

JBCC ADVISORY NOTE: EDITION 6.2

DOCUMENT/S

Principal Building Agreement
Nominated Selected/Subcontract Agreement
Minor Works Agreement
Small & Simple Works Contract
Direct Contractors' Contract

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*

THE IMPACT OF LOAD SHEDDING ON THE CONSTRUCTION INDUSTRY

23.0 REVISION OF THE DATE FOR PRACTICAL COMPLETION

23.1 The **contractor** is entitled to a revision of the date for **practical completion** by the **principal agent** without an adjustment of the **contract value** for a delay to **practical completion** caused by one or more of the following events:

23.1.1 -4, 6 Not applicable

23.1.5 Exercise of statutory power by a body of state or public or local authority that directly affects the execution of the **works**

INTERPRETATION

Master Builders South Africa (MBSA) and its member organisations have expressed deep concern regarding the implications for the building industry of Eskom's power generation problem. MBSA has not yet been able to fully quantify the potential negative impact on the industry and contractors but has undertaken to gather more information from members about the estimated overall effect on their contracts. They further stated that, "Building contractors may well seek compensation for the time loss and costs incurred due to the electricity supply problem. This issue also impacts significantly on health and safety conditions on building sites"

Time and cost overruns in projects are problems that are almost always experienced in construction projects. However, while there is almost no clear way of avoiding time and cost overruns, there should always be proper planning to decrease the chances of these overruns occurring. As with load shedding, there is an element of probability in the occurrence of time and cost overruns. Load shedding may cause delays in time overruns and these can affect not only current projects, but will also affect future projects, as time constraints and adjusted deadlines affect their execution. Time is interlinked with cost, thus as the time of a project exceeds the estimated deadline due to load shedding, this might influence the cost of a project

The impact of load shedding on the Republic of South Africa has resulted in the State President Mr. Ramaphosa declaring a national state of disaster on the 9th of February 2023 that was gazetted by the Department of Cooperative Governance and Traditional Affairs. However, the national state of disaster has as its focus measures to support businesses in the food production, storage and supply chain, including the rollout of generators, solar panels and uninterrupted power supply. The regulations published do not specifically include the construction industry, but some benefits may

result from it as the main aim of the regulations is to minimise the impact of load shedding on the economy

Load shedding has created numerous challenges across all South Africans' day-to-day business activities and personal lives, which include the challenge of managing the unavoidable impact correctly in terms of the applicable provisions of each contract regulating the contractual relationships between employer, contractor, and subcontractors. The load shedding scenario differs from all other delay and cost claims. The typical time bars in all standard form contracts to give notice or lose the opportunity to claim should, however, still apply for this event – the prompt provision of relevant information by all involved to present and resolve any load shedding claims remains essential. This Advisory Note attempts to provide the procedure parties will have to follow as outlined in the JBCC May 2018 edition agreements

SUGGESTED ACTION

Unlike the state of disaster of COVID-19, construction sites and related activities across South Africa, in compliance with the imposition of the nationwide lockdown and regulations promulgated to enforce and manage the nationwide lockdown in terms of inter alia the Act, had to temporarily close and cease to operate. The state of disaster of load shedding only provides for measures on how to manage the problem in general for all persons and businesses. The difficulty then arises how to allocate time and costs incurred as a result of load shedding delays. Generally, where the employer or his agents are at fault, the contractor will be compensated as per sub-clause 23.2, i.e., for time and money. In the load shedding scenario neither party is to blame and the contractor including his subcontractors will not be compensated, not even for time only, as per sub-clause 23.1. Contractor's ought to assume therefore that no time or money can be secured for the consequences of load shedding and accordingly they should price their tenders with this in mind. See below a typical clause found in the Preliminaries and General section of one of the leading quantity surveyor practices:

Power failures and/or load shedding

The contractor shall not be entitled to a revision of the date for practical completion as a result of electric power failures and/or load shedding [23.1 - 3]

The introduction of terms like this transfer what is traditionally a shared employer-contractor risk to a contractor-only risk. In these situations, it is suggested that contractors make the necessary allowances in their tender pricing to cater for the costs of temporary or back-up power

The question can then be raised whether the stakeholders via their constituent bodies can come up with the wording of a specific clause to be inserted in the contract data or, alternatively, of an item in the Preliminaries and General section of bills of quantities. Such a clause/item in construction contracts can then assist contractors/subcontractors in their tendering on future construction projects where load shedding will be encountered to minimise and manage the impact of load shedding on the time and cost elements of the project

Another option would be for contractors to qualify their tenders with a proposed budgetary allowance to fund the costs for temporary power, so as not to make their tenders uncompetitive. This could be a solution for the constituent bodies to consider.