

South Africa

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OVERVIEW OF THE CONSTRUCTION AND PROJECTS SECTOR

1. What are the main trends in the local construction and projects market? What are the most significant deals?

South Africa continues to see a high level of public and private sector infrastructure investment. This is mostly due to public sector infrastructure upgrading and private sector capacity expansion. A significant part of the investment continues to relate to:

- Increased electricity generating capacity.
- Road upgrades.
- Mineral and natural resource processing capacity.

The most significant transactions in the last 12 months relate to public sector procurement. They include:

- The continued construction of (and the continued placing of contracts for) the Eskom Medupi and Kusile Power Stations (each station comprising six generating units of about 600 megawatts each).
- Significant road infrastructure upgrades.
- Investment in mining infrastructure, including the development of new mines, the expansion of existing mines and the expansion of processing capacity.

Although not yet in construction phase, there has also been substantial activity in the renewable energy sector, mainly due to the government's Renewable Energy Feed-in Tariff (REFIT) programme.

MAIN PARTIES

2. Who are the main parties involved in a project?

The main parties in a construction and engineering project are the:

- Employer.
- Employer's agent.
- Contractor or contractors.

PROCUREMENT ARRANGEMENTS

3. Which are the most common procurement arrangements if the main parties are local? Are these arrangements different if some or all of the main parties are international contractors or consultants?

The construction and engineering environment is sophisticated (both from a legal and market perspective), and therefore procurement arrangements vary. An open or limited tender process is typically used (and generally required for public sector procurement), although negotiated procurement is not uncommon in the private sector.

The most common procurement arrangement for road works, or commercial or residential building works is for an appointed single main contractor to construct the works. The contractor assumes full responsibility for all construction activities and the supply of all labour and materials (whether supplied by the contractor or by subcontractors). The contractor carries out the works according to the employer's design, under the direction of the employer's agent. The employer appoints the design team.

For other projects, procurement arrangements vary from turnkey (that is, handing over the project in a ready to use condition)/ engineering procurement and construction (EPC) contracts, to multiple contractor arrangements (with or without the employer appointing an engineering, procurement and construction management (EPCM) contractor or one or more external professional consultants as the employer's agent). Multiple contractor arrangements typically include mixed design-build and construct-only or erect-only contracting arrangements.

These arrangements apply equally where the parties are international contractors or consultants.

TRANSACTION STRUCTURES

4. What transaction structures and corporate vehicles are most commonly used in local projects (when the main parties are based in your jurisdiction)?

Generally, internationally recognised transactional structures are used. These include special purpose vehicles, joint ventures and consortiums, depending on the nature of the procurement and works.



5. Are the common transaction structures and corporate vehicles different when the main parties are international contractors or consultants?

The same structures used in local projects (that is, special purpose vehicles, joint ventures and consortiums) are used when the main parties are international contractors. However, international contractors often include on-shore and offshore components in their joint venture and consortium structures (particularly when partnering with a South African entity). Employers typically seek to maximise single party liability, and usually require the assurance of joint and several liability from consortium and joint venture members.

FINANCE

6. How are projects financed? How do arrangements differ for major international projects?

Commercial and/or residential construction projects are generally bank-financed by development loans and secured through first mortgage bonds. There is no typical finance approach for other construction or engineering projects.

Private sector procurement is usually financed by debt and equity. Public sector procurement is generally self-funded or financed by bond issues, commercial and/or development bank or foreign export credit agency loans, or is procured through private public partnership (PPP) structures.

A significant development over the past 12 months is the retrospective and future funding of certain energy projects by the World Bank and the African Development Bank. The loans were granted to South Africa's electricity utility, Eskom Holdings Limited, for the purpose of funding works that had already been contracted and future works to be contracted in relation to, among others, the construction of the Medupi Power Station and the Kusile Power Station (see *Question 1*).

SECURITY AND CONTRACTUAL PROTECTIONS

7. What forms of security and contractual protections do funders typically require to protect their investments?

The security and contractual protections required by funders varies according to the nature of the project, that is, whether the project is financed:

- With recourse to the employer's balance sheet.
- With limited recourse to the employer's balance sheet (a project finance transaction).
- By way of a PPP.

Security

In the case of projects where investors have limited recourse to the employer's balance sheet, funders typically require:

- Security over all the project company's available assets, including:
 - mortgages over fixed property;

- notarial bonds over movable assets;
- pledges and cessions over all the project company's rights against third parties;
- security over all the project company's bank accounts; and
- a pledge of all shares in the project company.
- A range of step-in rights, which are generally exercised through security granted over the shares in the project company (the funders must first be entitled to exercise those rights under the security documents before they can step in).

In the case of PPP projects, investors typically require both:

- Security over the project company's various rights (particularly claims the project company has against the government under the PPP agreement).
- Shares in the project company. Generally funders cannot obtain security over the project's fixed assets, as these are usually the government's property.

Contractual

In the case of projects where investors have limited recourse to the employer's balance sheet, funders will typically require a comprehensive set of financing documents, including a fully termed common terms agreement that contains, among other things, all appropriate representations, warranties, positive and negative covenants, and events of default.

In the case of PPP projects, investors will typically require fully termed finance documents.

