

# CLIENT STRATEGIC OBJECTIVES: THE IMPACT OF CHOICE OF CONSTRUCTION CONTRACT ON PROJECT DELIVERY

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## Abstract

Meeting the strategic objectives of construction clients is paramount in construction procurement for the project to be regarded as successful by the client. The contention of this paper is that the choice of contractual arrangement can act as a barrier to achieving these objectives. This paper explores how contractual arrangement can be a delimitation to the client's construction strategic objectives through an analysis of the South Africa JBCC Principal Building Agreement. In addition to the client's strategic objectives, there are currently in South Africa, added strategic development objectives and imperatives that construction procurement should achieve including the creation of sustainable employment, skills development, affirmative action, the active promotion of small and micro- enterprises, and the development of public sector capacity to manage the delivery process. Government policy requires that the construction industry respond to these issues. Such imperatives can only reinforce the need for a choice of an appropriate contractual arrangement. This paper is based on research that comprised a desktop analysis of the JBCC together with the analysis of a single case study to explore how the *JBCC Principal Building Agreement* addresses the client's strategic objectives in theory and in practice. As a standard form document, it is concluded that the *Agreement* neither makes provision to deal with the client's strategic objectives nor are they met by its philosophy, structure, or parameters. The research concludes that construction clients who use the agreement or its equivalent for the benefit of its convenience and familiarity should consider its adequacy to manage strategic objectives within the wider sense of the investment and business case of the construction project.

**Keywords:** procurement, contractual arrangement, strategic objectives, business case, construction client, performance measurement, South Africa.

## **Introduction**

Construction works are procured for strategic reasons by clients that can be broadly defined in terms the client's ultimate use of the facility on completion. The strategic nature of construction raises two pertinent issues, namely, the manner in which construction works are procured and the measures applied to determine project success. In essence all activities related to the process of procurement should be informed, structured and carried out in a manner designed to meet or enhance those objectives strategic to the needs of the construction client. Typically, this would include all the procurement activities, from the evaluation of environmental conditions affecting delivery through to operational use. Consequently, any measures of project performance ought to be tied to the strategic outcome required by the construction client: in terms of the investment/business case, the product, and desired organizational and stakeholder outcomes.

Since few construction clients possess either the expertise or capacity to undertake building projects on their own, they typically engage external service providers (i.e. architects, engineers, management consultants, constructors and building suppliers) to deliver the building assets that they need. For most clients the activity of building is a complementary or residual activity and hence it is no economic case for them to retain these skills in order to carry on their primary business activities.

To engage the service providers, construction clients require contracts - not only to ensure full and adequate performance by the service providers on whom they depend, but also to provide a degree of certainty that the strategic objectives of the transaction are met in a controlled way. The contract thus assumes a pivotal role as a means towards these ends. It is imperative, therefore, that the contract's philosophy, structure and parameters are consistent with the procurement approach adopted to deliver the necessary control over supply chain resources, the manner in which the project will be managed and controlled, and with the choice of criteria selected to measure project success at completion.

Construction contracts have evolved into standard contract forms, not only because of their advantages of familiarity and the prohibitive cost of customisation but also to provide certainty on the nature of the transaction between parties on a project specific basis (Masterman, 1997); in effect, to minimise transaction costs . Fellows (1989) has been very critical of this development arguing that the practice is outmoded and that its practice has contributed significantly to many of the construction industry's recent and current difficulties highlighted subsequently by Latham (1993, 1994).

The development of these contract forms reflect the building industry's perspective. Terms and conditions are the product of an exclusive dialogue between building trade organizations and the built environment professions. The result is a compromise of beliefs between these parties to form a fair and equitable balance of risk and power in the contract terms. The business needs of the construction client, therefore, are very much a secondary consideration (Cox and Thompson, 1998). Whilst the client may accept this arrangement in order to gain the benefits of the reduced transaction costs within the construction project, the downside of this is that any resulting agreement between the contracting parties is the product of a 'free' commercial negotiation only in a very narrow sense (Root, 2001) and the client is limited in his ability to exercise any direct or meaningful control over the way the process is organised. However, these established contracting practices have come under sustained pressure as clients have started to exert pressure on the industry to better serve their needs (Egan, 1998) and have begun to look to their own sectors for innovative procurement practices (Root et al., 1999).

### **Economic impacts on construction contract practices**

Economic imperatives have put construction contract practice approach under increasing pressure following much criticism of the construction industry's procurement practice in the early 1970's (Masterman, 1997). The high level of inflation that preceded the 1973-1980 recession permanently affected the financial constraints under which the construction industry was required to achieve strategic outcomes. In the period that has followed, further changes have impacted on the traditional pattern of construction demand and supply including the decline of the skilled construction workforce, the withdrawal of

the public sector from its dominant role as the sector's principle client, and the steady increase in innovative financing strategies used for scheme development.

