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Prevention is Cheaper than Cure

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A COMPARISON BETWEEN THE NEC3 AND NEC4 PSC

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Employers need professionals to design their works – it is the reality of construction contracts. Contractors might need them too, if they are responsible for design. These professionals (let's call them engineers for the purposes of this article) enter into contracts with their clients to perform the design, based on their professional qualifications and ability to perform the design.

These contracts look nothing like the construction contracts we know and love and often the commercial elements of these contracts are overlooked. However, these contracts are just as (if not more) important that your construction contract because they would set out the engineer's liability to the client should he get the design wrong. Think of a collapsed slab in a shopping centre – there are people's lives at stake and the potential for huge liability if the design was wrong.

The NEC Suite of contracts recognizes the need for standard form professional services contract. The same could be said for FIDIC, where the FIDIC Suite has the "white" book which is the "Client / Consultant Model Services Agreement". Given that the NEC has recently published the NEC4 Suite of contracts, we thought it would be appropriate to compare one or two clauses of the NEC3 Professional Services Contract and the NEC4 Professional Service Contract (yes I've left the "s" off of the word "services" on purpose. Apparently its not needed in the NEC4 version!). One of the benefits of the use of standard form contracts is that they do get amended when appropriate to "keep up with the times" - so to speak.

In this regard, we would then assume that any updated versions would recognise a gap on the previous version that may have caused disputes or confusion (for example). So for me, that would say we have to take quite a close look at the updated clauses.

I would like to focus specifically on the clauses that relate to the Consultant's obligations and what happens if he breaches these obligations.

Core Clause 21 of the 2005 NEC PSC (which is a clause under the main heading *"Parties' main responsibilities*") states:

> *"21.1 – The Consultant Provides the Service in accordance with the Scope.*
>
> *21.2 – The Consultant's obligation is to use the skill and care normally used by professionals providing services similar to the service."* [my emphasis]

Whereas the 2017 NEC4 PSC dedicates the entire Core Clause 20 to the *"Consultant's main responsibilities".* Core Clause 20.1 states:

> *"20.1 – The Consultant Provides the Service in accordance with the Scope.* [Same as the 2005 NEC PSC]
>
> *20.2 – The Consultant's obligation is to use the skill and care normally used by professionals providing services similar to the service.* [my emphasis and same as the 2005 NEC PSC]
>
> *20.3 – The Consultant is not liable for a Defect unless it fails to carry out the service using the skill and care normally used by professionals providing services similar to the service.* [my emphasis and this is not in the 2005 NEC PSC]"

This clause 20.3 is an interesting addition to the Consultant's main responsibilities clause. But what does it mean?

In both the NEC3 PSC and the NEC4 PSC, the definition of a *"Defect"* is *"a part of the service which is not in accordance with the Scope or applicable law."* No changes there. So what's the big deal? Let's look at how Defects are dealt with in each of the contracts.

In the NEC3 PSC, one of the compensation events are:

> *"60.1(12) The Consultant corrects a Defect for which he is not liable under the contract."*

In the NEC4 PSC, one of the compensation events are:

> *"60.1(13) – The Consultant corrects a Defect for which it is not liable under the contract."*

Ok so they've changed the "he" to an "it". Besides being very politically correct (I mean girls can be professionals too, right?) I still don't see what the big deal is.

Being liable to correct a Defect could have quite a severe financial and time impact on the Consultant, so it would be great if (as the Consultant) there were a few as possible instances of "Defects" for which it **is** liable under the contract. So I guess it would be important to distinguish between what the Consultant is and isn't responsible for. This appears to have been set out in the new Core Clause 2 – the Consultant's responsibilities.

And there we go in a full circle back to Core Clause 20.3 - *The Consultant is not liable for a Defect unless it fails to carry out the service using the skill and care normally used by professionals providing services similar to the service.*

Essentially then, the Consultant is only liable to remedy a Defect if it fails to carry out the service using the skill and care normally used by professionals providing services similar to the service. In all other instances, the remedying of Defects is a compensation event.

So is this simply a case of setting out in very specific wording what was already implied in the NEC3 PSC? In my opinion, yes. The phrase "much ado about nothing" comes to mind. Perhaps the specific wording was inserted because of an interpretation issue? Whatever the reason might have been, there is a specified defence available to the Consultant if it can prove that it carried out the service using the skill and care normally used by professionals providing services similar to the service (kind of like a hint to the Consultants really, isn't it?).

Both the NEC3 and NEC4 PSC's requires the Consultant to provide (inter alia) insurance in respect of:

"Liability of the Consultant for claims made against it arising out of the Consultant's failure to use the skill and care normally used by professionals providing services similar to the service. The amount is set out in the Contract Data."