STANDARD FORMS OF CONTRACTS

8. What standard forms of contracts are used for local projects (when the main parties are based in your jurisdiction)? Which organisations publish them?

The most common standard forms of contracts used for large construction and engineering projects are:

- The *Fédération Internationale des Ingénieurs-Conseils* (FIDIC) Conditions of Contract (produced by the International Federation for Consulting Engineers):
 - Plant and Design-Build, First Edition, 1999 (Yellow Book);
 - Construction, First Edition, 1999 (Red Book);
 - EPC/Turnkey Projects, First Edition, 1999 (Silver Book); and
 - Short Form of Contract, First Edition, 1999 (Green Book).
- The New Engineering Contract (NEC) Engineering and Construction Contract (NEC3) produced by the Institution of Civil Engineers through its NEC Panel.
- The Joint Building Contracts Committee (JBCC) 2000 suite of contracts (last updated in 2007) produced by the JBCC.
- The General Conditions of Contract for Construction Works 2004 (GCC) produced by the South African Institute for Civil Engineering.

Public sector construction procurement must be undertaken on the above standard form contracts (and certain other standard form contracts approved or prepared by the Construction Industry Development Board (CIDB)) (*CIDB Act 38 of 2000 (CIDB Act) Regulations (CIDB Regulations)*). The CIDB encourages using these standard form contracts for private sector construction procurement to promote efficiency.

9. How do construction contracts for international projects differ from those used for local projects? Which organisations publish them?

Construction contracts do not differ for international projects from the standard form contracts in *Question 8*.

CONTRACTUAL ISSUES

Contractors' risks

10. What risks are typically allocated to the contractor? How are these risks offset or managed?

Risk allocation typically follows international trends and is largely determined by the nature of the works and the procurement methodology. Generally, the FIDIC or NEC risk allocation regimes are used in the construction market.

Fixed and firm price contracts (particularly where the contract period is more than 12 months) are the exception rather than the rule. This is largely because of South Africa's relatively high interest rates and the fact that commodity prices and inflation rates remain relatively unpredictable, and are influenced by foreign exchange rates. Construction and engineering contracts typically include change-in-cost provisions linked to acceptable indices. Contractors are not usually required to assume the risk for changes in the cost of labour, materials or other inputs except for a pre-determined fixed portion (usually between 5% and 15%). Employers similarly avoid unnecessary price premiums, which are otherwise associated with a fixed and firm price, and retain the benefit of downward price movements for these input costs.

Procurement arrangements and risk allocation are influenced by the volatility of the Rand and by the Exchange Control Regulations. The Exchange Control Regulations both:

- Prohibit payments in foreign currency by South African persons and entities, except with the prior approval of the Exchange Control Department of the South African Reserve Bank (Exchange Control).
- Regulate the receipt of foreign currency payments by South African persons and entities.

Typically, as a result:

- Foreign or multiple currency contracts are only appropriate where the contractor is a foreign entity or comprises a joint venture or consortium with one or more foreign entity members (in which case the employer can, subject to prior Exchange Control approval, make foreign currency payments to these foreign entities). The employer then assumes the risk of currency fluctuation and obtains forward cover (that is, secures foreign currency at a pre-determined rate, in advance) to mitigate this risk.

- Contracts with local contractors or between local entities are denominated and paid in Rand. The contractor assumes the risk of foreign currency-related input cost changes (and usually obtains forward cover to mitigate this risk).

Excluding liability

11. How can liability be excluded or restricted under local law?

Parties can contractually limit or exclude liability for both:

- Consequential and indirect loss.
- Negligence.

However, a party cannot exclude its liability for intentional loss or damage.

Caps on liability

12. Do the parties usually agree a cap on liability? If yes, how is this usually fixed? What liabilities, if any, are typically not capped?

Contracts typically exclude liability for consequential and indirect loss (*see Question 11*), and cap the contractor's liability for direct damages. The cap is usually determined as a percentage of the contract price and is subject to negotiation. The cap often depends on the nature of the works. Civil engineering contracts typically have a lower cap than design-build contracts.

Generally, the following are not taken into account to determine limitation of liability:

- Proceeds from principal-controlled insurances (that is, where the building contract parties are automatically covered under a blanket insurance policy, for all approved works).
- Liability from the annulment of principal-controlled insurance policies.
- Delay damages.
- Low performance damages.

However, this is subject to negotiation and depends on the level of the cap.

Force majeure

13. Are force majeure exclusions available and enforceable?

Force majeure exclusions are available and enforceable.

Common law recognises force majeure exclusions. Construction and engineering contracts typically expressly regulate the parties' rights and obligations with force majeure events. For the common law exclusion to be effective and to discharge the contract, the "supervening impossibility" must be absolute (as opposed to probable and relative) and must not be the fault of or under the control of either party. The courts do not recognise commercial impracticability as a supervening impossibility.

Material delays

14. What contractual provisions are typically negotiated to cover material delays to the project?

Liquidated damages for delay and the employer's right to terminate are typically negotiated to cover delay attributable to the contractor.

