

ice-sa NEC Forum

Including Jam Session 8

Thursday 12th September 2024
4 pm – 5:30 pm

FREE

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**Improving SA Infrastructure
using NEC Contracts as intended**

**CPD
Accredited**

NEC Jam Session 8

**Presented by Mile Sofijanic from
ECS Associates**

TOPIC:

Section 7 – Title

**Section 8 – Liabilities &
Insurance**

**Section 9 – Termination;
Disputes & Adjudication**

10 NEC Jam Sessions Topics

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Session 1

Introduction to the NEC3 family of contracts; How it came about, what it tries to do and how it is used; Synopsis of each of the 12 contracts in the family.

Session 2

Procurement & contract strategies; Parties and role players; Getting the best out of the NEC contract - change of the culture.

Session 3

Introduction to the sections of Core Clauses & actions in ECC3,
Section 1 – General.

Session 4

Section 2 - *Contractor's* main responsibilities,
Section 3 – Time.

Session 5

Section 4 - Testing & Defects (Quality),
Risk Management.

Session 6

Alignment between contracting Parties,
Diversity and Inclusion.

Session 7

Section 5 - Payment, Cost and the Options,
Section 6 - Change management through compensation.

Session 8

Section 7 - Title,

Section 8 - Risks and insurance,

Section 9 - Termination,

Disputes and Adjudication.

Session 9

Pre-award documentation & Developing a contract.

Session 10

NEC3 and NEC4 – the differences.

Objectives of 10 NEC Jam Sessions

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- Delegates should leave with
 - an understanding of the NEC philosophy, its associated culture change and how it contributes to the effective management of a project;
 - a basic understanding of how to prepare, tender to, and administer the ECC3 (Engineering and Construction Contract)

Introduction to ECS ice-sa

Collaborative Project Strategies©

ECS Associates
Empowered Contract and Project Management Services



www.ecs.co.za

Facts and Values

A leading, fully-empowered organisation.
35% black woman owned. BBBEE Level1



3 decades of experience in South Africa and overseas

Delivery of international best practice professional contract and project management services from front end studies to implementation

Business solutions through a combination of expert knowledge and hands on experience

Drive clients' success through collaborative, mutually beneficial contract and business management practices

Collaborative Project Strategies©
Agile Project Delivery

Our Founder Andrew Baird was a key member of the drafting committee for NEC 1, 2 & 3

Our associate Peter Higgins is chairman of the drafting committee for NEC4

Network based business model – low overhead cost
(current staff 100+, network 1000+)

