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Construction, Engineering & Infrastructure Law

Legal Update
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Our Cox Yeats Construction, Engineering & Infrastructure Team is committed to keeping you informed on developing legal issues.

GUIDANCE ON THE EFFECT OF COVID-19 LOCKDOWN ON CONSTRUCTION CONTRACTS

General Considerations

Before considering the provisions of the common construction contracts in detail, the following general recommendations are made:

1. Should payment certificates not have been issued during the period of lockdown, they should be issued as soon as possible after recommencement of works, but no later than the end of May 2020.

2. The lockdown period will give rise to various typical force majeure claims and contractors will be entitled to extension of time claims for the period of the lockdown. Whether those claims will entitle the contractor to further payment will need to be assessed on a contract by contract and claim by claim basis.

3. The Covid-19 epidemic and the continued lockdown regulations may have a further and continued impact to contractors after site re-opening. Those impacts will have to be assessed by the contractors and further claims for resulting delays to the project programmes may need to be considered.

4. Where time limits are applicable to claims and claim notifications, such time period should only be calculated from, at the earliest, the date on which the relevant construction site re-opens.

5. It is recommended that all claims arising from the lockdown be submitted and resolved as soon as possible after recommencement and well before any applicable time limits.

6. Any disputes emerging in regard to claims should be resolved expeditiously by either expert determination or adjudication where not already provided for in the contract.

7. Particular consideration should be given to the H&S requirements of each project and there may be instances where compliance with the required additional measures may cause increased cost to the contractor or result in additional time being required.

JBCC - Edition 4.1

1. Clause 29.1.4 states that a contractor is entitled to a revision to the date for practical completion (without adjustment to the contract value) if such delays are due to *vis major*, civil commotion, riot, strike or lockout.

2. In addition to this, Clause 29.3 also makes provision for revision to the date for practical completion where the contractor suffers a delay to the works due to circumstances beyond his or her reasonable control and which could not have been reasonably anticipated and provided for.

3. Accordingly a contractor may make a claim for a revision to the date of practical completion arising from the lockdown under either clause 29.1.4 or clause 29.3.

4. Clause 29.4.3 requires the contractor to notify the principal agent of his or her intention to claim for a revision to the date for practical completion within 20 working days of becoming aware, or reasonably should have become aware, of the potential for the delay.

5. Failure to issue such notification within this time period will result in the principal agent not considering the claim.

6. Clause 29.5 then requires the contractor, if he or she intends submitting such claim, to do so within 60 working days of the delay ceasing.

7. The principal agent must then give a ruling on such claim within 20 working days after receipt of this notice, in terms of clause 29.7.

8. If the principal agent fails to give a determination on the claim it will be deemed to have been refused (clause 29.8).

9. Clause 7.1 requires the contractor to comply with all laws and regulations, which would include any directives in regard to safety and hygiene standards resulting from Covid-19.

10. If the principal agent issues an instruction in regard to these measures, this would entitle the contractor to an adjustment to the contract value in terms of clause 32.

11. If the principal agent does not issue such an instruction, the contractor must give the principal agent a notice in terms of clause 32.6 within 40 working days of becoming aware of the additional expenses incurred in complying with the regulations/directives.

12. The principal agent must make a determination in respect of the claim within 20 working days and if he fails to do so the claim is deemed to be refused in terms of clause 32.6.3.

13. If a notice of disagreement is issued by either party, it is recommended that such disputes be resolved as expeditiously as possible through a managed expert determination process, alternatively adjudication in terms of the JBCC Adjudication Rules.

14. Any disputes remaining after the adjudication process should be dealt with in terms of clause 40 and where possible through arbitration.

15. Where there is a disagreement between the parties, notice of such must be given and resolved within 10 working days (clause 40.1). If resolution cannot be achieved, then clause 40.2 requires the disagreement to be deemed a dispute and thereafter arbitration should be elected wherever possible in terms of the procedures outlined.