The following are typically negotiated to cover delays which are not attributable to the contractor:

- Contractual time extension and additional cost entitlements (typically subject to time barring).
- The right to terminate for prolonged suspension (and consequently the right to receive payment for expenses incurred and work done).
- Limitations on the ultimate duration of defect or warranty periods.

Early warning provisions and comprehensive progress reporting requirements are often included to manage the risk of delays.

Material variations

15. How are material variations to the works usually dealt with in the contract?

Employers (through the employer's agent) can typically instruct the contractor to carry out a variation, subject to the contractor's entitlement to claim an extension of time and additional costs. This entitlement is usually subject to time barring. The right to instruct a variation in design-build contracts is, however, usually subject to the contractor's right to resist it if the resulting change affects the suitability (unless the employer accepts the risk) or safety of the works.

In common law (unless specifically provided for in the agreement or otherwise agreed, and depending on the circumstances), an employer cannot omit part of the works with the intention of giving it to another contractor to complete. The extent of the works that can otherwise be omitted is arguably limited.

Other provisions

16. What other main contractual provisions do the parties usually heavily negotiate?

Additional matters which are often heavily negotiated by the parties include both the:

- Contractor's liability for latent defects in the works.
- Governing law and dispute resolution provisions, where one of the parties is foreign. South Africa is a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and public sector construction contracts are typically regulated by South African law, with South Africa as the dispute resolution forum.

APPOINTING CONSTRUCTION PROFESSIONALS

17. How are construction professionals usually appointed? How are their liabilities dealt with in the contract?

Construction professionals are typically appointed using industry standard agreements, although bespoke agreements are also widely used. Standard form contracts include the NEC Professional Services Contract, the FIDIC Client/Consultant Model Services Agreement and various standard forms, prepared and distributed by various professional organisations and associations, for example, standard appointment contracts for architects, engineers, quantity surveyors and project managers. Bespoke agreements are usually used for more complicated EPCM-type arrangements.

However, the CIDB Regulations require public sector procurement for construction-related professional services to be undertaken using the NEC Professional Services Contract or the CIDB Professional Services Contract.

Professional liability is subject to negotiation, but is usually capped and limited to damages arising from negligence. Liability to re-perform defective services is, however, usually not limited. Specific performance is available as a legal remedy under common law.

Limitation of liability is usually determined with reference to the value of the fee to be charged (not the value of the resulting works) and available professional indemnity insurance. Professional indemnity insurance is often limited to insurance arranged through the relevant professional association (although larger consulting companies usually have self-standing professional indemnity insurance).

PAYMENT FOR CONSTRUCTION WORK

18. What are the usual methods of payment for construction work? Are there ways for the contractor and consultants to secure payment or mitigate risks of non-payment under local law?

Payment methods are negotiated and usually arranged to keep the contractor cash flow positive or at least cash flow neutral. Payments are typically structured as progress payments, as certified by the employer's agent, according to the value of work completed or to agreed milestones, and are typically subject to limited retention. Contracts often allow for an advance payment as an interest free loan, which is paid and secured against an on-demand bond. The advance payment is amortised and repaid against future payments.

Common law allows a contractor, unless otherwise agreed, to obtain a lien (right of retention) over the works, to secure payment of a claim relating to works' expenditure. It is, however, typical for an employer/funder to require a contractor to waive this lien. In building contracts, contractors usually only waive their lien because alternative security for payment is provided.

The risk of non-payment is mitigated by contractual rights of suspension and termination, an obligation to pay interest (at sometimes punitive, but lawful rates) and/or security in the form of a letter of credit or other payment guarantee.



SUBCONTRACTORS

19. How do the parties typically manage their relationships with subcontractors?

Between the employer and the contractor, the contractor generally assumes full responsibility for the performance of all subcontractors. This position can, however, be modified contractually, so that the employer assumes certain risks (or so that the contractor's responsibility therefore is otherwise limited). The standard form JBCC building contract, for example, provides that the responsibility for design undertaken by a nominated (selected) subcontractor does not fall on the contractor. Instead the contract allows the subcontractor's design liability to flow through to the employer.

The relationship between the contractor and a subcontractor is subject to negotiation and is usually managed on a back-to-back basis with the main contract. For example, a contractor is free to request an indemnity from the subcontractor, which will typically be on the same or similar terms as that provided by the contractor to the employer. In addition, the back-to-back arrangement often extends to the subcontractor's right to receive payment which, unlike the situation in, for example England and Wales, is permitted in South Africa.

LICENSING

20. What licences and other consents must contractors and construction professionals have to carry out local construction work? Are there any specific licensing requirements for international contractors and construction professionals?

The CIDB Regulations provide for the establishment of a register of contractors, and require that any enterprise tendering or entering a construction works contract with the public sector must be registered in the appropriate grading and designation. Contractors tendering or entering a construction works contract with the private sector are not restricted in this way. In addition, all home builders must be registered with the National Home Builders Registration Council (NHBRC). Contractors registered with the NHBRC do not also have to register with the CIDB, if the public sector procurement relates to the construction of a home.

Apart from these registration requirements, there are no specific licences required by contractors for construction work. There are, however, various works specific approvals or consents, required under applicable legislation (including environmental, and health and safety legislation and regulations), and relevant municipal or other building regulations.