Integrity

Professionalism

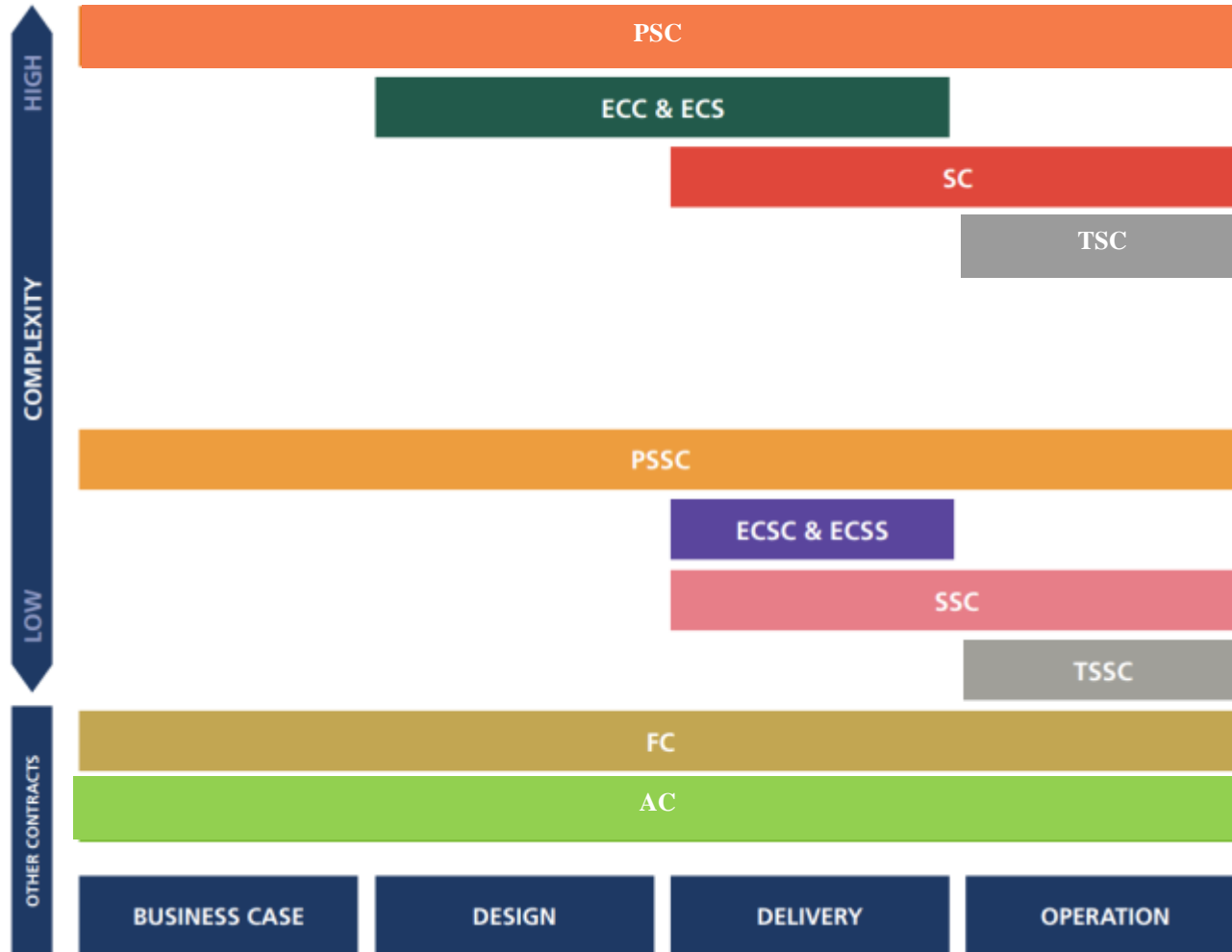
Collaboration

Courage

Reflection on the previous sessions

- Flexibility
- Clarity and simplicity
- Stimulus to good management
 - The most important objective; every procedure is designed to contribute to rather than detract from the effectiveness for all parties
 - foresight applied collaboratively mitigates problems and shrinks risk
 - clear division of function and responsibility helps accountability and motivates people

Contracts in NEC3 family ^{ice-sa}



Procurement Strategies

- How to split project in smaller components if required?
- Who does Engineering, Procurement and Construction?
- Who is managing interfaces?

Contract Strategies

- Allocation of risk and incentive
- Choosing the right Options through selection of Main and Secondary Options

Best practice: Use the NEC contract with no or minimum changes where required through Z clauses

NEC is the route to partnering

Moving industry culture



Traditional
Adversarialism

NEC



Mature
Partnering

- **Section 1 – General**

- | | |
|---|-------------------------|
| • Actions | Clause 10 (10.1) |
| • Identified and defined terms | Clause 11 |
| • Interpretation and the law | Clause 12 |
| • Communications | Clause 13 |
| • The <i>Project Manager</i> and the <i>Supervisor</i> | Clause 14 |
| • Adding to the Working Areas | Clause 15 |
| • Early warning | Clause 16 |
| • Ambiguities and inconsistencies | Clause 17 |
| • Illegal and impossible requirements | Clause 18 |
| • Prevention | Clause 19 |

- **Section 2 - Contractor's main responsibilities**
 - Providing the Works **Clause 20 (20.1)**
 - The Contractor's design **Clause 21**
 - Using the Contractor's design **Clause 22**
 - Design of Equipment **Clause 23**
 - People **Clause 24**
 - Working with the *Employer* and Others **Clause 25**
 - Subcontracting **Clause 26**
 - Other responsibilities **Clause 27**

- **Section 3 – Time**

- | | |
|--|-----------|
| • Starting, Completion and Key Dates | Clause 30 |
| • The programme | Clause 31 |
| • Revising the programme | Clause 32 |
| • Access to and use of the Site | Clause 33 |
| • Instruction to stop or not to start work | Clause 34 |
| • Take over | Clause 35 |
| • Acceleration | Clause 36 |

- **Section 4 – Testing and Defects**
 - **Tests and inspections** **Clause 40**
 - **Testing and inspection before delivery** **Clause 41**
 - **Searching for and notifying Defects** **Clause 42**
 - **Correcting Defects** **Clause 43**
 - **Accepting Defects** **Clause 44**
 - **Uncorrected Defects** **Clause 45**

Risk Management Options

Step 1 (Trigger!)

