Welcome !
The 2014 JBCC® suite of documents: a legal contract, risk and administration tool

Uwe Putlitz
Pr Arch 2444-1976 and Pr CPM D434-2005, AA(SA) 173
Chief Executive Officer:
The Joint Building Contracts Committee® NPC
Who is the JBCC?

Formalised in 1997 - with 9 constituents:
★ Association of Construction Project Managers
★ Association of SA Quantity Surveyors
★ Master Builders South Africa
★ Consulting Engineers South Africa
★ SA Black Technical Allied Careers Organization
★ SA Institute of Architects
★ SA Institute of Architectural Technologists
★ SA Property Owners Association
★ Specialist Engineering Contractors Committee
✿ Audited in terms of the International Financial Reporting Standard for Small + Medium sized Entities
✿ B-BBEE Level 4 Contributor
Who is the JBCC?

Objective …

“To compile contract documentation with an equitable distribution of contractual risk in the building industry”

JBCC® documents are used in SADC countries + throughout Africa

JBCC® is a registered trademark

JBCC® documentation is copyright protected

The new suite of documents has been submitted for approval by the Construction Industry Development Board

JBCC® documents are used by local, provincial and national state departments
The JBCC® publishes …

1. Principal Building Agreement
2. N/S Subcontract Agreement
3. Minor Works Agreement
4. Support forms – securities
5. Support forms – instructions
6. Support forms – payment
7. Support forms – completion
8. Support forms – guides
Construction industry environment

The presenter's views in this presentation are not necessarily those of the constituent members of the JBCC®.
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Project implementation

Figure 2.4: Level of influence – shows typical cost of changes in the IT industry

Burke, Rory ADVANCED PROJECT MANAGEMENT Fusion XYZ, 2011 Burke Publishing p35

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Project failures …?

“Good project management will not necessarily deliver a good project - but the lack of it can pretty much guarantee failure”

Most projects fail for the same reasons:

★ The project objectives have a lack of alignment with the strategic direction of the business
★ A lack of clarity around the objectives of the project
★ An understated or unrealistic budget and timescale
★ A project management structure that stifles decision making
★ Inexperienced resources or a general lack of resource to manage the project
★ A lack of engagement with the key stakeholders

EC Harris (Russel Gates): Effective Project Management Enables Better Service Outcomes
Advantages of ‘standard’ contracts

- Agreed between different bodies within an industry = familiarity
- Risks are more equitably spread
- Avoids the cost and time of ‘task specific contracts’
- Tender comparisons easier = ‘accurate’ comparison of prices
- Simpler to administer

... reduce ‘risks’ to parties ... and increase productivity

Lloyd QC Royal Brampton Hospital vs Hammond 7 others ... 2001
“A standard form is supposed to be just that. It loses value if those using it, or at tender stage those intending to use it, have to look outside it for deviations to the standard”

- Standard forms may be cumbersome, “one size fits all”!
- Standard forms a “compromise” = long time to update
Tender process

Tendering seeks to provide competition and therefore reduce costs

lancoucci (MJB v Defence Construction 1995) …

”a prudent owner would also consider the capability and experience of the contractor and how realistic the tender price was…”

- Culture of accepting the lowest tender … encourages abuse
- Swiss system: closest to average of 5 tenders - likely to be fair !
- Open tenders = non selective > wrong contractors?
- Selected tenders invited on past performance = skills / quality /resources / financial standing … then price the only criteria
- Note: A 'wrong' contractor increases the employer’s project risk
... when competently managed and administered, protects the employer, contractor and subcontractors

... changes drafted by others, including members of the building industry, often have results different from those intended that may be prejudicial to either or both parties
The agreement and the contract data constitute a contract.

The contract data records:

- Information: project - location - employer - principal agent
- Administration: law, documentation, duties of the parties
- Insurance and securities: obligations of the parties
- Design: by exception by specialist contractor
- Completion: inspection time - dates + penalties, payments
- Claims - time and money
- Dispute resolution - body to nominate mediator/adjudicator
- Changes to JBCC agreement: must be listed and accepted!
- Contractor: securities, preliminaries, holidays + tender …
# AGREEMENT

This agreement, the completed contract data and the listed documents (CD) comprise the entire contract between the parties. Any provision in this agreement that may confer a right or benefit on a subcontractor shall be binding on the parties and be capable of acceptance by such subcontractor at any time. No representations, terms, conditions or warranties not contained in this agreement shall be binding on the parties. No agreement or addendum varying, adding to, deleting or terminating this agreement including this clause shall be effective unless reduced to writing and signed by the parties.

