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Landscaping: an analysis of current contracting processes and documentation

Peer reviewed

Abstract

Landscape work, forms an integral part of most land development projects, whether they are building works or civil works. Environmental protection, rehabilitation and landscape beautification are nowadays considered essential aspects in land developments.

Building contracts for the construction industry have been developed over many years through the changing needs of clients and contractors, new levels of technological skills and development of new materials and construction methods. However, the varied nature and wide scope of landscape projects often make them difficult to be reconciled with standard forms of contract commonly in use in the construction industry.

This paper reviews the problem areas in the field of landscape contracting and landscape maintenance brought about by a lack of suitable forms of landscape contracts/subcontracts. Standard forms of contract generally do not allow for the circumstances that are unique to landscape contracting, and this short coming is regarded as a serious problem facing the landscape industry. This paper will, therefore, also attempt to address the issue of how to effectively reconcile landscape work with standard forms of contract that are generally in use in South Africa, all of which have been written specifically for building or civil works type projects.

Keywords: Procurement, building contracts/subcontracts, model documentation, landscape projects

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Abstrak

Landskapwerk vorm 'n integrale deel van die meeste grondontwikkelings projekte, hetsy bouwerk of siviele konstruksiewerk. Omgewingsbewaring en rehabilitasie asook landskapverfraaiing word deesdae as onontbeerlike aspekte van ontwikkelingsprojekte geag.

Boukontrakte vir die konstruksiebedryf is oor baie jare ontwikkel in reaksie op veranderende behoeftes van bouhere en aannemers, nuwe vlakke van tegnologiese vaardighede en die ontwikkeling van nuwe materiale en boumetodes. Die wyduiteenlopende aard en omvang van landskapprojekte maak hulle egter dikwels moeilik versoenbaar met die standaard kontrakvorms wat algemeen in die konstruksiebedryf gebruik word.

Hierdie artikel bied 'n oorsig oor die probleemareas in die veld van landskap kontraktering en landskaponderhoud wat ontstaan as gevolg van 'n gebrek aan geskikte kontrak- en onderkontrakvorms. Standaard kontrakvorms laat gewoonlik nie toe vir die omstandighede wat eie is aan landskapkontraktering nie, en hierdie tekortkoming word beskou as 'n ernstige probleem wat die landskapbedryf in die gesig staar. In hierdie artikel word die saak aan gesprek hoe om landskapwerk effektief te versoen met kontrakvorms wat algemeen in Suid Afrika gebruik word, maar wat almal geskryf is spesifiek vir bou- en siviele werk projekte.

Sleutelwoorde: Verkryging, boukontrakte/ onderkontrakte, modeldokumentasie, landskapprojekte

1. Introduction

Pleasant visual effects created by a landscaped environment can lead to an increased attractiveness to developers, tenants and buyers, which in turn can lead to increased profitability for the building owner. It has become the norm in South Africa for office developments in particular to be set in an extensively landscaped environment and for such landscapes to be maintained at a high level. Landscape work has also over time become specific 'specialist' work and within the South African context, since 1935 has evolved into an industry with a turnover of R1.314 billion in 1999 (Staples, 1999) – employing approximately 160 000 people.

The way that the formalised building industry structures and regulates itself has led to specialist subcontractors, such as landscape contractors, being involved in an ever-increasing way. However, through expedience and a lack of widely accepted alternative forms of contract, the contractual systems developed for building work have been and are still widely used for landscape work.

The intrinsic differences of working with live plant material, as opposed to the inanimate components in all other building trades, render the forms of contract and subcontracts typically used in the construction industry in South Africa¹ to some extent unsuitable for landscape work, which can lead to financial disadvantages for clients, consultants, main contractors or specialist subcontractors.