JBCC – Edition 5.0

1. There is little difference between Edition 4.1 and Edition 5.0 in regard to claims clauses identified.

2. Clause 29.1.4 includes reference to "*an event that neither party could prevent*".

3. Accordingly a claim may be made by the contractor under Clause 29.1.4 and/or clause 29.3. Neither claim will entitle the contractor to additional costs.

4. The claims for additional costs arising from Covid-19 preventative measures would be the same set out in Edition 4.1 in terms of clause 32.

5. If the principal agent issues a contract instruction in terms of clause 17.1.4, this would entitle the contractor to an adjustment to the contract value in terms of clause 26.2.

6. If the principal agent does not issue such an instruction, the contractor must give the principal agent a notice in terms of clause 26.5 within 20 working days of becoming aware of the additional expenses incurred in complying with the regulations/directives.

7. Clause 26.7 requires the contractor, within 40 working days from the submission of the notice to submit a detailed claim to the principal agent, who must make a determination within 20 working days, failing which it is deemed to be refused. The contractor may then give a notice of dispute in terms of clause 26.8.

8. Where notice of a disagreement is lodged by either party, or such disagreement cannot be resolved within 10 working days of receipt of such notice, the disagreement shall be declared a dispute. This dispute will be referred by the party giving the notice of disagreement to either adjudication or arbitration, in terms of clause 40.2, and the dispute resolution process shall proceed in accordance with clause 40.

JBCC – Edition 6.0 and 6.1

1. Clause 23.1.5 provides for the revision to the date for practical completion (without adjustment to the contract value) where "*exercise of statutory power by a body of state or public or local authority that directly affects the execution of the works"* causes a delay to the works.

2. Force majeure is specifically recognised in clause 23.1.6 and described as:

   "*an exceptional event or circumstance that:*

   (a) could not have been reasonably foreseen,
   (b) is beyond the control of the parties, and
   (c) could not have reasonably been avoided or overcome."

3. In addition to this, Clause 23.3 also makes provision for revision to the date for practical completion where the contractor suffers a delay to the works due to circumstances beyond his or her reasonable control and which could not have been reasonably anticipated and provided for.

4. Accordingly a claim for revision to the date for practical completion may be made under either clause 23.1.5, 23.1.6 or clause 23.3.

5. Clause 23.4 requires the contractor, to notify the principal agent of any intention to submit such a claim within 20 working days of having become aware of the delay.

6. The actual claim must be submitted to the principal agent in terms of clause 23.5 within 40 working days from when the contractor is able to quantify such delay.

7. The principal agent must give a ruling on this claim, in terms of clause 23.7, within 20 working days of receiving this claim.

8. If the principal agent fails to give a determination on the claim it will be deemed to have been refused (clause 23.8).

9. The claims for additional costs arising from Covid-19 preventative measures would be similar to the process set out in Edition 4.1 and would be dealt with in terms of clause 26.

10. Disagreements are resolved in terms of clause 30. Parties are required to refer the dispute to adjudication first, in accordance with the procedures in this clause. If these procedures are not complied with or the adjudication fails, then the dispute will be resolved through arbitration.

11. Notwithstanding the above, clause 30.8 still permits the parties to attempt to resolve disputes through mediation, which will suspend the provisions relating to adjudication or arbitration if the parties agree to pursue this resolution mechanism.

GCC 2015

1. Clause 5.12.1 provides that the contractor is entitled to an extension of time for the completion of the works if "***circumstances of any kind whatsoever***" will delay the achievement of practical completion of the works.

2. Clause 5.12.2.4 specifically lists "*any disruption which is entirely beyond the contractor's control*" as a circumstance entitling the contractor to an extension of time. A contractor will accordingly be entitled to an extension of time for delays caused by the lockdown and other circumstances resulting from Covid-19.

3. In terms of clause 5.12.3, if an extension of time is granted the contractor shall be paid such additional time-related general items as are appropriate.

4. Clause 5.12.4 provides that instead of granting an extension of time, if feasible, the contractor may be requested to accelerate the rate of progress to achieve practical completion and will be paid for the costs of such acceleration.

