

**ice-sa**  
**NEC Forum 10**

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SAICE CPD  
Points

NEC training sponsored by  **ecs**

**FREE**

**Thursday, 13th November**  
**4 pm - 6 pm**

**Topic: NEC4 ECC Tendering  
& Contract Finalisation**

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**&**

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# 10 NEC Jam Sessions Topics for 2025

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13 <sup>th</sup> February	The NEC4 Family of Contracts - Introduction
13 <sup>th</sup> March	Procurement and Contract Strategies
10 <sup>th</sup> April	ECC4 - Core Clauses
8 <sup>th</sup> May	PSC4 - Introduction
12 <sup>th</sup> June  Presented by Dr Jon Broome	Contract Strategy: Choosing the Main Options under the NEC4 Engineering & Construction Contract (with reference to other members of family + filling in Contract Data entries) and how to incorporate Early <i>Contractor</i> Involvement (ECI)
10 <sup>th</sup> July	ECC4 - Early Warnings and Compensation Events
14 <sup>th</sup> August	ECC4 – Dispute Avoidance
11 <sup>th</sup> September  Presented by Richard Patterson	Contract Strategy: The use of Option X29 : Climate Change
9 <sup>th</sup> October  Presented by Dr Jon Broome	Contract Strategy: The Secondary Option 'X' clauses including preparation of the associated Contract Data.
13 <sup>th</sup> November	ECC4 – Tendering and Contract Finalisation



# ECS Associates



Capital Project Advisory Services throughout the Project Lifecycle



Collaborative Project Strategies

- 30 Years in existence
- Projects in over 20 countries with a head office in South Africa
- Specialist in Project and Contract Management services



# 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 can contribute to the effective Procurement
- A basic understanding of how to prepare, tender to, and prepare the ECC4 (Engineering and Construction Contract) for award to selected Contractor
- Establish knowledge around how to align an ECC4 Contract to the general tender process
- Basic insight into Public Procurement mechanisms

## **1. Introduction**

- Reasons Why Projects Fail
- Defining Procurement
- Contextualising the application of NEC Contracts

## **2. Procurement Mechanism**

- Legislations and Governance
- Conditions for Tendering
- Aligning Conditions of Tendering to Contract Suite Choice

## **3. Transitions from Tender to Contract**

- Form of Agreement
- Drafting Style
- Standardised Documentation
- Carrying Over Risk Apportionment

## **4. Negotiations**

## **5. Conclusion**

# 1. Introduction

## Main reasons leading to claims/disputes in projects ≈ General Project Failure

Causes of claim and/or dispute	% projects
Change in scope	36,90%
Design was incorrect	21,50%
Design information was issued late	21,30%
Design was incomplete	19,80%
Contract management and/or administration failure	18,00%
Poor management of sub-contractor/supplier and/or their interfaces	17,90%
Contract interpretation issues	17,80%
Workmanship deficiencies	17,70%

Wrong Procurement Process or Incorrect Procurement Strategy is not usually mentioned or thought of at the first instance as a reason for project failure.

**BUT IT OFTEN IS THE ROOT CAUSE OF MANY OF THESE SYMPTOMATIC ISSUES.**

# 1. Introduction

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## Defining Procurement:

- Refers to the government's/private entities' acquisition of goods, services and construction
- The UNCITRAL Model Law on Public Procurement, one of the leading international legal instruments on public procurement defines "public procurement" as "the acquisition of goods, construction or services by a procuring entity"
- The draft Public Procurement Bill, tabled before Parliament in 2023, defines "procurement" as "the acquisition of goods, services or infrastructure by purchasing, renting, leasing or other means"

# 1. Introduction

“Procurement advice can have an equally dramatic impact on a projects performance when measured in terms of cost and time as can design and engineering advice on project performance when measured in terms of function and quality”

- E & F N Spoon, 1991

“It is impossible to unsign a contract, so do all your thinking before”