Clients affected by these changes, and the constraints imposed by a '*separate and coordinated*' (i.e. traditional) system of construction procurement to respond to them, have turned to alternative contracting methods like 'management contracting', 'design and build', and 'construction management', as well as innovative financing methods like 'Build, Operate and Transfer' (Masterman, 1997). They have done so in an endeavour to gain better control over delivery processes and contingent business circumstances that affect strategic outcomes

### **South African construction contracts practice**

Despite the changes resulting in the use of many other contractual arrangements to solve some of the problems imposed upon the construction industry, the *JBCC Principal Building Agreement* (1998) in South Africa is widely used for the procurement of a diverse range of construction projects. It is used by both occasional (inexpert) and expert (repeat build) clients. Its wide acceptance has readily made the document an industry standard for construction procurement in South Africa.

The contract, however, exhibits obvious limitations. It is premised on a single procurement system: the *traditional or separated and coordinated* system of construction procurement - and all the assumptions of procurement strategy that its format necessarily implies. The division of roles and responsibilities between the construction client and the contractor contemplates a strict separation of process between design and specification, and the activities related to construction. The construction client is responsible for the former and the building contractor is accountable for the latter. The conditions of risk within the document relate only to those risks arising from the division of roles and responsibilities between the contracting parties and works execution for delivery of the construction product.

Transactional behaviour is regulated by a provision for penalties for delayed/non-performance, and a procedure for the resolution of conflict based on third-party determination. The contract is thus premised on an *arms-length* adversarial supply

relationship whereby one party (aided by his professional advisors) seeks to define the building that is to be delivered) with the other party required to deliver the building so described (in the drawings, specifications and bills of quantities). The mechanism for reimbursement requires interim payments to be made to the contractor at regular intervals against actual work progress, irrespective of whether the criteria for overall project success is being fully met or not. The employer's principal agent, who enjoys wide powers of administration under the Agreement, bears no responsibility for process or project outcome under its terms. Taken together, one may question whether the wide market acceptance that the Agreement enjoys is at all justified given the clear limit of its applicability.

### **An overview of strategic objectives of construction clients**

The traditional criteria for determining a project success are evident in the golden triangle of time, cost and quality (see, for example, PMI, 2000). The argument here is that the criteria apply primarily to the work of the project and are defined solely from the point of view of the contractor. They neither address the wider issues of the investment and business case, nor the vested interest of stakeholders which is related to the performance of the building.

Based on the research undertaken between the 1960's and the 1980's in the United Kingdom, Turner (1993) distilled a more complete set of criteria for performance measurement in construction. He proposes, therefore, a set of project success criteria as follows:

- It achieves the stated business purpose;
- It provides satisfactory benefit to the owner;
- It satisfies the needs of the owner, users and stakeholders;
- It meets its pre-stated objectives to produce the facility;
- The facility is produced to specification, within budget and on time; and,
- The project satisfies the needs of the project team and supporters.

Having proposed a more complete set of pro-forma criteria, Turner (1993) makes a number of important observations concerning their nature and utility:

- Most of the criteria are subjective, with only time and cost being objective;
- The judgment is affected by the assessor's covert objectives;
- The measures are not necessarily compatible, so judgment depends on a complex balance. Relatedly, they are not mutually exclusive, so it is possible to satisfy them together;
- The measures are not judged simultaneously. They cannot, therefore, be forced to be compatible at the end of the project. For example, the first two measures are unlikely to be fully assessed until some time after commissioning and the product is in use.

Similarly, Bowen (1993) contends that the degree of client satisfaction revolves around two types of criteria: subjective criteria (e.g., aspirations, aesthetics, quality, value for money); and objective criteria (e.g., time scales, construction techniques, price).

This measurement of project success should define the strategy for project performance measurement, should also characterize the structure and process of planning, organizing and control for each project phase, and should be the measure applied on completion to determine the extent to which the strategic objectives of the investment/business case have been met.

### **Analysis of South African JBCC Principal Building Agreement**

The purpose of the JBCC Principal Building Agreement is expressed in a single phrase, namely, "*the execution of*" and "*payment for*" the works (Clause 2.1). The contractor is responsible to carry out the work (Clause 15.2), and the construction client (termed 'the Employer') must pay for it (Clause 2.0).

The clear and succinct expression of the purpose of the Agreement indicates several other issues:

- It identifies the building procurement system;
- It explains the nature of the service;
- It distinguishes the roles and responsibilities of the parties;

- It indicates obvious performance criteria; and,
- It reveals the mode of reimbursement.

The significance of the contractual definition is that it is likely to limit the entire focus of the contractor's management system and control, and the performance criteria he may apply, or may have applied by others, to determine project success.

