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PRACTICE ADVISORY – March 2011

Certification iro Advanced Payments & Deposits for Material off site

APPLICABLE TO JBCC SERIES 2000 PBA EDITION 5

It is well known that the deposit frequently requested by selected and nominated (n/s) subcontractors (and suppliers) should be strenuously avoided. Nevertheless, in "the real world" there is often no option and, unfortunately, the practice is widespread. While continuing to resist it in every way possible, we have to accept reality and act responsibly.

A suggested counter method which can be employed is to offer the subcontractor (or supplier in terms of Prime Cost Items) and interim payment certificate: On delivery of material to site, the QS will promptly be requested to make a valuation and a certificate recommendation to the principal agent, who will check and certify the value for immediate payment to the main Contractor - and then on to the subcontractor/supplier. This unusual and inconvenient procedure should be employed only by consultation with the Employer, the Contractor and the QS (all in writing) but offers the employer security of ownership. However, it may unacceptable to the parties.

If deposits cannot be avoided it is essential for building professionals to thoroughly appraise the Employer of both the extent and the duration of the risk exposure.

If the Employer refuses to accept the risk, then, quite simply, this subcontractor or supplier cannot be appointed, unless as a Direct Subcontractor.

The risk to the Employer can be minimised by obtaining a Bank Guarantee from the subcontractor equal to the deposit required, which is then released once value of site has been achieved equal to or more than the deposit. This is the best possible protection to the employer under the circumstances. Again, "in the real world", this is often unobtainable, as it is costly and burdensome for the subcontractor.



The comments below deal with situation where the Employer has been fully appraised of the risks and has accepted the situation in writing and authorised the principal agent to proceed without the Bank Guarantee.

In terms of Clause 9.2 of the PBA the Contractor is held harmless from default in terms of advanced payments made to n/s subcontractors. This is reasonable, provided the fully informed Employer has accepted the risks. However, it has been noted that Quantity Surveyors and Architects frequently include these advance payments under clause 2.1/2.2 (materials off site) of the JBCC Certificate: This effectively cancels the protection offered to the Contractor in terms of clause 9.2.10 of the PBA.

In respect of deposits and/or advanced payments, the building professionals should ensure that all such payments are included in Clause 13.2 of the JBCC payment certificate, after fully appraising the employer of the risks and obtaining written permission to proceed. This presumes that the risk has been accepted by the (fully informed) employer and should therefore be removed as a liability to the contractor - as stipulated in Clause 9.2.10 of the PBA.

Clause 2.1/2.2 (materials off site) of the JBCC Certificate has specific reference: This must not be seen as an advanced payment of a deposit ("booking fee"), it refers specifically to material to be used in the execution of the subcontract. In this case the same applies with regard to the Employer being fully informed and accepting (in writing) the risk: However, there are considerable difficulties presented in certifying for materials off site and the following should be noted:

- The old standard JBCC "Transfer of materials stored off site" document (which incorporated a waiver of contractor's hypothec) was withdrawn some time back by JBCC. This is significant and should be noted.
- Certifying in terms of Clause 2.1/2.2 (materials off site) of the JBCC certificate removes the protection afforded to the Contractor by clause 9.2.10 of the PBA and thereby renders him/her vulnerable, especially in the case of a selected subcontractor.

In cases where certification for material stored off site is unavoidable, the Principal Agent is obliged to take whatever precautions are available before taking this inadvisable step; notwithstanding the acceptance of risk by the Employer.

The following procedures should be followed and noted:

- The value of the payment should be commensurate with the value of the material. Here it is advisable for the QS to visit the premises where the materials are stored, in order to establish the value of certify accordingly;
- The subcontractor should furnish a competent document transferring ownership of the material to the Employer. Here often a "chicken-and-egg" situation arises, where the advanced funds are required by the subcontractor to purchase material and therefore (s)he is unable to transfer ownership of material (s)he does not yet own. There is therefore a very high level of risk associated with the period between the advanced payment being made and the transfer of ownership. This is a gray area about which all parties should be aware;
- Simultaneously with the purchase of the material, the subcontractor should furnish a certificate of insurance to the satisfaction of the Employer, noting the Employer's interest, corresponding to the period after the advanced payment, until and including delivery to site. (Where the material is stored in premises rented by the subcontractor, waiver of any lien enjoyed by the landlord should accompany the insurance document.)

Once these are in place the Employer may feel sufficiently protected to accept the risk and the Contractor may accept the lack of protection afforded by Clause 9.2.10 of the PBA, which, by omission, excludes "Materials off Site".

In conclusion it must be stressed that the publication of the PBA Edition 6 is imminent and the terms thereof may alter the circumstances described above.

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