From what is stated in the NEC4 PSC this insurance should cover the rectification of Defects when it fails to use the required level of skill and care. I'm not so clued up on professional indemnity insurance, but Consultants are advised to check their policies to see if they cover such a thing (ie remedying the Services so that they conform to the Scope or applicable law.)

But this isn't the only place in the NEC3 and 4 PSC's that talks about failure by the Consultant to use the required level of skill and care.

The NEC3 PSC doesn't really spell out the Employers' liabilities versus the Consultants' liabilities (only in Core Clause 21.2 does it state that the Consultant's obligation is to use the skill and care normally used by professionals providing services similar to the *services*). This has all changed in the NEC4 PSC. Core Clause 80.1 of the NEC4 PSC states quite categorically as follows:

"80.1 The following are Client's liabilities

- *Claims and proceedings from Others and compensation and costs payable to Others which are due to*
    - *The unavoidable result of the service or*
    - *Negligence, breach of statutory duty or interference with any legal right by the Client or by any person employed by or contracted to it except the Consultant.*
- *A fault of the Client or any person employed by or contracted to it, except the Consultant.*
- *Additional Client's liabilities stated in the Contract Data.*

81.1 the following are Consultant's liabilities unless they are stated to be Client's liabilities.

- *Claims and proceedings from Others and compensation and costs payable to Others which arise from or in connection with the Consultant Providing the Service.*
- *Costs incurred by the Client which arise from a failure by the Consultant to use the skill and care normally used by professionals providing services similar to the service*. [my emphasis – yes here are those words are again?]
- *Death or bodily injury to the employees of the Consultant."*

With regards to liabilities, the NEC3 PSC simply states at Core Clause 80.1:

"The Consultant indemnifies the Employer against claims, proceedings, compensation and costs payable arising out of an infringement by the Consultant of the rights of Others, except an infringement which arose out of the use by the Consultant of things provided by the Employer."

So in the NEC3 PSC, the Consultant steps into the shoes of the Employer if there are any claims, proceedings, compensation and costs which arise out of and infringement by the Consultant of the rights of Others (third parties, really).

In the NEC4 PSC, the liability of the Consultant is extended to claims from Others which arise from or are in connection with the Consultant Providing the Service (this is a wider net of liability) as well as costs incurred by the Employer (called the Client in the NEC4 PSC in case you hadn't noticed yet) where the Consultant fails to use the required level of skill and care. Costs isn't defined – it could mean anything?

There is a new clause dedicated to the recovery of costs in the NEC4 PSC:

"82.1 Any cost which the Client has paid or will pay as a result of an event for which the Consultant is liable is paid by the Consultant

82.2 Any cost which the Consultant has paid or will pay to Others as a result as a result of an event for which the Client is liable is paid by the Client.

82.3 The right of a Party to recover these costs is reduced if an event for which it was liable contributed to the costs. The reduction is in proportion to the extent that the event for which that Party is liable contributed, taking into account each Party's responsibilities under the contract". (This is the apportionment of damages, which is legislated in South Africa in the Apportionment of Damages Act).

So essentially the indemnity that was provided for in the NEC3 PSC has been replaced with a "liability for costs" clause, and a Consultant's liability to the Employer can be reduced if the Employer contributed to the event that caused the cost to arise in the first place. Notwithstanding that the Consultant's net of liability appears to have been widened, this could be counteracted by the addition of the Client's Liabilities clause, which absolves the Consultant from liability.

What is interesting and something that is perhaps the topic for another article, is what does *"the skill and care normally used by professionals providing services similar to the service"* actually mean? Because from what I'm reading, the Consultant can get away with quite a lot if he can show that this is what he has done. Because the NEC suite of contracts is used internationally, the law applicable to any specific contract based on jurisdiction, might have its own ideas with regards to the interpretation of the phrase *"skill and care normally used by professionals providing services similar to the services"*. In South Africa there isn't a plethora of case law that gives on guidance on how the South African courts (and arbitrators) would interpret that phrase. The current leading case is hardly new and dates back to 1983. In this case, of Randaree and Others NNO v WH Dixon and Associates and Another the engineer designed certain ramps that were not in accordance with accepted standards. The court held that a marked deviation from the norm would render a parking garage seriously defective and entitle the client to recover damages because of *"a failure of a professional man to adhere to the general level of skill and diligence possessed and exercised at the same time by the members of the branch of the profession to which he belongs, normally constitutes negligence."* This wasn't exactly what the case turned on, but we can see that the courts use similar terminology as does the NEC PSC (both NEC3 and NEC4).

Remember too that there is a Limitation of Liability clause, specifically, Core Clause 87.1 in the NEC4 PSC and Core Clause 82.1 in the NEC3 PSC where the limitation of liability does **not include** liability in respect of an infringement by the Consultant of the rights of Others (ie. the liability of the Consultant is unlimited).

So just how seriously do you take your liability and insurance clauses? Hopefully, after reading this – VERY SERIOUSLY.