**Building procurement system:** The *JBCC Principal Building Agreement* is intended for use only to procure the construction works. The nature of the service to be rendered by the contractor is thus defined as *the execution of the works* (Clause 2.1). The contractor must perform in terms of the *contract documents* as described in the schedule, and in terms of the *contract instructions* issued to him by the principal agent. The contractor has no obligation of design or specification in respect of the works, and the responsibility to provide this information falls on the employer. The Agreement, therefore, is premised on the *separate and coordinated* (i.e. traditional) procurement system, and all the assumptions of procurement strategy that its use would necessarily imply.

**Nature of the service:** The product (service) contracted by the contractor is “the *execution of the works*” (Clause 2.1). The agreement describes the act of ‘*execution*’ as an obligation to “*commence the works....and proceed with due skill, diligence, regularity and expedition and bring the works to ....completion*” (Clause 15.2). The act of *execution* is also a holistic concept. It is premised on two events: ‘*commencement*’ and ‘*completion*’ (Clause 15.2). The importance of these two events is that they define both the scope of the act of *execution* and thus the limits of the contractor's contractual liability.

**Roles and responsibilities of the parties:** The employer's primary obligation under this agreement is to make payment for the works in accordance with the terms of the Agreement (Clause 2.1). The responsibility for the design of the works is not expressly contemplated by the Agreement. It states merely that “*the contractor shall not be responsible for the design of the works*” (Clause 4.1). In terms of the Agreement, however, the contractor undertakes to *execute* the works in accordance with the drawings and instructions issued from time to time by the principal agent. The extent of the

employer's design responsibility, both in respect of his specific obligations to the contractor under the agreement, as well as in terms of his own strategic objectives, would include, *inter alia*, the responsibility for design functionality, aesthetics, operability, buildability, and whole-life cost efficiency – as well as the liability to prepare such design in accordance with statutory regulation in order to obtain the necessary approvals. The contractor's contractual obligation is merely to build in strict accordance with the design, subject to a 'duty of care' (*S.M. Goldstein & Co. (Pty) Ltd. v Cathkin Park Hotel (Pty) Ltd. and Another*, 2000 (4), SA 1019 (SCA)).

**Performance criteria** - The service rendered by the contractor to *execute* the works (Clause 2.1), is not just a matter of "*carrying out*" or "*performance*". The Agreement provides important descriptors that characterise the nature of the *execution* required to carry out the works. Implicit in these descriptors are two criteria by which to assess the performance demanded by the Agreement for the act of *execution*: (1) Quality management (simply quality) - the descriptor used in the phrase defining execution is the requirement for "*due skill*" (Clause 15.2); and (2) Time management (simply time) - the three descriptors that follow in Clause 15.2 of the Agreement require that the *execution* be carried out with speed. *Diligence, regularity* and *expedition* all have a single common theme related to time performance.

**Process of conflict management** - the *JBCC Principal Building Agreement* commences on the continuum of conflict resolution procedures with third party determination. The procedure is not peremptory and states only that should any '*disagreement*' arise between the employer or his agents on the one hand, and the contractor on the other, '*the contractor may request the principal agent to determine such disagreement by a written decision to both parties*' (Clause 40.1.1). In this case the principal agent can only act as an adjudicator and not as the principal agent of the employer. In the event of the determination being disputed by either of the parties, one party must give written notice to the other recording such dispute. A 'dispute' shall then be deemed to exist between the parties (Clause 40.2). At this point, two options are open to the party disputing the determination: the dispute may be submitted for mediation (Clause 40.4), or arbitration (Clause 40.5). The next step available to the parties after mediation of the 'dispute', and should this fail, is either arbitration or litigation (Clause 40.4.7), depending on the nature



of the agreement of the parties on this point. As a final step in the resolution of the 'dispute', the parties may proceed to arbitration. Arbitration in South Africa is regulated by the Arbitration Act, No. 42 of 1965. Provision is made in the Act for the courts to support and assist the process of arbitration. The arbitrator's award, therefore, is final and binding unless otherwise agreed by the parties (S 28 of the Arbitration Act).

**Cost management and mode of reimbursement** - Management of cost under the Agreement starts with contract value rather than the *contract sum*. The *contract sum* (Clause 1.1) is merely the 'accepted' or 'negotiated' sum agreed between the parties for the purposes of concluding the 'contract' on an express term. It does not establish the employer's obligation to the contractor, but it is merely a reference point. The employer's obligation to the contractor under the Agreement is the 'contract value'. This fact is confirmed by reference to the definition given in the Agreement for the final account. It states (Clause 1.1) that 'final account' means 'the document prepared by the principal agent, which reflects the contract value of the works at final completion or cancellation....' Under the Agreement, the management of cost falls wholly outside the contractor's responsibility but falls under the control and administration of the employer's principal agent. Only the principal agent 'shall determine the value of adjustments to the contract value' (Clause 32.1). However, in practice, especially on contracts let with a high proportion of prime cost/provisional sum items, and where the project budget is under threat, it is not uncommon for the contractor to play a significant role in assisting the principal agent to explore ways and means to manage and control cost through alternative specifications, designs, and building methodology. The contractor, however, is under no contractual obligation to perform this service. There is also no express provision in the Agreement that obligates the contractor to keep the employer informed on the current financial status of the works. This fact is perceived here as a distinct weakness in the control of project cost.