## The contracting parties

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<th>Employer</th>
<th>Contractor</th>
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<td><a href="mailto:veld@purrfect.co.za">veld@purrfect.co.za</a></td>
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<tr>
<td>Telephone</td>
<td>+27 11 234 56 78</td>
<td>+27 11 234 56 78</td>
</tr>
<tr>
<td>Mobile phone</td>
<td>+27 888 234 56 78</td>
<td>+27 777 234 56 78</td>
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<td>Signed - witness</td>
<td>Peter Trustworthy</td>
<td>Hans Steyn</td>
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Copyright reserved JBCC® Principal Building Agreement Edition 6.0 - March 2014
JBCC® Agreements: Administration

1. Interpretation
2. Law, regulations and Notices  [2.0]
3. Offer and Acceptance [3.0]
4. Assignment and cession  [4.0]
5. Contract Documents  [5.0]
6. Employer’s agents [6.0]
7. Duties of the parties  [12.0]
8. Appointment of subcontractors  [13.0 & 15.0]
9. Direct contractors  [16.0]
Definitions

NOTICE: Issued by either party, the principal agent and/or agents to the other party or any agents to, inter alia, record an event or on default or non compliance by the other party or any agent, to request outstanding information and/or where suspension and/or resumption of the works, or termination of the agreement is contemplated

STATUS REPORT: Compiled by the principal agent where the works is terminated, to record the state of completion of the works in a report including marked up drawings and photographs

CONTRACT MINUTES: A comprehensive set of minutes prepared by the principal agent in which all pertinent contractual information that arises at meetings is progressively recorded (MWA)
(1) Offer and Acceptance [3.0] <2.0>

This agreement shall come into force on the date of acceptance by the employer (the contract date) and continue to be of force and effect until the end of the LDLP notwithstanding termination or the certification of final completion and final payment [11.0, 29.0 & 30]
(1) Employer’s Agents [6.0] <5.0>

The employer warrants that the principal agent has full authority and obligation to act and bind the employer in terms of this agreement. The principal agent has no authority to amend this agreement (NSSA cl 5.7)

The employer may appoint agents to deal with specific aspects of the works in terms of this agreement [CD]. The PA shall give notice to the contractor where such authority to issue contract instructions and perform duties for specific aspects of the works is delegated to agents. An agent appointed in terms of this clause shall not be entitled to sub-delegate its authority without prior approval of the employer.
(2) Principal Agent [6.0] <5.0>

- ... be appointed by the employer, no reference in OHSAct, SANS 10400 wrt qualifications/experience as a competent person!
- ...technical competence, no bias or emotion, strong personality
- Pre-contract: Choice of appropriate procurement procedures and contract documents ... and contract data
- Appointment + coordination of agents on behalf of the employer
- Evaluation of tenders > selection + appointment of contractor(s)
- Follow up on returnables, insurances, securities, warranties, ‘as built’ data ... monitor key dates + progress (programme), ‘notices’
- Issue construction information, contract instructions, minutes, ‘completion’ certificates’...
- Issue interim payment certificates, the final account and final payment certificate
- Adjudicate ‘time’ and ‘money’ claims
- Prepare status report on termination

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(1) Insurances [10.0] <10,11&12>

- Only deal with a broker experienced in construction insurance
- Only deal with an insurer experienced in construction insurance
- Insurance is not a ‘do-it-yourself’ activity
- Insist on ‘project based’ insurance, not annual renewal, ... the latter can be cancelled before project completion!
- Beware of cut rate premiums ... in the event of a claim you may find that 'exclusions' apply = ± no insurance ? !!
The contractor provides a guarantee for construction where specified - chooses between fixed + variable, generally 10% of the contract sum

The contractor provides a guarantee for advance payment to protect the ‘employer’s loan’ to pay a deposit to suppliers for materials and plant - the value depends on the project

The contractor may request a guarantee for payment from the employer to suit the project risk - no fixed percentage

The contractor may retain his lien …
JBCC® Agreements: Design

1. Design
2. Subcontractors
The **contractor** shall not be responsible for the design of the **works** other than the **contractor**'s and the **subcontractor**'s temporary works. The **contractor** shall not be responsible for the coordination of design elements.

Any design responsibility undertaken by a **subcontractor** shall not devolve on the **contractor**. All contractual or other rights the **contractor** has against such **subcontractor** arising from any design responsibility are ceded to the **employer** on the date of **final completion** or the date of termination.

The **contractor** shall be responsible for the timeous submission of design documentation by a selected **subcontractor** for acceptance by the **principal agent** and/or **agents**.
Unless otherwise stated [CD], the subcontractor shall not be responsible for the design of the n/s subcontract works other than the subcontractor’s temporary works. The subcontractor shall not be responsible for the coordination of design elements.