- Warren Buffet

# 1. Introduction

## Standardised Documents and Format

- **Standardisation – Benefits**
  - Logical order of documentation to reduce ambiguity
  - Check list for every contract
  - Easier to complete, check, tender and administer once familiar
  - Uniform business-like image
- **Mandatory for organs of State; recommendation to private organisations**
- **Regulations in terms of the CIDB Act 2000 issued in Gov Gazette 26427 of 9 June 2004 (Standard for Uniformity)**
  - Documentation in terms of Standardised Construction Procurement Format for Engineering & Construction Works
- **SANS 10845-3, Construction Procurement Part 3: Standard Conditions of Tender**
- **Applicable to all of the four selected sets of standard forms which includes NEC**

## 2. Procurement Mechanisms

### Legislation

#### **S217 of the Constitution of the Republic of South Africa**

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. → (In the public interest)
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
  - (a) categories of preference in the allocation of contracts; and
  - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

## 2. Procurement Mechanisms

### Legislation

- **Public Procurement Act No. 28 of 2024** — A new overarching national framework regulating procurement by organs of state, prescribing a common system, including preferential procurement.
- **Preferential Procurement Policy Framework Act No. 5 of 2000** — Enacted to give effect to section 217(3) of the Constitution by providing the framework for procurement policies that provide for categories of preference.
- **Public Finance Management Act No. 1 of 1999** — Regulates the financial management of national and provincial government, including norms and standards for procurement in those spheres.
- **Municipal Finance Management Act No. 56 of 2003** — Governs municipal finances including supply chain management, procurement by municipalities and municipal entities (specific to local governments and municipalities).

## 2. Procurement Mechanisms

### Conditions of Tendering (CIDB)

#### 3 Volume Tendering Package:

- **Tendering Procedures (Volume 1)**
  - Invitation, Tender Data, Conditions of Tender
- **Returnable Documents (Volume 2)**
  - Tender Schedules, Form of Offer & Acceptance, Contract Data part 2, B of Q
- **The Contract/Draft (Volume 3)**
  - Part 1 Agreements & Contract Data
  - Part 2 Pricing Data
  - Part 3 Scope of Work
  - Part 4 Site Information
- **Need to be compatible with NEC (when used)**
  - Could use Tender Data for variables
- **Procedure usually organisation specific**
- **A Tender Form could be specific i.e. - “We offer to Provide the Works, Services, Supply Goods etc” Or Use CIDB’s Conditions of Tender and Form of Offer & Acceptance**

## 2. Procurement Mechanisms

### Returnable Documents (Volume 2)

- **Use returnable schedules which solicit**
  - Preparation of activity schedule (Op A / C in NEC)
  - Pricing of bills (Op B / D in NEC)
  - Technical suggestions for design & build
  - Outline of temporary works
  - QA plan, HSE requirements etc.
- **Some become *Contractor's Scope* to align with NEC format**

## 3. Transition from Tender to Contract

### CIDB 3 Vol Format

Tender stage documents	Contract award stage documents
<p><u>(Vol 1) Tendering Procedures:</u></p> <p>T1.1 Letter of invitation</p> <p>T1.2 Tender Data</p> <p>T1.3. CIDB Conditions of Tender</p> <p><u>(Vol 2) Returnable Documents</u></p> <p>T2.1 List of returnable documents</p> <p>T2.2 Tender Schedules</p> <p>C1.1 Form of Offer and Acceptance</p> <p>C1.2 Contract Data Part 2</p> <p>C2.2 Activity Schedule / Bill of Quantities</p> <p><u>(Vol 3) The (draft) Contract</u></p> <p>Part 1 Agreements &amp; Contract Data</p> <p>    C1.2 Contract Data Part 1</p> <p>    C1.3 Proforma of Securities</p> <p>Part 2 Pricing Data</p> <p>    C2.1 Pricing assumptions</p> <p>Part 3 Scope of Work</p> <p>    C3.1: <i>Client's</i> Scope</p> <p>Part 4 Site Information</p>	<p><u>The Contract</u></p> <p>Part 1 Agreements &amp; Contract Data</p> <p>    C1.1 Form of Offer &amp; Acceptance</p> <p>    C1.2 Contract Data, Parts 1 and 2</p> <p>    C1.3 Proforma of Securities</p> <p>Part 2 Pricing Data</p> <p>    C2.1 Pricing assumptions</p> <p>    C2.2 Activity Schedule or Bill of Quantities</p> <p>Part 3 Scope of Work</p> <p>    C3.1: <i>Client's</i> Scope</p> <p>    C3.2: <i>Contractor's</i> Scope including <u>some</u> of the T2.2 Tender Schedules that become obligations of contract</p> <p>Part 4 Site Information</p>

