

# STANDARD FORM CONSTRUCTION CONTRACTS; WHY THE NEED FOR REGULAR CHANGES?

Marthinus J Maritz<sup>1</sup> and Uwe Putlitz<sup>2</sup>

<sup>1</sup>*Department of Construction Economics, Building 5, South Campus, University of Pretoria, Pretoria, RSA*

<sup>2</sup>*JBCC, 26 Cedar Avenue, Richmond, Johannesburg, RSA*

Publications of the Joint Building Contracts Committee® (JBCC®) are revised periodically to comply with changing statutory and industry requirements in the interests of standardisation and good practice with an equitable distribution of contractual risk. The latest JBCC® edition was published in March 2014. This paper will highlight the changes that were made in this edition with reasons why such changes were deemed necessary, and, in addition, will look at changes that were recently made to other selected local and international standard forms of construction contracts. The related JBCC® documents have consequently been revised. This include the various JBCC® payment certificate forms, the JBCC® security forms and the JBCC® completion certificate forms. The Association of South African Quantity Surveyors has revised the 'Preliminaries' and has prepared a Model Bill of Quantities Preliminaries trade incorporating the new JBCC® edition 6.1. The Adjudication Rules have also been updated in consultation with the Association of Arbitrators of Southern Africa and the Construction Adjudication Association of South Africa. The content of standard forms of construction contracts and the respective industry model documentation used in South Africa and elsewhere, portray the consensus view of constituent bodies representing building owners and developers, professional consultants, and general and specialist contractors which are aimed at bringing about uniformity in construction procurement documentation. The discussion in this paper is about the question why regular changes are necessary to these standard forms of construction contracts. The discussion will be limited to building contracts with the design provided by the employer and to recent changes incorporated in the JBCC®, the GCC 2014 (RSA), the JCT (UK) and the AS 4000 (Australia). More particular emphasis will be placed on the changes between the JBCC® edition 6.1 (2014) and its predecessor, the JBCC edition 5.0 Reprint 1 (2007).

Keywords: construction contracts, contractual risk, procurement, revisions, standardisation.

## INTRODUCTION

Construction Contract Law is an increasingly well-developed division of law described by Bruner cited in Baily and Bell (2011) as a 'primordial soup in the melting pot of the law...consisting of centuries-old legal theories fortified by statutory law and seasoned by contextual legal innovations reflecting the broad factual realities of the modern construction process'. Construction Contract Law is, by its nature, diverse and complex (and occasionally controversial) - a reflection of the character of the building and construction industry itself.

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<sup>1</sup> tinus.maritz@up.ac.za

## Standard forms of contract

Standard forms of contract are popular amongst both project owners and industry because their use helps reduce procurement and contract administration costs and they are generally well understood by users, thereby resulting in fewer disputes on matters of interpretation. The purpose of standard forms of contract is therefore to facilitate the contractual arrangements between parties in a project. Standard forms of contract are ready-made terms and conditions when making a contract. These standards are commonplace in construction transactions and generally accepted by the different contracting parties. It would, however, be practically impossible to devise a standard form of contract that would account of all eventualities that might occur in a construction project as there are several factors that affect what type of contract is suitable for a certain project, e.g. the amount of involvement from the client, technical complexity, the location and size of the project. In the initial stage of the design phase, the client has to adopt a suitable contractual arrangement for the project and a corresponding standard form of contract. The advantage of using standard forms of contract may, however, be impaired when amendments and supplementary or 'special' conditions are included that significantly alter the standard general conditions, as there is a complex interaction between many of the terms (Ndekurigi and Rycroft, 2009). The Latham Report recommended the use of standard contracts without amendments (Latham, 1994) and amendments to standard forms were also criticized by Lloyd QC in *Royal Brompton Hospital National Health Service Trust v. Hammond and Others*<sup>2</sup>: *'A standard form is supposed to be just that. It loses its value if those using it or, at tender stage those intending to use it, have to look outside it for deviations from the standard'*

