

The Management of Construction Agreements in South Africa

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Abstract:

The management of construction agreements within the built environment of South Africa is not properly regulated. The effect of this may be seen in instances such as the poor quality of housing being built for the Rural Development Project, corruption as well as the dismal dispute resolution currently taking place. The Construction Industry Development Board, created in terms of the Construction Industry Development Board Act of 2000, is mandated in terms of section 4(f) to regulate the actions as well as procedures of parties engaged in construction contracts. Unlike the United Kingdom where the Housing Grants Construction and Regeneration Act 1996 deals with the shortcomings similar to those experienced by the South African Construction Industry; such as dispute resolution and the role of the parties. South Africa introduced the General Conditions of Contract for Construction Works (GCC). The latest edition is GCC 2010. It attempts to provide for guidelines to the construction industry. The GCC 2010 provides for dispute resolution, penalties, risk, the role of the relevant parties, to name but a few. However, there is no obligation on the parties to follow the said guidelines. It is uncertain whether the said measures adequately address the shortcomings experienced in the construction industry and upto now the GCC has not contributed towards the improvement of the situation. The aim of the paper is to critically analyse the GCC 2010 as a tool to manage construction agreements, with particular reference to dispute resolution, and to recommend improvements.

Keywords:

adjudication, construction contract, contract management, dispute resolution, South Africa

1 Introduction

The construction industry in any country, especially in South Africa, plays an 'indispensable role' in the economy thus having a direct impact on the public. It is essential that the industry improves on its effectiveness and efficiency which will inevitably enhance the environmental outcomes, safety, health, productivity as well as quantity and value for money to society' (Construction Industry Development Board Act 38 of 2000). South Africa unfortunately does not have legislation that would greatly assist in the achieving of the aforementioned goals. The United Kingdom, whom may be seen as one of the forerunners in this regard, is a good example of where legislation positively aids in the regulating of the industry. The English implemented the Housing Grants, Construction and Regeneration Act 1996 (HGRC) which stipulates the *essentialia* of a construction contract and provides for adjudication; amongst others. The justification that has been provided for this intervention by the State is that adjudication will contribute to a more balanced cashflow in construction projects which will enhance the overall performance of the construction industry (Ndekugri & Russell, 2006). This viewpoint has been taken globally as may be evidenced by other states introducing same into their legislation such as New Zealand for example. South Africa is, unfortunately, not one of the States to take such initiative.

The South African construction industry had, for many years, numerous so called 'in house contracts' used by the various parties. However, when new entrants were prevented from

competing freely for contracts as well as the lack of discipline that resulted from the confusion of conditions of contract, the South African government decided to take action (SAICE (2010) Management Guide). The Government of South Africa enacted the Construction Industry Development Board Act 38 of 2000 to ensure that leadership and 'active promotion of best practice' in the industry takes place. The regulatory body established in terms thereof is the Construction Industry Development Board, commonly known as the CIDB. In light hereof the CIDB has clearly defined powers and objectives such as to improve on delivery management, to establish as well as promote uniform and ethical standards which regulate the actions of those engaged in construction contracts. The CIDB Act goes on further to compel the CIDB to establish a register of contractors so as to facilitate the procurement process, albeit Public or Private Sector, as well as to obtain data so as to be utilised as a monitoring tool in the regulation of contractors' behaviour. There are 3 main fields of engineering in the construction industry namely mechanical, electrical and civil engineering and as such different contracts are therefore utilised in each field.

Focus shall be placed on how the improvement of contract management may aid in the reduction of disputes between the parties. Focus shall also be placed on the GCC 2010 specifically as to whether the dispute resolution method currently used prescribed therein is effective in resolving disputes arising in terms of the aforementioned contract.

2 The Various Construction Agreements used in South Africa

The Green Paper on Creating an Enabling Environment for Reconstruction, Growth and Development in the Construction Industry highlighted the fact that simplification of the contract documents, streamlining of surety arrangements and those of payment procedures where required. There are currently four standard forms of construction contracts currently being utilised in the South African construction industry namely FIDIC (French acronym for International Federation of Consulting Engineers), The Joint Building Contracts Committee (JBCC Series 2000), The General Conditions of Contract for Construction Works 2010 (GCC 2010) as well as The New Engineering Contract (NEC3). The GCC 2010, NEC3 as well as FIDIC are the standard forms of contract that may be used in all types of engineering and construction projects. The JBCC 2000 is confined to building works. For purposes of this paper focus shall be placed on the GCC 2010. The South African Institute of Civil Engineers (SAICE), developed a Management Guide to the General Conditions of Contract 2010, as a guideline to assist with the interpretation of the GCC 2010; of which said interpretation should not be seen as a legal interpretation thereof. According to Willie Claassen, the compiler, the aim of the guide is to promote efficient and effective management of construction contracts to which the GCC 2010 applies. He believes that the GCC 2010 will have an influence in the reduction of claims and disputes arising in terms of the GCC 2010 as it improves

...management techniques in construction projects. It does not only set out legal terms of rights and obligations, but concentrates much more on the conditions for good project management. - Claassen, W. GCC 2010

2.1 The GCC 2010

The GCC 2004 was replaced by the GCC 2010. Certain amendments and/or improvements may be seen in the fact that the contract has gone from a 58 clause contract to a contract that comprises of 10 clauses, being the GCC 2010; which is in line with the objectives of the CIDB. The aforementioned contract has been revised to the extent that the parties' responsibilities have allegedly been clearly defined. However, the contract has still remained very subjective in that the engineer has retained all his/her rights and/or powers and the contractor has not been afforded rights and/or protection therein.