5. A contractor may also be entitled to a claim for extension of time with adjusted value in terms of clause 5.4.3 if an instruction to commence work was issued to the contractor but the employer was unable to fulfil its obligation to give the contractor access and possession of site due to the limitations imposed during lockdown.

6. However, once the contractor has been given possession of the site, a claim under clause 5.4.3 would not be applicable.

7. Covid-19 may also fall within the definition of "excepted risk" and in particular the reference to "epidemic plague" set out in clause 8.3.1.7.

8. In terms of clause 8.3.2, the contractor is entitled to an extension of time and can recover additional costs where the contractor suffers a delay or loss directly or indirectly caused by an "excepted risk".

9. Clause 9.1.2 read with clause 9.1.4 provides that the contractor is entitled to claim additional costs, which are not covered by the additional time-related general items, caused by "*a state of emergency, riot, commotion politically motivated sabotaged acts of terrorism or disorder"* and "*any such event beyond the control of the contractor*" that materially affects the execution of the works.

10. Clause 9.1.4 requires the contractor to notify the engineer within 14 days of becoming aware of such increase in cost.

11. In terms of clause 6.8.4 the contractor is entitled to any additional costs, which are not covered by the additional time-related general items, if at any time within 28 days before the closing of tender or thereafter, any act, ordinance, regulation or by-law is amended and this results in additional cost to the contractor.

12. In terms of clause 10, the contractor is required to submit its claim for any extension of time or additional payment as follows:

    (a) the contractor must submit its claim to the engineer in accordance with the specified requirements, within 28 days after the circumstance or event giving rise to such claim; and

    (b) if the event giving rise to a claim is of an ongoing nature, the contractor is additionally required to deliver updated monthly claims to the engineer and submit its final claim within 28 days after the end of the event or circumstance.

13. The parties may deliver a written notice of dispute to each other and the engineer of any dispute provided that the dispute arises from a rejected claim and it is delivered within 28 days of the event giving rise to the dispute

14. The dispute shall be referred to adjudication unless an amicable settlement is contemplated. The parties may agree to settle any claim or any dispute amicably with the help of an impartial third party. If the other party rejects amicable settlement in writing or does not respond to the invitation within 14 days or if the amicable settlement is unsuccessful the dispute shall be referred to adjudication.

15. Either party is entitled to disagree with any decision of the Adjudication Board and refer the matter to arbitration or court proceedings, whichever is applicable in terms of the contract provided that a party disputes the adjudicator's decision not before 28 days or after 56 days from receipt of the decision.

GCC 2010

1. The contract provisions are the same in effect save for clause 8.3.1.7 relating to the excepted risk which is not part of GCC 2010.

2. The contractor may also be entitled to a claim for extension of time with adjusted value and additional costs in terms of clause 5.4.3, 5.10.1 and 5.11.2 as explained above in the GCC 2015 version. These clauses have the identical operation as in the 2015 version.

3. The clause numbering and content of the GCC 2010 dispute resolution process runs parallel to that of the GCC 2015, save that the 2010 version provides that the parties may deliver a written notice of dispute to each other and the engineer of any dispute provided that the dispute arises from an ***unresolved claim*** (and not a rejected claim as recorded in the 2015 version).

GCC 2004

1. Clause 42.2 provides that the contractor is entitled to an extension of time for the completion of the works if "***circumstances of any kind whatsoever***" will delay the achievement of practical completion of the works.

2. In terms of clause 42.4, if an extension of time is granted the contractor shall be paid such additional time-related general items as are appropriate.

3. Clause 54.2 read with clause 54.3 provides that the contractor is entitled to claim additional costs, which are not covered by the additional time-related general items, caused by "*a state of emergency, riot, commotion politically motivated sabotaged acts of terrorism or disorder"* and "*any such event beyond the control of the contractor*" that materially affects the execution of the works.

