A further deeming provision is that an acknowledgement of receipt of an electronic message is not necessary to give effect to that message. It should be noted that the Bill allows parties to contract out of these provisions by requiring acknowledgement of receipt to give legal effect to the communication
- 3 Agreements that previously had to be in writing and physically signed by the parties will now be able to be concluded and signed electronically. Note that this does not apply to sale of land or wills amongst others
- 4 Legal recognition is given to electronic signatures accredited by the Department of Communications
- 5 Data messages are admissible as evidence in a court of law

JBCC ADVISORY NOTE

Date: Dec 2002

Nº: PN01-08

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	3 rd Edition Jan 2003
N/S Subcontract Agreement	N	3 rd Edition Jan 2003

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1.0 DEFINITIONS AND INTERPRETATIONS

* “**ADVANCE PAYMENT GUARANTEE**” means a guarantee at call obtained by the **contractor** from an institution approved by the **employer** on the **JBCC** Advance Payment Guarantee form for the amount as determined in terms of the **schedule**

INTERPRETATION

An **Advance Payment Guarantee** is intended as a **security** to be provided by the **contractor** or **n/s subcontractor** where an advance payment is required in terms of the accepted tender. The purpose of the advance is not limited to **materials and goods** off site

The **JBCC Advance Payment Guarantee** is obtainable from major financial institutions and specialist insurers with the guarantee having the same legal standing as the **Construction and Payment Guarantees** currently supported by **JBCC**

SUGGESTED ACTION

Where a tender is qualified in requiring an advance payment the principal agent, before acceptance of the tender is given, must ensure that the employer:

- Is informed of the requirement of an advance payment
- Accepts the need for the advance
- Confirms that the request can be met

Further it is important that the **principal agent** and **agents** responsible for the administration of an advance payment and the recoupment thereof do so in terms of the signed **agreements**

The administration of the Advance Payment process is detailed on the following page

COMMENT

It must be appreciated that where the contractor or n/s subcontractor is capable of raising an Advance Payment Guarantee the guarantee-providing institution is of the opinion that the contractor or n/s subcontractor is financially sound to the extent of such guarantee

WARNING!

The Advanced Payment Guarantee can only be used with the 3rd Edition agreements. Earlier editions would require the following clauses referring to “advance payment”. Those marked “” indicate similar clauses in the n/s agreement:*

Definition, 3.2.2*, 9.2.10, 14.5*, 14.5.1*, 14.5.2*, 14.5.3*, 14.6, 15.2.2, 20.1.3, 21.1.4, 31.6.5*, 33.1.7*, 33.2.4, 33.5, 33.6, 33.8 together with the forms 2115, 2142, 2143, 2144, 2145, and 2146*

ADVANCE PAYMENT GUARANTEE (Continued)

ADMINISTRATION

Assumptions						
Contract Sum of Recipient	1 140 000					
Advance payment requirement	200 000					
Recoupment period (months)	2					
Recoupment start month	M3					
Recoupment monthly amount	100 000					
Payment Certificate Calculations	M1	M2	M3	M4	Total	
Valuation	60 000	250 000	600 000	1 000 000	n/a	
Less Previous Certification	0	-60 000	-250 000	600 000	n/a	
Net Amount Certified	60 000	190 000	350 000	400 000	1 000 000	
Add Tax @ 14%	8 400	26 600	49 000	56 000	140 000	
Sub Total	68 400	216 600	399 000	456 000	1 140 000	
Add / Less Advance / Recoupment	+200 000	0	-100 000	-100 000	0	
Total Payments to Recipient	268 400	216 600	299 000	356 000	1 140 000	

NOTES RELATED TO THE ABOVE SCHEDULE

- 1 Payment Certificate Calculations are related to that of the recipient only
- 2 The **Contract Sum** is the accepted tender of the recipient
- 3 The advance and recoupment amounts are “generated” in the Recovery Statement as they do not:
 - 3.1 Form part of the valuation of Work executed or Materials on or off site
 - 3.2 Attract **Tax** (similar to Interest)
- 4 All payments or recoupments are made via the Recovery Statement / Payment Certificate. No direct payments (advance or recoupment) outside of the terms of the **agreement/s** should be made by the **employer, contractor** or **n/s subcontractor**
- 5 In the unlikely event that where the advance is being made to a **n/s subcontractor**, and the **contractor’s** security is considered insufficient to cover the advance payment, specific arrangements would have to be made to make payment to the **n/s subcontractor** direct
- 6 Interest or other charges that may be agreed between the **employer** and the recipient can be added to the recoupment amounts but will not be covered by the **Advance Payment Guarantee** but will be covered by the recipient's security

“Electronic communications”

(Continued)

- 6 Where a law requires information to be retained, that requirement is met where such information is retained electronically
- 7 An agreement which previously required the stamp of a notary can now be signed and notarised electronically

SUGGESTED ACTION

- 1 All persons and companies who currently conduct business electronically or intend to do so must ensure that all their agreements and documentation comply with the Act and where applicable (and allowed), ensure that certain deeming provisions of the Act are “*contracted out of*” as covered in 2 above
- 2 All online/website terms and conditions will need to be reviewed for compliance with the Act
- 3 All businesses need to educate their staff on the implications of the Act. For example, that the contents of “casual” e-mails could be construed as being legally binding on the organization
- 4 All privacy, security, e-mail and internet usage and document retention policies must be updated and if the business doesn’t have such policies it is essential that these are developed and enacted

COMMENT

Although the intended legislation is still in draft form and will only become law once it has been promulgated businesses must begin to familiarise themselves with the provisions of the Act and prepare for the inevitable changes that will eventuate

Many employers, professionals and contractors presently exchange electronic attachments of drawings, spreadsheets, minutes, instructions and the like and have probably not considered the legal status of such exchanges. In light of the above a review of current practices would probably be worthwhile

JBCC is examining the implications of the Act and will endeavour to timeously make the necessary provisions in its documentation

JBCC acknowledges Werksmans Attorneys TECH WERKS publication on which this Advisory Note is based. It and other publications can be viewed at <http://www.werksmans.co.za>

Date: Dec 2000

JBCC ADVISORY NOTE

N^o: PN3-01

DOCUMENT/S	CODE	EDITION/S
Principal Building Agreement	P	All
N/S Subcontract Agreement	N	All

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3.0 DOCUMENTS

3.8 The **principal agent** shall identify in detail in the **schedule** any changes made to the provisions of **JBCC** standard documentation. Should non-disclosure of such changes cause the **contractor** expense and loss, then the **principal agent** shall determine such expense and loss in terms of 32.5 and 32.6

INTERPRETATION

The use of standard documentation in the construction industry is recommended by all the constituents of the **JBCC**, as it facilitates the tendering process and creates a uniform base in terms of which contracts can be administered and governed. While it is recognised that particular circumstances may warrant limited changes to standard documentation in individual (specific) contracts, amendments to recognised standard documentation are neither desirable or recommended. The **JBCC** agreements contain warnings regarding the dangers of introducing changes to standard documentation which may result in situations which are prejudicial to either or both parties

It should be noted that the provisions of the Principal Building Agreement take precedence over the standard provisions of the N/S Subcontract Agreement, but not over any express amendments in terms of 3.9 to the standard provisions of the N/S Subcontract Agreement which are detailed in 41.4.9 of the **n/s schedule** of such agreement

SUGGESTED ACTION

1 The **employer**, as the initiator of the project, together with his **agents** should consider the following questions before implementing a change to standard documentation:

C Is it "for convenience"?

C Is it motivated by the **agent** as being "necessary" or "common practice"?

C Is the risk to the **contractor / n/s subcontractor** increased? If so, can it reasonably be priced?

C Is there a negative impact on the cash flows of the **contractor/n/s subcontractor**?

C Will it be drafted by the **agent** and not an expert?

C Is there a possibility that "knock-ons" in other clauses and related documents may produce contractual conflicts?

A "Yes" answer to more than two of the above questions is probably an indication that the suggested change should not be implemented

2 Where it is considered essential to make changes to standard documentation, details of such changes *must* be inserted in the **schedule** of the **JBCC** agreement. This includes all changes detailed in **bills of quantities** and other documents that are part of the **contract documents**. In the event of the **contractor / n/s subcontractor** incurring expense and loss as a consequence of non-disclosure of changes, the **employer** is liable for reimbursement of such expense and loss

Date: June 2001

Nº: PN31-03

JBCC ADVISORY NOTE

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	All
N/S Subcontract Agreement	N	All

31.0 INTERIM PAYMENT TO THE CONTRACTOR

Transfer of Ownership for Materials Off Site

31.6 The value of **materials and goods** in terms of 31.4.2 shall be included in the value certified only where, to the satisfaction of the **principal agent**, the **materials and goods** are:

31.6.5 Covered by an approved guarantee where stored off the **site**

INTERPRETATION

The May 1998 editions of the JBCC Series 2000 PBA and the N/S Agreement both refer to the JBCC Transfer of Ownership form as an *alternative option* where the **materials and goods** are *stored off the site*. It is important to note that this provision does not appear in the July 2000 edition of these documents, nor has a Transfer of Ownership form ever been published for use with the Series 2000 documents

The reason for this is simply that, in law, ownership of **materials and goods** does not automatically pass to the party in whose favour the form may have been issued. There may be several valid legal reasons why, despite the form and the provisions of clause 31.7, ownership of the **materials and goods** will remain with the original legal owner, despite the **employer** having made payment to the **contractor** in terms of an interim **payment certificate** that includes the value of such **materials and goods**. The above also applies between the **contractor** and **n/s subcontractor**

The only recommended protection of the interests of the **employer** and, in turn, the **contractor** in such circumstances is the guarantee referred to in clause 31.6.5 which will financially compensate the relevant party in the event that ownership of such **materials and goods** is not acquire and the party is thereby prejudiced

SUGGESTED ACTION

The **principal agent** should ensure that only on the provision of an approved payment guarantee in accordance with the provisions of clause 31.6.5 will payment for **materials and goods** off the **site** be effected

WARNING

*The **principal agent** should not recommend or accept the old 1991 Transfer of Ownership form or any similar form of agreement in relation to making payment for **materials and goods** off the **site***

Date: Dec 2000

JBCC ADVISORY NOTE

Nº: PN14-02

DOCUMENT/S	CODE	EDITION/S
Principal Building Agreement	P	All
N/S Subcontract Agreement	N	All

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14.0 SECURITY

- 14.1 The **contractor** shall have the right to select the **security** to be provided in terms of 14.2, 14.3 or 14.4 as stated in the **schedule**. The choice of **security** shall be included in the **contractor's** tender, failing which the **security** in terms of 14.3 shall be deemed to have been selected. Such **security** shall be provided to the **employer** within twenty-one (21) **calendar days** of written acceptance of the **contractor's** tender

INTERPRETATION

It is intended that the choice of which of the three types of **security** shall be applicable to the contract is that of the **contractor**. This must be shown by the **contractor** in the tender form on which he submits his tender. Should he fail to do so the variable construction guarantee in terms of 14.3 will be deemed to have been selected. Further, should the **contractor** be incapable of providing this guarantee the **employer** will have the right to carry out either of the options available in terms of 14.7.1

It is not intended that the choice of the **security** should become a tender evaluation aspect. A concerted effort has been made, considering all factors, to give the **employer** the same effective guarantee no matter which alternative is chosen by the **contractor**.