The Agreement uses a reimbursement mechanism to pay the contractor through interim payments (Clause 31). This practice is a departure from the South Africa (SA) common law for the letting and hiring of work. In terms of the SA common law of '*locatio conductio operis*', the '*conductor operis*' is 'normally obliged to carry out the work which he is engaged to do before the contract money can be claimed' (De Wet and van

Wyk, 1978:138). The contractor's right to an interim payment, therefore, is contractual. The fact that it is interim, however, does not mean that it is made in settlement of the employer's obligations for work done but interim payments made are merely advance payments against the totality of work still to be done (*Thomas Construction (Pty) Ltd (in liq) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A)).

**Risk management under the Agreement** - Most important risks assumed by the employer relate to the very nature of the commercial venture to procure the works, which could be defined as the risks related to the strategic objectives arising from the investment and business case. However, none of these risks are explicitly defined for management in the JBCC Agreement, and any provision for their administration can only be inferred from the extent to which they are included within the parameters of time, cost and quality inherent in the contractor's responsibilities for the *execution* of the works. The flaw in the risk management system under the Agreement, therefore, is its very separateness from the commercial context of the overall strategic objectives for the project. In fact the contractor assumes very limited responsibilities for the management and control of risks related to the project investment and business case. His involvement in this regard is narrowly defined by his obligation merely to *execute* the works. All other risks (i.e. contextual risks) defined by the scope of activities necessary for the procurement of the works are the responsibility of the employer.

**Management of transactional behaviour** - Under the JBCC Agreement, the instruments used to manage transactional behaviour are indicative of an 'arms-length' contracting relationship and include security for due performance, penalties for non-completion of the works, and rights of 'set-off'. Under the *JBCC Principal Building Agreement*, the contractor may elect to provide the employer with either a 'variable' or 'fixed' construction guarantee, or a cash deposit, as security for due performance. Penalties are agreed between the parties to a contract since the enactment of the Conventional Penalties Act (Act, 15 of 1962). Penalties do not have to be an accurate pre-estimate of the damages likely to be suffered, nor are they limited to a consideration of the financial loss likely to be suffered by the employer. Under the *JBCC Principal Building Agreement*, provision is made for a penalty to be paid to the employer in the event of 'non-completion' of the works by the date of practical completion stated in the Schedule, or by such revised date as may have been determined for practical completion by the principal

agent (Clause 30.0). The penalty, therefore, relates only to time under the Agreement. The right of ‘set-off’ is a recognized principle of our common law (*Schierhout v Union Government*, cited by Christie, 1993:468), and is thus not an extraordinary remedy for the recovery for debts that are liquidated and fully due. The right, however, can be excluded by contract. The right of ‘set-off’ is not excluded by an explicit contractual term under the *JBCC Principal Building Agreement* and is, therefore, available to both parties under the agreement.

In summary, a detailed analysis of the *JBCC Principal Building Agreement* as a standard form document, suggests that it makes no provision to deal with the client’s strategic objectives not met by its philosophy, structure, or parameters. For example, the contract deals only with the transaction to procure the building asset within the parameters of the time required for its delivery, its cost, and the standard of quality to which it must be built. All other procurement issues related to the strategic and organizational objectives of the investment and business case that should be decided and managed under the same parameters fall outside its structure and control.

The conditions of risk within the document relate only to those risks arising from the division of roles and responsibilities between the contracting parties and works execution for delivery of the construction product. Transactional behaviour is regulated by a provision for penalties for delayed/non-performance, and a procedure to resolve conflict by third-party determination. The supply relationship is thus adversarial. The mechanism for reimbursement requires interim payments to be made to the contractor at regular intervals against actual work progress, irrespective of whether the criteria for overall project success is being fully met or not. Finally, the employer’s principal agent, who enjoys wide powers of administration under the Agreement, bears no responsibility for process or project outcome under its terms.

Whilst this is a valid reflection of the logic articulated within the JBCC document, it is its application in practice that is of concern. Whilst it could be argued that the document is an expression of Higgin and Jessop’s (1965) ‘directive’ function, the efforts of the practitioners is to make ‘the system work’ by operating and negotiating within the reality of the project (as opposed to the reality proposed in the contract); the exercise of the

‘adaptive’ function (Higgin and Jessop, 1965). However, as will be seen in the case study described below, this is still subject to the document’s inherent limitations in the way it defines and constrains the management function.

