

# THE CURIOUS CASE OF THE NOMINATED/SELECTED SUBCONTRACTOR UNDER JBCC

## PART I – GENERAL CONTRACTUAL & RISK PROFILE

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The Joint Building Contracts Committee (“JBCC”) provides a suite of standard project contracts and forms. The JBCC Principal Building Agreement (“PBA”) is popular for its extensive nominated/selected subcontractor (“N/SA”) regime.

The PBA differentiates between “nominated” and “selected” subcontractors. It must be borne in mind that a subcontractor under the PBA is assumed to fall under one of these categories and to have been appointed under the terms of the JBCC N/SA, especially when attempting to appoint a subcontractor under a bespoke form of contract where the main agreement is the PBA.

Nominated subcontractors (“NAs”) are those nominated by the principal agent (“PA”) for appointment by the contractor, following a tender process in which the contractor is given the opportunity to consult with the PA whilst tenders are being scrutinized.

The contractor **may refuse to appoint** a NA, where the contractor makes a “reasonable objection”, or where the subcontractor refuses or fails to enter into a subcontract agreement or **to provide the requisite security to the contractor.**

The employer bears the risk in relation to termination of a nominated subcontractor on the basis of default.

Selected Subcontractors (“SS’s”) are those selected by the **PA in conjunction with the contractor**, with the latter being involved in scrutinising subcontractor tenders, but also in choosing the successful tenderer to be appointed in consultation with the PA.

The contractor is **entitled to terminate** a selected subcontractor’s appointment for the subcontractor’s default of a material term, **but the exercise of this**

**right is subject to the PA’s instructions.**

**The contractor bears the risk** in relation to the termination of a SS (unless the SS’s default is attributable to the employer or its agents).

The PBA is clear that **there are no contractual rights or obligations between the employer and any subcontractor appointed by the contractor.** However, *any design responsibility undertaken by a subcontractor is not borne by the contractor, other than in relation to the subcontractors’ temporary works. Instead, the PBA provides for the automatic cession to the employer of all “contractual or other rights”,* which the contractor has against the subcontractor in relation to design responsibility, on the earlier of the date of final completion (“FC”) or the date of termination of the 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 FC. The remaining portion of the subcontractor’s defects liability period cedes to the employer on that date.

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 always 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).