SUGGESTED ACTION

The **contractor** should ensure, when submitting his tender, that his selection of which form of **security** he will be providing is clearly shown in the tender form

WARNING

- 1 *Failure by the **contractor** to indicate his **security** selection could result in his having to provide a form of **security** that does not suit his circumstances. The **employer's** option in terms of 14.7.1 (should he be entitled to invoke it) will have a detrimental effect on the **contractor's** cash flow*
- 2 ***Principal agents and contractors** should be wary of security documents that are not provided on the **JBCC** standard form. The financial institutions have **JBCC** permission to print their own security forms on condition that there is no deviation from the wording agreed with **JBCC**. Unfortunately some institutions are making changes that can, in certain circumstances, render the security worthless*

Date: Dec 1999

JBCC ADVISORY NOTE

Nº: PN29-01

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	May 1998
N/S Subcontract Agreement	N	May 1998

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29.0 REVISION OF DATE FOR PRACTICAL COMPLETION

29.1 The circumstances for which the **contractor** is entitled to a revision of the date for **practical completion** and for which revision the **principal agent** shall not adjust the **contract value** in terms of 32.12 are delays to **practical completion** caused by:

29.1.1 Inclement weather

INTERPRETATION

What is inclement weather?

Although generally interpreted as such, the word "Inclement" in clause 29.1.1 does not refer only to rain. The Collins Concise dictionary describes inclement as "stormy, severe or tempestuous" (weather). The Concise Oxford dictionary says virtually the same

Thus, extremes of temperature, strong or gusting winds, hail storms and other forms of intemperate weather would obviously all qualify as "inclement". However, light overnight rain could also qualify as "inclement"

In the **agreement** the contextual usage of the term "inclement weather" relates to a climatic condition that inhibits progress towards practical completion. Therefore it would include light overnight rain that affects excavation work in foundations. Conversely, heavy rain during working hours at the completion stage of the contract could well be excluded should it not cause a delay that would affect the **practical completion** date

Examples of inclement weather and the effects thereof which could delay the works

- Low temperatures that cause the water in plaster, mortar or concrete to freeze resulting in damaged or defective material having to be removed and the work redone
- Strong winds around high rise buildings that cause working conditions to become hazardous. At the coast this condition can and often does affect the use of tower cranes
- Strong or gusting winds that inhibit the erection of long span steel or metal roofing sheets
- Flooding or resultant soggy ground conditions during excavations due to earlier or overnight rainfall. The consequential delay may be evident only a day or two later and could persist for an extended period
- Hail storms that cause damage to the **works**

29.0 REVISION OF DATE FOR PRACTICAL COMPLETION (Continued)

The above examples are but a few of the delays to **practical completion** that could be occasioned by “inclement weather”

Exceptionally inclement weather

In certain contract documents the description “exceptionally inclement weather” is used. This has led to many disputes as the **contractor** is required to prove that the rainfall or other weather conditions that delayed the **works** was exceptional. To do this, accurate **site** rainfall and other weather records had to be kept and compared with the average conditions for that time of the year for that particular locality

Historical rainfall records (where available) had to be obtained from a recognised weather station to verify the **contractor’s** claim. Typically **site** rainfall records were required to be compared with those of the nearest weather station, often kilometres away. Where rainfall, temperature or other records were obtainable, these were frequently not a true reflection of the weather conditions at a particular **site** even where this was close to the weather station

It is now generally recognised that highly disparate microclimates can and do exist within a few hundred metres of each other and that the “exceptionalness” of inclement weather often has no relationship to the delay caused

Consequently JBCC does not deal with the inappropriate “exceptionalness” of inclement weather. Remember it is not the ‘cause’ (the weather) but the ‘effect’ that brings about the entitlement to an extension of time. Therefore professionals should not add the word “exceptional” to 29.1.1

Claiming a delay

In making a claim for a delay the **contractor** must follow the procedures prescribed in 29.4.1 to 29.4.3 and 29.5

A delay caused by inclement weather is not automatically granted - the **contractor** must satisfy the **principal agent** that:

- 1 The progress of the **works** towards practical completion was delayed
- 2 All reasonable practical steps were taken to avoid or reduce the delay
*(NOTE: This does not imply that the **contractor** was obliged or required to “make up time” or accelerate in any way)*
- 3 The delay claimed would be a delay to **practical completion** (ie impact on the critical path of the **contractor’s** programme)

*It is important that the **contractor** notes that the claim must focus on the delay caused and not on the quantum or severity of the weather condition. The mere fact that it rained on a particular occasion is not grounds for an extension of the **construction period***

SUGGESTED ACTION

The **employer/agents** must take into account the possible extensions of time that are likely to be granted to the **contractor** due to inclement weather in setting the **practical completion** date. This requires that the **practical completion** date stated in 41.2.8 should be set at the date derived by “back dating” the **employer’s** required date by the anticipated extensions likely to be granted since the **contractor** will not have included inclement weather delays in his programme

Date: Dec 1999

JBCC ADVISORY NOTE

N^o: PN14-01

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	May 1998
N/S Subcontract Agreement	N	May 1998

DISCLAIMER *The purpose of this publication is to give advice on the most effective use of the JBCC Series 2000 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*

14.0 SECURITY

14.2.6 The **employer** shall acquire ownership of the cash deposit only in terms of 33.4. The parties expressly agree that neither the **employer** nor the **contractor** shall be entitled to cede the rights to the deposit to any third party and the **employer** shall apply the deposit strictly according to the provisions of this **agreement**

INTERPRETATION

The clause endeavours to ensure that the **contractor** remains the owner of the cash deposit although it is in the possession of the **employer**. However, this might be difficult to enforce should the **employer** go insolvent or into liquidation. Under such circumstances the **contractor** would probably only have a concurrent claim against the **employer** for the return of the deposit and with little or no interest being paid out

SUGGESTED ACTION

Nil

COMMENT

The contractor offering this type of security must be aware of the risks associated therewith

Date: June 2001

N° PN17-01

JBCC ADVISORY NOTE

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	All
N/S Subcontract Agreement	N	All

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17.0 CONTRACT INSTRUCTIONS

Contract Instruction Book

“**CONTRACT INSTRUCTION**” means a written instruction signed and issued by or under the authority of the **principal agent** to the **contractor**

17.1 The **principal agent** may issue **contract instructions** to the contractor regarding:

17.3 An oral instruction issued by the **principal agent** or any other **agent** shall be of no force or effect. Neither the **contractor** nor the **employer** may rely upon an oral instruction for any purpose

INTERPRETATION

The above clauses make it quite clear that a **contract instruction** must be given in writing. To give effect thereto a number of users have requested that JBCC should make a Contract Instruction Book available as one of its documents. This has not been done for the following reasons:

- 1 There is no consensus among users as to the number of copies of each instruction that should be allowed for - **principal agent, employer, other agents, contractor, clerk of works, foreman, to name but a few**
- 2 The cost of the instruction book would be high as the specification would probably call for:
 - Hard cover
 - Self carbonated paper
 - Perforated tear-out copies
 - Sequential numbering
- 3 There is no contractual requirement for the **contractor** to provide a Contract Instruction Book. If he does, it is at the **principal agent's** request (or instruction). [Leaving the book on site in the control of the **contractor** is not considered good practice on the part of the **principal agent**]
- 4 Fax (and to some extent e-mail) is overwhelmingly the preferred medium of issuing **contract instructions**

SUGGESTED ACTION

The **principal agent** should, at the start of the contract, agree with the **contractor** on the procedures for requesting, issuing and recording **contract instructions**. Experience has shown that a **contract instruction** written in the office receives more careful consideration than one issued on the spur of the moment on site

JBCC ADVISORY NOTE

Date: Dec 2002

Nº: PN25-01

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	All
N/S Subcontract Agreement	N	All

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Works Completion - Can the contractor take as long as he likes?

