

CONSULTING ENGINEERING CONTRACTS, PROCUREMENT AND SCM ISSUES

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- Godfrey Ramalisa for inviting me to speak
- My audience for allowing me to speak
- My former partners and current bosses for allowing me to attend
- Arthur Taute for one of his presentations parts of which I have used as my structure

IS YOUR
PROJECT IN A
GOOD SHAPE?

APPARENTLY

WE STARTED 5
YEARS AGO AND NO
ONE HAS STOPPED
US YET

geek and poke

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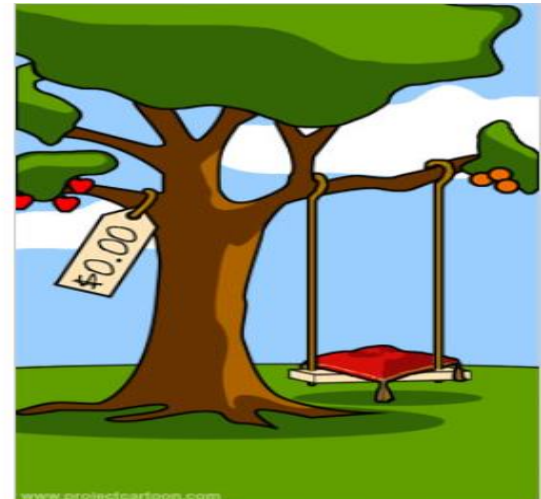
THE PROJECT DESIGN AND CONSTRUCTION LIFE CYCLE



What the Employer described



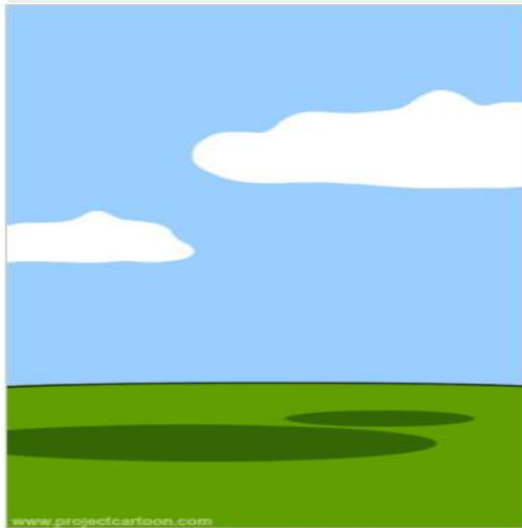
The Architect's sketch plan



The Engineer's design



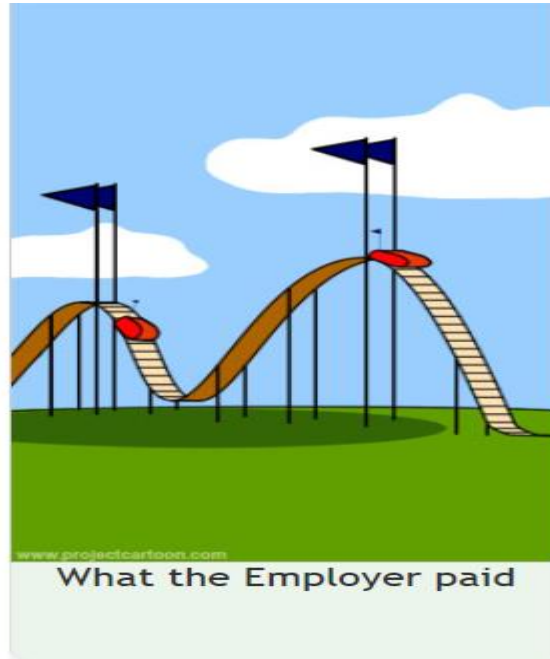
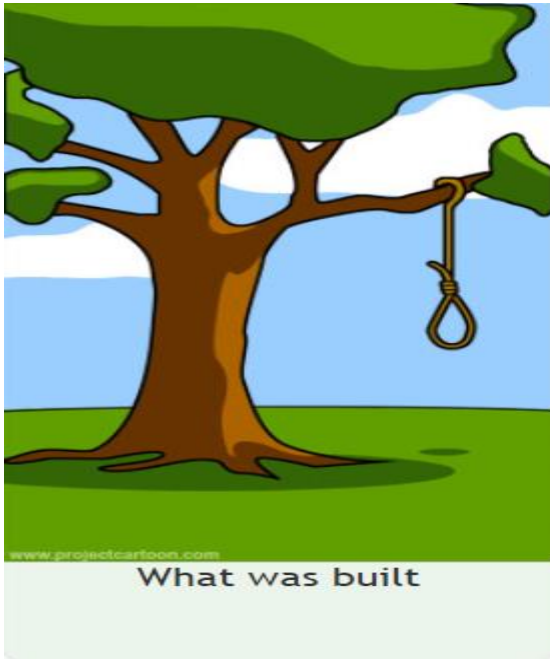
What the QS measured



