

JBCC ADVISORY NOTE: EDITION 6.2

DOCUMENT/S

Principal Building Agreement Nominated/Selected Subcontract Agreement Minor Works Agreement (clause 19.0)

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*

25.0 PAYMENT – Unfixed materials

- 25.4 The value of **materials and goods** [25.3.2] (excluding **materials and goods** off **site** or in transit) shall be included in the amount certified only where:
- 25.4.1 Not prematurely delivered or offered for delivery in terms of the **programme**
 - 25.4.2 Stored and suitably protected against loss and damage
 - 25.4.3 Covered by insurances [10.0]
- 25.5 The value of **materials and goods** [25.3.2] stored off **site** and/or in transit shall be included in the amount certified only where covered by a **guarantee for advance payment** or such other **security** acceptable to the **employer**
- 25.6 **Materials and goods** when certified [25.4] and paid for shall become the property of the **employer** and shall not be removed without the written authority of the **principal agent**

INTERPRETATION

What happens if the supplier delivers the materials and goods at a building **site** without informing the owner of the site (“the **employer**”) of the reservation of ownership in the **materials and goods**? Is the **employer** presumed to know that the **contractor** becomes owner thereof only once the full purchase price has been paid to the supplier? How does the JBCC deal with the issue, as well as with claims for payment for **materials and goods** stored off the **site** and/or in transit

First editions of JBCC (PBA and NSSA) referred to the JBCC Transfer of Ownership form as an *alternative option* where the **materials and goods** were stored *off site* and/or *in transit* for which payment was requested by the **contractor** for inclusion in an interim **payment certificate**. It is important to note that this provision does not appear in later editions (from the July 2000 edition to the current May 2018 edition). The reason for this is simply that, in law, ownership of **materials and goods** does not automatically pass to the party in whose favour the form may have been issued. There may be several valid legal reasons why, despite the form and the provisions of clause 25.6, ownership of the **materials and goods** will remain with the original legal owner. This is despite the **employer** having made payment to the **contractor** in terms of an interim **payment certificate** that includes the value of such **materials and goods**. The above also applies between the **contractor** and his **subcontractors**

Because of the problems already discussed in connection with ownership JBCC has introduced in later editions the “advance payment” provision that is in line with other modern international forms of contract. The **contractor** must provide details at tender stage of his requirements for advance payments together with an acceptable “**guarantee for advance payment**” from an approved financial institution. All advance payment transactions are dealt with in the **recovery statement**. No “direct payments” should need to be made between

the **parties**. This ensures that all financial transactions related to the contract are accounted for in the payment provisions of the **agreement**

COMMENT

If the **employer**, in terms of the JBCC agreements, has forwarded payment to the **contractor** for unfixed materials, the **employer** might be prejudiced because real ownership might still vest in a supplier, which the **contractor** has not paid. However, prejudice can easily be avoided by the **employer** if the value of these materials were to be excluded from subsequent **payment certificates**. Because the value of the work done by a **contractor** is calculated by subtracting previous payments made against the total value of all work done and unfixed materials stored on and off **site**, this measure is quite effective (Finsen, 2018, p 205). It is also important to ensure that the amount certified for unfixed materials does not exceed the amount for **security** in place at the time of the payment certification

The **principal agent** must further ensure that only on the provision of an approved **advance payment guarantee** in accordance with the provisions of subclause 11.2.2 and clause 11.3 will payment for **materials and goods** off the **site** and/or in transit be effected

WARNING

*The **principal agent** should not recommend or accept the old Transfer of Ownership form or any similar form of agreement in relation to including **materials and goods** off the **site** and/or in transit for payment as such transfer may not be worth the paper it is written on*