The Dotted Line: Which Construction Contract To Choose?

A construction contract is an agreement between an employer (sometimes referred to as the client) and a contractor to construct, repair, modify, renovate or even demolish something in an agreed time frame, for an agreed price and to agreed standards. Construction contracts elaborate what should happen in the construction project. A contract contains the specifics of what should be done and each party's obligations on it. So, it is important that the contract is well constructed to avoid building and contract disputes. You must also choose a type of construction contract that could fit well for the project. Using the wrong contract type might cause you serious problems as construction goes on. Different types of construction contracts have different setups and different use.

The factors which clients need to take into account when deciding upon which form of contract to use from includes: the complexity of the works, management capacity, capabilities and expectation of the parties and their agent , requirements for specific contracting and pricing strategies, the compatibility of contract administrative procedures with those of the organization and the requirements relating to the assignment.

The form of contract selected for a procurement must in the first instance make adequate provisions for the selected pricing and contracting strategy. The type of contract form to be used will depend on the employer's preference as well as the works to be executed.

Standard form contracts are useful because they can be obtained and understood in advance and, therefore, are usually easier to agree on instead of drafting the entire contract from scratch. The parties simply agree on specific changes to the standard terms based on the requirements for the specific construction project concerned. It is therefore very important for a contractor to become familiar with the relevant standard form contracts, which could be used for the type of construction work which the contractor would normally consider tendering for. The common ones are FIDIC, JBCC, NEC and BIDP. We will focus on the FIDIC and JBCC.

FIDIC is French initials International Federation of Consulting Engineers and produces standard form contracts for the construction and engineering industry and is aimed at achieving broad consultation and acceptance of its contract forms.

The obligations by the parties, rather than the nature of the work, determine which contract is to be used. FIDIC recommends that the use of the books as follows:

- Red- Building and Civil Engineering contracts
- Yellow- Mechanical & Electrical process plant contracts
- Silver- International major turnkey projects. For projects only and typically designed and managed by independent engineering consultants
- Green -Short Form of Contract

FIDIC is recommended for general use where tenders are invited. Guidance is provided in each of the books for the preparation of the particular conditions.

The Silver Book is suitable where there is certainty of final price and completion date are of importance. Contractors are assumed to assume responsibility for a wider range of risks than under contracts where Red and Yellow books are utilized. The Silver Book is not suitable for use where there is insufficient time or information for tenderers to scrutinize and check the employer's requirements, if construction will involve substantial work underground or work in other areas which tenderers cannot inspect; if the employer intends to supervise closely or control the contractor's work; or if the amount of each interim payment is to be determined by an official or other intermediary.

The FIDIC Short Form of Contract is recommended for engineering and building work of relatively small capital value, simple or repetitive work or work of short duration without the need for specialist sub- contracts. The parties to the contract are the employer and the contractor. The Short Form permits the employer to nominate his authorised spokesman and provides no overall limit on the contractor's liability.

The Joint Building Contracts Committee (JBCC) is supported by the major professional and contracting bodies in the building industry in South Africa and is compiled in the interests of standardization and portray the consensus view of the Joint Building Contracts Committee of good practice and an equitable distribution of contractual risk. The document is intended to provide a clear, balanced and enforceable set of procedures, rights and obligations, which when competently managed and administered, protect the employer, contractor and subcontractor alike.

JBCC is suitable for the building sector of the construction industry where the works are designed and administered by agents of the employer who are co-ordinated by a principal agent. The agreement is suitable for use where the contractor is a small to medium enterprise and the employer carries the major liabilities related to the works and is responsible for taking out construction risk and public liability insurances for the protection of both parties. The agreement is not intended for use where the employer wishes to use nominated and selected subcontractors or where contract price adjustment is required. The agreement is not suitable where the works are complex in nature, the construction period exceeds nine months and the necessary working drawings are not complete and available at tender stage. This can be contrasted from the FIDIC which focuses primarily on the complex and heavier aspects of construction. In the JBCC, the employer appoints a principal agent to oversee the agreement, direct contractors for specialized work which is not undertaken by the contractor and other agents for specific aspects of the works. The parties to the contract are the employer and the contractor. The contract requires that the employer appoint an agent to act his behalf in the administration of the contract and to provide the contractor with a payment guarantee.

In light of the aforesaid, one may view the various chains of delegation as a positive in that everybody has a task but the workload is less and the project ought to run smoother and faster. However, on the other side, the multiple chains of employment may cause an issue in so far as accountability is concerned. Having multiple people on one smaller sized project may be complicated as definitive roles may be harder to establish. At the end of the day, the employer is the one who will bear the fall in the event that the project disintegrates. In the JBCC contracts, the employer is responsible for the primary insurance for the project.

Choosing the right form of contract is all part of the innovative thinking necessary to improve project delivery. It is a strategic decision that an organization needs to make.