4. In terms of clause 46.4. the contractor will be entitled to any additional costs not covered by the additional time-related general items if at any time, after 28 days before the tender closing, there is an amendment to any Act, ordinance, regulation or by-law is and this results in additional cost to the contractor.

5. Clause 54.3 requires the contractor to notify the engineer forthwith of becoming aware of such increase in cost.

6. In terms of clause 48, the contractor is required to submit its claim for any extension of time or additional payment as follows:

    (a) The contractor must submit its claim to the engineer in accordance with the specified requirements, within 28 days after the circumstance or event giving rise to such claim; and

    (b) If the event giving rise to a claim is of an ongoing nature, the contractor is additionally required to deliver updated monthly claims to the engineer and submit its final claim within 28 days after the end of the event or circumstance.

7. In terms of clause 57 & 58, the contractor shall be entitled to, by written notice, require the engineer to consider any disagreement which he raises with the engineer provided that it is not a matter required to be dealt with in terms of clauses 48 or 58.7.

8. The written notice must be delivered within 28 days after the cause of disagreement has arisen. The engineer must deliver his ruling within 28 days of receiving the notice.

9. The parties are entitled to dispute any ruling issued by the engineer within 28 days of receipt of the ruling. If the engineer fails to deliver his ruling, the contractor shall be entitled to submit the claim or disagreement as a dispute notice within 28 days after the ruling should have been handed down.

10. Once a dispute notice has been issued the dispute shall be referred to mediation or adjudication, whichever is stated in the contract data. Until such time as the engineer's ruling is altered by adjudication, arbitration, court or agreement it shall remain of full force and effect.

11. If the contract data provides for dispute resolution by mediation, the mediator shall be selected by agreement between the parties within 7 days or failing such an agreement, the President of the South African Institution of Civil Engineering shall appoint the mediator.

12. The mediator shall follow formal or informal procedure and receive evidence orally or in writing at joint meetings with the parties or separately or from any person who can assist in the formulation of the opinion.

13. The mediator shall, as soon as reasonably practical, give each party his written opinion on the dispute which shall become binding on the parties only to the extent that it is correctly recorded as being agreed by the parties.

14. The dispute on any matter that is still unresolved after the mediation proceedings shall be referred to arbitration or court proceedings, whichever is applicable in terms of the contract.

15. If the contract data does not provide for dispute resolution by mediation, adjudication shall be conducted in accordance with the edition of the Construction Industry Development Board's Adjudication Procedure current at the date of issue of the dispute notice.

16. If the contract data provides for determination of disputes by arbitration and if a dispute is still unresolved after mediation and adjudication the matter shall be referred to arbitration. If the contract data does not provide for the determination of disputes by arbitration and if a dispute is still unresolved after mediation or adjudication the dispute shall be determined by court proceedings.

17. Clause 58.7 provides that any dispute between the contractor and employer not relating to a ruling, decision, order, instruction or certificate by the engineer or arising after the completion of the contract or after the termination of the defects liability period shall be determined by arbitration or court proceedings, whichever is recorded in the contract data.

GCSC 2018, SGCC 2018 & GCCSF 2018

The clause numbering and their titles of the GCSC 2018, SGCC 2018, GCCSF 2018 run parallel to that of the GCC 2015, and the interpretations that apply to the GCC 2015 may be applicable *mutatis mutandis* to these contracts.

FIDIC 1999 & 2010

1. "Force Majeure" is defined in Clause 19 as:

   "an exceptional event or circumstance:

   (a) which is beyond a party's control,

   (b) which such party could not reasonably have provided against before entering into the contract,

(c) which, having arisen, such party could not reasonably have avoided or overcome, and

(d) which is not substantially attributable to the other party."

2. Force majeure may include, **but is not limited to**, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

   (i) "*war, hostilities (whether war be declared or not), invasion, act of foreign enemies,*

   (ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,

   (iii) riot, commotion, disorder, strike or lockout by persons other than the contractor's personnel and other employees of the contractor and subcontractors,

   (iv) munitions of war, explosive materials, ionising radiation or contamination by radioactivity, except as may be attributable to the contractor's use of such munitions, explosives, radiation or radioactivity, and

   (v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity."