How the project was documented



The Contractor's tender




COMMUNICATION !?!

Has there been any?


Do these persons all speak the same language? SCM failure

PROBLEM STATEMENT

- 
- Engineers are trained to provide solutions based on the available data i.e. we are input driven and as a result the outcome is largely dependent on the input


- 
- Engineers deal on a daily basis with people and risk management issues within the framework of contracts yet have no formal training in either.

- 
- Lawyers are output driven in other words the input is largely dependent on the desired outcome

- 
- The solution to any problem is logic but whilst only inputs are considered most of the logical argument is never taken into account or is lost

PROBLEM STATEMENT (cont.)

In a tendering regime that is solely based on price the outcome is largely dependent on the income (the tender price)

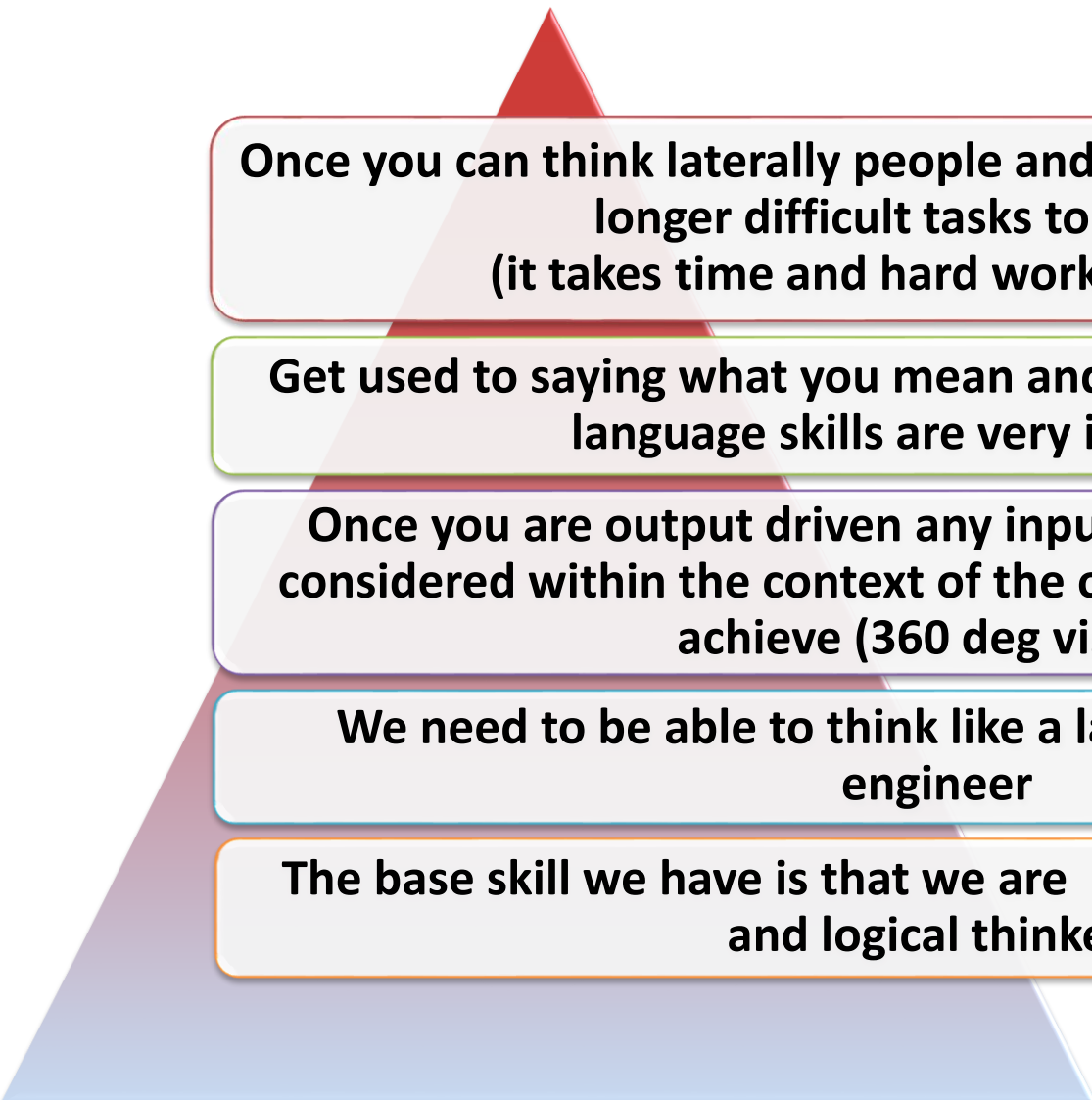


To have an income you must know the rules of the game otherwise you are going to play blind folded



Cutting costs in a competitive bidding process that is based solely on price is destroying the ability of thinking laterally as only repetition pays

KEY SKILLS



**Once you can think laterally people and risk management are no longer difficult tasks to perform
(it takes time and hard work to get there)**

**Get used to saying what you mean and meaning what you say
language skills are very important**

Once you are output driven any input is possible or can be considered within the context of the output you are trying to achieve (360 deg vision)

We need to be able to think like a lawyer but act like an engineer

