

The JBCC Building Agreements ...

OBJECTIVE

To introduce building contracts in general and the JBCC Building Agreement suite in particular to a non technical audience.

BACKGROUND

In an ideal world there would be no need for contracts. Parties may make any agreement provided it is enforceable by law. And in common law almost any agreement may be enforceable – with a whole lot of additional obligations that may not suit the parties. Hence ‘standard’ agreements have been developed for use in different industries, but with limits some obligations imposed in common law

- ✓ Usually negotiated between different bodies that make up the industry
- ✓ Thus risks are more equitably spread
- ✓ Avoids the cost and time of individually negotiated contracts (act as checklist)
- ✓ Tender comparisons easier - risk allocation is the same allowing comparison of prices

Building contracts, as we know them, were introduced in England in the late 1880’s and published by the Royal Institute of British Architects. South Africa followed this example with the South African Institute of Architects publishing a similar document from about 1900.

In the 1980’s representatives from the South African building industry created an informal body called the **Joint Building Contracts Committee** to involve property owners, contractors and all consultants in the writing of a series of building contracts applicable to the South African market. In 1997 this body was formally constituted as a ‘not for profit company’ with a full time chief executive tasked by the Committee to compile and maintain contract documents and associated worksheets as well as to present training courses in the appropriate application of the JBCC documentation. All documents are revised regularly to comply with statutory changes and industry usage.

The JBCC suite of documents have been successfully used in South Africa and beyond South Africa’s borders, mainly in English speaking countries – but not exclusively so.

The difference between ‘building’ and ‘construction’ agreements must be highlighted – simplistically ‘building’ deals with ‘buildings’ while ‘construction’ includes roads, bridges, dams etc. Whilst some materials and techniques are common to both, the skills and methods differ sufficiently to warrant separate legal agreements.

The South African version of a construction contract is the “General Conditions of Contract” that is not dissimilar but less comprehensive than the “NEC” and the “FIDIC” contracts published in London and Geneva respectively

PURPOSE

The purpose of a building contract has been concisely described as “an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work done. Decisions have to be made from time to time about such essential matters as the making of variation orders, the expenditure of provisional and prime cost sums and extension of time for the carrying out of the work under the contract” by Lord Diplock 1974 *Modern Engineering v Gilbert-Ash*.

All JBCC Agreements seek to ensure an equitable distribution of contractual risk in the building industry

FORMAT

The various building and construction agreements have similar headings in much the same order:

1. Definition and Interpretation
2. The parties
3. Design criteria
4. Risk allocation
5. Works description
6. Specialist contractors
7. Completion and adjustments
8. Payments and adjustments
9. Suspension
10. Dispute resolution
11. Agreement ... where the parties sign the agreement

Most agreements now use a 'contract data' form to record the variables applicable to an agreement

APPLICATION

The JBCC suite of contracts comprises the Principal Building Agreement and the associated Nominated/Selected Subcontract Agreement as well as the Minor Works Agreement. The agreements and worksheets are written in simple English (a requirement of the new South African Consumer Protection Act) in a similar format to that used internationally, with common clause numbering to facilitate cross referencing. Worksheets are used to record tender information, salient dates such as the start and completion of a project and to administer the payment process.

PARTIES

All JBCC building contracts are designed for use by the employer and the contractor with a third party, the principal agent, appointed by the employer, to administer the contract. The principal agent must be technically competent (qualified) person as defined in the South African Construction Regulations that form part of the Occupation, Health and Safety Act. Depending on the nature of the project, the principal agent may be an engineer, a quantity surveyor, an architect or a project manager. Where the employer or the contractor have acted as principal agent such contracts have generally not been successful with the parties disputing almost every action – with consequent delays and cost overruns.

PRINCIPAL BUILDING AGREEMENT

The JBCC Principal Building Agreement is used for all types of building contracts. This agreement is used in conjunction with the Nominated/Selected Subcontract agreement.

NOMINATED / SELECTED SUBCONTRACT AGREEMENT

A 'nominated subcontractor' performs specialised work – and is chosen by the employer and /or the principal agent without input from the main contractor. Such a specialist contractor is appointed by the main contractor on instruction from the principal agent as a nominated subcontractor. Conversely, a 'selected subcontractor' to perform specialised work – is chosen from a list compiled by the parties, ie including the contractor, is appointed by the main contractor on instruction from the principal agent as a 'selected subcontractor'. In both cases the subcontractor works under the main contractor in accordance with the project programme. Where a 'nominated subcontractor' defaults, the employer is at risk for the quality of the work, cost and time overruns. Where a 'selected subcontractor' defaults, the contractor is at risk for the quality of the work, cost and time overruns.

A specialist contractor may also be appointed as a 'direct' contractor by the employer with the same risks as the 'nominated subcontractor'. A direct contractor falls under the jurisdiction of the contractor but is paid by the employer. JBCC does not publish a 'direct' contractor agreement, but the JBCC Minor Works Agreement may be used for this purpose.

Sadly specialist contractors have not been treated equitably by some main contractors over the years mostly with part or late payments, contra charges for defective work, etc. Specialist contractors are bound by the same conditions as the main contractor – to complete the project on time, within budget and to specified quality standards. The JBCC Nominated / Selected Subcontractor Agreement has been written to mimic the Principal Building Agreement, using the same clause numbering system, but now the main contractor 'employs' the specialist contractor.

The main contractor is appointed by the employer for a particular project – the contractor may appoint any number of specialist contractors to suit the project.

MINOR WORKS AGREEMENT

The Minor Works Agreement was designed for small, simple projects under the control of a single contractor, say less than MR 1.0 to be completed in less than a year. Such work may be executed by emerging contractors. Thus principal agent has a wider responsibility to coordinate and administer such a contract and to assist with programming, quality control, valuations etc. To keep it simple, the Minor Works Agreement does not make provision for the appointment of nominated /selected subcontractors.

WORKSHEETS

The worksheets include 'certificates' to record the start and completion of a section of the work and the works as a whole, and 'certificates' to record interim and final payments – substantiated with calculation sheets as well as a notification of amounts due to each of the parties. JBCC also publishes various 'guarantee' forms – the contractor provides a financial guarantee to the employer that may be called upon should the contractor not perform the agreed duties. Similarly, the employer is expected to provide a payment guarantee to ensure uninterrupted cashflow to the contractor without holding back money. In the current economic climate contractors can generally not afford to 'loose' payment of an interim certificate at 10% or any other percentage of completed work as such money is required to finance the next phase of the works – and profit margins do not allow contractors to act as bankers for the employer.

CONTRACT DATA

The 'contract data' is issued as part of the tender enquiry listing the employer's details, the project description, critical completion dates, other criteria such as partial occupation or preservation of natural features, insurance and payment requirements. The contractor completes this form with unique information regarding site establishment and construction plant, and the price to undertake the project.

BENEFITS

All reputable building and construction agreements have built a track record over the years of successful applications - if used correctly. The modus operandi is widely understood by contractors and consultants as well as professional clients. Articles like this seek to inform employers like the once off home or small business owner of their benefits.

Where 'difficulties' have been encountered these largely relate to the parties not following procedures, partly out of ignorance, and sometimes deliberately so to intimidate the other party. The JBCC Technical Committee meets regularly to discuss such events and to find solutions for incorporation in future editions.