Choose Risk Management Approach

Consequence 1
Drivers/ Incentives

Consequence 2
Values

Consequence 3
Outcome

Avoid Risk

Traditional (Rigid) contract
High level liabilities
Lack of alignment
Do not lose money!
Manage the contract

Blame
Short-term focus
Confusion
Hierarchy
Bureaucracy

1. lose-lose
2. win-lose
3. lose-win
4. unlikely win-win

Manage Risk

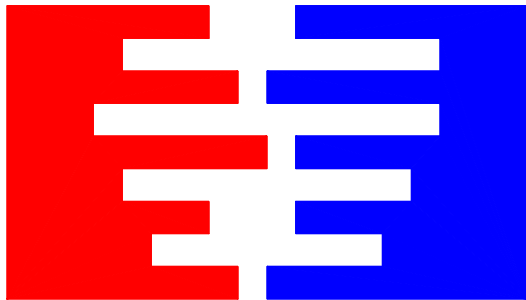
Full alignment
Long term relationship focused
Shared risk and reward – no finger pointing
Development, learning and improvement
Manage the project

Commitment
Accountability
Integrity
Caring
Creativity / Resourcefulness
Performance

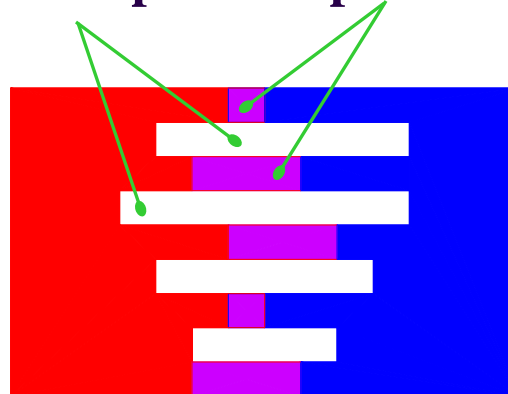
1. win-win
2. -
3. -
4. unlikely lose-lose

Alignment between ice-sa the contracting Parties

Separate Capabilities



Gaps Duplication



Typical
Partnering Results
in Alignment



Employer

Contractor

Employer

Contractor

Partner

Partner

Alignment: the greatest opportunity for step - change improvement

When alignment, diversity ice-sa and inclusion works



- **Section 5 – Payment**

- **Assessing the amount due**
- **Payment**
- **Defined Cost**

Clause 50

Clause 51

Clause 52

- **Section 6 – Compensation events**
 - **Compensation events** **Clause 60**
 - **Notifying compensation events** **Clause 61**
 - **Quotations for compensation events** **Clause 62**
 - **Assessing compensation events** **Clause 63**
 - **The *Project Manager's* assessment** **Clause 64**
 - **Implementing compensation events** **Clause 65**

- Section 6 – Compensation events

4 steps in the compensation events process:

1	Notifying compensation events	Clause 61
2	Quotations for compensation events	Clause 62
3	Assessing compensation events	Clause 63
3	The Project Manager's assessment	Clause 64
4	Implementing compensation events	Clause 65

NEC Jam session 8

- Section 7 - Title
- Section 8 - Risks and insurance
- Section 9 - Termination
- Disputes and Adjudication

Section 7

Title

Whatever title ...

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- Outside Working Areas title to Plant and Material passes if the *Supervisor* has marked (70.1) and the *Supervisor* marks if identified for payment (71.1)
- Otherwise title passes when brought within Working Areas
 - Ensure the *Contractor* has title to Plant and Materials before payment is made

73.1 The *Contractor* has no title to objects of value

- other materials as stated in the Works Information

Section 8

Risks and insurance

80.1 The *Employer's* risks are listed and become compensation event 60.1(14)

- Legal claims payable for reasons stated
- Loss and damage to free issue Plant and Material until the *Contractor* has received them
- Loss and damage due to excluded events
- Loss or wear or damage after take over and after termination

81.1 The *Contractor* carries risks which are not the *Employer's*

Risks lie where they fall

Contractor's risks .. ice-sa

- What are the Contractor's main risks?
 - The *Employer's* indirect or consequential losses
 - Damage to surrounding property
 - Construction All Risks
 - Loss and damage to Equipment
 - Injury to and death of People
 - Design and workmanship
 - Adverse weather
 - Transport; marine
- Even if costs are covered by insurance effect of delay may not be