The base skill we have is that we are trained to be analytical and logical thinkers

WHAT TO STUDY AND WHERE

A part time law degree via UNISA or a University

Courses offered by the Association of Arbitrators

CESA Business of Consulting Engineering

Specialist short courses via institutions of higher learning

CPD courses on construction contracts, disputes etc.

Never stop or give up reading, listening and learning

Like with anything else it takes at least 10,000 hours to become an expert so work at it and be patient

Results and assimilated knowledge come over time

KNOWLEDGE OUTCOMES

The South African Legal System

The Law of Contract

Construction Contracts

Other matters relevant to consulting engineering and construction (OHS, SCM, Environmental Law, Water Law, Land Use and Planning Law, ISO/SANS Standards etc.)

The Law of Contract and Construction Contracts (in depth)

The Law of Delict

The Law of Evidence

The dispute resolution process

THE SOUTH AFRICAN LEGAL SYSTEM

- The origins of our law: Roman Law, Dutch Law, Roman Dutch-Law, English Law, International Law, Customary South African Law, etc.
- How is our law made: common law, acts of parliament, customary law, international treatises, etc.
- What are the supreme and sacrosanct set of rules in our law: the Constitution and the Bill of Rights, the Rules of Natural Justice
- Inquisitorial versus adversarial systems
- Our judicial system, the doctrine of precedent and the power of the judiciary
- Legal principles:
 - standard of proof in civil suits
 - real rights and personal rights
 - ownership and possession and how it comes in existence
 - waiver and forfeit
 - estoppel
 - vicarious liability