### **A Case Study of Project Delivery using the JBCC Principal Building Agreement**

A single case study approach was adopted as the project involved the use of the standard *JBCC Principal Building Agreement* between a Contractor and a Developer with a Development Agreement between the Developer and a Construction Client. As such it constitutes an *extreme* or *unique* case (Yin, 1994; United States GAO, 1990) which because of the existence of the two agreements highlights the shortcomings of *JBCC Principal Building Agreement* in addressing the client’s strategic objectives in the way the project process is made more complex when used alongside another sets of agreements which more closely reflect those objectives. At the time of the collection of data, the contract for the project had already been signed between the client and the developer, and construction had been in progress for several months.

#### **The Client:**

The client is an established tertiary education institution in the public sector that actively engages in education, training and research. The client’s activities are funded through a combination of state funding and fee income. Owing to the restructuring and changing priorities of government, state funding for SA tertiary institutions is in a state of flux with funding being re-directed to redress historical imbalances with a consequent reduction in state subsidy to the client. To succeed, tertiary institutions are adopting a more business-like approach to management and marketing boosting revenue by increasing the number of students, rationalizing courses offered, enrolling more foreign students and entering into partnerships with the private sector in commercially exploiting research. The client’s mission is to be foremost in its areas of service in meeting the education needs of South Africa within the parameters of government objectives, the imperatives determined by industry, and the expectations of the international community.

The client's strategy of increasing student enrolments and improving its research facilities has led to a considerable construction programme involving a number of new-build and refurbishment projects. In addition, the existing built estate requires an extensive

maintenance programme. The client, therefore, commissions a steady stream of small to medium sized projects with at least one major new development every two to three years in the range of R30m to R50m (R11.50 = 1 GBP, August 2004). Table 1 presents the client's construction procurement processes in terms of the supply chain relationships engaged with, procurement strategies adopted and the contractual arrangements employed.

The categories of the construction work undertaken by the client with their associated different business requirements are classed as new-build, extension/modification and maintenance/refurbishment. New-build projects are affected by the limit of available funds. Research facilities are funded mostly by money made available through grants obtained locally or from abroad. The allocation of these funds is driven by strong stakeholder interests. Student accommodation is procured on the strength of the business case by contracting with a developer using a lease back mechanism in order to avoid the need to raise large amounts of development capital. There is a strong focus on whole life-cycle costs on these projects rather than on initial capital cost.

The client has definite generic strategic objectives for all its construction procurement as shown in Table 2. However, specific strategic objectives arising from the business case are identified and defined on a project specific basis.

### **The Project:**

The project was a new build student residence located on a piece of land strategically purchased by the client some years prior to the decision to build. The business case for the project arose from a shortage of student accommodation. The business case suggests that the annual cost of the lease offered by the developer who would finance and build the new Residence could be covered by the normal accommodation rental paid by students. Demand from end users was high and before the accommodation for the residence was built it was fully subscribed. The success of the business case, however, was premised on gaining completion of the student residence before the commencement of the academic year. Failure to gain completion by that time would have several significant consequences to the client: the loss of the enrolment of the students who had applied for residence in the new facility, not only for the first academic year, but also for the full period of time

intended for their studies; and the loss of the revenue for the whole facility for the first twelve months of operation. The client regarded the combined business risks as significant requiring proactive management.

Two contract agreement documents involved in the procurement of the project are Development Agreement between the developer and the client, and the *JBCC Principal Building Agreement* between the developer and the construction client.

The Development Agreement between the client and the developer require the developer to:

- Construct and deliver the new student residence within twelve calendar months from the date of handover of the site by a predetermined date.
- Appoint design consultants formally approved of by the client.
- Procure the construction works on the basis of the *JBCC Principal Building Agreement*.
- Obtain prior approval from the client before making payments to the contractor.
- Effect handover of the completed residence based on a final completion certificate issued by the principal agent in terms of the *JBCC Principal Building Agreement*.

The agreement also required the client to enter into a fixed period, and fully repairing, agreement of lease with the developer on completion of the works. The design in which the outline design was produced by the client and supply of a new residence building is in accordance with the client's brief.

This section analyses both the Development Agreement and the *JBCC Principal Building Agreement* to determine the manner in which the client had articulated its strategic objectives for the purposes of management, control and performance measurement.

### **Reconciling the Development Agreement and the JBCC Principal Building Contract**

An inspection of the JBCC Agreement between the developer and the contractor shows that it had been concluded without amendment, and that it agreed with the material terms

of the Development Agreement signed by the developers and the client in all respects. It would therefore seem logical that the objectives of the client would be communicated to the contractor by the developer. After all, any construction risk that the developer would bear would sensibly be passed on to the contractor who is best placed to manage that risk. Consequently, there ought to be a degree of alignment between the two agreements.