21. What licences and other consents must a project obtain:

- Before construction work starts?
- During construction work?
- On completion?

In general, the specific licences or consents required depend on the nature of the commercial activity for which the works are intended.

Before

In South Africa, land is divided into four main categories: agricultural, residential, business and industrial. Works can only be constructed on land which is appropriately zoned for the intended use.

All land falls within the jurisdiction of a municipality, which will have its own requirements relating to the approval of building plans. Generally, all building plans for any residential, business or industrial project must be approved by the relevant municipality before commencing the construction (*National Building Regulations and Building Standards Act No. 103 of 1977*).

During

Various statutes and authoritative standards:

- Provide for the authorities' rights to carry out inspections.
- Require inspections to be carried out and/or certificates to be issued in respect of construction work.

These inspections and certificates apply mainly in relation to health and safety requirements, and to civil engineering construction works. These generally are of an administrative nature rather than specific licences or consents. However, in terms of applicable road traffic legislation, specific permits are required for conveying abnormal loads on public roads. An example is an exemption permit issued by a Provincial Roads Authority under Article 81 of the National Road Traffic Act 1996, authorising the transportation of an abnormal load or the movement of an abnormal vehicle (or a combination of vehicles). Terms, conditions and fees can be imposed.

Completion

Generally, there are no specific licences or other consents required on completion of a project. However, no building can be occupied until the relevant municipality has issued a certificate of occupancy (*National Building Regulation and Building Standards Act*). A certificate of occupancy certifies that the building has been constructed and completed in accordance with the approved building plans, including compliance with related health and safety requirements.

PROJECTS INSURANCE

22. What types of insurance must be maintained by law? Are other non-compulsory types of insurance maintained under contract?

There is no specific construction-related insurance that must be maintained by law. Construction contractors, as with all employers (in the context of an employer/employee relationship) must register with the Compensation Fund for the Compensation for Occupational Injuries and Diseases Act 130 of 1993, or with a licensed compensation insurer. Under the Construction Regulations 2003 (Construction Regulations), prescribed in terms of the Occupational Health and Safety Act 85 of 1993 (OH&S Act), employers must ensure Principal Contractors (appointed under the Construction Regulations) are registered and in good standing with the compensation fund or a licensed compensation insurer, before construction work starts.

Contract Works Insurance, Public Liability Insurance and Marine Insurance (as applicable) are typically procured by the employer or the contractor, and the contract typically regulates the obligation to procure and maintain insurance.

Insurance for physical loss or damage arising from strike, riot, civil unrest and/or terrorism is provided by the South African Special Risks Insurance Association (SASRIA). A SASRIA coupon is typically procured together with (and linked to) Contract Works Insurance.

LABOUR LAWS

23. Are there any labour law requirements for hiring (local and foreign) employees?

Local workers

There are no specific requirements related to the hire of construction sector employees. The Basic Conditions of Employment Act 1997 (BCEA) prohibits employment of any child under 15 years of age or who is under the minimum school leaving age.

Foreign workers

Foreign nationals, who have not been granted permanent resident status in South Africa, must obtain work permits under the Immigration Act 13 of 2002. It is an offence to employ a foreign person in violation of the Immigration Act.

24. Which labour laws are relevant to projects?

Sectoral Determination 2: Civil Engineering Sector, South Africa (Sectoral Determination) applies to all civil engineering sector employers and employees, and regulates wages. The provisions of the Sectoral Determination regulating the following do not apply to employees whose earnings exceed an amount determined by the Minister of Labour in terms of the BCEA (the current earnings threshold being ZAR149,736 per annum) (as at 1 April 2011, US\$1 was about ZAR6.8):

- Ordinary hours of work.
- Overtime.
- Payment for overtime.
- Meal intervals.
- Rest periods.

Employers outside the civil engineering sector, whose activities fall within metal and engineering industries are subject to the Main Agreement concluded at the Metal and Engineering Industries Bargaining Council. The Main Agreement is binding on employers and employees within its scope and is valid for a fixed period, after which, it is renegotiated.

The BCEA, which sets basic conditions of employment and the Labour Relations Act 66 of 1995 (LRA) also apply. The LRA provides, among other things, that every employee has the right not to be unfairly dismissed and be subjected to unfair labour practices.

On major construction projects, employer organisations increasingly negotiate with trade unions to sign a Project Labour

Agreement (PLA). A PLA can include a productivity bonus and can also regulate matters not covered under any industry level Sectoral Determination or Collective Agreement, and provide for expedited dispute resolution procedures.

25. Must an employer pay statutory redundancy or other payments at the end of a project? Are all employees eligible?

An employee employed on an indefinite basis by a contractor can be redeployed to another construction project by the employer without his employment terminating at the end of a construction project. Given that the employee's employment is not terminated the employee is not entitled to any statutory or redundancy payments.

Employees can be employed under a fixed term contract for the duration of a particular project or for the duration of certain work on the project. At the end of the fixed term contract, the employee's employment terminates automatically, and this is not considered a dismissal. Therefore, employees are not entitled to any statutory payments.

