

JBCC ADVISORY NOTE: EDITION 6.2

DOCUMENT/S

Principal Building Agreement Minor Works Agreement (Clause 15.0)

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19.0 PRACTICAL COMPLETION – Deeming provisions

- 19.3 The **principal agent** shall inspect the **works** or of a **section** thereof, within the period stated [CD] and forthwith issue to the **contractor**:
- 19.3.1 A comprehensive and conclusive **list for practical completion** [17.1.12] where the **works** has not reached **practical completion** specifying the **defects** to be rectified and work to be completed to achieve **practical completion**
- 19.3.2 An updated **list for practical completion** for limited to items on the **list for practical completion** that have not been attended to satisfactorily. The **contractor** shall repeat the procedure until all items on the **list for practical completion** have been attended to satisfactorily before the **certificate of practical completion** is issued by the **principal agent**
- Or ...
- 19.3.3 A **certificate of practical completion** with a copy to the **employer** stating the date on which **practical completion** of the **works**, or of a **section** thereof, was achieved
- 19.4 Should the **principal agent** not issue a **list for practical completion** or the updated list within five (5) **working days** after the inspection period, or the **certificate of practical completion** [19.3], the **contractor** shall give **notice** to the **employer** and the **principal agent**. Should the **principal agent** not issue such list within a further five (5) **working days** of receipt of such **notice**, **practical completion shall be deemed to have been achieved** on the date of such **notice** and the **principal agent** shall issue the **certificate of practical completion** forthwith (emphasis added)
- 19.6 Where the **employer** takes possession of the whole or a portion of the **works** by agreement with the **contractor**, **practical completion shall be deemed to have occurred**. The **principal agent** shall after inspection of the **works** [19.3], issue a **certificate of practical completion** to the **contractor** with a copy to the **employer** within five (5) **working days** of the date of possession of the whole or portion of the **works** by the **employer** and the **list for completion** of items to be rectified and work to be completed within a period agreed between the **parties** (emphasis added)

INTERPRETATION

What is the purpose of a deeming provision?

Sub-clause 1.2.5 defines the word 'deemed' as *conclusive that something is fact, regardless of the objective truth*, or elsewhere described *to regard or consider something in a specified/particularly way*. Thus, the reference in a contract provision to 'deem' something, means a contractual fiction that a specified condition is satisfied (or not) or that a fact or event has (or has not) occurred

The interpretation of the deeming provision in clause 19.4 hinges on the inaction of the **principal agent** for not issuing either the **list for practical completion** or the updated list or the **certificate of practical completion** forthwith (as required in clause 19.3).

19.0 PRACTICAL COMPLETION (Continued)

There are several important consequences that follow the certification that the **works** is practically complete and can be used for the intended purpose, such as:

- Possession of the **site** is relinquished to the **employer**
- **Contractor's** all risk insurance reduces until **final completion**
- **Employer's** building insurance commences
- Public Liability Insurance remains in force until **final completion**
- No further **contract instructions** issued except to rectify **defects**
- Commencement of the patent **defects** liability period
- **Contractor's** liability for **penalties** ceases
- Securities either reduce or expire

The provision that **practical completion** shall be deemed to have been achieved five **working days** after the date of the **notice** by the **contractor** has expired was introduced in the May 1998 edition for the first time and has remained basically unchanged since then

The introduction of the deeming provision as provided for in clause 19.6 followed much later and appeared for the first time in the July 2007 edition (clause 24.8), albeit with less detail and, importantly, the removal of the wording "... at any time ..." in later editions

The agreement for the **employer** to take possession of the **works** before **practical completion** should only happen in exceptional circumstances and be delayed as long as possible as the **contractor** remains liable to complete the remaining works. When **practical completion** is deemed to have been achieved, the **principal agent** must take prompt further action and issue the **certificate of practical completion** and the **list for completion**. If the **principal agent** fails to do this, the **contractor** may give **notice** that the required list be issued, failing which it will be deemed that there are no items for his attention to complete/rectify. It is then possible that the **employer** may lose the right to have certain obvious **defects** rectified. Neglect to issue the **list for completion** may result in the **works** being deemed to have been accepted with these **defects**

COMMENT

It is assumed that the deeming provision in clause 19.4 is well understood as it has been around for a long period of time without any change. However, the deeming provision covered in clause 19.6 is more recent, not dealt with in available textbooks, and further comment will, therefore, be provided by means of examples

An egg-packaging facility was constructed near Krugersdorp and the **client** imported sophisticated packaging machinery from overseas and wanted the facility to be operational at **practical completion** (PC). It was therefore necessary for the machinery plus components such as the conveyor belts etc to be installed and tested before the due date of PC. Access and a specific area were then made available for the installation of the equipment by agreement with the **contractor**. This created a dual responsibility with regards works risk, insurances, etc and therefore clause 19.6 would become applicable and PC was now deemed to have taken place. However, it had to be the **client's** intention to take permanent possession of that portion of the works. The **principal agent** and **contractor** must then agree on a reasonable period for the **contractor** to complete all outstanding work. It goes without saying that for the **client** to make full use of the intended purpose of the facility he would first need to obtain all the certificates of compliance from the **contractor** as well as the occupation certificate from the local authority

If the agreement between the **employer** and **contractor** was for only the off-loading and installation of the equipment where after the **client** would move out again after a few days to allow the **contractor** to continue with his obligation to achieve PC, deemed PC would not be applicable

Other examples can be when certain work has not reached PC, such as a boundary wall or landscaping, but the **employer** decides to start using the facility without it being practically complete. Such arrangements should only happen towards the end of the **construction period**. 'At any time' or where the **works** was only just more than 50% complete is not what clause 19.6 is intended for