2.2 The NEC3

This family of contracts was originally conceived in the mid-eighties after the London Institution of Civil Engineers approved a recommendation provided to it by its Legal Affairs Committee. The reason for the recommendation was in lieu of the fact that the engineering and construction professionals advising that there was an urgent need to approach contracts with a different view; specifically to do that more in line with the approach to project management. The Engineering and Construction Contract (ECC) incorporates three important components namely:

Conditions of contract;

Risk management; and

Process / project management

One of the main characteristics of the ECC is that it encourages teamwork as well as elaboration so as to increase the opportunities for partnering to occur. Partnering, according to the CIDB, is defined as

...working together in a way that suits particular partners and which suits the particular project or service being procured. There is no stable template for partnering. There are, however, key elements which determine whether or not a particular procurement process is likely to yield the benefits from a true partnership. The key words associated with partnering are: co-operation; openness; shared standards; common objectives; respect for each partner's motivation; and trust. Partnering is about sharing costs, risks and rewards.

So in effect this particular construction contract establishes a "real time" contract management process (CIDB Best Practice Guideline C2) requiring cross organisational boundaries.

3 Research Methodology

The author made use of legal research methods. Firstly a literature review was done by referring to various literature comprising of books, journal articles, legislation and case law. It is important to note that there are no updated South African sources relating to the GCC 2010 with the exception of an article or two written by an engineer. After having read through the limited sources available so as to ascertain the theoretical background of what dispute resolution methods are used in the South Africa Construction Industry in particular those specified in the GCC 2010 a comparative study between South African and England was then attended. The purpose was to compare the difference in the manner within which adjudication as a dispute resolution method is applied. Each source was analysed so as to assist in arriving to the conclusion that efficient contract management is imperative and that the South African dispute resolution procedure prescribed in the GCC 2010 is inadequate and should be regulated.

4 Management of the Contract

One of the most underestimated areas in an organisation is contract management. According to the UK Office of Government Commerce, contract management is a process enabling the contractual parties involved to meet their obligations so as to deliver the objectives arising in terms of the contract by proactively managing the contract so as to anticipate future needs and react to situations that may arise (OGC 2002 Contract Management Guidelines). It further entails building a 'good working relationship' between the parties that shall, hopefully, continue throughout the life of the contract.

Many organisations are moving towards a more 'informal' method of contract management where constructive relationships between the parties are built as well as a more rewarding method called financial incentive management is used as opposed to the formal traditional manner of contract management, where contractor's were usually at 'arm's length'. The contract forms the foundation for the contractual relationship. In light hereof it is essential to have the right contract in order for

efficient contract management to take place. Aspects such as quality of service required, allocation of risk, communication methods and/or procedures and resolution of disputes, to name but a few, should be included in the contract. The GCC 2010 is said to make adequate provisions for the aforementioned factors. It is further said to have improved on the defining of the parties' roles as well as the dispute resolution process.

One of the most common problems experienced by organisations with numerous contracts in place is that they are plagued with paper intensive contracting; of which said contracts are stored electronically and/or manually (De Oliveira, M. 2011). Therefore, emphasis must be placed on developing a sound contract management infrastructure by addressing the essential area of contract lifestyle management. Presently many organisations are establishing contract management departments so as to ensure that proper and effective contract management takes place (Barret, G. & Cummins, T 2011).

Modern day trends of contract management have two main characteristics in common namely to clearly define the parties' roles so as to achieve the agreed main objectives in terms of the contract and to encourage a symbiotic relationship between all the parties involved (Fisher S, *et al* 2009). It may be said that contract management involves the easing and resolving of tensions so as to build a relationship which benefits all the parties involved resulting in a win/win relationship. According to Siyabonga Mbanjwa there seems to be a general consensus that 'contractual arrangements' may improve in achieving the objectives of the client as well as have a huge influence on the failure and/or success of a construction project. (Mbanjwa, S. 2003). Therefore, effective contract management results in the monitoring of delivery performance of the appointed contractors as well as in saving opportunities (De Oliveira, M. 2011).

According to SAICE, the management of the GCC 2010 is the responsibility of the Employer's Engineer and of the Contractor's site agent (SAICE (2010) Management Guide). The SAICE Management guide goes on further to stipulate that a substantial amount of power is bestowed on the Engineer in the GCC 2010. The guide goes on further to stipulate that the
---.time-trusted arrangement of contract management by the Site Agent/Engineer ensures that timeous and well-considered decisions are made, and encourages the parties to take all possible steps to avoid conflict;"

illustrating the point that the resolution of conflicts can be planned for.