For employees employed on an indefinite basis and who are not redeployed to another project site, their services may be terminated because of the employer's operational requirements. Operational requirements are requirements based on the economic, technological, structural or similar needs of the employer (LRA). The LRA provides a specific procedure which must be followed for a dismissal for operational reasons. An employer must consult with employees or their representatives on issues specified in the LRA. Failure to do so can result in the dismissal being found to be unfair. On termination of employment for operational requirements, in terms of the BCEA an employer is required to pay an employee severance pay equal to at least one week's remuneration for each completed year of continuous service with the employer.

In addition, on termination of employment, an employer must give the employee notice. The employer can require the employee to work the notice period or pay the employee in lieu of notice. On termination of employment, an employee must also be paid for all accrued annual leave.

HEALTH AND SAFETY

26. Which health and safety laws apply to projects?

The OH&S Act and the Construction Regulations (as well as various other regulations promulgated under the OH&S Act) regulate the health and safety of all persons (subject to certain minor exceptions) involved in construction work, other than construction work which is regulated under the Mine Health and Safety Act 29 of 1996.

The Construction Regulations impose obligations on employers (owners), contractors and designers. The obligations relate principally to the management of health and safety by the employer and designer through the design and procurement phase of the project, and by all parties on the construction site itself. The management of health and safety on the construction site

must be undertaken under pre-formulated and agreed health and safety plans, setting out specific minimum safety requirements for various construction activities (*Construction Regulations*). These include minimum requirements for:

- Work at elevated positions.
- Formwork and support work.
- The use of cranes and mobile plant.
- Transport of construction personnel.
- General housekeeping.
- Welfare.

ENVIRONMENTAL ISSUES

27. Which local laws regulate projects' effects on the environment?

Air

The National Environmental Management: Air Quality Act 39 of 2004 (AQA) provides measures for the prevention of pollution and ecological degradation, particularly for the control of emissions, and securing ecologically sustainable development. The AQA sets out national norms and standards regulating air quality monitoring, management and control by all spheres of government.

The list of activities that may result in atmospheric emissions which cannot be carried out without an atmospheric emissions licence was published on 31 March 2010. This list of activities can be found in the Regulations to the AQA (*GN 248 in GG 33064, 31 March 2010*).

Water

The National Water Act 36 of 1998 gives effect to a public rights system under which water is allocated on an administrative licensing basis. This Act contains stringent polluter-pays provisions in the event of on- and off-site water contamination. Under the Act people involved or in control of the construction projects would be required to take all reasonable measures to prevent water pollution if their activities may pollute water. Failure to take these reasonable measures exposes the contractor to criminal liability and liability for pollution clean-up costs.

Waste

The National Environmental Management Act, Waste Act 59 of 2008 requires holders of waste to both:

- Ensure that the waste is treated and disposed of in an environmentally sound manner.
- Prevent any employee or any person under his or her supervision from contravening the Waste Act.

The Waste Act prohibits unauthorised disposal of waste and littering. The Act also provides for the licensing of the waste management services.

A list of waste management activities that have or are likely to have detrimental effect on the environment was published on 3 July 2009. This list of activities can be found in the Regulations

to the AQA (*GN 718 in GG 32368, 3 July 2009*). The listing notice prohibits any person from commencing, undertaking or conducting a waste management activity listed unless a licence is issued for that activity.

Hazardous substances are regulated by the Hazardous Substances Act 15 of 1973, which provides for the control of hazardous substances that can cause injury, ill-health or death to human beings. A licence is required to supply, let, use, operate or apply a hazardous substance as identified in the Hazardous Substances Act.

Environmental impact assessments (EIAs)

EIAs are provided for in regulations to the National Environmental Management Act 107 of 1998 (NEMA). There are three lists of activities that require environmental assessments. Listing Notice 1 contains activities which require a basic assessment to be carried out before being authorised. Listing Notice 2 lists activities requiring scoping and EIAs to be undertaken before being authorised. Listing Notice 3 identifies geographical areas in each province (for example, protected areas, important areas for biodiversity conservation, estuaries, and sites or areas identified under an international convention).

Sustainable development

In the general environmental management principles section, NEMA requires that development must be socially, economically and environmentally sustainable. This includes:

- Avoiding pollution and degradation of the environment.
- Managing waste.
- Using and exploiting non-renewable natural resources responsibly.
- Adoption of a risk-averse and cautious approach in developments.
- Anticipating and preventing negative impacts on the environment and on people's environmental rights and where they cannot be altogether prevented, ensuring that they are minimised and remedied.

Authorisations granted under NEMA are subject to this principle.

28. Must buildings meet carbon emissions or climate change targets?

South Africa is a party to the United Nations Framework Convention on Climate Change and the Kyoto Protocol. South Africa is classed as a developing country under the Kyoto Protocol and therefore does not have specified commitments to reduce and/or cap carbon emissions. However in the Copenhagen Accord, South Africa undertook to reduce greenhouse gas emissions 34% by 2020 and 42% by 2025. Currently, there are no legislative instruments that have been passed to require buildings to comply with carbon emissions or climate change targets. It is expected that such instruments will only be made when detailed technical work and mitigation action plans needed to ensure that South Africa achieves the above targets are finalised.