¹ Focus Group 6 of the Interministerial Task Team for Construction Industry Development recommended that only the following forms of contract be used in South Africa to comply with the provisions of Best Practice #2: Features of a modern form of engineering and construction contract. These are:

1. FIDIC (French acronym for International Federation of Consulting Engineers) 1999
2. The General Conditions of Contract for Construction Works (GCC) 2004 (Incorporating COLTO General Conditions of Contract for Road and Bridge Works for State Road Authorities 1998)
3. The Joint Building Contracts Committee (JBCC Series 2000)
4. The New Engineering Contract (NEC also referred to as the Engineering and Construction Contract ECC).

Whereas the Joint Building Contracts Committee (JBCC), which has been developed in South Africa to suite local practices, is the preferred contract documentation system in the building industry for private projects, it does not have any representation from an organised landscape contractors' body such as the South African Landscapers Institute (SALI) or the Institute of Landscape Architects of South Africa (ILASA). The fact that the majority of large landscaping projects, i.e. commercial or industrial projects, are tied to the JBCC system exacerbates the problems experienced when using inappropriate forms of contract for landscaping.

2. Definition of terms

2.1 Pre-main contract

The term is used to describe those contracts that are entered into between a landscape contractor and the client for certain work to be done before and in anticipation of a main contractor to be appointed to undertake the bulk of the development project. Pre-main contracts typically include growing contracts to ensure the required number and species of planting will be available to be used in the main contract, environmental protection and rehabilitation work, and relocation and protection of existing flora.

2.2 In-main contract

The term is used to describe those landscape contracts that are entered into between the landscape contractor or subcontractor and the client or the main contractor during the duration of the main project construction contract.

2.3 Post-main contract

The term is used to describe those contracts that are entered into between the client and the landscape contractor for landscape work to be done after the main contractor, usually a building or civil works contractor, has completed the principal construction contract and it becomes difficult for him to have the landscape subcontractor under his control for an extended period normally not allowed for in the form of principal contract agreement.

3. A brief overview of the model forms of contract recommended for use in South Africa

In the South African Institute of Architects' Practice Note No. 1/1999 (SAIA, 1999) the advantages of using pro-forma contract documentation are spelled out as follows:

The advantage of using model documentation is that there is a fair distribution of risk between the parties to the agreement. A further advantage is that the parties become familiar with their obligations and are in a position to enter into the building agreement with confidence.

However, the Green Paper on Public Sector Procurement Reform in South Africa (1997) made the observation that there is little uniformity in contract documentation and delivery systems in South Africa. In works contracts, the tendency is to follow the recommendations laid down by professional associations and learned societies and to utilise standard industry documents and systems, which are adapted to suite the need, style and culture of the organisation calling for bids. Consequently the Focus Group 6 on procurement of the Interministerial Task Team on Construction Industry Development (2000) recommended that the public sector should procure engineering and construction works in terms of a limited range of standard and approved procurement documents (see footnote 1).

To assist clients and their consultants in selecting an appropriate form of contract, the Construction Industry Development Board (CIDB) has identified in its Best Practice Guideline C2 (2004: 11-12) the following factors to take into account:

- The complexity of the works;
- Management capacity, capabilities and expectation of the parties and their agents;
- Requirements for specific contracting and pricing strategies, viz:
 - construction management;
 - management contract;
 - design and build;
 - develop and construct;
 - activity schedules;

- bills of quantities;
- cost reimbursable;
- target cost; and
- partnering;
- Requirements relating to:
 - the assignment / management of risk;
 - back to back contracts for the engagement of all types of subcontractors; and
 - the management of cost and time overruns;
- The ability and capacity within the client body to handle different administrative procedures for building and civil engineering contracts, e.g. the use of JBCC on building contracts and GCC / FIDIC on civil engineering contracts; and
- Training requirements.

Figure 1 illustrates the logic to be followed in deciding which form of contract within a series is required for a specific application. Choosing the right form of contract is a strategic decision that an organisation needs to make.

