A COMPARATIVE ANALYSIS OF RISKS ADOPTED BY EMPLOYERS IN CONSTRUCTION CONTRACTS IN SOUTH AFRICA

Stéfan Cremer

A research report submitted to the Faculty of Engineering and the Built Environment, University of the Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the degree of Master of Science in Building – Project Management in Construction.

Johannesburg, 2021

ABSTRACT

Construction projects are unique and temporary endeavours that are risky in their very nature; however, standard form construction contracts endeavour to apportion risk evenly between the contracting parties. Such risk can be managed, minimised, shared, transferred or accepted; however, it cannot be ignored. The purpose of this research report was to determine from and compare between the three most commonly used building construction contracts in South Africa, those being the JBCC PBA 6.2, NEC4 ECC and FIDIC Red Book 2017 what the risks to the Employer are, resulting from: its own mandatory obligations, the Project Manager's mandatory obligations; as well as risks related to the provision of health and safety, the environment and quality provisions in the contracts in question. Based on limited critical review of the contracts, as well as legal commentaries on the contracts, it was found that the study was generally too broad to draw a like-for-like comparison between the contracts in question; however, certain comparisons were able to be drawn. The contracts share similar main employer obligations, but the quantum of obligations differ, where the FIDIC Red Book 2017 requires the highest level of action from the Employer. The contracts share similar main Project Manager / Principal Agent / the Engineer obligations, but the quantum of obligations differ, where the FIDIC Red Book 2017 requires the highest level of action from the Employer. Compared to the other contracts, the JBCC PBA 6.2 does not rely on the Principal Agent to act in a collaborative effort to eliminate risk. Both the NEC4 ECC and FIDIC Red Book 2017 make good provision for Health and Safety, Environment and Quality management, whereas the JBCC PBA 6.2 unfortunately does not make any express provision for this.

It is recommended that any construction project Employer do a thorough analysis of their contracting strategy as well as to do a detailed study of whether it will be able to meet all of the mandatory obligations related to the contracting strategy and standard form contract in question. Lastly, the Employer has to ensure that a competent main agent is employed to act on its behalf, so as to ensure the meeting of mandatory obligations (which results in risk management) as well as to ensure that the main agent is measured against its performance in terms of the mandatory obligations in the contract.