CORRUPT PRACTICES

29. Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

The Code of Conduct for all Parties Engaged in Construction Procurement published under the CIDB Act (Code) provides a framework under which an action or default by any party to the procurement process may be assessed. An agent, contractor, employer, employee or subcontractor must not accept gifts, favours, or anything of more than token value from another party to the procurement process, and must not engage in unfair or unethical practices (*Code*).

The CIDB can convene and conduct an inquiry into breaches of the Code and can issue fines or warnings for breaches, referring the matter to the relevant authority in the circumstances, or de-registering contractors for a period of time.

The Prevention and Combating of Corrupt Activities Act 12 of 2004 (*Corrupt Activities Act*) identifies various specific corrupt actions and corrupt practices. It is an offence for any person who corruptly gives or agrees to give any person any undue gratification as an inducement or reward to do or not to do anything, in carrying out or performing his duties or functions (*section 3, Corrupt Activities Act*). Specific offences apply to specific circumstances, including matters involving public officials, tenders and contracts.

A person who is convicted of any of the above offences may be liable to imprisonment or fines, with a maximum penalty of life imprisonment (*section 26, Corrupt Activities Act*). In addition to any fine, a court can impose a fine equal to five times the value of the gratification involved in the offence (*section 26(3), Corrupt Activities Act*).

A court can order the particulars of a conviction and sentence of any person convicted of an offence to be endorsed on a register (*section 28, Corrupt Activities Act*). If the party convicted is an enterprise, the particulars of that enterprise, as well as the particulars of any partner, manager, director or other person who wholly or partly exercises control and was involved in or knew about the commission of the offence, can be recorded with the conviction and sentence. Endorsement on the register allows the National Treasury to terminate any agreement with the person or entity convicted subject to certain restrictions. The register is open to the public (*section 32, Corrupt Activities Act*).

BANKRUPTCY/INSOLVENCY

30. What rights do the client and funder typically require on the contractor's bankruptcy or insolvency?

Insolvency is regulated by the Insolvency Act 22 of 1936 (*Insolvency Act*) and the Companies Act 61 of 1973 (*Companies Act*). The Companies Act has been repealed and replaced as of 1 May 2011, but the provisions of the new act will not affect issues in a liquidation (although will introduce a new form of bankruptcy (*see below, Business rescue*)).

Effect of insolvency

The contractor's insolvency affects all executory (partly performed) contracts it is party to at the time. The contractor's insolvency does not, however, give the employer an option to terminate the contract.

Generally (subject to specific exclusions in the Insolvency Act), insolvency neither suspends nor terminates a contract. Instead, the trustee or liquidator, being bound to do whatever is in the best interests of the group of creditors (*concursum creditorum*), can generally choose whether to abide by the agreement or repudiate.

Repudiation by the contractor can usually be countered with an order for specific performance. However, this option is unavailable to an aggrieved employer (no matter how fully it has fulfilled its obligations) when the trustee of an insolvent estate repudiates. If the contractor's liquidator repudiates further performance under the contract, the employer is left with an unsecured concurrent claim for damages (for example, for the additional costs of getting a new contractor to complete the works at a higher cost than the original contract).

Alternatively, the trustee can elect to complete the contract and step into the shoes of the insolvent contractor (thereby becoming entitled to any performance owed by the employer and being bound to carry out the insolvent contractor's obligations).

The effect is that a clause designed to protect the employer's interests if the contractor becomes insolvent (for example, by conferring a preference or modifying the legal consequences of the *concursum creditorum*), is void against the trustee. A clause that allows termination on the basis of a party's insolvency is also unenforceable, as this denies the trustee the right to elect to continue with the contract if the creditors' interests demand it. However, where a right to cancel accrues for reasons other than insolvency (for example, non-performance) before insolvency, but insolvency occurs before the employer can cancel the contract, the employer can exercise its right to cancel the contract.

Mitigating risk

To mitigate risk, construction contracts typically provide that the employer acquires ownership of plant and materials intended for the works on the earlier of payment or delivery to site. If the right does not arise as a result of the contractor's insolvency, the employer's rights under these clauses are principally sustainable. However, set-off clauses and clauses providing for direct payments to subcontractors are invalid against the insolvent's trustee.

Business rescue

The new Companies Act 71 of 2008, which has come into effect as of 1 May 2011, introduces a new form of bankruptcy called business rescue. Under this, a supervisor can suspend or cancel, entirely, partially or conditionally, any provision of an agreement to which the company is a party at the commencement of the business rescue period. The other party is left only with a claim for damages. Therefore, if a construction contract is not terminated on the onset of business rescue, the supervisor can cancel or suspend certain obligations of the contractor, such as delay penalties.

PPPs

31. Are public private partnerships (PPPs) common in local construction projects? If so, which sectors commonly use PPPs?

PPPs are becoming increasingly common. The government issued a policy confirming that PPPs are one of their instruments of choice for, among other things, developing infrastructure in the country. PPPs have been used in the following sectors:

- Government, for example, with administration buildings.
 - Healthcare, including hospitals.
 - Road infrastructure, such as toll roads.
 - High-speed rail links (such as the Gautrain project).
 - Correctional services, consisting of buildings and prisons.
 - Education, comprising schools and other facilities.
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32. What local laws apply to PPPs?