### *Advantages of standard form construction contracts:*

- The standard form is usually negotiated between the different bodies that make up the industry in the interests of standardisation and good practice. As a result the contractual risks are spread equitably;
- Using a standard form avoids the cost and time of individually negotiated contracts;
- Changes made to the provisions of the standard form should be clearly identified in the procurement documents, failing which they shall be null and void;
- Contracting parties should be familiar with the terms and conditions of the standard form as seminars and workshops are organised on a regular basis that are presented by experts with extensive knowledge of the standard documentation and the construction industry; and
- Tender comparisons are made easier since the risk allocation is the same for each tenderer. Parties are assumed to understand that risk allocation and their pricing can be accurately compared.

### *Disadvantages of standard form construction contracts:*

- The forms may be cumbersome, complex and difficult to understand for someone lacking regular exposure to its use; and
- Because the resulting contract is often a compromise, they are resistant to change. Much-needed changes take a long time to bring into effect.

## What is a construction contract?

Construction projects are unique in nature and every situation and every problem in construction is different and contains unique facts that may require a different approach and solution from that of another apparently similar situation or problem.

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<sup>2</sup> *Royal Brompton Hospital National Health Service Trust v. Hammond and Others* [2001] EWCA Civ, [2001] BLR 297, [2001] Lloyd's Rep PN 526

In *Modern Engineering (Bristol) Ltd v. Gilbert-Ash Northern*<sup>3</sup>, Lord Diplock described a building contract 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'*

The need for standard forms of contract arises from the foregoing to provide written contracts that can be economically executed, usually without the need for extensive legal services, and from a desire to standardise certain relationships and practices according to the general agreement about contract fundamentals reached by the representatives of the parties involved.

*'What is written endures; things spoken speed away'* (Peters and Pomeroy, 1938)

The construction industry standard forms of contract differ in material respects from other standard form contracts in use in the commercial world, as the former seek to define the risk profiles of the parties to the contract, whilst the latter – such as supply agreements and credit agreements – are often extremely one-sided.

Standard form construction contracts seek to regulate the relationships between the contracting parties, particularly in respect of risk, management and responsibility for design and execution. Most conditions of construction contracts incorporate a set of conditions whose primary purpose is to lay down procedures of general application to a variety of types of work. There is no rule to what should be included in conditions of contract, but according to Uff (2009: 277) most sets of conditions follow a standard pattern. Typically, conditions deal with:

- General obligations to perform the works;
- Provisions for instructions, including variations;
- Valuation and payment;
- Liabilities and insurances;
- Provisions for quality and inspections;
- Completion, delay and extension of time
- Role and powers of the certifier or project manager
- Disputes; and
- Reference to specific legal principles

Standardisation attempts to ensure that certain fundamental and recognised practices are always followed in construction contracts, and that better agreement is achieved by using a form of contract with which the parties are already familiar.

The Association of South African Quantity Surveyors (ASAQS) and the Construction Industry Development Board (CIDB) both firmly support standardisation, as the large number of documents published by these bodies specifically dealing with standardisation and uniformity in the construction industry clearly indicate. One such example is the extract hereunder that is from the (then) executive director of the ASAQS (Wortmann, 2010) regarding standardised Procurement Documentation Guidelines. These Guidelines are based on the CIDB Standard for Uniformity in Construction Procurement, which engenders a culture of consistency and predictability within the procurement process, and which aims at bringing about standardisation and uniformity in construction procurement documentation, practices and procedures.

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<sup>3</sup> *Modern Engineering (Bristol) Ltd v. Gilbert-Ash Northern* [1974] AC 689 at 717

*'The Association is committed to and supportive of the CIDB regulations which are aimed at bringing about standardisation and uniformity in construction procurement documentation and appeals to members and practises to be supportive of the regulations and to refrain from making unnecessary amendments to the documents'*

### **Brief overview of the development of building contracts in South Africa**

Conditions of building contracts in South Africa are founded largely on British conditions and applicable English case law that has been found to be highly analogous to and compatible with the South African law system. The most important of the exceptions manifest themselves where construction contract law, as applicable to conditions of building contract, is interpreted in conjunction with other measures, such as insolvency laws, legislation relative to the standards and validity of warranties, the passing of ownership of materials, etc. Thus, while British judgements may not be formally authoritative under South African law in the accepted legal sense of the term, they have a strong persuasive influence and are generally followed by the South African courts (Finsen, 2005).