- Legal jurisdictions give different interpretations to force majeure
 - Hence defined as an event which ‘stops’ the *Contractor*
- Very difficult to define and confine
 - Supervening event
- See Clause 19, compensation event 60.1(19) and 91.7 for termination

Limitation of liability ice-sa

- Can use Option X18 to limit the *Contractor's* liability to the *Employer* for
 - Consequential / indirect loss
 - Damage to the *Employer's* surrounding property
 - Latent Defect
 - Cap to total liability except for excluded matters
 - *end of liability date* in Contract Data

Repairs and indemnity ice-sa

82.1 The Contractor has obligation to repair until Defects Certificate has been issued

- Unless the *Project Manager* instructs otherwise
- Compensation event after take over
- Claim on insurance

83 Each Party indemnifies the other due to events which are at his risk

84.1 Insurance provided by either Party

- Insurance by the *Employer* does NOT change the *Contractor's* risks
- Contract All Risks and 3rd party by either Party
- Design, Equipment and the *Contractor's* employees always by the *Contractor*
- The *Contractor* provides certificate to the *Project Manager* for acceptance
- The *Project Manager* gives the *Contractor* policies & certificates for insurance.
- The *Employer* provides & states deductibles in Contract Data

Section 9

Termination

Reasons, procedures ice-sa and amount due

- either Party may terminate the Contractor's obligation to Provide the Works; we do not cancel the contract
- The Contractor for listed reasons
- The Employer for any reason
 - substantial fee if not for a listed reason
- procedures to suit reasons
- amount due set-out in table
- Obtain good legal advice before terminating

Dispute resolution

Disputes and Adjudication

- Contract dispute resolution refers to the process of resolving conflicts and disagreements that arise in the engineering and construction industry.
- Construction projects are complex undertakings that involve multiple parties such as owners, contractors, subcontractors, architects, and suppliers.

Due to the nature of the industry, disputes can arise from various sources, including contract interpretation, delays, cost overruns, design changes, quality issues, payment disputes etc.

Possible dispute resolution options:

- Informal negotiation (by senior representatives)
- Mediation
- Expert evaluation and/or dispute Boards
- Adjudication
- Arbitration
- Litigation

Adjudication in NEC ice-sa

Dispute resolution Option W1 – applicable for South Africa:

- Adjudication followed by the *tribunal*

W1.2 The *Adjudicator* appointed at time Parties conclude their contract or nominated by others.

- Not used unless dispute arises
- Paid equally by the Parties

W1.3(1) Dispute type per Adjudication Table

W1.3(2) If a disputed matter is not notified or referred on time neither Party may refer to the *Adjudicator* or the *tribunal*

The Adjudicator's decision

W1.3(3) The *Adjudicator* decides on basis of written submissions

- May seek advice from others; e.g. legal Counsel

W1.2(2) Makes decision as an independent adjudicator not as an arbitrator

W1.3(10) Decision is binding and enforceable

- If a Party is dissatisfied, he may notify intent to proceed to the *tribunal* (Arbitration or a court of law).
- If no notice of dissatisfaction decision is also final!

Appoint the *Adjudicator*

- agree selection from the ICE-SA's list or NEC Adjudicators
 - See <https://ice-sa.org.za>
- inform the selected *Adjudicator*
- obtain his agreement to act
 - settle terms and fees
- sign NEC Adjudicator's Contract

Lessons Learned No.10 ^{ice-sa}



Steps in dispute avoidance and resolution:

- 1) Make sure that you have a complete and accurate Works Information, realistic Programme and Budget and unambiguous NEC contract with as few changes as possible!!! (Prevention is better and cheaper than cure!)
- 2) Act as stated in the contract and in spirit of mutual trust and cooperation (clause 10.1!)
- 3) Talk to each other and try to resolve disputes on a project level
- 4) Ask your managers to resolve and/or avoid disputes
- 5) Use an Adjudicator
- 6) Still not happy? Are you sure you want to go to Arbitration? Sure, sure? Is it worth it and you have a strong case? – Go to Arbitration
Still no joy? Then, find another job... or emigrate...

The end of NEC Jam Session 8



Next NEC Jam Session

Combined Session 9 Session 10

- Pre-award documentation & Developing a contract
- NEC3 and NEC4 – the differences

**Thank you for your
participation**

Feedback is welcome

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