The Public Finance Management Act 1 of 1999 (PFMA) and the Municipal Finance Management Act 56 of 2003 are the two most noteworthy pieces of legislation that deal with PPPs in South Africa. Regulation 16 under the PFMA sets out the requirements and processes required by National Treasury for PPP arrangements.

33. What is the typical procurement/tender process in a PPP transaction? Does the government or another body publish standard forms of PPP project agreement and related contracts?

The government issues a request for qualification (RFQ) to potential tenderers who must respond to the RFQ to qualify for participation in the subsequent stages of the tender.

The government then issues a fully termed request for proposal (RFP), requesting all qualified tenderers to submit a bid for the proposed project. The base agreement for the RFP is the PPP agreement itself, which is gradually becoming more standardised.

Occasionally the government runs a best and final offer (BAFO) process after the RFP closes. This process stage is likely to become more infrequent as the process of concluding PPPs and standardised terms becomes more settled and common practice.

After the RFP and BAFO processes (if relevant), the government announces a preferred bidder and a reserve bidder, and then conducts the negotiations to financial close with the preferred bidder. If negotiations with the preferred bidder fail, the government can revert to the reserve bidder and negotiate with them. The standardised terms for PPPs are issued by the PPP Unit of the National Treasury.

The National Treasury has recently implemented debt funding competitions immediately before or after the PPP agreement has been signed. Various models for this have been proposed and this process is not standardised.

DISPUTE RESOLUTION

34. Which are the most common formal dispute resolution methods used? Which courts and arbitration organisations deal with construction disputes?

Formal dispute resolution methods

Unless otherwise provided for in a construction contract or subsequently agreed to between litigants, the default position is that disputes are dealt with either in the high court or magistrates' court. Jurisdiction depends on the monetary value of the claim. The parties generally contractually agree for disputes to be referred to adjudication followed by private arbitration. The conduct of a private arbitration is regulated by terms of reference and rules agreed to by the parties, either in the contract or subsequently in terms of a separate arbitration agreement, subject to the provisions of the Arbitration Act 42 of 1965, which provides a statutory framework for arbitrations.

Courts and arbitration organisations

There are no specific construction courts. The relevant high court or magistrates' court with jurisdiction, depending on the monetary value of the claim, deals with construction related disputes.

The following national or international arbitration organisations are used to arbitrate construction disputes:

- The Association of Arbitrators (Southern Africa) (www.arbitrators.co.za).
 - Tokiso Dispute Settlement (Pty) Limited (www.tokiso.com).
 - The Arbitration Foundation of South Africa (AFSA) (www.arbitration.co.za).
 - United Nations Commission on International Trade Law (www.uncitral.org).
 - International Chamber of Commerce (ICC) (www.iccwbo.org).
 - The London Court of International Arbitration (LCIA) (www.lcia.org).
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35. What are the most common alternative dispute resolution (ADR) methods used?

Adjudication (whether by a single adjudicator, through dispute review or adjudication boards) is commonly used as a first step dispute resolution mechanism for construction disputes. Mediation is also a common form of ADR. Both adjudication and mediation are non-legislated voluntary processes which are regulated by terms of reference and rules agreed to by the parties, either in the construction contract, or subsequently in terms of a separate agreement.

TAX

36. What are the main tax issues arising on projects?

Construction contracts are not subject to any stamp duty, withholding tax or other specific construction contract or construction activity based tax.



South Africa applies transfer pricing rules similar to the Organisation for Economic Co-operation and Development (OECD) transfer pricing rules.

VAT

VAT is payable on:

- The supply of goods and/or rendering of services by a registered VAT seller in the course or furtherance of any enterprise carried on by him.
- The importation of goods or on the supply of any imported services by any person.

VAT is generally levied at a rate of 14%, while certain supplies may be subject to a zero-rating and others, such as financial services, are exempt from VAT.

Any person who carries on an enterprise in South Africa (or partly in South Africa) on a continuous or regular basis, and whose taxable supplies exceed the annual threshold of ZAR1 million must register as a VAT seller.

Income tax and capital gains tax

South Africa applies a residence basis of taxation. This means that:

- Residents are subject to income tax and capital gains tax (CGT) on their worldwide income and capital gains.
- Non-residents are subject to income tax only on their income from South African sources and to CGT only in relation to capital gains arising from the disposal of either:
 - immovable property in South Africa;
 - an asset which is attributable to a permanent establishment (PE) of that non-resident in South Africa.

Non-residents conducting business in South Africa are therefore subject to income tax only to the extent they derive income from a South African source, subject to any tax relief which may be available in terms of a double tax agreement (DTA), if applicable. In most DTAs, South Africa can only tax business profits of a non-resident enterprise to the extent these profits are attributable to a PE of the non-resident in South Africa. Customs duties (at varying rates) are payable with respect to imported goods, in addition to the import VAT referred to above.

Non-resident individuals are similarly subject to income tax only to the extent that they derive income from a South African source. In terms of South African case law, the source of income from employment is the place where the services were rendered, irrespective where the contract of employment was entered into or where payment was received. Accordingly, to the extent that non-resident employees render services in South Africa, their remuneration will be from a South African source and they will, in principle, be subject to South African income tax.