### **Principle Observations:**

On the basis of this proposition, the contractual arrangements were evaluated for their suitability in meeting the client's strategic objectives as shown in Table 2 and a comparison of the two agreements in achieving this is presented in Table 3. The conclusion drawn from this analysis is that neither contractual arrangements supported the client strategic objectives. More specifically, the *JBCC Principal Building Agreement* was not only at variance with the client's established supply relationship with the developer, but it made no meaningful contribution to the management and control of the client's strategic objectives, nor did it provide any basis for the measurement of project outcomes in terms of these.

A review of all key planning documents and organizational systems revealed how the *JBCC Principal Building Agreement* signed by the developer and the contractor failed to meet the client strategic objectives as there was:

1. No evidence that a project organization had been purposefully designed to meet strategic project objectives
2. No master development programme for the project in terms of time.
3. No formal quality management plan for the project in terms of the client's technological objectives
4. No formal site safety management plan
5. No formal environmental management plan for the control of construction activities in terms of ISO 14 001
6. No stakeholder management plan for the management of project stakeholder objectives or relationships
7. No formal procurement management plan in terms of the client's stated objectives for preferential procurement

Following the review of the documentary evidence, interviews were conducted on a semi-structured basis with the project manager and the architect to explore these issues and to correlate and validate specific findings. Both the developer and client were unwilling to be interviewed, although the client provided the project documentation

These documents confirmed the initial observation that the client's strategic objectives in terms of the socio-economic objectives and corporate policy were not explicitly communicated to the team, nor stated in the project documents made available to them.

Both interviewees opined the supply relationship between the client and the developer prior to conclusion of the development agreement as being collaborative in nature; a *de facto* joint venture, where one party provided land, and the other finance. Both expressed surprise that the client subscribed to the *JBCC Principal Building Agreement*. Both considered the supply relationship and the contractual arrangement to be inappropriate for the achievement of the strategic objectives of the client for the project because of the number of unresolved issues that remained at the start of the project. Their opinion was that the *JBCC Principal Building Agreement* is only appropriate where there is certainty in design information and where the client is fully involved in the construction process. Both found that the division of roles and responsibilities between the client and developer in terms of their rights and obligations in respect of outstanding matters to be completely inadequate as there is no definition, nor any parameters for their resolution.

Two steps taken by the client and the developer to manage the project for the client's stated strategic objectives were identified by the architect and project manager, namely:

- putting a completion date in the contract; and,
- the appointment of a professional planner by the developer.

Other than these, they were unaware of any specific measures or steps taken to manage project risk in terms of the contract and that performance criteria for the project were neither identified nor defined.

Analysis of all the project documents provided yielded only one clear client strategic objective, namely, project completion by the date recorded in the Development Agreement. This objective was reinforced by significant penalties.



This would indicate that the choice of supply relationship adopted by the client appears to have been ill-considered for several reasons:

1. The client procured the development by protracted negotiation with a *single source* supplier. The relationship was highly collaborative from the start. Both the project manager and the architect described the supply relationship at inception as being akin to a *joint-venture*.
2. The brief was incomplete at the date of contract, both the Development Agreement and *JBCC Principal Building Agreement* suggesting that it was going to require significant levels of joint working throughout the construction period to ensure final product quality for project delivery;
3. The nature of the agreement to proceed with the project before contract, was premised on a working relationship that was destined to last for more than two decades; and
4. A strong demand by client stakeholders that had impacted on project scope.

It would appear that the essence of the contractual arrangement between the client and the developer was a *turn-key* development contract. The arrangement in which both the Development Agreement and *JBCC Principal Building Agreement* were applied to the project, however, proved unduly complex for several reasons:

1. The client had bound the developer to procure the construction works in terms of the *JBCC Principal Building Agreement* and then, through the terms of the Development Agreement, agreed to bind itself to accept project completion based on a final completion certificate issued to the developer by the principal agent (see Clause. 26 of the *JBCC Principal Building Agreement*) in terms of a contractual arrangement between the developer and the contractor. The arrangement effectively precluded the client from exercising any direct control over an event intrinsic to its contractual rights under the Development Agreement.
2. Explicit in the development agreement was an understanding the client would rely on all systems of management and control intrinsic to the *JBCC Principal Building Agreement* in order to satisfy its objectives. It should be noted that the client's interests in this regard are not recorded in the construction agreement. The arrangement again effectively precluded the client from exercising any direct control over matters of immediate contractual right under the Development Agreement.

The weakness in the development agreement was that the client chose to rely on mechanisms of control privy only to the developer in terms of its relationship with the contractor at the second tier of the supply chain. The client clearly stood outside this contractual relationship and left itself without any means to exercise its rights under those terms. The client's contractual position was thus greatly weakened. It is postulated that this rather complex contractual arrangement between the client, developer and the construction contractor occurred because of a 'thoughtless' decision, possibly driven by 'over-familiarity' or 'trade-usage'(Root and Hancock, 1996) to make use of the *JBCC Principal Building Agreement* which is so conveniently available to the construction industry.