NOTE: *Clause No's are as per 3^d edition. Previous edition No's that differ are in italics*

- 25.1 Within seven (7) **calendar days** of the date of **practical completion** the **principal agent** shall issue to the **contractor** a **works completion** list defining the outstanding work and **defects** which were apparent at the date of **practical completion** and are to be completed or rectified to achieve **works completion**
- 25.4 Should the **works completion** list not be completed within thirty (30) **calendar days** of the issue thereof the **contractor** shall not be entitled to compensatory interest in terms of 31.10 on the value of the outstanding work so listed
- 25.5 *new* The **defects** liability period in terms of 26.1 shall not commence until the issue or deemed issue of the **certificate of works completion** in terms of 25.2.1 or 25.3

OTHER CLAUSES

- 26.1 The **defects** liability period shall commence on the date of **works completion** and end at midnight (00:00) ninety (90) **calendar days** from such date
- 15.3 On being given possession of the **site** on the date stated in the **schedule** the **contractor** shall commence the **works** within the period stated in the **schedule** and proceed with due skill, diligence, regularity and expedition and bring the **works** to:
- 15.3.3 **Works completion** in terms of 25.0
15.2.3
- 17.1.18 The lists for **practical completion**, **works completion**, **final completion** and **defects**
- 17.4 Should the **contractor** fail to proceed with due diligence with a **contract instruction**, the **principal agent** may notify the **contractor** to proceed within five (5) **working days** from receipt of such a notice. Without further notice, on default by the **contractor**, the **employer** may employ other parties to give effect to such **contract instruction** in addition to any other rights that the **employer** may have. The **employer** may recover expense and loss in terms of 33.0 resulting from such employment

INTERPRETATION

The effectiveness or ineffectiveness of **works completion** as an element in the completion process depends entirely on the understanding of the consequences of nonperformance towards the achievement of completion of this stage

Superficially, the **contractors's** perception is that should he take more than the thirty (30) **calendar days** to achieve **works completion** his right to compensatory interest in terms of 25.4 will be forfeited. This is generally considered to be of little consequence, which is in fact true. A few contractors will appreciate that every unnecessary day taken to achieve **works completion** is a day of contractual risk to which they are exposed to in terms of the **defects** liability period

Date: Dec 1999

JBCC ADVISORY NOTE

Nº: PN29-01

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	May 1998
N/S Subcontract Agreement	N	May 1998

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29.0 REVISION OF DATE FOR PRACTICAL COMPLETION

29.1 The circumstances for which the **contractor** is entitled to a revision of the date for **practical completion** and for which revision the **principal agent** shall not adjust the **contract value** in terms of 32.12 are delays to **practical completion** caused by:

29.1.1 Inclement weather

INTERPRETATION

What is inclement weather?

Although generally interpreted as such, the word "Inclement" in clause 29.1.1 does not refer only to rain. The Collins Concise dictionary describes inclement as "stormy, severe or tempestuous" (weather). The Concise Oxford dictionary says virtually the same

Thus, extremes of temperature, strong or gusting winds, hail storms and other forms of intemperate weather would obviously all qualify as "inclement". However, light overnight rain could also qualify as "inclement"

In the **agreement** the contextual usage of the term "inclement weather" relates to a climatic condition that inhibits progress towards practical completion. Therefore it would include light overnight rain that affects excavation work in foundations. Conversely, heavy rain during working hours at the completion stage of the contract could well be excluded should it not cause a delay that would affect the **practical completion** date

Examples of inclement weather and the effects thereof which could delay the works

- Low temperatures that cause the water in plaster, mortar or concrete to freeze resulting in damaged or defective material having to be removed and the work redone
- Strong winds around high rise buildings that cause working conditions to become hazardous. At the coast this condition can and often does affect the use of tower cranes
- Strong or gusting winds that inhibit the erection of long span steel or metal roofing sheets
- Flooding or resultant soggy ground conditions during excavations due to earlier or overnight rainfall. The consequential delay may be evident only a day or two later and could persist for an extended period
- Hail storms that cause damage to the **works**

Works Completion - Continued

Principal agents' understanding is often little different to that of the **contractors** as they erroneously believes that they can take no action until the thirty (30) **calendar days** in terms of 25.4 have elapsed. Most principal agents do not appreciate that each day of tardiness on the part of the contractor almost certainly also exposes them to this increased liability

SUGGESTED ACTION

In terms of 15.3 (15.2) the **contractor** is required to proceed with due skill, diligence, regularity and expedition and bring the **works** to **works completion**. In terms of 17.1.18 the list for **works completion** is a **contract instruction**

The **principal agent** is therefore entitled to act in terms of 17.4 in regards to tardiness or inaction by the **contractor** in relation to the **works completion** list within days of the issue thereof and not only at the end of the thirty (30) **calendar days** in terms of 25.4. The cost to the contractor of having an outside party completing the **works completion** list is no longer of little consequence. Further, the principal agent's risk exposure is reduced as is the "nuisance" to the employer

It should be appreciated that the above action can be taken in relation to the **practical completion** and **defects** lists and, in the case of the **contractor** related to **n/s subcontractors**, the **interim completion** list as well as the other lists

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JBCC ADVISORY NOTE

Nº: PN31-04

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	All
N/S Subcontract Agreement	N	All

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31.0 INTERIM PAYMENT TO THE CONTRACTOR

Cash advance for the purchase of materials and goods

31.6 The value of **materials and goods** in terms of 31.4.2 shall be included in the value certified only where, to the satisfaction of the **principal agent**, the **materials and goods** are:

INTERPRETATION

Clause 31, and 31.6 in particular, make no allowance for cash advances that may be made by the **employer** to the **contractor** or **n/s subcontractor** for the purchase of **materials and goods** for the following reasons:

- 1 A cash advance is a loan and has no status in terms of the **agreement**
- 2 No provision is made in a **recovery statement**, interim **payment certificate** or a **payment advice statement** for making a cash advance nor for the repayment thereof
- 3 The definition of **materials and goods** relates specifically to delivery
- 4 The **principal agent** is required to certify "A reasonable estimate of the **materials and goods** in terms of 31.6" which does not cover a cash advance
- 5 A cash advance included in a **payment certificate** or **payment advice statement** could be effected where the security provided by the **contractor** or **n/s subcontractor** or both is in terms of 31.8
- 6 The advance, if treated as "delivered **materials and goods**", will attract **tax** ahead of when such **tax** is due to the detriment of the **employer**
- 7 Where an advance is included in a **payment certificate** for the benefit of a **n/s subcontractor** the **contractor** could be seriously prejudiced should the **subcontractor** default prior to the repayment or "off-setting" of the cash advance

WARNING!

*The **principal agent** should not attempt to accommodate a cash advance in the certification process. The advance should be treated as a loan from one party to another with terms and conditions appropriate to the circumstances thereof. The **principal agent** (and the **contractor** where the advance is made to a **n/s subcontractor**) should not carry the responsibility and financial risk of administering a cash advance*

Date: Dec 2001

JBCC ADVISORY NOTE

Nº: PN36-02

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	All
N/S Subcontract Agreement	N	All

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36.0 CANCELLATION BY EMPLOYER - CONTRACTOR'S DEFAULT

36.6 The **employer** may not exercise his right in terms of 36.0 if he himself is in breach of a material term of this agreement

INTERPRETATION

What is meant by "in breach of a material term of this **agreement**"?

The Oxford dictionary defines:

Breach as "the breaking of or failure to observe a law, contract, etc."
Material as "important, essential, relevant" and
Term as "condition or stipulation".

Clause 36.6 can thus be restated as "The **employer** may not cancel if he is breaking or failing to observe an essential condition of the **agreement**

How does the **employer** determine which of the conditions of the **agreement** are essential to cancellation and which are not?

In clause 38.0 a number of conditions are listed which entitle the **contractor** to cancel. These by definition must be "material terms of the **agreement**". It therefore follows that the **employer** would be in breach should any of these conditions be transgressed. These are:

- 38.1.1 The **employer** fails to appoint **agents** in terms of 5.1 or 5.3
- 38.1.2 The **employer** fails to give possession of the **site** to the **contractor** in terms of 15.2
(No clause for N/S)
- 38.1.3 The **employer** fails to provide a payment guarantee in terms of 15.4
- 38.1.4 The **principal agent** fails to issue any **payment certificate** in terms of 31.0 or 34.0
- 38.1.5 The **principal agent** fails to issue a statement to the **contractor** in terms of 31.13.1
- 38.1.6 The **employer** fails to pay the amount certified in terms of 31.9 or 34.10
- 38.1.7 The **employer** prevents the **principal agent** from exercising his independent judgement regarding the performance of his duty in terms of this **agreement** and the **contractor** being prejudiced by such action

SUGGESTED ACTION

The **employer** should seek expert or legal advice before giving notice of his intention to cancel the **agreement**

Date: Dec 2001

JBCC ADVISORY NOTE

Nº: PN38-01

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	All
N/S Subcontract Agreement	N	All

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38.0 CANCELLATION BY CONTRACTOR - EMPLOYER'S DEFAULT

38.6 The **contractor** may not exercise his right in terms of 38.0 if he himself is in breach of a material term of this **agreement**

INTERPRETATION

What is meant by "in breach of a material term of this **agreement**"?

The Oxford dictionary defines:

Breach as "the breaking of or failure to observe a law, contract, etc."
Material as "important, essential, relevant"
Term as "condition or stipulation".

Clause 38.6 can thus be restated as "The **contractor** may not cancel if he is breaking or failing to observe an essential condition of the **agreement**

How does the **contractor** determine which of the conditions of the **agreement** are essential to cancellation and which are not?