37. Are any methods commonly used to mitigate tax liability on projects? Are there any tax incentives to carry out regeneration projects?

A non-resident contractor that is tax resident in a country which has a double tax agreement (DTA) with South Africa may qualify for tax relief under the DTA.

MAIN CONSTRUCTION ORGANISATIONS

Construction Industry Development Board (CIDB)

Main activities. The CIDB is tasked, among other things, with:

- Establishing a national register of contractors and construction projects to regulate, monitor and promote the performance of the construction industry for sustainable growth, delivery and empowerment.
- Promoting improved delivery management capacity, and the uniform application of procurement policy throughout all spheres of government.
- Promoting improved performance and best practice of public and private sector clients.

W www.cidb.co.za

Council for the Built Environment (CBE)

Main activities. The CBE is a statutory body established under the CBE Act. Under the CBE Act, the CBE is, among other things, responsible for transforming the professions, acting as a conduit between the South African government and the built environment professions, fostering growth of the professions, and contributing to the creation of a dynamic built environment.

W www.cbe.org.za

The South Africa Federation of Civil Engineering Contractors (SAFCEC)

Main activities. SAFCEC was formed to advance the interests of civil engineering contractors in South Africa.

W www.safcec.org.za

There are no tax incentives available specifically for construction regeneration projects.

OTHER REQUIREMENTS FOR INTERNATIONAL CONTRACTORS

38. Are there any specific requirements that international contractors or construction professionals must comply with?

The CIDB Regulations require that any enterprise (including foreign contractors) that tenders or enters into a contract for construction works with the public sector, must be registered with the CIDB (see *Question 20*). A foreign contractor can apply for registration with the CIDB. The process can take several months and the cost depends on the specific grade of registration required. For example, the cost of a grade nine application (for contracts with a value greater than ZAR130 million) is about ZAR55,000. For registration in the required grade to be granted, a contractor must prove its record of experience in contracts with a similar nature and value. Further visa and permit requirements apply to foreign nationals working in South Africa (see *Question 23, Foreign workers*).

The government has also implemented certain policies and legislation regarding economic transformation, local content, skills development and sustainable growth in South Africa, namely the:

- National Industrial Participation Programme (NIPP).



- South African government's Accelerated and Shared Growth Initiative (ASGISA).
- Broad-Based Black Economic Empowerment Act (B-BBEE Act).

The NIPP and ASGISA are aimed at developing sustainable industry and growth in South Africa and apply only to state-owned entities and those parties contracting with state owned entities.

Black Economic Empowerment (BEE) is a central part of the South African government's economic transformation strategy. The BEE Act is the key legislation through which the BEE process is managed. It does not set out offences or penalties relating to BEE performance but rather seeks, through economic measures, to facilitate a uniform approach to BEE in the South African economy.

Other than in state licensing, permitting and authorisation processes, there is no law requiring that any entity in South Africa must meet specific B-BBEE targets or must implement a B-BBEE policy within the entity. However, from a practical perspective, any company (including a foreign contractor) wishing to do business in South Africa must consider and develop its B-BBEE position. This is because, in addition to the pressures from government, an entity that does not have a good B-BBEE rating, or does not strive to improve its B-BBEE rating, is obstructed in the conduct of day-to-day business with the government, organs of state and private sector customers. For these reasons, a contracting party in South Africa may require a foreign contractor to have a certain B-BBEE rating.

In relation to exchange control restrictions, the following are relevant:

- Exchange controls have limited application to non-residents (although some rules do apply).

- A non-resident can operate a non-resident bank account with a South African bank, which allows it to freely receive foreign currency and convert Rand amounts received into foreign currency.
- The limited exchange control rules which apply to expatriate individuals generally do not result in significant restrictions, provided they confirm their status as temporary workers with an authorised dealer, such as any of the commercial banks.

In practice, there are no legal obstacles to a foreign company opening bank accounts, renting office space or hiring local services or other local supports for its daily operations in South Africa.

REFORM

39. Are there any proposals to reform construction and projects law?

The Waste Act contains onerous provisions regarding contaminated land. These provisions will, among other things, apply to already contaminated land. Once these provisions come to force contractors will have to ensure that the land on which their construction projects take place was not previously contaminated. This is because a contractor may be directed to arrange for a site assessment to be conducted by an independent person, at the contractor's own cost, and to submit a site assessment report to the relevant authorities.

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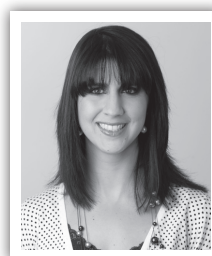
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Areas of practice. Construction and engineering; energy; commercial property; corporate and commercial; mergers and acquisitions; arbitration (local and international); construction and engineering dispute resolution.

Recent transactions

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- Lead lawyer to Eskom in connection with the new Medupi and Kusile Power Stations.
- Acts for, among others, Airports Company South Africa, the City of Johannesburg, Barloworld, BHP Billiton, ENRC Pretoria Portland Cement and Xstrata Coal.



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