Where the subcontractor is appointed to design, supply and to install an element [CD]:

- The subcontractor shall submit such design to suit dates in the programme to the contractor for review by the PA or relevant agent for conformity with the n/s subcontract contract documents.

- The PA shall be responsible for coordination of design elements.

- The subcontractor indemnifies the contractor for consequences of such design and cedes such indemnity, warranties, and other rights to the employer [9.1; 12.5].
1. Setting out [13.0]
2. Contract Instructions [17.0]
3. Completion in sections [20.0]
4. Interim Completion [18.0]
5. Practical Completion [19.0]
6. Defects liability and Final Completion [21.0]
7. Latent defects liability [22.0]
(1) Practical Completion [19] <24>

The **Principal Agent** shall:

* Inspect **works** at appropriate intervals > give direction on the standard of work and state of completion required to achieve **practical completion**
* Issue **CI** consequent on such inspection, if required
* Notify **C** of the period required to inspect **works**

The **Contractor** shall:

* Inspect the **works** to confirm standard of work required for **practical completion** = achieved
* Give timeous **notice** to the **PA** to inspect the **works**
(2) Practical Completion [19] <24>

Contractor confirms works ready for inspection i.t.o. the programme
The PA shall:

- Inspect works, if ok issue Certificate of Practical Completion
- Inspect works, if not ok issue comprehensive and conclusive list for Practical Completion to be achieved for PC
- (Re)issue updated List for Practical Completion until complete
- Issue Certificate of Practical Completion

- Possession of the site/works is relinquished to the employer subject to obtaining an occupation certificate from the LA
- E allows access to C to attend to the List for Completion
**Practical Completion** applicable in the JBCC Principal Building and Minor Works Agreements

### CONTRACT VALIDITY PERIOD

- **DATE - Tender award**
- **DATE - Site possession**
- **DATE - completion INTERIM**
- **DATE - completion PRACTICAL**
- **DATE - completion FINAL**
- **DATE - expiry LDLP**
- **DATE - expiry PRESCRIPTION**

#### C’s CONSTRUCTION PERIOD = Private Sector

- PA in tender documents specifies start + duration of construction period + completion criteria
- PA/agents direct standard of work + quality of finish required
- C notice to PA to inspect for PC
- PA inspects works, issues List for Practical Completion, and if ready, issues Certificate of Practical Completion and List for Completion
- C claim revision of date of PC
- PA assesses time + money claims
- PA assesses penalties

**90day DLP**  
5 year LDLP

Note: Issue Certificate of Practical Completion - employer occupies works, penalty liability ends, contract works insurance > building insurance, value of securities reduces

#### C’s CONSTRUCTION PERIOD = Public Sector

- Note: PA + C + SC resolve final account

Note: C fixes items on list for completion

**C’s CONSTRUCTION PERIOD** = Public Sector

**C’s CONSTRUCTION PERIOD** = Private Sector
Practical Completion: (sub)contractor hand over ‘as built’s/warranties

- PA compiles ‘operating manual’ @practical completion>employer
- Occupation certificate = employer’s (agents) responsibility
- Possession of the site is relinquished to the employer
- Contractor’s all risk policy reduces until final completion
- Employer’s building insurance commences
- Public Liability Insurance remains in force until final completion
- No further contract instructions issued except to rectify defects
- Contractor’s liability for penalties ceases
- Guarantee for Construction (fixed) expires, work certified to 97.5%,
- Guarantee for Construction (variable) – reduced to 4% contract sum
- Guarantee for Advance Payment – in force until repaid
- Guarantee for Payment – expires on receipt of final payment …
- Retention, where applicable - reduced to 2% of contract sum
JBCC® Agreements: Payment

1. Payment [25.0]
2. Adjustment of the contract value & final account [26.0]
3. Recovery of expense and loss [27.0]
(1) Certificate for Payment [25]<31>

PA shall certify payment to C with a copy to E to include:

★ Fair estimate of value work executed
★ Materials & goods – protected etc
★ Value of work executed by n/s subcontractors
★ Security adjustments
★ Authorised adjustments to the contract value
★ Contract Price Adjustment Provisions [CD]
★ Previous amount certified
★ Amounts due to either party = recovery statement
★ Tax
★ Interest amounts
★ Non Taxable items
(2) Certificate for Payment [25]<31>