In clause 36.0 two conditions are listed which entitle the **employer** to cancel. These by definition must be "material terms of the **agreement**". It therefore follows that the **contractor** would be in breach should either of these conditions be transgressed. These are:

36.1.1 Fails to comply in terms of 15.1 or to commence the **works** within the period stated in the **schedule** and proceed with due skill, diligence, regularity and expedition

36.1.2 Refuses to comply with a **contract instruction** subject to 17.2

SUGGESTED ACTION

The **contractor** should seek expert or legal advice before giving notice of his intention to cancel the **agreement**

Date: June 2001

Nº: P3-01

JBCC ADVISORY NOTE

DOCUMENT/S

Principal Building Agreement

CODE

P

EDITION

All

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PAYMENT GUARANTEE EXPIRY DATE

The Principal Building Agreement reference clauses are:

3.1 The **employer** shall provide a payment guarantee for the fulfilment of the **employer's** liability in terms of this **agreement** within twenty-one (21) **calendar days** where required by the **contractor** in the accepted tender. The payment guarantee shall be according to the relevant **JBCC** Payment Guarantee form and in the amount as stated in the tender

15.4 The **employer** shall provide a payment guarantee where either:

15.4.1 A waiver of lien or right of continuing possession of the **works** in terms of 41.4.1 is required

15.4.2 The **contractor** requests such guarantee in terms of 3.1

and the Payment Guarantee Form 2124

Guarantee expiry date means

9.0 This Payment Guarantee is neither negotiable nor transferable and shall expire upon settlement of the final certified sum in terms of the Agreement or on payment in full of the Guaranteed Sum or on the Guarantee expiry date, whichever is the earlier, whereafter no claims will be considered by the Guarantor. The original of this Payment Guarantee shall be returned to the Guarantor after it has expired

INTERPRETATION

Where a payment guarantee is provided by the **employer** it is important for the **contractor** to note that the guarantee expires in terms of 9.0 of the guarantee on the earlier of:

- 1 The settlement of the final certified sum
- 2 On payment in full of the guaranteed sum
- 3 On the guarantee expiry date stated in the guarantee form

WARNING!

- The guarantee expiry date should be to the reasonable satisfaction of the **contractor***
- Under no circumstances should the initial intended **practical completion** date be accepted as the guarantee expiry date*
- Should the guarantee expiry date occur before 1 or 2 of the interpretation above either the **employer** or the provider of the guarantee could refuse to extend the guarantee period thereby significantly increasing the **contractor's** risk*

(Continued)

PAYMENT GUARANTEE EXPIRY DATE (Continued)

SUGGESTED ACTION

The **contractor** should ensure that where the above guarantee is provided by the **employer** that the guarantee expiry date is set at a date reasonably beyond the anticipated settlement of the final **payment certificate**. To determine this date the **contractor** needs to compute the date using the *assumed or estimated periods* applying to the specific contract concerned

Determination of suggested Payment Guarantee expiry date		Days + Dates
1	The intended date of practical completion in terms of 41.2.8	2001.07.02
2	A reasonable allowance for granted extension periods to the date of practical completion in terms of 29.7.2 <i>say 15% of contract period of 300 days</i> Date = 1 + 2	<i>45 days</i> 2001.08.16
3	The expected period required to complete the works completion list in terms of 25.1 <i>say</i> Date = 2 + 3	<i>15 days</i> 2001.08.31
4	The defects liability period of ninety calendar days in terms of 26.1 Date = 3 + 4	90 days 2001.11.29
5	The anticipated period to the receipt by the contractor of the final account for approval in terms of 34.1 <i>say</i> Date = 2 + 5	<i>56 days</i> 2001.10.11
6	The anticipated period required by the contractor to give acceptance of the final account in terms of 34.3 <i>say</i> Date = 5 + 6	<i>28 days</i> 2001.11.08
7	The <u>later</u> of the dates determined in <u>4 and 6</u>	2001.11.29

8	The issuing of the final payment certificate in terms of 34.5 Date = 7 + 8	7 days 2001.12.06
9	The settlement of the final payment certificate in terms of 34.10 Date = 8 + 9	7 days 2001.12.13
10	The payment guarantee notice periods in terms of 38.2 and 3.2 where the employer fails to make payment on the due date in terms of 34.10 Date = 9 + 10 say	14 days 2001.12.27
11	Suggested payment guarantee expiry date say	2001.12.31

Date: June 2002

JBCC ADVISORY NOTE

Nº: P04-01

DOCUMENT/S

Principal Building Agreement

CODE

P

EDITION

All

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“Rogue Design Indemnity”

4.0 DESIGN RESPONSIBILITY

4.2 Any design responsibility undertaken by a **nominated** or **selected subcontractor** shall not devolve upon the **contractor**. All contractual or other rights the **contractor** shall have against such **nominated** or **selected subcontractor** arising from any design responsibility undertaken by them are ceded to the **employer**. The rights flowing from a warranty regarding such design responsibility are ceded to the **employer** whether or not such a design warranty is referred to in the subcontract agreement

INTERPRETATION

It has been brought to the attention of JBCC that subcontractors are being required to provide a design indemnity in favour of the contractor, principal agent and agents when being appointed on certain projects

The JBCC Series 2000 Principal Building Agreement addresses Design Responsibility (clause 4.0) and Indemnities (clause 9.0) and does not require a separate indemnity form to be signed by subcontractors

Opinion was sought from senior legal practitioners and experienced local and international insurers on the design and indemnity provisions when the JBCC 1991 documents were published. With the replacement of the 1991 documents with the Series 2000 the two clauses were again tested by our advisers. The clauses remained essentially unchanged but were once again checked when JBCC decided to "internationalize" its documents in 2000. No indemnity form or changes to the clauses were advocated

This "rogue" indemnity rides roughshod over the JBCC design and indemnities provisions and leaves subcontractors defenseless on any and all design issues with the risk to the subcontractor being opened and therefore probably uninsurable

SUGGESTED ACTION

All parties to the contract and particularly subcontractors are advised to vehemently oppose the imposition of indemnities that are not called for in terms of the JBCC Series 2000 documents. Unfair practices, such as this indemnity, should be reported to the perpetrator's representative bodies for action

COMMENT

JBCC prides itself on providing fair and equitable contract documentation to the building industry. As its contract documents are produced as "standards" JBCC cannot prevent users from making changes to meet the particular conditions that may prevail on specific contracts. However, Draconian provisions such as the "rogue" indemnity discussed above have no place in the building industry let alone alongside JBCC documentation

Date: June 2000

Nº: P5-01

JBCC ADVISORY NOTE

DOCUMENT/S

Principal Building Agreement

CODE

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5.0 EMPLOYER'S AGENTS

5.4 The **principal agent** shall be the only person who shall have the authority to bind the **employer**, except where **agents** issue **contract instructions** under delegated authority in terms of 5.4.2. Without detracting from the above, the **principal agent** shall be the only person empowered to:

5.4.1 Issue **contract instructions**, except as provided in 5.4.2

5.4.2 Delegate to other **agents** authority to issue **contract instructions** and perform such duties as may be required for specific aspects of the **works**, provided that the **contractor** is given notice of such delegation

5.4.3 Receive notices on behalf of the **employer**

INTERPRETATION

Other than in small simple contracts, the **principal agent** will lack the range of expertise to handle all aspects of the contract, and will need to delegate certain of his functions to other **agents**. His power to delegate is strictly limited by the **agreement**. The **principal agent** may not delegate to any other **agent** the authority to perform any acts which bind the **employer** other than the issue of **contract instructions** in terms of 17.1 in respect of that **agent's** aspect of the **works**. The **principal agent** may not delegate the authority to do any of the following:

- C Issue an interim **payment certificate** or a final **payment certificate** to the **contractor**
- C Issue special payment certification in favour of a **nominated** or **selected subcontractor** or other parties in terms of 35.1.2
- C Issue a certificate of **practical completion**, **works completion** or **final completion** in terms of 24.3.1, 25.2.1 and 26.2.1 respectively
- C Grant, reduce or refuse an application for a revision of the date for **practical completion** in terms of 29.7
- C Issue to the **contractor** notices of cancellation of the **agreement** in terms of 36.2, 37.2 and 39.1
- C Determine a disagreement between the **employer** or his **agents**, on the one hand, and the **contractor** on the other, in terms of 40.2

The **principal agent** may delegate duties, to the extent that they relate to the **agent's** specific aspect of the **works**, such as:

- C Accepting a design from a **nominated** or **selected subcontractor** in terms of 4.3 of the **n/s agreement**
- C Periodically inspecting the **works**
- C Issuing **practical completion** lists, **works completion** lists and **final completion** lists and **defects**
- C Preparing valuations for interim **payment certificates**
- C Valuing variations and preparing the **final account**

5.0 EMPLOYER'S AGENTS (Continued)

The **principal agent** must notify the **contractor**, in terms of 5.4.2, what authority and duties he has delegated to whom. It would be good practice to furnish the **employer** with a copy of such notification for his information. The **agents** concerned should be informed in writing of the nature and scope of such delegation

SUGGESTED ACTION

The **principal agent** should delegate appropriate authority and duties to the other **agents** specifying in detail the nature and extent of such delegation. The **contractor** must be advised of such delegation, possibly by copy of such written authority, and it would be good practise to furnish a copy to the **employer**

COMMENT

Any act by an **agent** in the absence of delegated authority or duty would be void and without legal effect and could be disregarded by the **contractor** and the **employer** alike. Although the **principal agent** may have delegated certain duties to other **agents**, he remains liable to the **employer** for ensuring that they perform their delegated duties in terms of the **agreement**

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JBCC ADVISORY NOTE

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14.0 SECURITY

14.7.1 Hand over the **site** to the **contractor** and withhold payment from the **contractor** until the amount withheld is equal in value to ten per cent (10 %) of the **contract sum**, where after 14.2 shall be applicable

INTERPRETATION

The clause allows the **employer** to accumulate a "cash deposit" equivalent to 10% of the **contract sum** by withholding all or part of the payment due to the **contractor** in a **payment certificate**. The **employer** has no obligation to invest the accumulated "cash deposit" until it reaches the required 10% of the **contract sum**

SUGGESTED ACTION

*Once the accumulated "cash deposit" reaches the required 10% of the **contract sum** the **employer** MUST act in terms of 14.2.1*

WARNING

*In enacting the withholding process the **payment certificate** amount stated in the provision "3.0 Security" must be used and not "15.0 AMOUNT DUE FOR PAYMENT" as the latter will create a **VAT** liability on the amount withheld which should not be the case for a cash deposit*

JBCC ADVISORY NOTE

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DOCUMENT/S

Principal Building Agreement

CODE

P

EDITION

All

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17.0 CONTRACT INSTRUCTIONS

Contract Instruction Book

“**CONTRACT INSTRUCTION**” means a written instruction signed and issued by or under the authority of the **principal agent** to the **contractor**