## 3. Transition from Tender to Contract

### Part 1: Agreement

- **Notification of Acceptance**
  - Brings the contract into existence
  - Contract only becomes effective when signed and dated by both parties. Both Parties must reach mutual consensus on the agreement as to its respective rights and obligations
  - Defines the Contract Date (*starting date, Completion Date, defects date*)
- **Form of Agreement**
  - Confirmation that those who accepted were authorised
  - Not simply a case of populating an NEC Template
  - Acceptance of the contract comprises of numerous documents as per previous slide
- **Or use CIDB Form of Offer and Acceptance with Schedule of Deviations**

## 3. Transition from Tender to Contract

### Appointing an Adjudicator/Dispute Avoidance Board (W1/W3)

- **Agree selection from the ICE-SA's list or NEC Adjudicators**
  - See [www.ice-sa.org.za](http://www.ice-sa.org.za)
- **Inform the selected *Adjudicator* and enquire into their availability or potential conflicts**
- **Obtain their agreement to act**
  - Settle terms and fees
- **Use NEC4 Dispute Resolution Service Contract**

## 3. Transition from Tender to Contract

### Part 1: Contract Data

- Identification of the terms in *italics* in the conditions of contract
- Enter only the Data applicable to the selected Options and do not change the published statements
- Data provided by *Client* (Contract Data PART ONE)
- Data provided by *Contractor* (Contract Data PART TWO)
  - Basis of its tender

## 3. Transition from Tedner to Contract

### Part 2: Pricing Data

- **Pricing assumptions for either Activity Schedule or Bill of Quantities**
  - Identifies assumptions to be made when preparing the pricing document
- **If Option A or C: *activity schedule* provided by the Contractor with tender**
- **If Option B or D: *Client's bill of quantities* priced by the tenderer**
- **Or list of rates as required by the Client**

## 3. Transition from Tender to Contract

### Part 3: Scope of Works (in NEC4: The Scope)

\*Clause X22:  
Early Contractor  
Involvement

#### Role of the Scope

- **Specifies and describes the works**
  - the “created” specifications
- **States any constraints on how the Contractor Provides the Works (ECC4)**
  - Constraints, compel or restrict the Contractor
- **Includes, drawings, models, samples, etc**
- **Over 75 references about the Scope from ECC4 clauses and options (Index)**

#### Conditions of Contract

- **Many are mandatory**
  - Completion, extent of design, etc
- **NEC4 will motivate better performance**
  - If used as intended
- **Technical people need to know NEC4 before starting to draft *The Scope* including specifications**
- **Technical department, supply chain management and legal department must work together**

## 3. Transition from Tender to Contract

### Part 4: Site Information

**\*Clause X22:  
Early Contractor  
Involvement**

- **States what is within the Site at time of tender**
  - Geotechnical, underground services, as-builts
- **Does not include anything that happens after award; that is the Scope**
- **Site Information does not change; it is provided to the tenderers as information upon which he can base its pricing**
- **If later found to be wrong – compensation event – Clause 60.1(12)**

## 3. Transition from Tender to Contract

### Other Considerations

- If the Scope provided by the *Contractor*, keep it separate from the *Client's Scope*
- Weather data is in Contract Data; no need to mention in either Site Information or Scope (Only for NEC → may not be true for other contracts)
- Additional *Client's* liabilities could be listed in the contract data instead of Z Clauses. If they occur, it may lead to a compensation event – 60.1(14)

## 3. Transition from Tender to Contract

### Drafting Style

- Use the simplest words. Simple words have few syllables. Use short sentences
- Do not use words which are not needed
- Use an adverb or adjective only if it is unavoidable
- Verbs and nouns are usually precise; adverbs and adjectives are usually imprecise
- Use present tense for all statements of what somebody must do or not do.
- Use capital initials and italics as per contract
- Avoid reference to a person or organisation in technical specifications
- E.g. engineer, Fluor, Eskom
- Use simple everyday English
- Use short sentences
- Always remember that somebody must decide whether the spec has been met
- Objective compliance procedure

