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Constitution**
of the Republic of South Africa, 1996

The South African Council for the Architectural
Profession (SACAP)

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THE ARCHITECTURAL PROFESSION, ETHICS AND THE LAW



A WEBINAR SERIES
16 JULY 2019 – 27 SEPTEMBER 2019

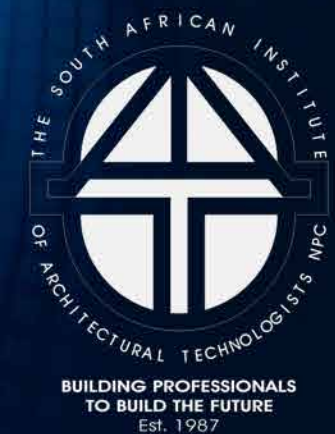
MODULE 5 – 20 AUGUST 2019

SACAP Category 1
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Bad communications do not have a bearing on this rating.

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MODULE 5

AGREEMENTS



AGREEMENT:

“An understanding between entities to follow a specific course of conduct”

“An arrangement between parties regarding a course of action”

“A negotiated and usually legally enforceable understanding between two or more legally competent parties”

“An arrangement or understanding between or among two parties that purports to establish a relationship in law between or among them”

A CONTRACT:

“An agreement between two or more persons which give rise to personal rights and corresponding obligations and which is legally enforceable”

The Professional’s obligation is to design the building and render services related to the design and his right is to be paid by the Client.

The Client’s obligation is to pay the Professional and his right is to have the building designed and services related to the design rendered.

HOW A CONTRACT IS MADE?

A contract comes into existence the moment that the person receiving an offer informs the person making the offer that he accepts his offer.

The acceptance may be in writing or oral, and in certain cases acceptance may be conveyed by conduct.

A conditional acceptance is not an acceptance but a counter-offer which may be accepted or rejected.

An offer may be accepted at any time before it is withdrawn.

A letter of intent is not an acceptance of an offer, but only states an intention to accept at some future date – does not give rise to a binding contract.

REQUIREMENTS FOR A VALID CONTRACT:

1. **Essential terms**

- All must be covered

2. **Agreement**

- There must be an agreement (consensus) between the parties
- A lack of agreement = misunderstanding
- If a misunderstanding concerns a non-essential term, courts will generally uphold the contract
- Fraudulent misrepresentation renders contract invalid

3. **Contractual capacity**

- Legal age or authorisation required

REQUIREMENTS FOR A VALID CONTRACT:

4. **Seriousness**

- Intention to contract

5. **Legal**

- Objective must be legal

6. **Need not to be in writing**

- Oral contract legal and binding
- Not advisable

TERMS AND CONDITIONS:

Although the words “terms” and “conditions” are frequently used interchangeably, they have *different meanings* which are often confused.

A **term** is something that *governs* the way a contract may be carried out

- e.g. when payment is to be made which modifies the common law term that payment is only due when all obligations are completed.

A **condition** is something that *affects* the very existence of the contract

- e.g. contract will come into effect when land use rights are granted.

IMPLIED LAW AND CONTRACTUAL TERMS:

Common Law implies a number of terms in a client-professional agreement:

- Design will comply with all acts, regulations and standards (CPA)
- Professional only entitled to payment when project is completed

INTERPRETATION OF CONTRACTS:

The basic rules for the interpretation of a contract are:

- documents take precedence over oral agreements and common law rules
- Typed (computer generated) documents take precedence over a pre-printed documents
- Hand-written document takes precedence over both typed (computer generated) and pre-printed documents

HOW CONTRACTS COME TO AN END:

1. By performance

- When each party has done all that it contracted to do, the contract comes to an end.

2. By release

- When one party still has some of his obligations to perform, the other party may be prepared to release him from these obligations

3. By cession

- Cession occurs when one party, who has obligations to perform to the other party in the contract, is permitted by that party to pass those obligations to a third party who will undertake to perform them for the first party.