THE LAW OF CONTRACT

- **Fundamental Requirements of a Valid Contract**
 - agreement, capacity to contract, certainty, lawful performance, performance possible, formalities
- **Offer and Acceptance**
 - misrepresentation, fraud, negligence, innocent mistake, non-disclosure, voetstoets contracts etc.
- **Interpretation of contracts**
 - words, parol evidence, contra proferentem and caveat subscriptor rules etc.
- **Breach of Contract and remedies for breach of contract**
 - default (mora debitoris, creditoris, ex re, ex persona and ex lege), positive malperformance, repudiation, rendering performance impossible
 - reduction in price, cancellation, damages
- **Damages**
 - positive interesse and negative interesse damages, mitigation of loss, penalties/liquidated damages
- **Special Classes of Contracts**
 - purchase and sale, letting and hiring of work, letting and hiring of services, agency, suretyship and guarantee

CONSTRUCTION CONTRACTS

- **The CIDB,**
 - the role of the CIDB and the CIDB Regulations
 - the CIDB Practice Notes and Guidelines
- **The JBCC Suite of Contracts**
- **The GCC2015**
- **The NEC 3 Suite of Contracts**
- **The FIDIC Suite of Contracts**
- **The PSP Contract and its relationship with construction contracts**
- **Tenders and tendering**
 - Changing clauses in standard form contracts
 - Contract Data, Specifications, Drawings and Bills of Quantities
 - Functionality Matrices
 - National and International Standards
 - Bid Evaluation and Bid Adjudication
 - Disputes

OTHER LEGAL MATTERS

- **The Occupational Health and Safety Act**
 - The general requirements of the Act
 - The Construction Regulations
- **The Supply Chain Management System**
 - the CIDB
 - National Treasury
 - the Department of Trade and Industry – Local Content
 - National Departments
 - Provincial Departments
 - Municipalities
 - SOEs
 - Courts
- **Environmental Law, Water Law, Land Use Law etc.**
- **ISO Standards**
 - ISO 9001, ISO 14001, ISO 15000 etc.

THE LAW OF EVIDENCE

- **The law of evidence**
 - Theory of the law of evidence, basic concepts and distinctions, the law of evidence and substantive law
- **Admissibility**
 - Relevance and admissibility, character evidence, similar fact evidence, opinion evidence, previous consistent statements
- **Privilege**
- **Hearsay and exceptions to the hearsay rule**
- **Types of evidence and its presentation**
 - Oral evidence, real evidence, documentary evidence, machine generated evidence
- **Witnesses**
 - Competence and compellability of witnesses, calling of witnesses, credibility
- **Proof without evidence**
 - Admissions, judicial notice, presumptions of law and of fact (rebuttable and irrebuttable presumptions)
- **Weight of evidence and standards and burden of proof and duties in civil trials**
 - Evaluation of evidence, the standard and burden of proof in civil trials

