

MBA North calls for united front in countering unethical contractual practices

Mohau Mphomela, executive director at Master Builders Association (MBA) North says the association has noted with concern that a growing number of its members are finding themselves in trouble due to unethical contractual practices forced on them by some professionals and employers. To help counter this, MBA North has issued a practice note for its members.



Source: Supplied

“When you start to see contractors and subcontractors who have been in business for decades having to go into business rescue, then it’s clear there is something wrong,” he says. “We convened a meeting with some of our leading members – contractors and subcontractors – to hear from them what challenges they were facing when it comes to contracts. The practice note is the fruit of that meeting.”

The practice note provides guidance about best practice when it comes to contracting, for both contractors and subcontractors.

Standard industry contracts should be followed to the letter

Brad Boertje, a construction risk management consultant and ADR practitioner for the MBA North, says that the standard industry contracts, such as the Joint Building Contracts Committee (JBCC) contracts, are the gold standard and should be followed to the letter. These standard contracts should ideally not be amended but, if amendments are made, they need to be agreed to by both parties, not imposed by the developer or principal agent.

It's also vital that contractors and subcontractors take the time to populate the contract with all the relevant data. If a dispute arises later, an incomplete contract could prejudice the contractor.

The contract should be the full and complete record of all parties' obligations to each other. Contractors should not accede to requests to take on out-of-scope work on the promise that they will be "looked after" at a later stage – only to find that the client will not honour that payment. The JBCC contracts are necessary because the Common Law does not cater for issues specific to the construction industry.

Payment certificate issues

Another challenge is the issuing of incorrect payment certificates or the non-issue of payment certificates. Boertje cautions that "negative" payment certificates have become common, but they often do not reflect an accurate certification of the works.

"Contractors often find themselves having to litigate to get their money, which greatly impacts their cash flow," he says.



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27 Sep 2022



Construction guarantees

Construction or performance guarantees are yet another area where contractors are experiencing issues. Boertje points out that contractors have the right to choose the kind of security they wish to offer. He advises that construction guarantees are much to be preferred to retentions; in the latter case, if the main contractor runs into business difficulties, the subcontractor can find his or her retention is at major risk of being released.

The appointment of selected subcontractors is another area of contention, and there are many others.

"Because business conditions are so tough, contractors and subcontractors often find themselves being forced to condone unethical contractual practices, and then find themselves in trouble. Yet they find it hard to fight back for fear of being precluded from future tenders," Mphomela concludes.

"As an association, the time has come to say enough is enough – we must present a united front to demand adherence to ethical practices – to the benefit of all stakeholders."