

NOMINATED/SELECTED SUBCONTRACTORS APPOINTED BY LETTER OF APPOINTMENT

Contractual obligations

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Did you know how common it is for nominated and selected subcontractors (“NSS”) to be appointed by means of a letter of appointment (“LOA”), which incorporates the provisions of the JBCC NSS agreement (“NSS agreement”)

Strange as it may sound to outsiders, it is seldom that a hard copy of the NSS agreement is actually signed by the contractor and NSS. In fact, it is not unheard of for NSS to not even know the terms of the NSS agreement. Experience has shown us that contractors tend to incorporate further terms into the LOA, which contradict those in the NSS agreement.

This series will explore this curious situation. More importantly, we will provide guidelines that will help NSS to navigate this minefield.

THE JBCC PRINCIPAL BUILDING AGREEMENT (“the PBA”)

The starting point is that NSS are subject not only to the terms of the NSS agreement, but also to the terms of the Principal building agent (“PBA”), which the contractor will have concluded with the employer if these have been incorporated by reference.

In our observation, LOA often incorporate both the terms of the NSS agreement and the PBA by reference.

INCORPORATION BY REFERENCE

In our law, the principle of *pacta sunt servanda* prescribes that the provisions of a contract are binding in law as between the parties. If the parties to a LOA agree that the contracting parties contained in a NSS agreement and/or the PBA are incorporated by reference, this will be supported and enforced in our law. **In short, provisions of a contract may be incorporated by reference in Botswana.**

Signature of a LOA, which incorporates the terms of

the NSS agreement and/or the PBA by reference, is proof that the signatory has advised him/herself of the terms and provisions of these agreements.

If a LOA is not signed, strangely not an uncommon phenomenon, it is more difficult to establish what exactly the NSS and the contractor agreed to. That said, an unsigned LOA does not mean that there is no agreement between the contractor and the NSS. It does mean that establishing the terms of the LOA, let alone what was incorporated by reference, will be a matter of proof, especially in the absence of an admission.

Next week, we will dive into incorporation by reference, and give a guideline for NSS facing the prospect of being appointed by LOA.

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