The first recorded standard form of contract, comprising of articles of agreement and conditions of contract, to which the NFBTE (National Federation of Building Trade Employers, the precursor of BIFSA (Building Industries Federation South Africa) and subsequently MBSA (Master Builders South Africa) had access was introduced in England in 1909 by agreement between RIBA (Royal Institute of British Architects), the Builder's Society and the Central Association of the Master Builders of London (Lipshitz and Malherbe, 1979).

After using the 1909 form unaltered for some time in Britain consideration was given to amend the document by a committee that was especially set up for this task, and a document, with appropriate annotations, was published in 1928 under the heading "*Agreement and Schedule of Conditions of Building Contract*". The document had been published with the idea to replace the 1909 RIBA form. However it later transpired that although the document had met with agreement at the level of a representative negotiating and drafting committee, it had failed to gain approval of the general membership of RIBA and, as such, it was never used in practice. The result was that in Britain the revision of the 1909 RIBA form was tackled de novo, while on the South African scene discussions were deferred until such time as the approved revised RIBA edition became available. The first published annotation appeared in Britain in 1931 that substantially revised and brought up to date the 1909 RIBA form. Subsequent annotations appeared regularly thereafter (Lipshitz and Malherbe, 1979).

Although standard conditions of contract were introduced in South Africa to a restricted extent in some regions shortly after the establishment of the NFBTE in 1904, it was only during the late 1920s that serious attempts were initiated to prepare and enforce standard conditions of contract on a national basis in the private sector (Lipshitz and Malherbe, 1979).

The 1931 RIBA form (supra), was found acceptable to the Institute of South African Architects, the Chapter of South African Quantity Surveyors and the NFBTE, and according to NFBTE's annual report published in 1932 it was adopted by all the interests concerned, subject to the introduction of such amendments as were necessary to satisfy the requirements of differing local conditions. Thus this form became the basis of the first standard form of contract in South Africa – the 1932 edition. It carried the endorsement "*Approved and Recommended by the Institute of South African Architects, the Chapter of South African Quantity Surveyors and the National Federation of Building Trade Employers in South Africa*" and was entitled

‘Agreement and Schedule of Conditions of Building Contract’. This cumbersome name required a nickname. As the ‘with quantities’ version was printed on white paper and the ‘without quantities’ on blue, the two versions became known as the ‘white form’ and the ‘blue form’ respectively.

This 1932 agreement was revised and re-issued on no fewer than fifteen occasions, with major redrafts undertaken in 1957, 1960 and 1980 (Finsen, 1989) as the South African building industry developed and became more sophisticated. A permanent review committee was appointed for this purpose, known as the Joint Study Committee, constituted of representatives of the Institute of Architects, the Chapter of Quantity Surveyors and (then) BIFSA (*supra*). The last amendment of this agreement was published in 1981 and re-issued in 1988 with minor amendments; shortly afterwards the Joint Study Committee, rent asunder by internal dissent, was dissolved. In 1984 a new committee was established, the Joint Building Contracts Committee or JBCC for short. The JBCC released its first standard building contract documentation into the marketplace in 1991 that included some material differences from its predecessor, e.g. the introduction of the Construction Guarantee in lieu of the Retention Fund. This contract quickly gained acceptance in most quarters and is today the foremost contract document suite in use in the Republic of South Africa for building related work (Maritz, 2009). The primary contract documentation is comprehensive and fully integrated with over 25 support Forms and Guides.

It was recognised from the outset that an enormous advantage could be gained by employers, contractors and professionals should the document meet the needs of both the private and public sectors. A joint committee was set up with the National Department of Public Works (NDPW) and over a number of months the apparent differences of requirements were reduced to manageable proportions that could be accommodated without impairing readability.