HOW CONTRACTS COME TO AN END:

4. By impossibility of performance
 - The law does not require anyone to perform the impossible
 - If the obligation has become totally impossible to perform, the contract automatically comes to an end

5. By breach
 - Breach occurs when a party perform his obligations in a defective manner or refuses to perform his obligations at all and the other party exercises his legal right to cancel the contract.
 - Not all breaches entitle the injured party to cancel.

REMEDIES FOR BREACH OF CONTRACT:

Where one of the parties breaches the contract, the other party has two options:

1. To cancel the contract
 - May only do so if the breach is serious and affects a fundamental aspect of the contract
 - Types of breach that would entitle one party to cancel normally specified in the contract
2. To uphold the contract and apply to court for order of specific performance requiring the defaulting party to perform his contractual obligations in a proper manner

In either event the injured party may claim damages.

TIME BEING THE ESSENCE OF THE CONTRACT:

In some contracts, especially building contracts, it is often stated that time is the essence of the contract.

- Seldom legally valid.
- Time is only the essence of the contract when the due performance is valueless if it is not performed by the agreed time.
- Almost never the case in client-professional agreements as well as building contracts.
- The injured party does not have a legal right to cancel a contract merely because the defaulting party is late in performing his obligations.

PROFESSIONAL – CLIENT AGREEMENTS

SACAP CODE OF CONDUCT

RULE 4: PROFESSIONAL RESPONSIBILITIES

A registered person shall only:

- 4.1 undertake to perform architectural work where the registered person has **clearly set out in writing the terms of the appointment**, which must inter alia include the following:

- 4.1.1 the scope of the work;
- 4.1.2 the services to be provided;
- 4.1.3 the allocation and limitation of responsibilities;
- 4.1.4 fee payable for the work or services, the method of calculating it (if appropriate) and the stage(s) at which it will be payable;
- 4.1.5 the budget (if applicable) or other cost limit for the project, work or service, and the method and implementation of estimating costs;
- 4.1.6 provisions for termination of the agreement;
- 4.1.7 details of the professional indemnity insurance; and
- 4.1.8 provision for dispute resolution.

AGREEMENTS AVAILABLE:

1. Procsa

The Agreements for Architect, Quantity Surveyor, Electrical, Mechanical, Wet Services, Structural & Civil Engineers include Principal Consultant and Principal Agent as separate individual services and deliverables. There is no need to sign a separate Principal Agent Agreement for these disciplines.

2. SAIA Client Architect Agreement

3. SAIAT Professional Client Agreement

4. SACAP Client-professional Project Agreement for Architectural Services Between Client And Architectural Professional



BUILDING CONSTRUCTION CONTRACTS

The contract should describe the following:

- What will be done;
- How long it will take to complete;
- How much it will cost and the payment terms;
- What will be done if either party defaults; and
- The extent to which the common law, which would usually apply, is adhered to.

A construction contract is an agreement between an employer (sometimes referred to as the client) and a contractor to construct, repair, modify, renovate or even demolish something in an agreed time frame, for an agreed price and to agreed standards.

