

Don't fall prey to the building contract blues

In South Africa, most building contracts use the Joint Building Contracts Committee (JBCC) and Master Builders South Africa (MBSA) standard-form contracts. The bodies that publish these agreements release new editions from time to time. These new editions are issued to correct inconsistencies in the text which tend to emerge only once the agreements are put to use in real life, and to update the provisions to cater for changing market trends and the contracting environment in general.



Brad Boertje, construction risk management consultant and ADR practitioner for the Master Builders Association (MBA) North

Unfortunately, many contractors and subcontractors continue to use older versions of standard-form agreements, probably because those are what they have on file. In fact, some of these versions are so old that they can't even be purchased, and copies of copies have to be used.

Clause on cash retention

One example of a subcontract that required updating is the MBSA 2008 domestic subcontract agreement. In this version of the agreement, cash retention is catered for as a form of security by stipulating that where a construction guarantee is not in operation, the contractor can "allow the subcontractor to commence the subcontract works and withhold payment from the subcontractor until the amount withheld is equal in value to ten percent (10%) of the subcontract sum".

On a strict interpretation of the clause, the subcontractor is not due any progress payments until such time as more than 10% of the subcontract sum has been certified for payment. This already places a cashflow burden on the subcontractor, but there is a further anomaly in that this version of the agreement does not stipulate how retention is to be released as progress milestones are achieved.

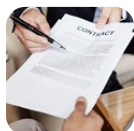
This anomaly was fixed in the 2014 version of the agreement. The updated agreement stipulates that retention reduces to 2.5% of the subcontract sum at practical completion, and gets fully released with the issue of the final subcontract payment advice. This change was carried through into the 2018 version.

Using the 2008 version of this agreement leaves a void – and leads to arguments later – with the subcontractor having no contractual provision to rely on when demanding a reduction or release of retention held by the contractor.

Retention is calculated on the subcontract sum and not the subcontract value. It's vital to understand the difference between the two, and that means unpicking some jargon. The subcontract sum is derived from the contract sum (or tender/appointment value), and never varies, while the contract or subcontract value is adjusted to accommodate changes, variation orders and the like. The subcontract value is invariably more than the subcontract sum, and some contractors try to take 10% retention of the contract value, as it's the greater of the two – something that subcontractors often do not pick up until it's too late!

In my view, using a guarantee as a form of security makes much more sense because it preserves the subcontractor's cash and reduces exposure to contingent risks such as the main contractor going into liquidation or business rescue.

My advice is that when using older versions of standard-form agreements, both parties need to agree to certain mandatory amendments to cater for situations such as the one described above. But, if possible, use the latest version.



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Jennifer Smit 20 Jun 2022



Use the correct version of the subcontract agreement

The MBSA domestic subcontract agreement is designed to be used with a specific JBCC principal building agreement ("the PBA"). Whilst a domestic subcontractor cannot dictate what version of the PBA is in operation, it is important to make sure the compatible subcontract agreement is used.

The January 2008 MBSA subcontract is compatible with the July 2007 JBCC PBA. The March 2014 MBSA subcontract is compatible with the March 2014 JBCC PBA. The May 2018 MBSA subcontract is compatible with the May 2018 JBCC® PBA. The different versions are not interchangeable.

Complete the contract data

More often than not, I find that no attention has been given to the contract data or variables. The standard-form agreements cannot cater for every eventuality of a construction contract as there are a lot of variables – programme, penalties, insurances, etc., which are specific to a particular project.

It is, therefore, absolutely essential that the contract data is accurately and completely populated and agreed. In various

editions of the standard-form agreements, this section is also known as the “variables” or the “schedule”. Some versions of the JBCC agreements have a separate contract document for the contract data.

In conclusion, pay attention when signing a subcontract, agree to amendments where necessary, get the contract data fully completed and make sure you are using the correct edition.

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