

JBCC ADVISORY NOTE: EDITION 6.2

DOCUMENT/S

Principal Building Agreement Nominated/Selected Subcontract Agreement Minor Works Agreement (clause 17.0)

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

CORONAVIRUS (COVID-19) GLOBAL PANDEMIC – A *FORCE MAJEURE* EVENT?

The impact of the COVID-19 global pandemic on the Republic of South Africa has among other restrictive measures resulted in our State President Mr. Ramaphosa declaring a national disaster on Sunday 15 March 2020 and on Monday 23 March 2020 imposing a nationwide lockdown in terms of *inter alia* the Disaster Management Act 57 of 2002 (the Act). The nationwide lockdown is to become effective from 0:00pm on Thursday 26 March 2020 and currently set to endure until 0:00pm on Thursday 16 April 2020. The possibility exists that the nationwide lockdown may be extended beyond that date

Construction sites and related activities across South Africa will, in compliance with the imposition of the nationwide lockdown and regulations promulgated to enforce and manage the nationwide lockdown in terms of *inter alia* the Act, temporarily close and cease to operate from 0:00pm on Thursday 26 March 2020

These unprecedented circumstances have created numerous challenges across all South Africans' day-to-day business activities and personal lives, which include the challenge of managing the unavoidable impact correctly in terms of the applicable provisions of each contract regulating the contractual relationships between employer, contractor and subcontractor

The COVID-19 scenario differs from all other delay and cost claims. The typical time bars in all standard form contracts to give notice or lose the opportunity to claim should not apply for this event – but the prompt provision of all relevant information by all involved to present and resolve the COVID-19 claims is critical. This Advisory Note attempts to provide the procedure parties have to follow as outlined in the JBCC May 2018 edition agreements

23.0 REVISION OF THE DATE FOR PRACTICAL COMPLETION – *Coronavirus*

23.1 The **contractor** is entitled to a revision of the date for **practical completion** by the **principal agent** without an adjustment of the **contract value** for a delay to **practical completion** caused by one or more of the following events:

23.1 – 4

23.1.5 Exercise of statutory power by a body of state or public or local authority that directly affects the execution of the works

23.1.6 ***Force majeure***

INTERPRETATION

Unfortunately, there is in our view neither an immediately obvious correct nor necessarily a “one size fits all” solution to this challenge. It is critical, therefore, that each contract (and its applicable provisions) be carefully considered in each case

The immediate (and perhaps most obvious) course is to invoke contractual provisions regulating a **force majeure** situation, where these are available in terms of the relevant contract. However, while it is undoubtedly correct that the COVID-19 global pandemic qualifies as a **force majeure** event, the nationwide lockdown imposed on Monday 23 March 2020 (not the COVID-19 global pandemic) is the immediate event causing the temporary closure of most construction sites and ceasing of related on-site construction activities across South Africa for at least 16 working days

Force majeure as defined in the JBCC in the respective sub-clauses 1.1 of the PBA and NSSA can be shortened to read as an *exceptional event or circumstance that could not have reasonably been foreseen or anticipated by the parties that prevents the contractor from executing or completing the works*

Once a national disaster had been declared on Sunday 15 March 2020 it was certain that at some stage in the national government’s response to curtail the spread of COVID-19 either a nationwide or targeted lockdown would inevitably be imposed under the Act. It was therefore, at least since 23 March 2020, entirely foreseeable (if not certain) that either a nationwide or targeted lockdown would be imposed, which would in either event probably have cause the temporary closure of most construction sites and the ceasing of related on-site construction activities across South Africa. Therefore, the COVID-19 global pandemic is not the event causing the temporary closure of most construction sites and the ceasing of related on-site construction activities as a direct result of a **force majeure** event

The JBCC PBA and NSSA sub-clause 2.1 [Laws, Regulations and Notices] provides:

The contractor shall comply with the law [CD], obtain permits, licences and approvals required and pay related charges for the execution of the works [17.1.4]. The employer shall comply with the law [CD], obtain permits planning, building or similar permissions and pay charges for the works other than those which are the responsibility of the contractor [26.4.1]