5 Dispute Resolution

There are various alternative methods other than litigation to resolve disputes between the parties namely arbitration, mediation, negotiation, adjudication, refereeing. All of these methods have certain characteristics in common in that they are supposed to be cost effective, expedient and presided over by a neutral third party.

The prescribed dispute resolution method in the GCC 2010 may be seen as a three-pronged process: first the parties attempt to resolve it amicably amongst themselves failing which a notice of dispute must be furnished to the engineer. Secondly the engineer is to make a ruling and should either party be dissatisfied with the ruling the matter may be referred to adjudication which forms the third leg. Adjudication is seen as a combination of mediation and arbitration where a third party adjudicates on the matter and provides a ruling which may be final should the parties agree thereto. According to SAICE, the GCC 2010 has been updated so as to include the 'latest thinking of dispute resolution' (SAICE (2010) Management Guide). However, is it really the latest thinking? If one has reference to the English construction industry for example, it will be noted that the English have been utilising adjudication for many years and have gone so far as to include the procedure as well as the contents of the contract in legislation, of which said legislation is specific to the construction industry and deals with the day to day obstacles encountered. Northern Ireland, as small as it may seem, has also developed a Construction Act. South Africa is extremely behind in that there is nothing regulating contracts let alone the construction industry.

Furthermore the whole point of alternative dispute resolution is the fact that it is said to be more expedient and cost effective. If one refers to the procedure found in the GCC 2010 it is somewhat lengthy as well as costly. The reason for this is that each stage involved in the adjudication process is 28 days meaning that a dispute is resolved within 90 to 100 days; resulting in the process being substantially drawn out. The impression created by the GCC 2010 is that 28 days is a reasonable time. Whilst this may allow for the individual tasked with resolving the dispute to assess the matters, the nature of the construction industry does not always allow for such a prolonged period. Clause 10 deals with claims and disputes. Clause 10.1 specifically deals with the contractor's claim relating to the extension of time and/or additional payment/compensation. The contractor has to submit a written claim to the engineer within 28 days of the occurrence substantiating the reasons for the extension and/or variation. The engineer is to furnish the employer as well as contractor with his written recommendations within 28 days of receipt of the written notice. If the contractor disagrees with something in the contract he is to first attempt to resolve it with the engineer amicably; should this not resolve itself then the aggrieved party must furnish the other with a dispute notice (clause 10.3 GCC 2010). If one had to monitor the process more efficiently the amount of disputes that take place would in all likelihood reduce. Adjudication in South Africa is becoming costly as well as lengthy and the way within which it is applied in South Africa it defeats the purpose of alternative dispute resolution.

As a result more non-traditional mechanisms have been introduced to resolve disputes; namely:

Private Judging in which participants hire a third party judge to make a decision

Neutral Expert fact-finding in which a third party with specialised knowledge makes a recommendation

Mini-trial in which legal summaries of the participants' position are presented to a jury comprising of principals of the affected parties.

(Civil Engineer)

6 Conclusion and Recommendations

Conflicts between parties are inevitable. That having been said, it is blatantly obvious that South Africa needs to do something so as to circumvent the ever increase of disputes arising between the parties due to various factors; the one being poor contract management as well as to make the chosen method of alternative dispute resolution more efficient. The English took the initiative and regulated their construction industry which can be seen as successful. South Africa should learn from its English counterparts and attend to the regulating of its construction industry. Greater emphasis must be placed on regulating the construction industry, focusing primarily on the contract used as well as the dispute resolution method, so as to allow for efficient contract as well as project management to take place and for the occurrence of disputes to reduce alternatively to be dealt with expeditiously.

7 References

CIDB Best Practice Guideline C2

Civil Engineer Resolution of Construction Disputes <http://civilengineerlink.com/resolution-construction-contracts-disputes/>

Viewed: 13/08/2011

Barret, G. & Cummins, T (2009) –“Contract Management what to do and where to start” *IMFO Winter*. Date of Use 9 May 2011.

Claasen, W. (2010) –“GCC 2010 – SAICE Contract Document for the Future” *Civil Engineering* July 2010

De Oliveira M ADR & Penalties used as instruments of contract management in construction agreements, 8th *International Commercial Law Workshop* Sandton 3 August 2011

- Fisher S, Wasserman M, Wolf P (2009) Effectively Managing Professional Services Contract 12 Best Practices IBM Centre for the Business of Government
- Nedkugri, I. and Russel, V. (2006) "Disputing the existence of a dispute as a strategy for avoiding construction adjudication" *International Journal of law for the built environment: Engineering, Construction and Architectural Management*, Vol.13 No. 4, pp 380 – 395.
- Mbanjwa S 2003 Thesis: The Use and Effectiveness of Construction Management as a Building Procurement System in the South African Construction Industry
- SAICE Management Guide to General Conditions of Contract 2010