3. Covid-19 and the lockdown would fall within the definition of force majeure provided it satisfies the conditions listed in 19(1) (a) to (d).

4. In terms of clause 19.2, if a party is or will be prevented from performing under the contract by force majeure, then the party is required to give notice of the event or circumstances constituting the force majeure together with the obligations that it is unable to perform as a consequence.

5. The notice must be given within 14 days after the party became aware, or should have become aware, of the relevant event or circumstance constituting force majeure.

6. Clause 19.3 nevertheless creates an obligation on the parties to minimise delay in their performance of the contract as a result of force majeure. Once a party is no longer affected by force majeure, it must give notice.

7. In terms of clause 19.4, where the contractor has suffered a delay and/or incurred costs as a consequence of force majeure and has given the requisite notice in terms of clause 19.2, the contractor will be entitled to claim in terms of clause 20.1.

8. The contractor must give notice of its claim as soon as practicable, and not later than 28 days after it became aware (or ought to have become aware) of the event or circumstance. In the event that timeous notice is not given, the employer will be discharged from liability in connection with the contractor's claim.

9. In addition, clause 20.1 provides that the contractor must submit a fully detailed claim to the engineer within 42 days after the contractor became aware (or should have become aware) of the event/circumstances giving rise to the claim. Alternatively, the claim must be submitted within a time proposed by the contractor and approved by the engineer.

10. If the event or circumstances giving rise to the claim has a continuing effect, the claim submitted by the contractor will be regarded as interim and the contractor will need to send further interim claims at monthly intervals. The contractor's final claim must be submitted within 28 days after the end of the effects resulting in the claim, or within a period proposed by the contractor and approved by the engineer.

11. Where a contractor is prevented from performing its substantial obligations, and where it suffers delays and/or incurs costs as a consequence of the force majeure, the contractor will be entitled (subject to clause 20.1) to claim for:

    (a) an extension of time for any such delay, if completion is or will be delayed; and

    (b) if the event or circumstance falls within sub-paragraphs 19.1(i) to (iv) and occurs in the country, payment of any such **cost**.

12. "**Cost**" is defined as "all expenditure reasonably incurred (or to be incurred) by the contractor, whether on or off the site, including overhead and similar charges, but does not include profit."

13. Nevertheless, Covid-19 and the lockdown would not fall within sub-paragraphs 19.2 (i) to (iv) therefore the Contractor would only be entitled to an extension of time and not cost.

14. In addition, clause 8.5 of the contract makes provision for delays caused by authorities. “Authorities” is not a defined term.

15. A contractor will be entitled to claim for an extension of time in terms of this clause if:

    (a) the contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the country;

    (b) these authorities delay or disrupt the contractor’s work, and

    (c) the delay or disruption was unforeseeable.

16. Clause 13.7 makes provision for adjustments to the contract price as a consequence of adjustments or changes in legislation. It provides that the contract price shall be adjusted to take account of any increase or decrease in cost resulting from a change in the laws of the country (including the introduction of new laws and the repeal or modification of existing laws) or in the judicial or official governmental interpretation of such laws, made after the base date, which affect the contractor in the performance of obligations under the contract.

17. If the contractor suffers (or will suffer) delay and/or incurs (or will incur) additional costs as a result of these changes in the laws or in such interpretations, made after the base date, the contractor will need to give notice to the engineer and will be entitled to:

    - an extension of time for any such delay, if completion is or will be delayed; and

    - payment of any such Cost, which shall be included in the Contract Price.

18. It is recommended that claims be made and adjudicated under the provisions of clause 13.7 for at least the period of lockdown, which would entitle the contractor to its costs for the period of the lockdown.

19. Both FIDIC version 1999 and 2010 provide for a substantially similar dispute resolution procedure. They require that disputes be referred to a Dispute Adjudication Board (“DAB”) for decision in accordance with clause 20.4. The DAB shall comprise, as stated in the contract data, either one or three suitably qualified persons (“members”).