This led to an intensive re-examination and re-drafting of the documents by the Review and Main committees and in 1998 the new documents, designated JBCC Series 2000, were published (the Second Edition). These replaced all the documents published in 1991. In order to further broaden the scope of the JBCC Series 2000, a minor works document was published in 1999.

JBCC published the Third Edition in January 2003 primarily to update the Series 2000 documents. There were, however, some significant changes; e.g. in cases where the employer in the agreement is an organ of the State specific requirements that differ from those required by the private sector were set out in a single clause for ease of reference. This clause provided for the substitution by these clauses in the document when so required.

JBCC published the Fourth Edition in March 2004. The primary purpose of this revised edition (that followed so soon after the publication of the Third Edition) was to satisfy the requirements of the office of the State Attorney, which were regarded to be inadequate provided for in the Third Edition. The content of the State clause was substantially expanded to further accommodate aspects where the State differs in its approach from the private sector. To distinguish this edition from its predecessors it featured on the front cover the wording ‘including State provisions’ to make it clear that it had been accepted by the NDPW.

Another significant change in the Fourth Edition was the introduction of ‘adjudication’ as an alternative dispute resolution (ADR) process to bring it in line with other modern agreements such as the NEC. This had the result that the dispute clause had to be completely redrafted.

A further edition (edition 4.1) was published in March 2005, which included further expansion of the State Provisions and the Dispute Provisions were once again redrafted to allow for adjudication to be the default dispute resolution process in private sector contracts.

JBCC published the Fifth Edition in August 2007 featuring some major modifications to previous editions; with the removal of the substitution provisions applicable to State in the various documents certainly representing the most significant of these modifications.

## **ABOUT JBCC®**

JBCC® was established in 1984 (supra) and is representative of building owners and developers, professional consultants, and general and specialist contractors who contribute their knowledge and experiences to the compilation of the suite of documents. All JBCC® documents portray the consensus view of the constituent members and are published in the interests of standardisation and good practice with an equitable distribution of contractual risk.

JBCC® is a committee comprising of nominees from its current eight constituent members, namely:

- Association of Construction Project Managers (ACPM)
- Association of South African Quantity Surveyors (ASAQS)
- Consulting Engineers South Africa (CESA)
- Master Builders South Africa (MBSA)
- South African Black Technical and Allied Careers Organisation (SABTACO)
- South African Institute of Architects (SAIA)
- South African Property Owners Association (SAPOA)
- Specialist Engineering Contractors Committee (SECC)

The Association of Arbitrators and the Construction Adjudication Association of South Africa are represented by nominees holding dual portfolios.

The major changes between the new sixth and fifth edition will be discussed in more detail hereinafter and reasons will be provided why such changes were deemed necessary.

## **ABOUT GCC (RSA)**

The South African Institution of Civil Engineering (SAICE) has a strong tradition of developing, publishing and maintaining conditions of contract and has, over several decades, published six editions of the General Conditions of Contract for Civil Engineering Works, the last one in 1990. The 1990 edition was replaced in 2004 by the publication of the General Conditions of Contract for Construction Works, First Edition - abbreviated to GCC 2004. To satisfy the CIDB's requirements for uniformity in procurement documentation that followed after Focus Group 6, an advisory body set up by the NDPW after the 1994 elections, identified in their Report to the NDPW in 1996 that only a limited number of standard contracts be considered for use by the State for construction procurement.

### **GCC 2014 – What is new?**

GCC 2004 was replaced in 2010 by the Second Edition (abbreviated to GCC 2010) to clarify inter-responsibilities and to make provision for a wider spectrum of construction works. This edition could deal with civil, mechanical, electrical and building projects, or a combination of various types of projects. However, after four

years of application, it became clear that certain amendments were necessary and the GCC Second Edition, Revised 2014 was published (SAICE, 2014). Some of the most important amendments in this edition are:

- It permits the Contractor to suspend the Works if the Employer fails to make payment on a payment certificate;
- It adds a Variable Construction Guarantee to the list of securities;
- It allows for the selection of inflation indices that are appropriate to the type of Works; and
- It replaced Engineer with Employer's Agent throughout the document because of the wider application of the contract.