Law is defined in sub-clause 1.1 as “the law of the country [CD]”, which is assumed for present purposes to be the law of the Republic of South Africa. The **contractor** and **employer** each have an overarching statutory obligation to comply with the **law**. The imposition of the nationwide lockdown in terms of the Act and regulations issued thereafter pursuant to that legislation to manage the nationwide lockdown, therefore, constitute **laws** as defined in the PBA and NSSA

The PBA and NSSA clause 17.0 [Contractor Instructions] provides:

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

17.1.4 Compliance with the **law**, regulations and bylaws [2.1] (our underlining)

The **principal agent** therefore enjoys a specific discretion in this regard. To the extent that the **contractor** has an overarching statutory obligation to comply with the **law** including especially the nationwide lockdown and subsequent regulations issued in terms of the Act, it is unnecessary for the **principal agent** to issue a **contract instruction** regarding compliance with the imposition of the nationwide lockdown imposed on Monday 23 March 2020 in accordance with the Act

In the absence of a **contract instruction** (which in any event need not be given by the **principal agent**), the statutory obligation to comply with the imposition of the nationwide lockdown requires temporary closure of most construction sites and ceasing of related on-site construction activities for at least 16 **working days**, would in the prevailing circumstances be interpreted widely as “an event or circumstance that is beyond the control of the parties”, albeit that in the prevailing circumstances it is not a **force majeure** event

In accordance with PBA and NSSA clause 23.0 [Revision of the Date for Practical Completion] a **contractor** / **subcontractor** would (subject to timeous provision of the required notice in terms of the PBA and NSSA sub-

clauses 23.1.5 and 23.1.6) be “entitled to a revision of the date for **practical completion** by the **principal agent** without an adjustment of the **contract value** (PBA and NSSA clause 23.1).

A **contractor** / **subcontractor** is obliged, in addition to timeously furnishing the required notices to, in accordance with PBA and NSSA sub-clause 23.4.1, “take reasonable steps to avoid or reduce such delay”.

Undoubtedly, the imposition of the nationwide lockdown on Monday 23 March 2020 in accordance with the Act, which has caused the temporary closure of most construction sites and ceasing of related on-site construction activities across South Africa, is an “exercise of a statutory power by a body of state or public or local authority that directly affects the execution of the **works**”.

In accordance with PBA and NSSA clause 23.0 [Revision of the Date for Practical Completion] a **contractor** / **subcontractor** would (subject to timeous provision of the required notice in terms of PBA and NSSA sub-clause 23.4.2) be entitled to a revision of the date of **practical completion** but without an adjustment of the contract value

COMMENT

The determination of additional time to complete a project is relatively straight forward as provided for in clause 23.0 of the JBCC PBA and NSSA, but the prompt provision of all relevant information by the **contractor** / **subcontractor** to the **principal agent** and the **employer** to resolve the COVID-19 claim is critical. The difficulty then arises how to allocate costs incurred as a result of such delay. Generally, where the **employer** is at fault, the **contractor** must be compensated. In the COVID-19 scenario neither **party** is to blame ... should the additional costs be shared equally by the **parties**?

Owners, managers and staff may suffer serious financial hardship during the legally enforced lockdown, if salaries cannot be paid regularly as no money is earned and regular expenses such as plant hire, insurance premiums, etc must continue to be paid. The likely scenario is that **subcontractors** will be affected more than principal **contractors**. Certain government sponsored grants may be claimed – but payment may take some time and the quantum is unlikely to be ‘generous’

Registration is open, on www.smmesa.gov.za, for small and medium-sized businesses that require help during the coronavirus crisis

ACKNOWLEDGEMENT

JBCC wishes to acknowledge the assistance of MDA Attorneys, and more particularly to Vaughan Hattingh and Natalie Reyneke (directors) in compiling this Advisory Note. MDA Attorneys, *inter alia*, has expertise in all matters relating to construction law, and their free advice has contributed to a better understanding of the underlying legal principles about the COVID-19 lockdown