It is clear that the reliance of the parties (and in particular the client) on the *JBCC Principal Building Agreement* was born out of a certain familiarity and confidence in its established use. Regretfully, the approach of the parties prevented them from adopting a ready mind to their own unique contractual requirements. Their attempt to cure their commercial arrangements in terms of this agreement, therefore, did much to weaken their contractual position with a tendency to produce many oddities that could consequently lay the foundation for serious conflict/dispute.

## **Conclusions**

The paper has shown that the South African *JBCC Principal Building Agreement* deals only with the transaction to procure the built asset (construction work) within the parameters of the time required for its delivery, its cost, and the standard of quality to which it must be built. Its focus, therefore, is placed on construction process and the description of the product required for project delivery. The limitation of such a contracting method, in terms of the argument presented thus far, would seem to indicate that the Agreement lacks utility for the control of strategic objectives, or to establish the measures necessary to evaluate their success.

As a standard form document, *JBCC Principal Building Agreement* makes no provision to deal with strategic objectives not met by its philosophy, structure, or parameters. All other procurement issues related to the strategic and organizational objectives of the investment

and business case that should be decided and managed under appropriate parameters, fall outside its structure and control. This means that construction clients who use the document for the benefit of its convenience are obliged to consider its adequacy to manage strategic objectives within the wider sense of the investment and business case. The document clearly prevents the client from accurately expressing his specific project wishes but rather merely moulds the client's intentions into a prescribed document.

At present in South Africa there is the added focus of development objectives that have been identified as strategic for the whole country. The imperatives documented by government include the creation of sustainable employment, skills development, affirmative action, the active promotion of small and micro- enterprises, and the development of public sector capacity to manage the delivery process. Government policy requires that the construction industry respond to these issues.

These imperatives reinforce the strategic value of process over product and should be reflected in the way the project is organized overall and in the methods of implementation – a matter that is clearly absent from the current version of the *JBCC Principal Building Agreement*. Up till date, procurement emphasis has been placed on awarding contracts to companies with a requisite percentage of black equity shareholding. Recent market signals indicate, however, that added weight is being placed on meeting the country's imperatives by operational practices within the construction process. It has thus become more important to structure the contractual framework accordingly and to determine performance measures aligned with a uniquely developmental approach which, in turn, is responsive to specificities, and the resource base of the location in which it is to occur.

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Table 1: The client's construction procurement features and processes

<i>Supply chain</i>	The client maintains a separate department responsible for its property development and maintenance programme. The department is well staffed with its own project managers, architects, engineers and quantity surveyors and it is able to manage projects up to R5m. Projects larger than R5m are wholly outsourced.
<i>Supply chain relationship</i>	The client maintains a database of service providers for professional and construction services, and specialist suppliers. Inclusion on the database is subject to a registration procedure. Selection of a service provider for appointment to a particular project is based firstly, on the government's policy for preferential procurement and, thereafter, follows an assessment of technical competence, capacity, programme, and an understanding of the client's requirements. The client, therefore, outsources only to preferred suppliers. Professional consultants are appointed more or less on a rotation basis. Construction contractors and suppliers are subjected to competitive tender.
<i>Procurement strategy</i>	<p>Construction Management is the preferred route of procurement for all projects under R5m. The main reason for following this organizational method of procurement is that it:</p> <ul style="list-style-type: none"> <li>▪ allows the client to have a single point of contact with the supply base.</li> <li>▪ permits separate competitive tendering for all trade work packages and thus maximizes cost savings.</li> <li>▪ affords an intimate understanding of market pricing</li> <li>▪ strengthens the client's strategic cost and value management systems.</li> <li>▪ facilitates fast-track programming, and thus early project delivery</li> <li>▪ builds internal capacity in regard to product development</li> <li>▪ facilitates lessons learnt which can be carried forward within the client's organization.</li> <li>▪ it is focused on strategic objectives driven by the low allocation of monies in current annual capital expenditure budgets.</li> </ul> <p>Projects above R5m are wholly outsourced under the <i>separate and coordinated</i> (i.e. traditional) procurement system.</p>
<i>Contractual arrangements</i>	Projects procured under the Construction Management model are contracted in terms of the <i>JBCC Minor Works Agreement</i> for each trade package. Outsourced projects are contracted in terms of the <i>JBCC Principal Building Agreement</i> .