17.1 The **principal agent** may issue **contract instructions** to the contractor regarding:

17.3 An oral instruction issued by the **principal agent** or any other **agent** shall be of no force or effect. Neither the **contractor** nor the **employer** may rely upon an oral instruction for any purpose

INTERPRETATION

The above clauses make it quite clear that a **contract instruction** must be given in writing. To give effect thereto a number of users have requested that JBCC should make a Contract Instruction Book available as one of its documents. This has not been done for the following reasons:

- 1 There is no consensus among users as to the number of copies of each instruction that should be allowed for - **principal agent, employer, other agents, contractor, clerk of works, foreman, to name but a few**
- 2 The cost of the instruction book would be high as the specification would probably call for:
 - Hard cover
 - Self carbonated paper
 - Perforated tear-out copies
 - Sequential numbering
- 3 There is no contractual requirement for the **contractor** to provide a Contract Instruction Book. If he does, it is at the **principal agent's** request (or instruction). [Leaving the book on site in the control of the **contractor** is not considered good practice on the part of the **principal agent**]
- 4 Fax (and to some extent e-mail) is overwhelmingly the preferred medium of issuing **contract instructions**

SUGGESTED ACTION

The **principal agent** should, at the start of the contract, agree with the **contractor** on the procedures for requesting, issuing and recording **contract instructions**. Experience has shown that a **contract instruction** written in the office receives more careful consideration than one issued on the spur of the moment on site

Date: June 1999

JBCC ADVISORY NOTE

Nº: P21-01

DOCUMENT/S

Principal Building Agreement

CODE

P

EDITION

May 1998

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21.0 SELECTED SUBCONTRACTORS

Appointment of Selected Subcontractors

INTERPRETATION

Standard Appointment Procedures

Employers and their **agents** invariably prefer to appoint a specialist subcontractor as a **selected subcontractor** rather than as a **nominated subcontractor**. This preference is understandable as the **employer's** potential exposure to the consequences of a **selected subcontractor's** defective performance or default becomes the responsibility of the **contractor**

A **contractor** will generally have little difficulty with this situation 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 judgement and experience in his choice and has not had it imposed on him.

It is perfectly logical and fair therefore 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 clause 21.1 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**

The **contractor** is also entitled to be consulted about the choice of the successful tenderer. He then has to satisfy himself that the subcontractor can meet the requirements of the N/S Subcontract Agreement and can provide the necessary **security** (clause 21.2). Thereafter the **contractor** is either obliged to notify the **agent** that the **selected subcontractor** has been appointed or provide reasonable cause for not making the appointment (clause 21.3)

Simultaneous Appointment of Contractor and Selected Subcontractor

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 in complying 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 for selected subcontracts. This approach forces tenderers that have an objection to any of the proposed subcontractors, either to qualify their tender or to refrain from tendering - potentially to the disadvantage of both the **contractor** and the **employer**

21.0 SELECTED SUBCONTRACTORS (Continued)

JBCC considers this an unfair practice that should be strongly discouraged. It deprives the **contractor** of his right to approve the appointment of a **selected subcontractor** and extends the grounds on which he could refuse to do so. Where calling for tenders for subcontracts simultaneously with the appointment of the **contractor** is necessary, such subcontractors must become **nominated subcontractors** as required by the **JBCC** documentation and appointed as such by the **contractor**

Appointment of a Subcontractor before the Appointment of the Contractor

Circumstances have arisen where a subcontractor is appointed by the **employer** to commence work before the appointment of the **contractor**, in respect of which the principal contract tender documents state that the **contractor** will be required to take over the appointed subcontractor as a **selected subcontractor**

JBCC considers this procedure to be unacceptable, 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. The **employer** must appoint the subcontractor as a Direct Contractor in terms of clause 22.0. Under these circumstances clear lines of responsibility must be established as the **contractor** cannot be expected to exercise control over such a subcontractor

Date: Dec 2000

JBCC ADVISORY NOTE

Nº: P22-01

DOCUMENT/S	CODE	EDITION/S
Principal Building Agreement	P	All

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Note: *In the July 2000 edition "direct contractors" replaces "others" in the May 1998 edition*

22.0 WORK BY DIRECT CONTRACTORS

- 22.1 On instruction of the **principal agent** the **contractor** shall permit work to be executed and installed in the **works** by direct contractors for whom the **contractor** is not responsible. The type and extent of such work shall be described in the **schedule**
- 22.2 The **contractor** shall make reasonable allowance in his construction programme for such work or installation
- 22.3 Such work or installation and the associated risks shall be the direct responsibility of the **employer**. Direct contractors executing such work or installations shall be subject to reasonable controls as required by the **contractor**

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:

- C Work to be executed by artists or craftsmen related to the adornment of the building
- C The installation of the manufacturing and processing plant in industrial buildings
- C The installation of telephone and computer cabling, security and access systems
- C '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 **schedule** in 41.2.3 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 22.2 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 clause 29.2.8. 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

22.0 WORK BY DIRECT CONTRACTORS (Continued)

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**

Clauses 22.3 and 8.3.8 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 does not include 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 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. But what if the need for such work transpires only after the contract has been let? There is no provision in the **agreement** for further work by direct contractors to be added after the **contractor** has been appointed. If the need for such additional work arises, the **employer** would need the **contractor's** consent to introduce such work. While the **contractor** might readily agree, he is not obliged to do so. He has a legal right to refuse or to consent subject to whatever conditions he might care to impose. If the **contractor** refuses, the alternatives open to the **employer** are for the work be done by a **nominated** or **selected subcontractor** in terms of 17.1.11, or 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 22.0 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

Date: June 2002

JBCC ADVISORY NOTE

Nº: P31-01

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	All

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31.0 INTERIM PAYMENT TO THE CONTRACTOR

31.9 The **employer** shall pay to the **contractor** the amount certified within seven (7) **calendar days** of the date of issue of the **payment certificate**, or for a government contract within twenty-one (21) **calendar days** of such date. Payment shall be subject to the **contractor** giving the **employer** a **tax** invoice for the amount due within the relevant period for payment

INTERPRETATION

Failure by the **contractor** to provide a **tax** invoice to the **employer** will allow the withholding of payment of a **payment certificate**. Further, this will also be true should the **tax** invoice not reflect the correct amounts as reflected in the **payment certificate**

SUGGESTED ACTION

*It is important that the **contractor** ensures that the **tax** invoice reflects the amounts shown in the **payment certificate** against:*

	12.0	Add Tax on 11.0
		<i>together with</i>
	15.0	AMOUNT DUE FOR PAYMENT TO THE CONTRACTOR
<i>and not</i>	9.0	NET AMOUNT CERTIFIED
<i>nor</i>	11.0	SUB TOTAL

COMMENT

*Where the Recovery Statement introduces amounts in 13.1 and 13.2 into the **payment certificate** the **tax** amount will not be proportionate to the total amount in terms of 15.0 as interest amounts included will not attract **tax***

Date: June 2001

JBCC ADVISORY NOTE

N^o: N3-01

DOCUMENT/S
N/S Subcontract Agreement

CODE
N

EDITION
All

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PAYMENT GUARANTEE EXPIRY DATE

The N/S Subcontract Agreement reference clauses are:

- 3.1 The **contractor** shall provide a payment guarantee for the fulfilment of the **contractor's** liability in terms of this **n/s agreement**. The payment guarantee shall be for the amount of ten per cent (10%) of the **n/s contract sum** and shall be according to the relevant **JBCC N/S Payment Guarantee form**
- 3.2 where the **contractor** has failed to make payment to the **subcontractor** in terms of 31.9.2 or 31.15 or 34.10.2 or 34.14, the **contractor** shall provide a payment guarantee to the **subcontractor** for the unpaid balance of the **n/s contract value**.
- 15.4 The **contractor** shall provide a payment guarantee on receipt of a request from the **subcontractor**:
- 15.4.1 In terms of 3.1 within twenty one (21) **calendar days**
- 15.4.2 In terms of 3.2 within seven (7) **calendar days**
- 34.14 Where the **employer** has not paid the **contractor** in terms of a final **payment certificate** to enable the **contractor** to meet his obligations in terms of 34.10.2, the **contractor** shall notify the **subcontractor** within five (5) **working days** of the **employer's** default and make payment to the **subcontractor** within the earlier of:
- 34.14.1 Seven (7) **calendar days** of receipt of payment from the **employer**
- 34.14.2 Ninety (90) **calendar days** of the due date for payment in terms of 34.10.2

and the N/S Payment Guarantee Form 2125

Guarantee expiry date

9.0 This N/S Payment Guarantee is neither negotiable nor transferable and shall expire upon settlement of the final certified sum in terms of the Agreement or on payment in full of the Guaranteed Sum or on the Guarantee expiry date, whichever is the earlier, whereafter no claims will be considered by the Guarantor. The original of this N/S Payment Guarantee shall be returned to the Guarantor after it has expired

INTERPRETATION

Where a payment guarantee is provided by the **contractor** it is important for the **subcontractor** to note that the guarantee expires in terms of 9.0 of the guarantee on the earlier of:

- 1 The settlement of the final certified sum
- 2 On payment in full of the guaranteed sum
- 3 On the guarantee expiry date stated in the guarantee form

(Continued)

PAYMENT GUARANTEE EXPIRY DATE (Continued)

WARNING!