20. Clause 20.4 provides that if a dispute (of any kind whatsoever) arises between the parties in connection with, or arising out of, “the contract or the execution of the works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the engineer, either party may refer the dispute in writing to the DAB for its decision.

21. The DAB shall give its decision within 84 days after the dispute was referred, alternatively within such period as may be proposed by the DAB and approved by both parties.

22. The adjudicator’s decision will be binding on both parties which will be obligated to give effect to the decision unless and until it shall be revised in an amicable settlement or an arbitral award.

23. If either party is dissatisfied with the DAB’s decision, the dissatisfied party may, within 28 days after receiving the decision, give of its dissatisfaction. Neither party will be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with sub-clause 20.4.

24. Where notice of dissatisfaction has been given under clause 20.4, both Parties shall nevertheless attempt to settle the dispute amicably before the commencement of arbitration.

FIDIC 2017

1. The term “force majeure” was replaced with “exceptional event”, but the definition and the non-exhaustive list of events or circumstances remains substantially the same.

NEC 3

1. Clause 60.1 defines a compensation event as:

   “An event which stops the contractor completing the services or stops the contractor completing the services by the date shown on the accepted programme and:

   - *which neither party could prevent;*
   - *an experienced consultant would have judged at the contract date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it; and*
   - *is not one of the other compensation events stated in this contract;*

2. A contractor must notify the project manager of a compensation event in accordance with clause 61.3 which provides that if the contractor has not given notice of the compensation event within eight weeks of becoming aware of the event, it will not be entitled to a change in the prices, the completion date or a key date (unless the project manager should have notified the event to the contractor but did not).

3. If the project manager does not respond to the contractor’s notice timeously, it will be deemed to have accepted the existence of a compensation event.

4. If the employer does not respond to the contractor’s abovementioned notice, it will be deemed to have accepted the existence of a compensation event.

5. The employer will then instruct the contractor to submit quotations which could impact the contract price and/or completion date.

6. Where the employer decides that the effects of a compensation event are too uncertain to be forecast reasonably, it must state assumptions about the event in its instruction to the contractor to submit quotations. Assessment of the event will then be based on these assumptions. If any of them is later found to have been incorrect, the employer must give notice of a correction.

7. In terms of clause 63, a delay to the completion date is assessed as the length of time that, due to the compensation event, planned completion is later than the planned completion shown on the accepted programme.

8. The NEC3 makes provision for a risk register which is “a register of the risks which are listed in the contract Data and the risks which the project manager or the contractor has notified as an early warning matter. It includes a description of the risk and a description of the actions which are to be taken to avoid or reduce the risk.”

9. It is recommended that Covid-19 and the Disaster Management Regulations and their impact be included in the Risk Register.

10. In terms of clause 16.1 the contractor and the project manager will give an early warning by notifying the other as soon as either becomes aware of any matter which could:

    - increase the total of the prices;
    - delay completion;
    - delay meeting a key date; or
    - impair the performance of the works in use.

11. The contractor may give an early warning by notifying the project manager of any other matter which could increase its total cost.

12. The project manager then enters early warning matters in the risk register. Early warning of a matter for which a compensation event has previously been notified is not required.

13. In terms of clause 16.3, the parties will then hold a risk reduction meeting in order to:

    - make and consider proposals for how the effect of the registered risks can be avoided or reduced;
    - seek solutions that will bring an advantage to those affected;
    - decide on the action to be taken in accordance with the contract; and
    - decide which risks have been avoided or have passed and can be removed from the Risk Register.

14. The NEC3 series of contracts mandate adjudication as a dispute resolution procedure. An adjudicator is appointed by the parties in terms of an NEC Adjudicator's Contract.

15. The adjudication procedure is included either in section 9 of the core clauses or under Option W1 (Dispute Resolution).

16. The contracts provide that a party referring a matter to an adjudicator must do so on notice, and within the time periods specified in the adjudication table. The table refers to four categories of disputes and specifies which party may refer each category to adjudication and the timelines for doing so.