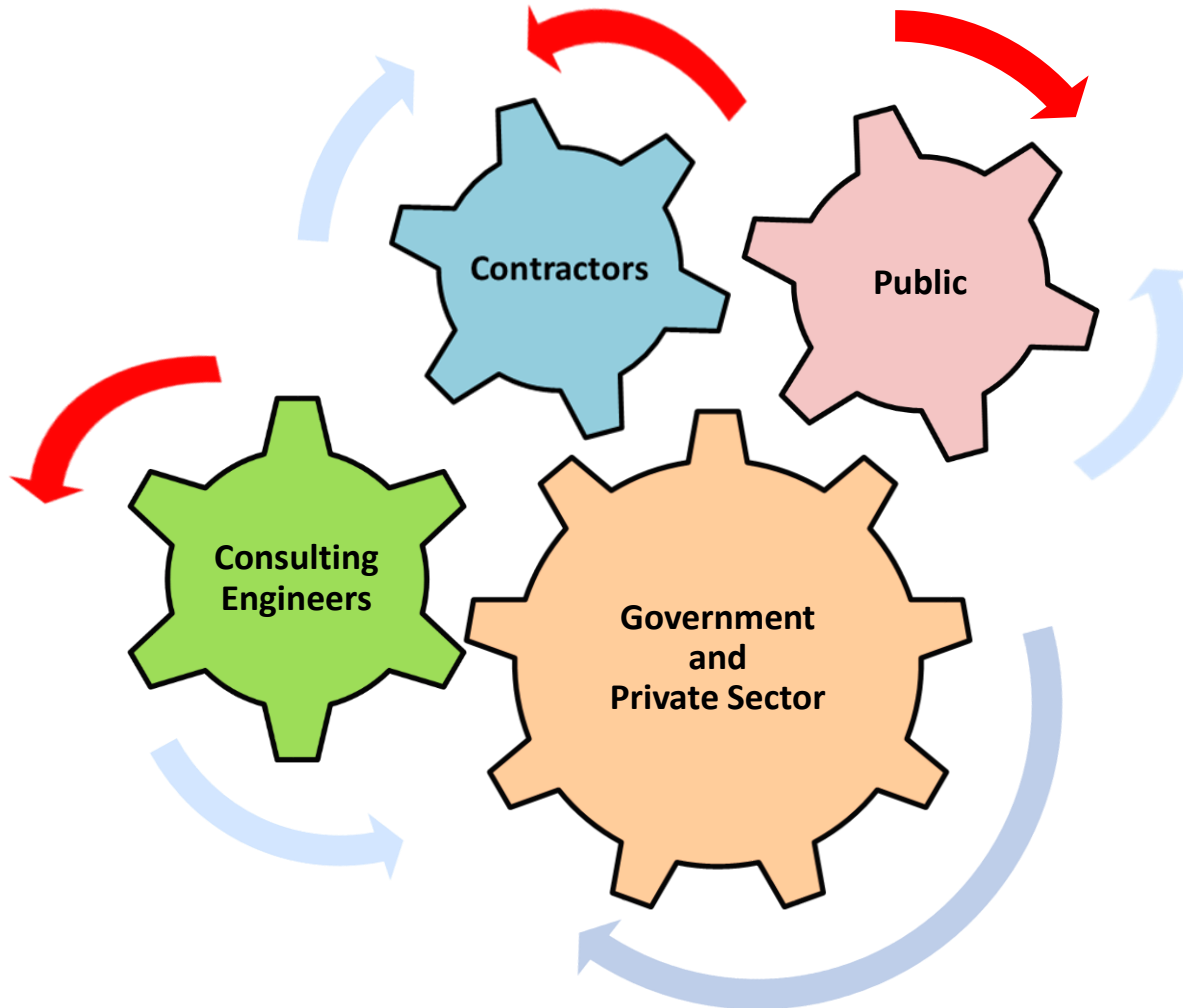
THE LAW OF DELICT

- **Historical background (the Aquilian Action)**
 - Requirements for delict, difference between breach of contract and delict
- **Conduct**
 - Acts and omissions
- **Wrongfulness including products liability**
- **Fault and contributory fault**
 - Intent, negligence
- **Causation**
 - Actual causation, intended and unintended consequences, foreseeability, novus actus interveniens, multiple causes
- **Damage/Harm**
- **Joint wrongdoers and contributory fault**
- **Specific forms of damnum iniuria datum**
- **Liability without fault**
- **Delictual remedies**
 - Damages, apportionment of damages

THE DISPUTE RESOLUTION PROCESS

- **The different dispute resolution processes and differences between the processes**
 - Amicable settlement, mediation, adjudication, arbitration, litigation
- **Mediation**
 - The mediation process, the mediator
- **Adjudication**
 - The adjudication process, the adjudicator
- **Arbitration**
 - The law and practice of arbitration, the arbitration process, the arbitrator, the interpleading process, the hearing, witnesses and their examination, writing an award
- **Litigation**
 - Introduction to the litigation process, motion versus action proceedings, summons, interdicts and declaratory orders

SCM SYSTEMS AT WORK



SCM – PUBLIC SECTOR

- In the General Procurement Guidelines the National Treasury identifies what it refers to as the Five Pillars of Procurement:

Value for Money: means the best available outcome when all relevant costs and benefits over the procurement cycle are considered

Open and Effective Competition: means a framework of procurement laws, policies, practices and procedures that are transparent

Ethics and Fair Dealing: means dealing with others on a basis of mutual trust and respect and conducting business in a fair and reasonable manner and with integrity

Accountability and Reporting: means ensuring that individuals and organisations are answerable for their plans, actions and outcomes; openness and transparency in administration by external scrutiny through public reporting

Equity: means the application and observance of government policies which are designed to advance persons or categories of persons disadvantaged by unfair discrimination

SCM – PUBLIC SECTOR (cont.)