- The guarantee expiry date should be to the reasonable satisfaction of the **subcontractor**
- Under no circumstances should the initial intended **practical completion** date be accepted as the guarantee expiry date
- Should the guarantee expiry date occur before 1 or 2 of the interpretation above either the **contractor** or the provider of the guarantee could refuse to extend the guarantee period thereby significantly increasing the **subcontractor's** risk
- The **subcontractor** has the right to a guarantee in terms of 3.1 and, where the contractor has failed to make payment, in terms of 3.2. The above circumstances issues apply in both

SUGGESTED ACTION

The **subcontractor** should ensure that where the above guarantee is provided by the **contractor** that the guarantee expiry date is set at a date reasonably beyond the anticipated settlement of the final **payment certificate**. To determine this date the **contractor** needs to compute the date using the *assumed or estimated periods* applying to the specific contract concerned

Determination of suggested N/S Payment Guarantee expiry date <i>Note: Most of the periods are those that apply to the contractor and not necessarily to the specific subcontractor</i>		Days + Dates
1	The intended date of practical completion in terms of 41.2.8	2001.07.02
2	A reasonable allowance for granted extension periods to the date of practical completion in terms of 29.7.2 say 15% of the construction period of 300 days Date = 1 + 2	45 days 2001.08.16
3	The expected period required to complete the total works completion list in terms of 25.1 (Note: Not the subcontractor's extract from the list) say Date = 2 + 3	15 days 2001.08.31

4	The defects liability period of ninety calendar days in terms of 26.1 Date = 3 + 4	90 days 2001.11.29
5	The anticipated period to the receipt by the contractor of the final account for approval in terms of 34.1 Date = 2 + 5 say	56 days 2001.10.11
6	The anticipated period required by the contractor to give acceptance of the final account in terms of 34.3 Date = 5 + 6 say	28 days 2001.11.05
7	The <u>later</u> of the dates determined in <u>4 and 6</u>	2001.11.29
8	The issuing of the final payment certificate in terms of 34.5 Date = 7 + 8	7 days 2001.12.06
9	The settlement of the final payment certificate in terms of 34.10 Date = 8 + 9	7 days 2001.12.13
10	Payment to the subcontractor by the contractor in terms of 34.14.2 (Note: There are other lesser periods but the largest of these must be used) Date = 9 + 10	90 days 2002.03.12
11	The notice periods in terms of 38.2, 34.15.1 and 3.2 of the payment guarantee where the contractor fails to make payment say	14 days 2002.03.26
12	Suggested Payment Guarantee expiry date say	2002.03.31

Date: Dec 2001

Nº: N3-02

JBCC ADVISORY NOTE

DOCUMENT/S	CODE	EDITION
N/S Subcontract Agreement	N	All

N/S PAYMENT GUARANTEE Form 2125

The N/S Payment Guarantee reference clauses are:

- 2.1 A copy of a first written demand issued by the Subcontractor to the Contractor stating that payment of a sum certified in the payment advice has not been made in terms of the Agreement and that:
 - 2.1.1 The Contractor has failed to notify the Subcontractor of payment default by the Employer and has failed to make payment to the Subcontractor within fourteen (14) calendar days after due date for payment to the Contractor by the Employer; or
 - 2.1.2 The Contractor has received timeous payment from the Employer and has failed to make payment to the Subcontractor within fourteen (14) calendar days after due date for payment to the Contractor by the Employer; or

INTERPRETATION

The fourteen (14) **calendar day** periods in the above clauses are derived from the N/S Subcontract Agreement. Advisory Notes N31-03 and N34-02 notify that these periods have been reduced to seven (7) **calendar days**. Consequently the N/S Payment Guarantee must be adjusted accordingly

SUGGESTED ACTION

A **n/s subcontractor** when obtaining a N/S Payment Guarantee from the **contractor** in terms of 3.1 or 3.2 of the N/S Subcontract Agreement should ensure that the above periods have been reduced to seven (7) **calendar days**

COMMENT

The major banks have been informed and all future printings of the N/S Payment Guarantee will incorporate this change

JBCC ADVISORY NOTE

Date: June 2002

Nº: N03-03

DOCUMENT/S	CODE	EDITION
N/S Subcontract Agreement	N	All

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“Appointment by Reference”

3.0 DOCUMENTS AND PRINCIPAL AGREEMENT

- 3.3 The **contractor** shall complete the **n/s schedule** and arrange the formal signing of this **n/s agreement** once the **n/s contract documents** have been provided and effected. Formal signature is not required to render this **n/s agreement** valid
- 3.4 The parties shall sign, in original, the number of sets of **n/s contract documents** required by the parties. The **subcontractor** shall be entitled to receive one (1) set of **n/s contract documents** at no expense to the **subcontractor**
- 3.8 The **principal agent** shall identify in detail in the **n/s schedule** any changes made to the provisions of **JBCC** standard documentation. Should nondisclosure of such changes cause the **subcontractor** expense and loss, then the **principal agent** shall determine such expense and loss in terms of 32.5 and 32.6
- 3.9 Express amendments to the standard provisions of this document are detailed in the **n/s schedule**. These shall take precedence over the provisions of the **principal agreement** which shall be applicable *mutatis mutandis* to this **n/s agreement** as far as they relate and apply to the **n/s works** and are not repugnant to or inconsistent with such express amendments as if the provisions of the **principal agreement** were severally set out herein
- 41.4.7 Details of changes made to the provisions of **JBCC** standard documentation
- 41.4.8 Express amendments to the provisions of this document

INTERPRETATION

Contractors frequently appoint **n/s subcontractors** by letter and include the **n/s agreement** only by reference which is at variance with 3.0 and 41.0 as follows:

- 3.3 requires the **contractor** to complete the **n/s schedule** but goes on to say: *“Formal signature is not required to render this **n/s agreement** valid”*
- 3.4 requires the parties to: *“... sign, in original, the number of sets of **n/s contract documents** required by the parties ...”*
- 3.8 requires the principal agent to: *“... identify in detail in the **n/s schedule** any changes made to the provisions of **JBCC** standard documentation”*
- 3.9 requires that: *“Express amendments to the standard provisions of this document are detailed in the **n/s schedule**. These shall take precedence over the provisions of the **principal agreement**”. Note: Dictionary definition: *“Express - definitely stated, not merely implied”**
- 41.4.7/8 are both required to be completed should any changes or amendments be required in terms of the **principal agreement** and accepted n/s tender

(Continued)

3.0 DOCUMENTS AND PRINCIPAL AGREEMENT (*Continued*)

From the above it is clear that significant legal complications can and do eventuate from the practice of not preparing and signing the requisite documents

SUGGESTED ACTION

Contractors and n/s **subcontractors** should ensure that correctly completed **n/s agreements** are signed by the parties in terms of 3.4

Principal agents should ensure that in their instruction to the **contractor** on the appointment of n/s **subcontractors** comply in terms of 3.8 and 3.9

COMMENT

*Formal signing of the **n/s agreement** is not only good practice but is in the best interests of all parties concerned*

Date: June 2002

JBCC ADVISORY NOTE

N^o: N04-01

DOCUMENT/S
N/S Subcontract Agreement

CODE
N

EDITION
All

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“Rogue Design Indemnity”

4.0 DESIGN RESPONSIBILITY

4.2 Any design responsibility undertaken by the **subcontractor** shall not devolve upon the **contractor**. All contractual or other rights the **contractor** has against the **subcontractor** arising from any design responsibility undertaken by the **subcontractor** are ceded to the **employer**. The rights flowing from a warranty regarding such design responsibility are hereby ceded to the **employer** whether or not such a design warranty is referred to in this **n/s agreement**

INTERPRETATION

It has been brought to the attention of JBCC that subcontractors are being required to provide a design indemnity in favour of the contractor, principal agent and agents when being appointed on certain projects

The JBCC Principal Building Agreement addresses Design Responsibility (clause 4.0) and Indemnities (clause 9.0) and does not require a separate indemnity form to be signed by subcontractors

Opinion was sought from senior legal practitioners and experienced local and international insurers on the design and indemnity provisions when the JBCC 1991 documents were published. With the replacement of the 1991 documents with the Series 2000 the two clauses were again tested by our advisers. The clauses remained essentially unchanged but were once again checked when JBCC decided to "internationalize" its documents in 2000. No indemnity form or changes to the clauses were advocated

This "rogue" indemnity rides roughshod over the JBCC design and indemnities provisions and leaves subcontractors defenseless on any and all design issues with the risk to the subcontractor being open-ended and therefore probably uninsurable

SUGGESTED ACTION

All parties to the contract and particularly subcontractors are advised to vehemently oppose the imposition of indemnities that are not called for in terms of the JBCC Series 2000 documents. Unfair practices, such as this indemnity, should be reported to the perpetrator's representative bodies for action

COMMENT

JBCC prides itself on providing fair and equitable contract documentation to the building industry. As its contract documents are produced as "standards" JBCC cannot prevent users from making changes to meet the particular conditions that may prevail on specific contracts. However, Draconian provisions such as the "rogue" indemnity discussed above have no place in the building industry let alone alongside JBCC documentation

Date: June 1999

Nº: N14-01

JBCC ADVISORY NOTE

DOCUMENT/S	CODE	EDITION
N/S Subcontract Agreement	N	May 1998

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14.0 SECURITY

14.7.1 Allow the **subcontractor** to commence the **n/s works** and withhold payment from the **subcontractor** until the amount withheld is equal in value to ten per cent (10 %) of the **n/s contract sum**, where after 14.2 shall be applicable

INTERPRETATION

The clause allows the **contractor** to accumulate a "cash deposit" equivalent to 10% of the **n/s contract sum** by withholding all or part of the payment due to the **subcontractor** in a **payment advice**. The **contractor** has no obligation to invest the accumulated "cash deposit" until it reaches the required 10% of the **n/s contract sum**

SUGGESTED ACTION

Once the accumulated "cash deposit" reaches the required 10% of the n/s contract sum the contractor MUST act in terms of 14.2.1

WARNING

*In enacting the withholding process the **payment advice** amount stated in the provision "3.0 Security" must be used and not "15.0 AMOUNT DUE FOR PAYMENT" as the latter will create a **VAT** liability on the amount withheld which should not be the case for a cash deposit*

Date: June 2002

Nº: N31-01

JBCC ADVISORY NOTE

DOCUMENT/S	CODE	EDITION
N/S Subcontract Agreement	N	All

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31.0 INTERIM PAYMENT TO THE SUBCONTRACTOR