## 4. Negotiations

The *Client* needs to be satisfied that the preferred contractor is qualified to complete the project successfully and timeously:

The following are examples that need to be considered

- Financially capable
- Labour capabilities
- Requisite skill set and project experience
- BBBEE
- CSD
- ASGI-SA
- Bonding and insurance
- NEC Proficiency
- Secondary Option Clauses (see appendix)

## 4. Negotiations

**‘Frequently, negotiations with one or more [contractors] are necessary to clarify intentions, to agree amendments, to eliminate qualifications which are not acceptable to the [client] and to fully evaluate the [contractor’s] proposal. It is important to effectively control these negotiations and to ensure that they do not allow an individual [contractor] to unfairly improve the bid (pre-award). All [contractors], during the tendering phase, should be given equal opportunity to negotiate aspects of the contract.’**

**‘The need for complex and lengthy negotiations with a contractor prior to the final signing of the contract can be avoided with careful preparation of the tender documents and detailed, well explained instructions for the [contractor] stating award criteria in objective terms and contractual obligations once awarded’**

## 4. Negotiations

**Achieving consensus means that both parties fully understand everything in the contract (especially the Scope)**

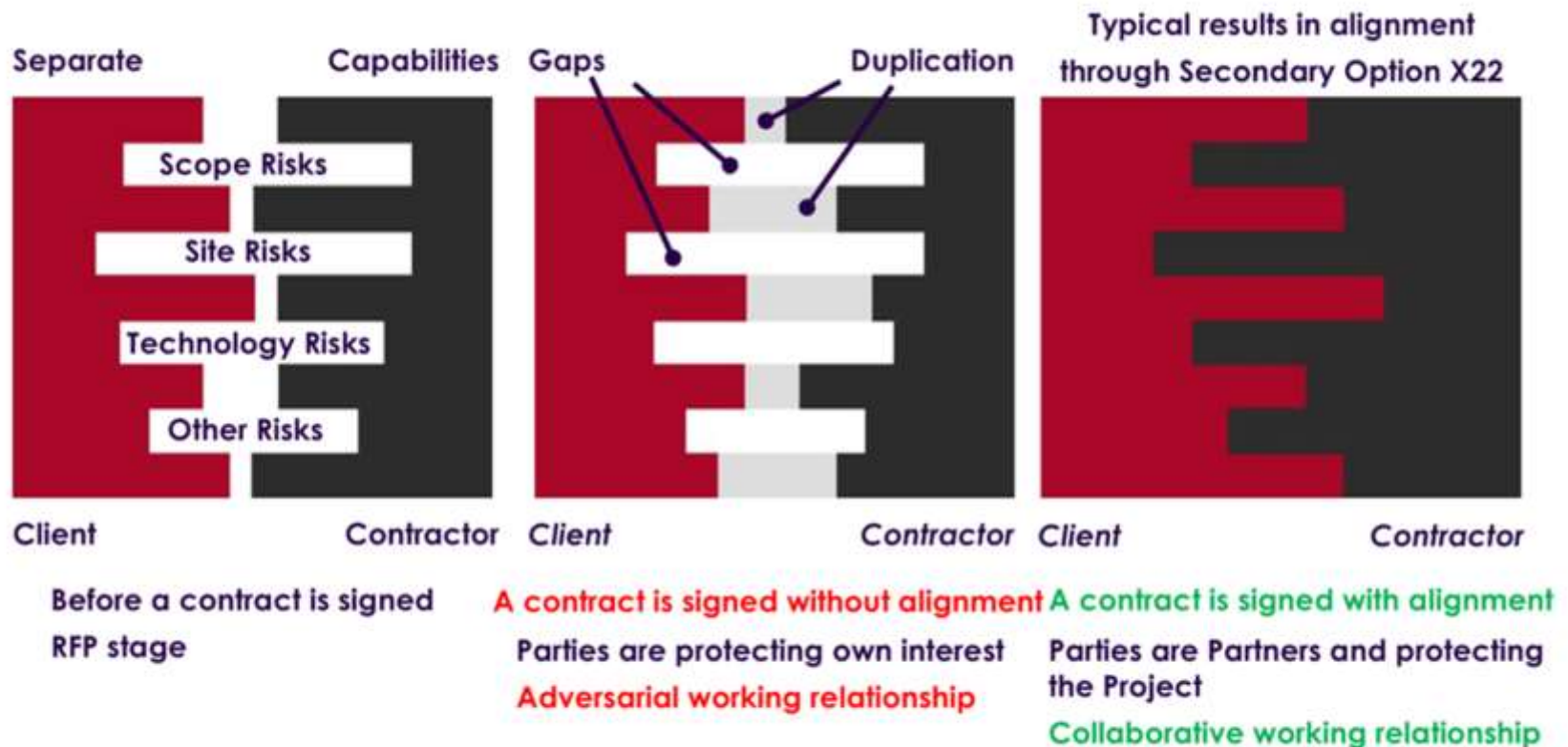
This requires:

- Open discussions
- Clarification review
- Addressing potential risks within the project and within contractual compliance upfront
- Specification compliance
- Site conditions (visit) – Battery limits
- Quality and documentation
- Reporting

**\*Ensure both parties have a clear understanding of the scope (e.g. ask the Contractor to demonstrate a detailed presentation on the scope)**

## 4. Negotiations

### Contractor Alignment (Preparing for a pre-award clarification meeting)



## 4. Negotiations

### Contractor Alignment (Early Contractor Involvement)

SCOPE: CCC  
 PROGRAMME: PRA  
 BUDGET: CRA  
 RISKS: IAM  
 OVERALL: TLA



Clear, Complete and Correct  
 Practical, Realistic and Achievable  
 Complete, Realistic and Affordable  
 Identified, Allocated and Managed  
 Three-Letter Acronym – just for fun!

**Alignment** refers to the process of ensuring that all the components of a project, including its objectives, scope, deliverables, timelines, budget and resources, are aligned with the overall business case.

**Alignment:** The greatest opportunity for step – change improvement through an Early Contractor Involvement – X22

## 5. Conclusions

- Tender three Volume approach for all other contracts (tender procedures, returns, contract)
- Single Volume approach for straightforward contracts involving almost no clarification at award
- Keep Tendering Procedures separated from the Contract – remember the entire agreement principle
- It should be clearly indicated in the contract and during conversations with the contractor that the contract, its attached appendixes and all other documentation attached or found within the contract = the ENTIRE AGREEMENT
- No side agreements, letters or word of mouth promises can override or change the contract (unless expressly signed and agreed to in writing by both parties and subsequently added to the contract)
- Where possible use Alignment Process to remove duplications, identify and mitigate risks

## 5. Conclusions

### **Prepare and Share Agenda in Advance**

- Ensure all participants understand meeting objectives and topic

### **Ensure Representation from All Key Stakeholders**

- Include *Client's* technical, commercial, legal, and contract management teams
- Confirm presence of contractor's authorized representatives

### **Maintain Professional and Transparent Communication**

- Foster open, honest dialogue to clarify expectations and concerns
- Document all discussions and agreements

### **Focus on Contractual Clarity and Alignment**

- Confirm understanding of scope, specifications, pricing, and timelines
- Address risk allocation, compliance, and reporting obligations

### **Adhere to NEC Contract Procedures**

- Follow NEC-defined processes for changes, early warnings, and compensation events

## 5. Conclusions

### **Manage Confidentiality and Commercial Sensitivity**

- Protect sensitive information and respect confidentiality agreements

### **Define Clear Next Steps and Responsibilities**

- Assign action items with deadlines for contract finalization and follow-up

### **Record Minutes and Obtain Meeting Sign-Off**

- Ensure formal documentation of outcomes and participant acknowledgment

### **Adhere to Legal parameters regarding Public Procurement Law**

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### **Ensure sound procurement strategies**

- This requires wholistic understanding of Public Procurement (legislation, governing bodies, procedure, tender document requirements etc)

## 5. Conclusions

Always  
remember  
what you  
are  
playing  
against



# The end of NEC Jam Session 10



# Next NEC Jam Session **ice-sa**

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**The list for JAM Sessions in 2026 will  
issued early next year!**

**Thank you for your  
participation**

**Feedback is welcome**

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