There can be little doubt that the reduction in the prolific number of forms of contract in use in South Africa to the abovementioned four series of documents will assist in the elimination of many of the inefficiencies and losses associated with having to interpret the many varied approaches used to establish the risks, liabilities and obligations of the parties to a contract and the administration procedures associated therewith. The NEC and FIDIC families of contract documents are international series of documents that can be used on all types of engineering and construction contracts. The GCC and JBCC forms of contract, however, have been developed in South Africa, and are confined to civil engineering and building works, respectively. These series of documents, with the exception of the GCC, all contain short versions of engineering and construction works contracts, and collectively cover the commonly encountered contracting strategies that are currently being pursued internationally.

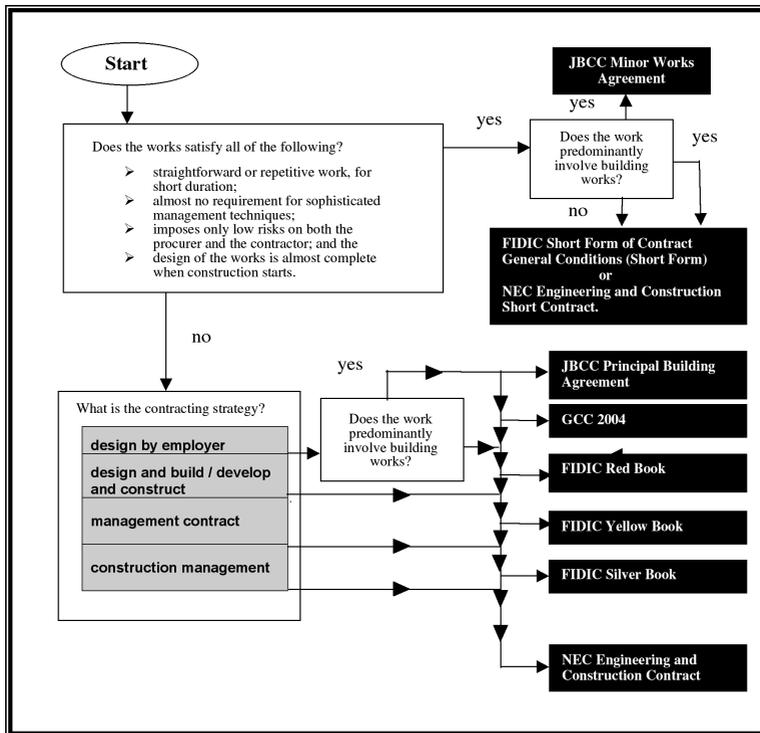


Figure 1: The selection of an appropriate form of contract for engineering and construction works
Source: CIDB Best Practice Guideline C2, 2004: 13

3.1 An overview of the JBCC Series 2000 suite of documents

The JBCC was founded in 1972 and is supported by all the major professional and contracting bodies in the building industry in South Africa. The constituent bodies that form the JBCC are:

- Association of Construction Project Managers (ACPM);
- Association of South African Quantity Surveyors (ASAQS);
- Master Builders South Africa (MBSA);
- South African Association of Consulting Engineers (SAACE);

- South African Institute of Architects (SAIA);
- South African Property Owners Association (SAPOA); and
- Specialist Engineering Contractors Committee (SECC).

The JBCC documents were first published in 1991 and were replaced by the Series 2000 published in 1998. The JBCC documents are compiled in the interests of standardisation and portray the consensus view of the JBCC of good practice and an equitable distribution of contractual risk. The documents are 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.

The Principal Building Agreement is the cornerstone of the JBCC Series 2000 document range, and also contains standard provisions to cater for the requirements commonly associated with government contracts.

3.1.1 The JBCC Minor Works Agreement

The JBCC minor works form of contract is aimed at projects that are comparatively small in extent, uncomplicated and where less sophisticated contractors with a low capital base can be accommodated.

The agreement is designed for use where:

- The contract is for minor works of simple content;
- The employer appoints only a principal agent to administer the contract; and
- The employer appoints direct contractors for specialised work or installations not to be undertaken by the contractor.

The agreement is suitable but not limited for use where the contractor is a small to medium enterprise, the employer carries the major liabilities related to the works, and the employer is responsible for the primary insurances related to the works.