Table 2: The client’s strategic objectives in construction

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<i>Socio-economic objectives</i>	<p>The client endorses the principles of:</p> <ul style="list-style-type: none"> <li>▪ sustainable development enunciated in the Constitution and thus seeks to comply with all statutory provisions and guidelines governing its own projects in the built environment</li> <li>▪ sustainable construction and has thus instituted an Environmental Management System (EMS) framework in accordance with ISO 14 001 for implementation on all their projects.</li> <li>▪ the involvement of previously disadvantaged and marginalized sectors/individuals and thus procures its construction works in accordance with the Preferential Procurement Policy Framework (PPFA), No. 5 of 2000, and the Targeted Procurement Policies developed by the National Department of Public Works.</li> <li>▪ safe working environment for all its staff and external service providers appointed to work on its property, and thus seeks to comply with the provisions of the Health &amp; Safety Act, No. 85 of 1993, and the Draft Construction Regulations published 2002 (Government Gazette No. 23310, 2002)</li> </ul>
<i>Technological objectives</i>	<p>The client has developed standards for all construction materials and finishes, building systems, installed equipment, and furniture and fittings. The standards relate directly to whole life-cycle building costs which must fall within defined parameters. The standards are required to be met on all projects.</p>
<i>Operational objectives</i>	<p>Design functionality for all construction works must adhere to the operational requirements of the client’s various operations departments responsible for the running and maintenance of its buildings after project completion.</p>
<i>Aesthetics</i>	<p>The client maintains its own aesthetics committee which is mandated to ensure that all its buildings fit the context of the environment into which they are placed. In this regard, the client also seeks to cooperate with the aesthetics committee’s of other bodies, whether statutorily constituted or not, which may have a vested interest in the client’s construction projects.</p>
<i>Organizational objectives</i>	<p>The client seeks to develop and empower its staff, and increases its organizational capacity by the process of the development of its own property. Objectives in this regard are defined and undertaken on a project specific basis.</p>
<i>Stakeholder objectives</i>	<p>The client maintains a proactive relationship with all its regular stakeholders and has constituted various forums in which to engage with them on a regular basis. Project stakeholders are identified at the inception of each project and their needs are identified for negotiation in terms of project objectives.</p>
<i>Functional objectives</i>	<p>Objectives related to time, cost and quality are project specific and are usually identified in terms of the investment/business case.</p>

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Table 3: How the Development Agreement and JBCC Principal Building Contract addressed the client's strategic objectives

<i>Strategic objectives</i>	<b>Development Agreement</b>	<b>JBCC Principal Building Contract</b>
<i>Socio-economic objectives</i>	<p>The land did not fall within the provisions of the Environmental Conservation Act nor the NEMA Act 107</p> <p>There was no evidence that the developer was obligated to ensure that the contractor:</p> <ol style="list-style-type: none"> <li>would manage the construction works in accordance with the client's Environmental Management System (EMS) framework</li> <li>would procure the construction works in accordance with the (PPFA)</li> <li>comply with the Targeted Procurement Policies developed by the National Department of Public Works.</li> <li>implement a health and safety plan for the management and control of the construction works.</li> </ol>	<p>No provisions for EMS Framework (ISO 14 001 and Preferential Procurement (PPFA) although these could have been incorporated under Preliminaries</p> <p>No Provisions although JBCC place the obligation for H&amp;S on the contractor (Cl.7) while Regulation (2003) shift the primary onus for H&amp;S onto the employer.</p>
<i>Technological objectives</i>	<ol style="list-style-type: none"> <li>were unresolved at the time of the development agreement.</li> <li>there was very little clear definition of the client's requirements.</li> <li>no parameters were laid down for whole life-cycle building costs for the project.</li> <li>no provision was made in the development agreement to define the nature of the division of responsibilities between the parties.</li> </ol>	<p>Technological objectives for building materials and finishes, building systems, and equipments are contained in the employer's specifications with the proviso that they must be fit-for-purpose if not specified.</p> <p>There is no provision for the whole life-cycle costs which is considered the employer's obligation.</p>
<i>Operational objectives</i>	<p>Design of the project had been completed before conclusion of the development agreement</p> <p>Matters of the design functionality of the building in terms of operational requirements, therefore, were not addressed in the development agreement.</p>	<p>This is not applicable in this case as the contract is only for works execution</p>



<i>Aesthetics</i>	As stated above, design of the project had been completed before conclusion of the development agreement and matters of the design aesthetics of the building, therefore, were not addressed in the agreement.
<i>Organizational objectives</i>	No organizational objectives were recorded in the development agreement for the training of the client's staff to engender empowerment or facilitate capacity building.
<i>Stakeholder objectives</i>	No stakeholder objectives were recorded in the development agreement, nor were there any obligations on the developer to institute a stakeholder management plan for the project.
<i>Functional objectives</i>	No functional objectives are recorded in the development agreement for cost and quality. The only functional objective explicitly dealt with in the development agreement was that the project must be delivered by a predetermined date. Failure to deliver the project by the said date would result in the client being paid a penalty.

This is not applicable in this case as the contract is only for works of execution.

No provision for this; would have to be negotiated with contract.

No provision, would need to be negotiated with the contractor.

Time is covered Clause 15.2 that the work should with diligence, regularity and expedition.

Cost – there is no provision and is considered employer's obligation.

Quality: covered by Clause 15.2 that the workmanship to be executed with due skill to a standard determined by the principal agent.

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