**The following organisations endorse the GCC Revised 2014:**

- Consulting Engineers South Africa
- Electrical Contractor's Association of South Africa
- Institute of Municipal Engineers of Southern Africa
- South African Black Technical and Allied Careers Organisation
- South African Federation of Civil Engineering Contractors
- South African Institute of Electrical Engineers
- South African Institute of Mechanical Engineers

**ABOUT JCT (UK)**

The Joint Contracts Tribunal (JCT) was established in 1931 by the Royal Institute of British Architects (RIBA) and other leading bodies and has for over 80 years produced standard forms of contracts, guidance notes and other standard documentation for use in the construction industry (Hibberd, 2011).

JCT Contracts (published by Sweet and Maxwell Thomson Reuters) represents all parts of the UK construction industry and is the leading provider of standard forms of building contract (<https://www.jctcontracts.com> accessed 26/03/2014). The following are members of JCT:

- British Property Federation Limited
- Contractors Legal Grp Limited
- Local Government Association
- National Specialist Contractors Council Limited
- Royal Institute of British Architects
- The Royal Institution of Chartered Surveyors
- Scottish Building Contract Committee Limited.

The JCT Council is comprised of five Colleges representing employers/clients, (including local authorities), consultants, contractors, specialists and sub-contractors, and Scottish building industry interests.

**JCT 2011 – What is new?**

The principal purpose of the 2011 edition is to reflect the coming into force of amendments to the Housing Grants, Construction and Regeneration Act 1996 ('the Construction Act') made by the Local Democracy, Economic Development and Construction Act 2009, insofar as they relate to payment terms and payment-related notices (JCT, 2014).

Other changes include:

- Insolvency definition in the Termination section has been amended to include the definition in section 113 of Construction Act;

- The revised Terrorism Cover provisions included in JCT's December 2009 Update has been incorporated;
- The provision for appointment of the principal contractor under CDM Regulations has been extended to cover that function under the Site Waste Management Plans Regulations 2008 also;
- Statutory reference has been updated for the Bribery Act 2010;
- Regarding PI insurance, entries relating to asbestos and fungal mould have been removed as cover for these items is limited and not readily available to contractors; and
- Revised retention provisions have been included in the sub-contracts.

### **ABOUT ABIC AND AS 4000 (AUSTRALIA)**

The Australian Building Industry Contracts (ABIC) are jointly published by Master Builders Australia Ltd and the Australian Institute of Architects. They are intended for use in building projects where an architect administers the contract. The Major Works Contract (ABIC MW-1 2003) – a lump sum contract for use on projects with a value of more than \$2 million - is the most comprehensive contract in the ABIC suite of building contracts (<http://www.masterbuilders.com.au/abic-contracts> accessed on 03/03/2014).

The suite of Australian Standards for contract conditions (AS 4000) provides a guide to the general conditions of contracts for a range of contractual agreements, including design and construct, minor works, major works and supply of equipment. The AS 4000 – general conditions of contract for use on commercial projects – is the most common contract in the Australian Standards suite of building contracts (<http://www.contracts.com.au/~contracts/standard.htm> accessed on 03/03/2014).

Sharkey (2014) confirmed that the original AS 2124 – 1992 was superseded and re-designated as AS 4000 – 1997 with minor amendments in 1999, 2000 and 2005. Sharkey added that Standards Australia is undertaking an extensive review of the AS 4000 at the moment, which will be the first major revision of the form since it was launched in 1997.

In the Policy Document submitted to the Attorney-General on Australian Contract Law by the Civil Contractors Federation (CCF) in July 2012 the CCF made some recommendations in relation to the Standards Australia AS 4000-1997 contract. It is evident from the document that construction law in Australia, as in most other countries, is in a continuous process of development.