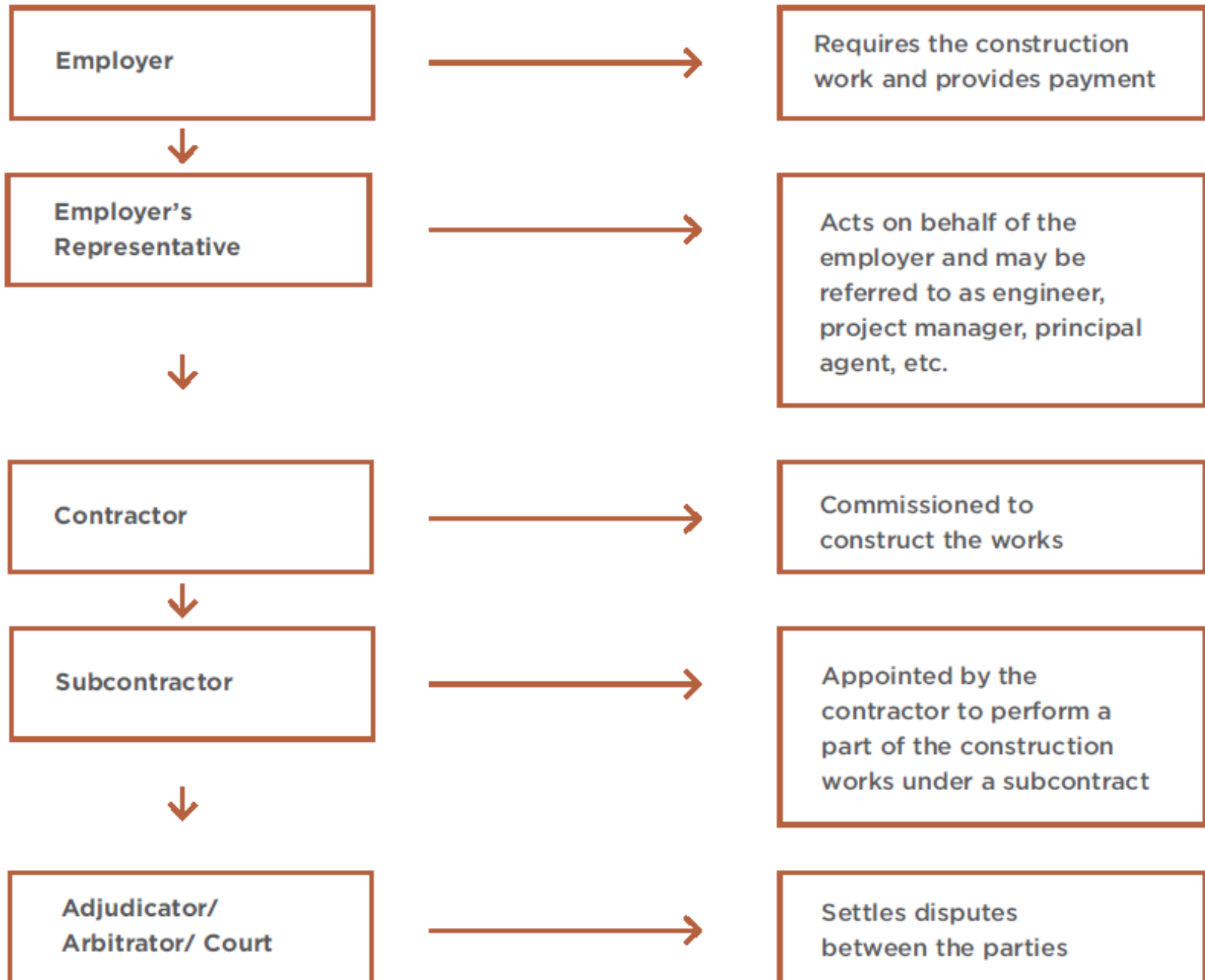
ROLE PLAYERS WITHIN THE CONSTRUCTION CONTRACT

Although the construction contract typically only has two parties,

1. the employer and
2. contractor,

there are a number of role players usually involved (appointed separately by either party or in some cases jointly by both parties), who assist in the construction process.

The role players are set out as follow:



Employers usually elect to work through a representative who may be an architectural professional, an engineer professional, a project manager, a quantity surveyor or any other qualified third party.

The employer gives his or her representative the authority to act on his or her behalf in the execution of certain provisions of the contract.

The representative's role is to oversee and administer the contract and the project itself.

The the employer's representative is usually the person to whom all notices, invoices and claims must be submitted and is the person who determines the amounts due to the contractor.

“locato conductio operis”

Conventional building contract – the contractor undertakes to supply all the labour and materials and to erect and complete the building

Each party undertakes obligations towards the other and neither is entitled to enforce the contract unless he has performed or is prepared to perform his own obligations.

TYPES OF BUILDING CONTRACT

Lump-sum contract

The builder undertakes to erect and complete the building in accordance with certain drawings together with written descriptions and instructions (specifications) and the employer undertakes to pay a lump-sum price for the finished product.

The agreement is frequently hedged with a variety of terms and conditions, the most important of which is probable the time for completion.

Lump-sum contract

- Tends to be inflexible
- No convenient basis to value variations
- Success depends on complete and comprehensive documentation of all aspects of the design before tenders are invited.