3.1.2 Using the JBCC agreements for landscaping work

The JBCC agreements make full provision for subcontracting, whether for the contractor's domestic subcontracts, nominated/selected

subcontracts or direct contracts. The contracts within its family of contracts suited to landscape work are:

- The JBCC Nominated/Selected Subcontract Agreement for use between a main contractor and the subcontractor. The same form of agreement is used for both nominated and selected subcontracts, as the contractual relationship between the contractor and the subcontractor is the same whether the subcontractor is nominated or selected. The differences are dealt with in the Principal Agreement, as they effect the contractor's liability to the employer for the consequences of the subcontractor's default or insolvency; and
- The JBCC Minor Works Agreement that is a form of contract suitable for a direct contract between the employer and contractor/subcontractor for the landscape works. It can be used with the Principal Building Agreement as a direct contract in terms of clause 22: Employer's Direct Contractors, or as an independent direct contract on its own, or in conjunction with other subcontracts all using the same form of contract.

The principal agent administers the contract, or can delegate certain of his duties to other agents, e.g. an architect or landscape architect, to act on his behalf.

3.2 An overview of the GCC 2004 contract

The foreword of the abovementioned document states that the South African Institution of Civil Engineering (SAICE) has a strong tradition of developing, publishing and maintaining forms of contract and has over several decades published six editions of the General Conditions of Contract for Civil Engineering Works. The sixth edition, GCC 1990, was modified by the Committee of Land Transport Officials and republished by SAICE as the General Conditions of Contract for Road and Bridge Works for State Authorities (COLTO, 1998).

The GCC 2004 contract replaced the GCC 1990 and COLTO 1998 contracts, but retains the language, style, ethos and current wording of these documents. It remains a form of contract primarily for use in contracts where the contractor undertakes construction on the basis of full designs issued by the employer and bills of quan-

titles for payment purposes. It satisfies the CIDB requirements for a standard form of contract, and is suitable for use in procurement documents that are prepared in accordance with the provisions of SANS 10403, Formatting and Compilation of Construction Procurement Documents.

3.2.1 Using the GCC 2004 contract for landscaping work

In the South African Federation of Civil Engineering Contractors' newsletter No. 20/2004 (SAFCEC, 2004) the following statements are made:

COLTO 1998 is basically a revised version of the GCC 1990 document which incorporates certain standard amendments previously issued together with the GCC 1990 by individual road authorities.

There are, however, two issues which differ significantly between the two documents, namely the authority of the Engineer and the status of the nominated/selected subcontractor. The COLTO document requires the Engineer to act as the agent of the Employer and does not make provision for a nominated subcontractor.

The COLTO document was used as the point of departure, being the most recent edition, for the revision of the GCC 2004 contract and, therefore, follows closely the provisions of the equivalent sub-clauses of COLTO. As stated above, this had the result that the term "nominated subcontractor" has disappeared from the new document, being replaced by the term "selected subcontractor". All subcontractors, such as for landscape work, will be appointed in terms of clause 6: Subcontracting, the contractor being fully responsible for their performance. It is important to note that under the GCC 1990 contract, the nominated subcontractor could be selected by either the engineer or the employer, whereas under the GCC 2004 contract, the appointment is the exclusive preserve of the contractor and the employer; the engineer now being precluded from participating in the selection process.

There is no short form of contract as the Procurement and Delivery Management Panel resolved that the Short Conditions of Contract (1996) for minor works be withdrawn.

The engineer administers the contract, but can nominate a person as his representative, or can delegate certain of his duties to others, to act on his behalf.

3.3 An overview of the FIDIC family of contracts

FIDIC was founded in Belgium in 1913 and is an association of national member associations. At present membership is drawn from more than 60 countries, of which more than 10 are from Africa – South Africa being one of the early members. The documents prepared and published by FIDIC are widely used internationally, mostly for civil engineering and process plant projects. It includes both professional-driven and contractor design and construct variants.