In relation to the Australian Standard AS 4000- 97 General Conditions of Contract the CCF recommends that:

- a) Standards Australia should be asked to examine whether there should be a monetary limit below which Australian Standard AS 4000- 97 should not be amended. This should be related to Risk.

That the Australian Standard AS 4000-1997 General Conditions of Contract be specifically reviewed as to ensure that:

- a) Payment provisions reflect the Security of Payment regime by excluding damages and other claims from the calculation of progress payments.
- b) Payment schedule should be amended so that certification is required within 7 days of a claim being submitted and payment by the Principal within 7 days of certification.



- c) The provisions dealing with Superintendents are strengthened to further support the role of the Superintendent in being fair and impartial by imposing a positive duty to do so.
- d) There should be a strengthening of the clause which provides for retention of payments and/or bank guarantees to ensure the prompt return of retention payments and/or guarantees occur in practice.
- e) What constitutes practical completion under the definition section and in particular paragraph (c) of the contract needs to be rewritten to reflect the fact that not all of the documents and information is under the control of the contractor.

## **DIFFERENCES BETWEEN THE 2007 JBCC® PRINCIPAL BUILDING AGREEMENT (PBA) 5.0 EDITION AND THE NEW 2014 6.1 EDITION**

JBCC® published Edition 6.1 PBA in March 2014 (JBCC, 2014). The changes from the 2007 edition are extensive and involve major redrafting to, inter alia, shorten and tidy up the suite. The main modifications include:

- The removal, adding or rewording of some of the definitions
- The rewording and repositioning of certain clauses
- The removal or incorporation of a number of clauses (30 vs. 42)
- The reduction of default periods in a number of instances
- The omission of ‘domestic’ subcontractors - relationship managed by the contractor
- The compaction of the insurance and security clauses into fewer clauses but more sub-clauses
- The removal of ‘Works Completion’ as a completion stage
- The introduction of a ‘suspension’ clause
- The collapsing of the previous four ‘termination’ clauses into a single clause
- The complete redrafting of the Employer-Contractor and Contractor-Employer data documents into a single Contract Data document.

The redrafting and publication of the JBCC® 2014 edition will, as with previous redrafting exercises, endeavour to serve the building industry better by providing a modern reconstructed suite of documents using contemporary simple English, splitting long clauses into sub-clauses resulting in greater clarity of the legal agreement and a more user-friendly contract administration tool.

See Annexure A for a list of the more detailed changes between the 2007 and 2014 editions.

## **CONCLUSION**

There is a large array of different standard forms of construction contracts, drafted for a multitude of different construction and procurement types. Standard forms are valuable and convenient as they reduce the time and cost at the negotiation stage and provide a sound framework for project success as they attempt to distribute the risk equally amongst the parties. Regular modifications can create legal uncertainty which may result in the courts interpreting terms in an unintended way. It is therefore important to consider the ramification of amendments, question whether changes are necessary and ensure that the terms do not have a detrimental effect on other interlinked clauses or on the contract as a whole.

However, it is evident from the foregoing that minor or major redrafts of standard form construction contracts will be undertaken on a regular basis wherever these contracts are being applied, and it is unlikely that current editions will remain

unchanged in use for any length of time. For instance, since the publication of the JBCC 2007 edition South Africa has seen the introduction of the Consumer Protection Act, the enactment of revised building regulations, and revisions to the Occupation Health and Safety Act to name but a few. Such new acts, regulations, etc. will necessitate amendments to be made to terms and conditions in standard form construction contracts in order to keep pace with an ever changing built environment in which these terms and conditions are applied.

Because of the paper's limitation not to exceed ten pages it was not possible to address other critical issues such as the continuous changing structure of the construction industry, which consequently implicated on the ways in which contracts are structured and the role of various technical committees constituted over time and how that implicated on the ways changes were introduced. A follow-up study can look more closely at these, and other, reasons as to why there is a need for standard forms of construction contracts to change over time.

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