- The rules and regulations that govern public sector (government and SOEs) procurement and SCM are contained in the following:

The Constitution and Bill of Rights

Prior decisions of courts (Constitutional Court – Appeals Court – High Court)

The Preferential Procurement Policy Framework Act (PPPFA)

The Broad Based Black Economic Empowerment Act (BBB-EE)

The Promotion of Administrative Justice Act (PAJA)

The Public Finance Management Act (PFMA)

The Public Access to Information Act (PAIA)

The Construction Industry Development Board Act (CIDB)

National Treasury Regulations

Provincial Legislation

Provincial Treasury Regulations

The Municipal Finance Management Act (MFMA)

Municipal by- Laws and Regulations

- Acts are generic and are given effect by regulations so when we refer to an Act we also refer to the regulations annexed to the act

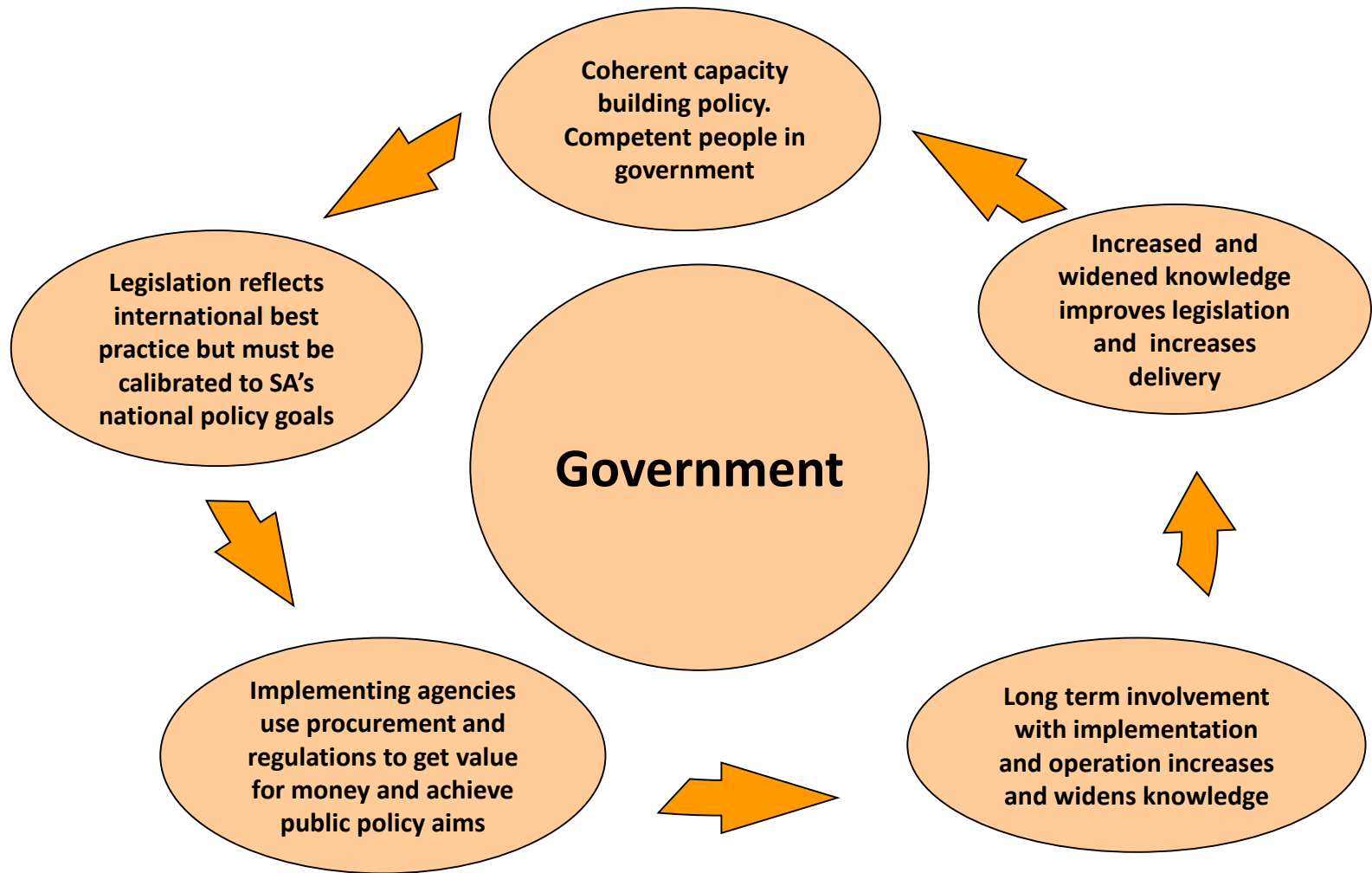
SCM – PUBLIC SECTOR (cont.)