Lump-sum contract with bills of quantities

Bills of quantities have now become the accepted basis for inviting tenders for any building project, other than those of the smallest and simplest nature.

Exact science governed by rule as set out in the “*Standard System for Measuring Building Works in South Africa*” published by the Association of South African Quantity Surveyors.

Advantages:

- All tenderers tender on the same basis and moreover on a basis capable of yielding accurate results;
- Because of the accuracy of bills of quantities, information yielded by one set of bills may be relied upon in pricing another set;
- The information contained in the bills of quantities can form the basis of pricing variations to the contract and valuing work in progress;

- Where the exact nature and extent of work to be done are not known at the time of compiling the bills, provisional allowances may be made which can later be adjusted when the completed work can be accurately measured and priced.

Lump-sum contract based on provisional bills of quantities

The production of bills of quantities extends the pre-contract period as it must be done from the architectural professional's technical drawings.

A provisional bills of quantities from the architectural professional preliminary sketches shorten the pre-contract period.

It is possible to review provisional decisions the tender rates are known to make cost-effective substitutions with minimum disruption to technical documentation.

Cost-plus contract

A contract in which the contractor is reimbursed for the actual cost of all labour and all materials together with an agreed fee for his management services and profit.

The amount of the fee and profit is usually expressed as an percentage of the direct labour and material costs.

An incentive to work wastefully – the greater the cost of labour and material – the bigger the profit.

Enables a building contract to be placed at a very early stage, possibly even before the design of the building has started.

Labour-only contract

The employer provides all material timeously and pays the contractor only the labour portion.

Contractor erects the building on his own time within the agreed building period.

Contractor provides plant and carry the risk.

Differs from where the employer remunerate an agreed sum of money per day/week/month. Contractor then becomes an employee and employer takes all the risk.

Building by direct subcontract

Confused term to described a confused arrangement!

Employer dispenses the services of a general contractor and instead employs a variety of tradesmen or small specialist contracting organisations to perform portion of the work such as bricklaying, plumbing and tiling.

The employer sees a general contractor as one who engages the services of a number of sub-contractors and who charges the employer a management fee for co-ordinating their services and add profit on their work – believes that he can do this himself and achieve a substantial saving.

Turnkey contract

Some employers do not wish to be bothered with employing professionals and prefer an arrangement in which the contractor assumes responsibility for producing the design as well as building the building.

The advantages to the employer are frequently illusory.

- Few savings on professional fees – included in contractor's price
- No professional to safeguard his interest
- Contractor draft documentation to suit his own advantage.

BESPOKE CONTRACT

This is a type of contract that is not based on a standard form contract and is specially drafted and fully customised to cater for specific needs or requirements for the parties.

STANDARD FORM CONTRACTS

There are usually risks and issues which will be common for all construction projects and activities. Accordingly, a number of “standard form” contracts have been developed which set out standard terms for a construction contract to cover the related issues and risks that will most likely apply.

Standard form contracts are useful because they can be obtained and understood in advance and, therefore, are usually easier to agree on instead of drafting the entire contract from scratch. The parties simply agree on specific changes to the standard terms based on the requirements for the specific construction project concerned.

Specific types of standard form contracts (approved by the CIDB)

CONSTRUCTION

FIDIC - French Initials for International Federation of Consulting Engineers (1999) Short Contract and Red, Yellow and Silver Books

GCC - General Conditions of Contract for Construction (2010)

JBCC - (JBCC series 2000) (Principal Building Agreement and Minor Works Agreement)

NEC - New Engineering Contract (Engineering and Construction Contract and Engineering and Construction Short Contract)

NEXT WEEK

MODULE 6 + 7

- The National Building Regulations
- The Construction Regulations



- HOME
- SAIAT REGIONS
- AWARDS
- CPD EVENTS
- CERTIFICATES
- DOWNLOADS
- CONTACT US
- DISCLAIMER

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THE ARCHITECTURAL PROFESSIONAL, ETHICS AND THE LAW
16 JULY >
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PPE PREPARATION 2019

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