17. Where the adjudicator's decision includes assessment of additional cost or delay caused to the contractor, he makes his assessment in the same way as a compensation event is assessed.

18. The adjudicator's decision is binding unless and until revised by the tribunal (arbitration or litigation as selected by the parties in the contract data), alternatively it is binding if a party does not notify the other party of his intention to refer the matter to the tribunal within 4 weeks of the adjudicator's decision. The adjudicator's decision will be enforceable as a contractual obligation.

19. The dispute may not be referred to the tribunal if the matter has not first been referred to the adjudicator.

NEC 4

1. The relevant provisions of the contract mirror those in the NEC 3, save that in NEC4 the 'risk register' has been renamed the 'early warning register' to help separate it from the project risk register, often used as a wider project management tool. In addition, the NEC4 introduces default periods for early warning meetings.

2. It should be noted that the allocation of risk due to a prevention event differs as between NEC3 and NEC4. The NEC4 provides that the trigger for the event is its effect on the planned Completion of the whole of the *works* only. By contrast, NEC3 provides that the trigger is the effect on completing the *works* which could include a *section* as well as the whole of the *works*.

3. Notably, the NEC4 introduced a more consensual approach to dispute resolution. The NEC4 provides that designated senior representatives of each party *must* meet over a period of four weeks and try to reach a negotiated resolution of a dispute prior to the commencement of any formal dispute resolution proceedings. Thereafter adjudication is to be pursued similarly to the NEC 3.

MASTER BUILDER SOUTH AFRICA AGREEMENTS

1. These agreements are to be read in conjunction with the JBCC Principal Builders Agreement and follow much the same protocol.

2. Given the similarity between the 2005 and 2008 and the 2014 and 2018 editions respectively, these editions are accordingly considered together.

MBSA Sub-Contract Agreement 2005 and 2008

1. In terms of Clause 29.1.4, the sub-contractor may claim for a revision for the date for practical completion of works relating to the sub-contract without adjusting the value of the sub-contract in the event of *vis major*, civil commotion riot, strike or lockout. The 2008 edition substitutes the term "*vis major*" for "an event that neither party could prevent".

2. In addition to this, Clause 29.3 also makes provision for revision to the date for practical completion where the sub-contractor suffers a delay to the works due to circumstances beyond his or her reasonable control and which could not have been reasonably anticipated and provided for.

3. Accordingly, a sub-contractor may make a claim for a revision to the date of practical completion arising from the lockdown under either clause 29.1.4 or clause 29.3.

4. The sub-contractor is required to submit his intention to claim within 15 working days of becoming aware of the circumstances leading to such delay (clause 29.4.3). However, clause 29.4.4 states that if the sub-contractor does not submit an intention to claim within the prescribed period but the contractor is aware of the circumstances leading to the delay or has himself made a claim for an extension of time to the principal agent based upon the same circumstances, then the sub-contractor's right will not be prejudiced.

5. The agreements do not prescribe a time in which the claim must be submitted by the sub-contractor, only that it be done once the delay may be quantified. It is recommended that sub-contractors endeavour to formulate and submit their claims as soon after they are lawfully entitled to re-commence works on site.

6. Where a disagreement arises between the contractor and sub-contractor, a notice of disagreement must be filed by one of the parties in terms of clause 40.1. Where this disagreement cannot be resolved within 10 working days, a dispute will be declared and must then be referred to an adjudicator.

7. If any disputes remain after the adjudication process, or if no decision is made by the adjudicator, this should be dealt with in terms of clause 40 and, where possible, referred to arbitration.

8. Parties are still entitled to refer the dispute to mediation under clause 40.8. Provision is also made for disputes with the employer to be pursued by the subcontractor in terms of clause 40.9.

9. The sub-contractor must submit his actual claim once the delay may be quantified, which should only be once he or she is lawfully entitled to re-commence works on site.

10. Any disputes remaining after the adjudication process should be dealt with in terms of clause 40 and, where possible, referred to arbitration, except where such dispute involves the employer or agent.