Since its formation FIDIC has addressed a whole range of professional issues affecting consulting engineers, but it has become known outside that profession, particularly amongst client bodies, the international financing institutions, lawyers and contractors because of its work in preparing and publishing standard forms of contract, often referred to as the 'FIDIC Rainbow'. In 1999 FIDIC extended its ambit into other disciplines with the publication of first editions of a new family of contracts comprising four new standard forms of contract:

- Conditions of Contract for Construction;
- Conditions of Contract for Plant and Design-Build;
- Conditions of Contract for EPC / Turnkey Projects; and
- Short Form of Contract.

In addition to the above documents FIDIC has produced a number of other documents for use by its members. These include:

- Tendering Procedure;
- Model Services Agreement between Employer and Consultant;
- Joint Venture Agreement;
- Sub-consultancy Agreement; and
- Various Guides and Supplements.

3.3.1 Using the FIDIC contracts for landscaping work

According to Ahier (2004) the FIDIC Short Form of Contract is particularly well-suited to small construction projects and landscaping work. Being a member of the FIDIC family of standard form con-

tracts it uses the same philosophy, format and terminology as other members of the family. It is basically a contract between the employer and the contractor with the provision of an employer's representative, such as the architect/engineer, an optional extra. It also deals with the provision of design by the contractor, which is often the situation in landscaping contracts.

The employer may administer the contract himself, or may delegate any of his actions to others, such as an architect or landscape architect, to act on his behalf.

3.4 An overview of the NEC family of documents

The NEC family of documents is an integrated and multi-discipline set of contracts for engineering and construction projects covering both construction and the associated professional services. The documents were first conceived in 1985, when the Council for the London Institution of Civil Engineers (ICE) approved a recommendation from its Legal Affairs Committee to lead a fundamental review of alternative contract strategies, with the objective of identifying the needs for good practice. This recommendation arose out of the belief of many engineering and construction professionals that there was an urgent need for a whole new approach to contracting, in line with modern approaches to project management.

A consultative version was published in 1991, which after use and feedback resulted in the issue of the first edition in 1993. The ICE published a second edition in 1995, which incorporated refinements and changes prompted by comments from the industry and feedback from projects that had been executed under the first edition.

The NEC is the title for the complete family of documents that comprises:

- Engineering and Construction Contract (ECC) – the 'Black Book';
- ECC Guidance Notes – the 'Brown Book';
- Engineering and Construction Subcontract;
- Flow Charts;
- Main options A – F;
- Secondary options G – Z;

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- NEC Professional Services Contract;
- Adjudicator's Contract; and
- Engineering and Construction Short Contract (ECSC).

The NEC system is designed to be suitable for use anywhere in the world and by any organisation, whether public or private.

3.4.1 Using the NEC contracts for landscaping work

According to Baird (2004) the NEC has four contracts within its family of eight contracts, suited to landscape work. They are:

- NEC Engineering & Construction Short Contract (ECSC) that would be used between an employer and contractor for the design and construction of typically straight forward work, which does not require a high degree of project management;
- NEC Engineering & Construction Short Subcontract (ECSS) that is a back-to-back form of subcontract for use with the above document, when the landscaping contractor is required to subcontract any of the construction or installation work;
- NEC Professional Services Contract (PSC2) that is a form of contract suitable for the appointment of professionals of any discipline. This contract would be used on larger projects where a landscaping professional is appointed to carry out scheme design, and perform services for an employer on a fiduciary basis; and
- NEC Term Services Contract (TSC1) that is a form of contract used by an employer with a contractor for the management and/or maintenance of an existing facility for a term of say two to five years. It also includes provision for a certain amount of design during that period.

The form most likely to be used would be the ECSC. Being a member of the NEC family of standard form contracts it uses the same philosophy, format and terminology as other members of the family. A set of Guidance Notes and Flow Charts is also available to assist preparation and administration of contracts using the form, and its back-to-back subcontract, the ECSS.