31.9.2 Be made within fourteen (14) **calendar days** after the due date for payment to the **contractor** by the **employer** in terms of 31.9. Payment shall be subject to the **subcontractor** giving the **contractor** a **tax** invoice for the amount due within the relevant period for payment

INTERPRETATION

Failure by the **subcontractor** to provide a **tax** invoice to the **contractor** will allow the withholding of payment of a **payment advice**. Further, in terms of the VAT Act, this will also be true should the **tax** invoice not reflect the correct amounts as reflected in the **payment advice**

SUGGESTED ACTION

*It is important that the **subcontractor** ensures that the **tax** invoice reflects the amounts shown in the **payment advice** against:*

	12.0	Add Tax on 11.0 <i>together with</i>
	15.0	AMOUNT DUE FOR PAYMENT TO THE SUBCONTRACTOR
<i>and not</i>	9.0	NET AMOUNT CERTIFIED
<i>nor</i>	11.0	SUB TOTAL

COMMENT

*Where the N/S Recovery Statement introduces amounts in 13.1 and 13.2 into the **payment advice** the **tax** amount will not be proportionate to the total amount in terms of 15.0 as interest amounts included will not attract **tax***

Date: June 2001

JBCC ADVISORY NOTE

Nº: M2-01

DOCUMENT/S

Minor Works Agreement

CODE

M

EDITION

All

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EMPLOYER PAYMENT GUARANTEE EXPIRY DATE

The Minor Works Agreement reference clauses are:

2.5 The **employer** shall provide a **JBCC** Payment Guarantee to the **contractor** for the due fulfilment of his liability in terms of this **agreement** within fourteen (14) **calendar days** of his acceptance of the **tender**. Such guarantee shall be issued by a guarantor to the reasonable approval of the **contractor**

and the Employer Payment Guarantee Form 2129

Guarantee expiry date means

9.0 This Payment Guarantee is neither negotiable nor transferable and shall expire upon settlement of the final certified sum in terms of the Agreement or on payment in full of the Guaranteed Sum or on the Guarantee expiry date, whichever is the earlier, whereafter no claims will be considered by the Guarantor. The original of this Payment Guarantee shall be returned to the Guarantor after it has expired

INTERPRETATION

Where a payment guarantee is provided by the **employer** it is important for the **contractor** to note that the guarantee expires in terms of 9.0 of the guarantee on the earlier of:

- 1 The settlement of the final certified sum
- 2 On payment in full of the guaranteed sum
- 3 On the guarantee expiry date stated in the guarantee form

WARNING!

- The guarantee expiry date should be to the reasonable satisfaction of the **contractor***
- Under no circumstances should the initial intended **practical completion** date be accepted as the guarantee expiry date*
- Should the guarantee expiry date occur before 1 or 2 of the interpretation above either the **employer** or the provider of the guarantee could refuse to extend the guarantee period thereby significantly increasing the **contractor's** risk*

(Continued)

PAYMENT GUARANTEE EXPIRY DATE (Continued)

SUGGESTED ACTION

The **contractor** should ensure that where the above guarantee is provided by the **employer** that the guarantee expiry date is set at a date reasonably beyond the anticipated settlement of the final **payment certificate**. To determine this date the **contractor** needs to compute the date using the *assumed or estimated periods* applying to the specific contract concerned

Determination of suggested Payment Guarantee expiry date		Days + Dates
1	The intended date of practical completion in terms of 19.1.15	2001.07.02
2	A reasonable allowance for granted extension periods to the date of practical completion in terms of 11.4 <i>say 15% of contract period of 190 days</i> Date = 1 + 2	28 day 2001.07.30
3	The defects liability period of ninety calendar days in terms of 10.2 Date = 2 + 3	90 days 2001.10.28
4	The period in which the contractor must submit the final account for approval in terms of 13.10 Date = 2 + 4	45 days 2001.08.16
5	The period allowed to the agent to give acceptance of the final account in terms of 13.10 Date = 4 + 5	14 days 2001.08.30
6	The <u>later</u> of the dates determined in <u>3</u> and <u>5</u>	2001.10.28
7	The issuing of the final payment certificate in terms of 13.10 Date = 6	2001.10.28

8	The settlement of the final payment certificate in terms of 13.11 Date = 7 + 8	7 days 2001.11.04
9	The payment guarantee notice period in terms of 13.15 where the employer fails to make payment on the due date in terms of 13.11 say Date = 8 + 9	14 days 2001.11.18
11	Suggested payment guarantee expiry date say	2001.11.30

JBCC ADVISORY NOTE

Date: June 2001

Nº: M3-01

DOCUMENT/S

Minor Works Agreement

CODE

M

EDITION

July 1999

DISCLAIMER *The purpose of this publication is to give advice on the most effective use of the JBCC Series 2000 documents. JBCC gives advice in good faith and disclaims all liability for any loss, damage or expense that subscribers may incur through acting on such advice*

Note: *This Advisory Note supersedes the Advisory Note M14-01 issued in December 2000*

3.0 RISK AND INSURANCE

3.2 The **employer** shall in all circumstances be at risk for:

3.2.1 The cost of making good physical loss and repairing damage to the **works**, including existing buildings and the contents thereof

3.4 The **employer** shall take out:

3.4.2 Contract works insurance which shall be in the joint names of the **employer** and the **contractor** for the amount stated in the **schedule**. Where applicable such amount shall include existing buildings and their contents

3.6 Where the cost of making good loss or damage to the **works** or the existing buildings and their contents exceeds the amount recoverable under the insurance taken out in terms of 3.4 the **contractor** shall not be liable for any cost greater than such an amount

INTERPRETATION

The above clauses hold the **employer** responsible for the **works** and to take out the necessary contract works insurance. This is as intended by JBCC. However, as worded the clauses could be open to abuse in relation to the **contractor** claiming for petty expense or loss or failing to provide reasonable care, supervision and management of the **works**. This could lead to frequent claims against the insurance at the cost of the **employer**. For the **employer** to recover the deductible from the **contractor** in such a circumstance modification to clauses 3 and 14 are required.

Where the **employer** is the defaulting party in relation to a claim the responsibility for the deductible should correctly remain with the **employer**

SUGGESTED ACTION

*Register the following replacement and additional clauses in the **schedule** (19.1.6):*

3.2 The **employer** shall be at risk for:

3.2.1 The cost of making good physical loss and repairing damage to the **works** subject to 3.6, including existing buildings and the contents thereof

3.4.2 Contract works insurance which shall be in the joint names of the **employer** and the **contractor** for the amount and deductible stated in the **schedule**. Where applicable such amount shall include existing buildings and their contents. The amount payable by the **contractor** in terms of 14.9 shall be stated in the **schedule**

(Continued)

RISK AND INSURANCE (Continued)

3.6 Where, in the opinion of the **agent**, loss and damage to the **works** in terms of 3.2.1 is due to the **contractor's** negligence the **contractor** shall be liable for such loss and damage. Such liability shall not exceed the insurance deductible stated in the **schedule** in any particular instance

14.9 Where the **employer** has incurred expense and loss arising from an insurance claim in terms of 3.4.2 for which the **contractor** was responsible the **employer** shall provide details thereof to the **agent** for approval and adjustment of the **contract value** in the amount as stated in the **schedule** for each such event

19.1.9 Contract Works Insurance by the **employer**

[3.4.2]

(1) For the sum of

(amount)

(2) With a deductible of

(amount)

COMMENT

It should be appreciated that should the **employer** fail to specify the deductible amount in the Pre-tender Information no deduction whatsoever can be made from monies due to the **contractor** in relation to a contract works insurance claim

Date:

N°:

M13-01

JBCC ADVISORY NOTE

DOCUMENT/S

Minor Works Agreement

CODE

M

EDITION

July 1999

13.0 VALUATION AND PAYMENT TO CONTRACTOR

13.9.2 Two and a half per cent (2.5%) of such value after the date of **practical completion** to, but not including, the date of issue of the final **payment certificate**. The **retention** held shall be increased to include any unpaid amount due in terms of 13.12 in the previous **payment certificate**

INTERPRETATION

Wording error. The percentage should refer to “the **contract sum**” and not to “such value”

SUGGESTED ACTION

Register the following correction in 19.1.6:

In clause 13.9.2 first line replace the words “such value” with “the **contract sum**”

Date: June 2001

Nº: M16-01

JBCC ADVISORY NOTE

DOCUMENT/S

Minor Works Agreement

CODE

M

EDITION

July 1999

16.0 CANCELLATION BY CONTRACTOR

16.3 Where the **contractor** decides to cancel this **agreement** in terms of 16.1 the **contractor** shall notify the **employer** and the **agent** of the default and of the **contractor's** intention to cancel this **agreement** should the default continue for seven (7) **calendar days**

16.4.7 Where applicable, the **retention** in terms of 2.2 shall expire and be returned to the **contractor**

INTERPRETATION

Reference and wording errors

SUGGESTED ACTION

Register the following correction in 19.1.6:

In clause 16.3 first line add "or 16.2" after "in terms of 16.1"

*In clause 16.4.7 first line replace the word "**retention**" with "**security**"*

COMMENT

The above changes have been effected in the April 2001 edition

Date: June 2002

Nº: J01-01

JBCC ADVISORY NOTE

DOCUMENT EDITION DATES (*Updates in italic/bold*)