11. Clause 40.9 provides for dispute resolution where the dispute arises from a decision or an action or non-action by the employer or her agents, whereby the sub-contractor may elect to either use the contractor's name or join the contractor to institute proceedings in terms of the applicable principal building agreement.

MBSA Sub-Contract Agreement 2014 & 2018

1. Clause 23.1.5 in 2014 edition and clause 23.1.4 in the 2018 edition provides for the revision to the date for practical completion without adjustment to the contract value where "*exercise of statutory power by a body of state or public or local authority that directly affects the execution of the works"* causes a delay to the works.

2. Force majeure is specifically recognised in clause 23.1.6, where it has not been in earlier editions, and described as:

   "*an exceptional event or circumstance that:*

   i. could not have been reasonably foreseen,
   ii. is beyond the control of the parties, and
   iii. could not have reasonably been avoided or overcome."

3. In addition to this, clause 23.3 also makes provision for revision to the date for practical completion where the sub-contractor suffers a delay to the works due to circumstances beyond his or her reasonable control and which could not have been reasonably anticipated and provided for.

4. Accordingly, a claim for revision to the date for practical completion may be made under either clause 23.1.4 (under the 2014 edition) or 23.1.5 (under the 2018 edition), clause 23.1.6 or clause 23.3. These claims may not include an adjustment to the contract value.

5. Clause 23.4 requires the sub-contractor to notify the contractor of any intention to submit such a claim within 15 working days of having become aware of the delay.

6. However, clause 23.4.3 states that if the sub-contractor does not submit an intention to claim within the prescribed period but the sub-contractor has not yet started work on site or the contractor has himself has been granted an extension of time by the principal agent based upon the same circumstances then the sub-contractor's entitlement to a delay claim will not be prejudiced.

7. The actual claim must be submitted to the contractor in terms of clause 23.5 within 20 working days from when the contractor is able to quantify such delay. It is recommended that the 20 day period be calculated from the date the sub-contractor recommences works if notice has already been submitted by the sub-contractor.

8. Clause 23.7 requires the contractor to make a determination on the claim within a prescribed period which differs between the two editions. The 2014 edition prescribes 15 working days, while the 2018 prescribes 25 working days. Where a contractor fails to act on this claim, it is deemed to be rejected and the sub-contractor may give notice of a disagreement.

9. Disagreements are to be resolved in terms of clause 30. Where disagreements cannot be resolved within 10 working days, it will be declared a dispute and it is required to then refer it to adjudication, in accordance with the procedures in this clause. This does not apply if the dispute involves the employer or agent.

10. If these procedures are not complied with or the adjudication fails, then the dispute will be resolved through arbitration.

11. Disagreements are to be resolved in terms of clause 30. Parties are required to refer the dispute to adjudication first, in accordance with the procedures in this clause, unless such dispute involves the employer or agent. If these procedures are not complied with or the adjudication fails, then the dispute will be resolved through arbitration.

    Clause 30.9 provides for dispute resolution where the dispute arises from a decision or an action by the employer or agents.

MBSA House Building & Small Contracts Agreement

1. Clause 8.1 of this agreement entitles the contractor to fair and reasonable extension to the date for completion in the event of works being delayed by either inclement weather, variations or any other cause for which the contractor is not responsible.

2. It is recommended that the 10 day period for the contractor giving notice to the employer in terms of clause 8.2 should begin from when work is permitted to re-commence.

3. Clause 8.3 provides that any loss or expense attributable to a delay may only be recovered by the contractor if such delay was the fault of the employer. Therefore, for Covid-19 and lockdown related claims, contractors will only be entitled to extend the time for completion of the works.

4. Clause 13.1 requires that formal disputes be referred directly to arbitration. It is recommended that adjudication or determination by an expert be pursued by the parties prior to arbitration.

FOR MORE INFORMATION PLEASE CONTACT RICHARD HOAL WHO IS AVAILABLE TO ASSIST YOU.

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