

# THE CURIOUS CASE OF THE NOMINATED/SELECTED SUBCONTRACTOR UNDER JBCC PART II – A QUESTION OF LIABILITY

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This is the second part of our foray into our series on JBCC nominated/selected subcontract agreements. This link [here](#) will lead you to the first part of the series.

The following defined terms were used in the last part and will have the same meaning below - **N/SA** means “**nominated/selected subcontractor**”; **PA** means “**principal agent**”; and **PBA** means “**principal building agreement**”.

Where a subcontractor’s defects liability period extends beyond that of the contractor, **the contractor’s obligations and liability in respect of subcontractor defects ends on the date of issue of the certificate of final completion**. The remaining portion of the subcontractor’s defects liability period cedes to the employer on that date.

The N/SA provides that, where a subcontractor is appointed to design, supply and install an element of the subcontracted works and the PA remains responsible for the coordination of design elements, **the subcontractor indemnifies the contractor for the consequences of its design and cedes any guarantee, warranty or indemnity to the employer on the date of issue of the certificate of final completion**.

The subcontractor takes **full responsibility for the works under the subcontract until interim completion (“IC”)**. IC is the state of completion where the subcontract works, or a section thereof, are substantially complete as certified by the contractor. IC occurs before practical completion (“PC”), which is the state of completion referred to under the PBA when risk transfers to the employer. The subcontractor also has an obligation to make good physical loss and repair damage to the subcontract works caused by its acts or omissions arising before PC.

Whilst the employer is entitled to penalties for the contractor’s failure to achieve PC by the date for PC in the PBA, **the contractor is not entitled to any measure of liquidated damages under the N/SA for the subcontractor’s failure to achieve IC by the date for IC**. Instead, the subcontractor is liable to the contractor for damages for this default. The contractor must be able to prove a claim against the subcontractor before being entitled to damages for late completion under the N/SA.

BBL is your one-stop shop for general construction advice, with our team of experienced experts ready to provide assistance across the breadth of the value chain. Our team is the trusted advisor that will manage your risk from the negotiation stage, through to execution of the works, and is at the ready to assist with conventional and alternative dispute resolution should matters devolve into conflict.

For more information on our full house construction offering please contact our Head of Dispute Resolution, [Msiya Kindiano \(partner\)](mailto:msiya@bookbinderlaw.co.bw) on [msiya@bookbinderlaw.co.bw](mailto:msiya@bookbinderlaw.co.bw) or [Kelebileone “Flex” Malefo \(partner\)](mailto:kelebileone@bookbinderlaw.co.bw) on [kelebileone@bookbinderlaw.co.bw](mailto:kelebileone@bookbinderlaw.co.bw).