Code	Document	Date
2101	Principal Building Agreement	May 1998 July 2000
2102	Nominated/Selected Subcontract Agreement	May 1998 July 2000
2103	Preliminaries	May 1998 January 2001
2104	Engineering General Conditions	May 1998 May 2001
2105	Contract Price Adjustment Provisions	May 1998
2108	Minor Works Agreement	July 1999 April 2001
2115	Form of Tender	June 1999 April 2000 July 2000
2121	Waiver of Contractor's Lien	May 1998 August 2000
2122	Construction Guarantee (PBA)	June 1999
2123	N/S Construction Guarantee	June 1999
2124	Payment Guarantee (PBA)	June 1999
2125	N/S Payment Guarantee	June 1999
2128	Variable Construction Guarantee (MW)	July 1999
2129	Employer Payment Guarantee (MW)	July 1999
2142	Payment Certificate (PBA)	May 1998 August 2000
2143	Payment Certificate Notification (PBA)	May 1998 August 2000
2144	<i>Recovery Statement (PBA)</i>	May 1998 August 2000 May 2002
2145	N/S Recovery Statement	May 1998 August 2000
2146	Payment Advice Statement (N/S)	May 1998 August 2000
2148	Payment Certificate (MW)	August 2000
2181	Certificate of Interim Completion (N/S)	May 1998
2182	Certificate of Completion (PBA)	May 1998 August 2000
2188	Cert of Completion (MW)	July 1999
2201	Valuation, Certification and Payment Guide	January 2001
2202	Interim, Practical, Works and Final Completion Guide	January 2001
2301	<i>Contract Document Manual</i>	<i>Available</i>

Date: June 2002

N°: J01-02

JBCC ADVISORY NOTE

QUICK GUIDE TO JBCC SERIES 2000 DOCUMENTS

JBCC documents are compiled in the interests of standardisation and portray the consensus view of the Joint Building Contracts Committee of good practice and an equitable distribution of contractual risk in the building industry. The documentation sets out a clear, balanced and enforceable set of procedures, rights and obligations, which when competently managed and administered, protect the employer, contractor and subcontractors alike. The Series 2000 covers all aspects of contract for most types of building projects and should consequently simplify the administration of building contracts

Principal Building Agreement

Code: 2101

The Principal Building Agreement is the cornerstone of the JBCC Series 2000 document range. The Agreement is made up of nine sections starting with the definitions of all the primary elements and phrases that regularly occur in the document. The next sections are ordered as closely as possible to the project execution sequence. The final section is a schedule of all the variables required to complete the Agreement. An index of the occurrence of definition elements is included for easy reference. The Agreement, in catering for both bills of quantities and lump sum contracts, brings about a strong consistency in the contractual language used and the administrative procedures required. The Agreement is designed to service with or without bills of quantities as well as private and public sector contracts

Nominated/Selected Subcontract Agreement

Code: 2102

See Principal Building Agreement. The N/S Subcontract Agreement covers both nominated and selected subcontractors and is modelled on the Principal Building Agreement with all common clauses retaining the same numbering

Preliminaries

Code: 2103

The document covers all generally reoccurring aspects of preliminaries for most types of projects and should consequently simplify the tendering for and the administration of building contracts. Users should note that this Preliminaries document has been specifically formulated for use with the JBCC Series 2000 documentation and maintain the same definitions, numbering style and schedule of variables as are consistent throughout the JBCC Series 2000

Engineering General Conditions

Code: 2104

The document is specifically designed to be used in conjunction with the N/S Subcontract Agreement where the appointed subcontractor is responsible for the installation and performance of a dynamic system related to the building contract and for which a specialist engineer is appointed in terms of the Principal Building Agreement

Contract Price Adjustment Provisions

Code: 2105

The CPAP has been designed to simplify procedures to compensate a contractor or subcontractor for cost fluctuations at a level which is acceptable and fair to both the employer and contractor/subcontractor. However, the CPAP can only reflect price changes within the philosophy of an index based formula system. No index can precisely reflect actual cost fluctuations on any one contract, work group or trade. CPAP is applicable to both the Principal Building Agreement and the N/S Subcontract Agreements unless specifically excluded

Minor Works Agreement

Code: 2108

JBCC has designed this Agreement for use where minor works of simple content are to be carried out for an agreed lump sum. The employer appoints only one agent to administer the contract and appoints direct contractors for specialised work or installation not to be undertaken by the contractor. The Minor Works Agreement is considered suitable for use where the contractor is a small to medium enterprise and the employer carries the major liabilities related to the works. This Agreement is not intended for use where the works are of a complex nature, nominated or selected subcontractors are required and/or CPAP adjustments are required

Form of Tender

Code: 2115

This document is for use with the Principal Building Agreement, Nominated/Selected Subcontract Agreement and the Minor Works Agreement. The form sets out the Conditions of Tender, The Tender Sum and the tenderer's choice of Preliminaries and Security selection items

Waiver of Contractor's Lien

Code: 2121

The standard form can be used for both the Principal Building and Minor Works Agreements and requires the provision of a Payment Guarantee from the Employer

Construction Guarantee (PBA)

Code: 2122

The form makes provision for a construction guarantee in a variable or fixed form as selected by the contractor. The guarantor's maximum liability is stated. This is restricted to the payment of money on demand

JBCC ADVISORY NOTE

Date: Dec 2002

N°: J03-01

DOCUMENT/S	CODE	EDITION
Principal Building Agreement	P	All
N/S Subcontract Agreement	N	All

DISCLAIMER *The purpose of this publication is to give advice on the most effective use of the JBCC Series 2000 documents. JBCC gives advice in good faith and disclaims all liability for any loss, damage or expense that subscribers may incur through acting on such advice*

SERIES 2000 - 3RD EDITION

The following warning is printed in the opening page to all JBCC 3rd Edition primary documents:

JBCC has undertaken this Third Edition primarily to update the Series 2000 documents with improved drafting, grammar and the elimination of minor errors where appropriate. However there are some significant changes and unavoidable clause renumbering but no departure from the style of the Second Edition. This has resulted in certain support documents having to be revised to remain compatible. These are listed in the Schedule of Revisions. Where the employer in the agreement is an organ of State specific requirements that differ from those required by the private sector are set out in a single clause for ease of reference that provides for the substitution by these clauses in the document when so required.

Persons entering into or preparing contracts using the JBCC Series 2000 are warned of the dangers inherent in modifying any part of it. If it is considered essential to make changes, users are advised that such changes are drafted by qualified legal persons with extensive knowledge of the JBCC documentation and the construction industry. Experience has shown that changes drafted by others, including members of the building professions, often have results very different from those intended which may be prejudicial to either or both parties

INTERPRETATION

The following should be observed in relation to the above warning in regard to the 3rd Edition documents:

- 1 The Principal Building Agreement and N/S Subcontract Agreement definitions have been extensively revised, a single clause (13.0) is used for State Provisions, advance payment provisions have been included and some clause renumbering has, of necessity, occurred
- 2 The Preliminaries definitions have been revised to remain compatible with the Agreements
- 3 The Form of Tender and all Payment related forms have been revised to accommodate the Advance Payment provisions

SUGGESTED ACTION

- The documents relating to 1 and 2 above cannot be used in conjunction with earlier editions of these documents as contractual and legal contradictions will occur
- The documents relating to 3 above can be used with earlier editions of the primary documents *but not where advance payments are required*
- The provisions for an advance payment under no circumstances should be introduced where earlier edition documents are being used

COMMENT

Stay up to date - Change to the 3rd Edition of the JBCC Series 2000

(Continued)

QUICK GUIDE TO JBCC SERIES 2000 DOCUMENTS (Continued)

Construction Guarantee (N/S) Code: 2123
See Construction Guarantee (PBA)

Payment Guarantee (PBA) Code: 2124
The form makes provision for a maximum aggregate amount being the Guaranteed Sum which is intended to cover the potential risk of default by the employer. This is restricted to the payment of money on demand

Payment Guarantee (N/S) Code: 2125
The form makes provision for a maximum aggregate amount being the Guaranteed Sum which is limited to ten per cent of the Subcontract Sum in terms of the N/S Subcontract Agreement

Variable Construction Guarantee (MWA) Code: 2128
See Construction Guarantee (PBA)

Employer Payment Guarantee (MWA) Code: 2129
See Payment Guarantee (PBA)

Payment Certificate (PBA) Code: 2142
The Payment Certificate is a standard form in terms of the Agreement issued monthly that provides for the setting out of all the financial elements due between the parties. These include a reasonable valuation of the work carried out to date, materials on and off site, expense or loss incurred by the employer, tax on such amounts and interest

Payment Certificate Notification (PBA) Code: 2143
This notification is required to be issued to all n/s subcontractors indicating the amount related to their contract that is include in the payment certificate issued to the contractor. It is not a certification of the monies due between the contractor and the n/s subcontractor

Recovery Statement (PBA) Code: 2144
The Recovery Statement, which is issue simultaneously with the payment certificate, accounts for items of expense or loss that are not part of the contract value. These items include penalties and interest

Recovery Statement (N/S) Code: 2145
See Recovery Statement (PBA). The Statement is issued by the contractor

Payment Advice Statement (N/S) Code: 2146
See Payment Certificate (PBA). The Statement is issued by the contractor

Payment Certificate (MWA) Code: 2148
See Payment Certificate (PBA)

Certificate of Interim Completion (N/S) Code: 2181
The Certificate is issued by the contractor to n/s subcontractors. It corresponds in most respects to the practical completion certificate issued by the principal agent

Certificate of Completion (PBA) Code: 2182
The Certificate, issued by the principal agent, covers Practical, Works and Final Completion as well as Sectional completions were applicable

Certificate of Completion (MWA) Code: 2188
The Certificate, issued by the agent, covers Practical and Final Completion

Valuation, Certification and Payment Guide Code: 2201
The guide, using full colour examples, deals in detail with the valuation, certification and payment cycle in worked examples of all the related forms for the Principal Building, N/S Subcontract and Minor Works Agreements. The impact of the differing securities that can be offered by the contractor and subcontractors is also addressed. The guide is cross referenced to the Agreements

Interim, Practical, Works and Final Completion Guide Code: 2202
The guide, using full colour flow diagrams, deals in detail with the completion process from the commencement of the works to the expiry of the latent defects liability period. The consequences and responsibilities of the contracting parties on the achievement, or non-achievement of each stage are clearly defined. The guide is cross referenced to the Agreements