- An interim payment certificate is not evidence that works is in conformity with the contract documents
- Materials & goods > property of E on payment
- Payment certificates issued regularly [CD]; final payment certificate = 100% of contract value, after the issue of the Cert of Final Comp
- Final account disputed = pay undisputed amount in additional interim payment certificate
- E pay C < 14 c-days of issue [CD] of a payment certificate
- C pay SC < 21 c-days of issue [CD] of payment certificate
- Late payment = SC entitled to default interest
- C=partial or no payment / SC notice 5 w-days > C to comply or call up security / suspend / terminate ... enforce lien if not waived
1. Revision of the date for practical completion [23.0]
2. Penalty for late or non-completion [24.0]
3. (Adjustment of the contract value and final account) [26.0]
Revision of the date for practical completion [23.2] <29>

C is entitled to a revision of the date of *practical completion* by the PA *without* an adjustment of the *contract value* for a *delay* caused ...

1. Adverse weather conditions
2. Inability to obtain *materials & goods* where C has taken reasonable steps to avoid / reduce delay
3. Making good physical loss / repairing damage
4. Default by a nominated SC where C has taken reasonable steps to avoid / reduce such delay
5. Exercise of statutory power by a body of state ...
6. **Force Majeure**
(2) Revision of the date for practical completion\[23.2\]<29>

1. Delayed possession of the site
2. Making good physical loss / damage - C not at risk
3. **Contract Instructions** not due to C’s default
4. Opening up, testing, **materials & goods** that conform to ‘spec’
5. Late issue of **construction information** …
6. Late supply of **free issue, materials & goods** by E
7. Late supply of **Prime Cost** amount item
8. Late acceptance of a design by **subcontractor** …
9. Act/omission by a **direct contractor** or **nominated subcontractor**
10. Insolvency of a **nominated subcontractor**
11. Suspension/termination by **subcontractor** = E, PA, A default
12. Additional work inadequately described in tender/BoQ
13. Suspension of the **works**

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(1) Adjustment of the contract value and final account [26] <32>

* PA prepares and issues the final account to the contractor within 90 calendar days of the date of practical completion
* The C accept the final account within 45 calendar days - failing which the final account shall be issued
* Should C give notice objecting to the correctness of the final account within the period and such objection not be resolved within 10 working days, the contractor may give notice of a disagreement
* 25.14 Where contractor disputes the correctness of the final account within the period, the PA shall issue interim payment certificate(s) ... by the due date [CD] for the undisputed amount(s)
* 25.13 PA issues final payment certificate to E and C < 7 c-days of acceptance of the final account by C but not before the issue of the certificate of final completion
JBCC® Agreements: Termination

1. Suspension [28.0]
2. Termination [29.0]
Suspension by the contractor [28]

Contractor may suspend the works where the Employer, on notice, has not remedied a default within 5 w-days:

- PA has not issued an interim payment certificate
- Employer = No payment of an amount due
- Employer = No proof of special insurance, E responsible [CD] (not Public Sector)
- Employer = Not appointed another PA or agent [6.0]
- Security for Payment not provided + maintained, [CD] (not Public Sector)

The employer may (must!) suspend the works where the contractor does not comply with the law = health and safety plan Cl 17.1.4
(1) Termination [29] <36>

Reasons for termination: employer

* Not provided Guarantee for Construction [CD]<15 working days
* Not proceeded with the works < 10 working days of notice
* Not complied with a contract instruction

Reasons for termination: contractor

* PA has not issued payment certificate [CD]
* Not provided Guarantee for Payment [CD]<15 working days
* Not given possession of the site [CD]
* Not made payment [CD]
* Interfered with agents’ independent judgement
* Not effected insurance [CD]
* Not appointed agent(s)
Either party ...

Either **party** may give **notice** of termination for specified reasons or by agreement where the **works** has been destroyed or work has ceased for 120 intermittent / 90 continuous calendar days.
1. Dispute resolution [30.0]
**JBCC® Agreements: Disputes**

- Speedy
- Cost effective
- Conducted by an independent third party
- Can hear any matter
- Capable of becoming final and enforceable
- Binding on the **parties**
- Undertaken by a person (or group) chosen by the **parties**
- Undertaken by a person (or group of people) who has the required legal / technical knowledge or is able to acquire it
- Will not interfere with the progress of the **works**
- “private”
JBCC® Agreements: in short …

★ A legal agreement
★ A contract administration tool
★ Synchronised between the Principal Building Agreement and the N/S Subcontract Agreement
★ Written in simple English with task specific bullets
★ Full set of supporting templates -“free”- certificates, guarantees
★ Free *frequently asked question* service
★ **Meticulous use to save time / money in contract administration**
Thank you for your participation!
Safe journey home ...