

JBCC ADVISORY NOTE: EDITION 6.2

DOCUMENT/S

Principal Building Agreement

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17.0 CONTRACT INSTRUCTIONS - Acceleration

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

The list of twenty items that follows does not include an item where the **principal agent** may instruct the **contractor** to accelerate. What is JBCC's stand on this?

INTERPRETATION

Can the principal agent accelerate the work under the JBCC Agreement?

Acceleration is one of those sticky concepts in the building industry, especially within the ambit of the JBCC Agreements. Contractors, employers, and principal agents habitually find themselves in heated disputes after acceleration deals have gone askew

It's only late in the day when parties realise, the concept of acceleration is an external arrangement and no provision is made for that in the JBCC

Scenario

A particular **contractor** suffered certain delays and provided a notification under clause 23.4 and later submit a claim for the revision of the date for **practical completion** in terms of clause 23.5 of the JBCC. The **principal agent** responded in terms of clause 23.7 and refused the extension of time claim (EOT)

The reason for refusal was that after scrutinising the **programme**, the **principal agent** identified opportunities for acceleration. Some of these opportunities required additional resources but the **principal agent** also pointed out some aspects in the **programme**, where a sequence change could lead to faster completion. The **principal agent** felt the **contractor** could implement these sequence changes and resource additions to accelerate the **works**, to the benefit of the project and to recoup the claimed delay

The **principal agent** also acknowledged that a portion of the proposed acceleration may require additional expense and cost for which the **employer** was willing to reimburse the **contractor**. He then issued a formal **contract instruction** to the **contractor** to accelerate work and keep the **practical completion** date fixed

So, what's the problem?

1. Firstly, it's not always possible nor practical to speed up work. As an example, extra resources are not always available. The **contractor's** own resources may be tied up in other projects or the nature of the work may be such that more resources is not going to speed it up
2. More resources need more control and supervision. With too many resources, everyone's job can become no one's job. Also, to use external resources becomes a quality risk

23.0 REVISION OF THE DATE FOR PRACTICAL COMPLETION - Acceleration (Continued)

3. What happens if the **contractor** fails to accelerate? Or if the changes in sequence turn out to have failed and the project is still delayed? This then creates a serious problem
4. If the **contractor** fails to accelerate, are they still entitled to claim an EOT or have they now lost that right due to their acceptance of the **contract instruction** for acceleration?
5. What if the **contractor** did speed up, but there were other delays beyond their reasonable control which prevented completion on time? Do they still retain the right to claim an EOT on these delays?
6. Should the **contractor** pay back the acceleration money if they failed to accelerate?
7. If they fail to accelerate in terms of a **contract instruction** what happens if the **employer** use others to complete the **works** as is the **employer's** entitlement under clause 17.3?

A **principal agent** does not enjoy unlimited powers to issue **contract instructions**. There is a definite limitation on his powers to issue **contract instructions** and this limitation is imposed by the JBCC agreement and common law. From these restrictions it follows then that the **principal agent** is not entitled to issue certain instructions such as:

- an instruction to suspend work,
- instructions to accelerate work, nor
- an instruction about the order in which a **contractor** has to carry out the **works**

If the **employer** wishes for work to be carried out in a preferred sequence, it can only be enforced contractually at tender stage. The **principal agent** simply cannot issue an instruction to force the **contractor** to carry out work in a particular order. Even if there are opportunities in the **programme** for fast-tracking or changing sequences in a bid to accelerate.

Therefore, it must be understood that a **contractor** cannot lose his right or entitlement to claim for a revision of the date of **practical completion** only because acceleration options may exist and are being considered. In other words, the **principal agent** cannot unilaterally dispose of the **contractor's** right to claim a delay, on the grounds of possible acceleration options. This would require a firm amendment of the standard provisions of the JBCC to enforce as no such limitations or conditions exist under clause 23.0.

SUGGESTED ACTION

Contractors should reject an acceleration instruction formally in writing if no provision in the agreement exists and must inform the **principal agent** that it is not a valid **contract instruction** in terms of the JBCC. Also, they should make clear they have no obligation or intention to proceed with it. If the **principal agent** disagrees, the **parties** can refer the matter to dispute resolution

This does not mean that acceleration is prohibited as an option between **parties** in a JBCC **agreement**. The **parties** can still negotiate and agree on a form of acceleration between them. This can sometimes be a positive negotiation to the benefit of the project. Many contractors also prefer to quote on acceleration rather than claim a revision of the date for **practical completion**, and it can therefore provide a win-win opportunity for the **parties** if handled correctly. However, it is important to appreciate the contractual boundaries and if an acceleration negotiation is contemplated, it is strongly advised to get legal help in drafting an amendment

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