- In November last year Treasury published the Standard for Infrastructure Procurement and Delivery Management which seeks to address many of the problems that will be discussed; the document was the focus of Civiltion this year and whilst it offers great promise the jury is still out on its implementation as there must be buy in from all national departments, provincial departments, the SOEs and the municipalities.
- The motto of the Civiltion document is: *“A thriving economy, which manifests as a happy civil society, is underpinned by sound infrastructure.”*
- The document published by Treasury makes reference to the following SANS standards which are intended to provide uniformity
 - SANS 10845-1, Construction procurement – Part 1: Processes, methods and procedures
 - SANS 10845-2, Construction procurement – Part 2: Formatting and compilation of procurement documentation
 - SANS 10845-3, Construction procurement – Part 3: Standard conditions of tender
 - SANS 10845-4, Construction procurement – Part 4: Standard conditions for the calling for expressions of interest

SCM – PUBLIC SECTOR (cont.)

- **In terms of the requirements of the PAJA all Acts and regulations have to be circulated for public comment before being promulgated. It is our right and our duty to pass comment if it is warranted, unless one is satisfied with the legislation being promulgated.**
- **Legislation that is contrary to the provisions of our Constitution and Bill of Rights has no place in our legal system irrespective of the intentions**
- **We must be seen as being of unquestionable integrity so that our comments are valued as being made in the interest of the broader industry and country rather than of a fairly narrow interest group**
- **Comments must be based on factual evidence and not on perceptions**
- **Comments assist the legislators in determining scenarios which they may not have planned for and reduce the risk of legislation being struck down by courts when challenged**

IDEAL GOVERNMENT SCM SYSTEM



OVERCOMING SCM CHALLENGES

- **SA has excellent SCM regulations but the biggest challenge remains lack of capacity within the SCM system (knowledge and specialist expertise)**
- **Capacity is required to be built within the SCM system as a matter of priority if we are to unlock the growth and delivery potential of the NDP**
- **Capacity building is everyone's responsibility and needs to be an absolute priority for all involved in SCM but requires a cogent policy from Government**
- **Why are there no engineers in SCM systems? SCM is not a clerical function, Government must answer and we must push for inclusion**
- **Consulting engineers must be at the forefront of the drive for good SCM systems by providing constant and continued input and feedback**
- **Engineers are technocrats and implementing agents and are optimally positioned to assist in capacity building whilst fostering good relationships with career state bureaucrats and technocrats**
- **This year's CESA's aim is Partnering for Excellence**

OVERCOMING SCM CHALLENGES (cont.)

- **Lack of capacity building has detrimental consequences all round:**
 - professions become less attractive and eventually disappear by attrition
 - Government does not meet its priorities in terms of delivery targets (both soft and hard)
 - the public becomes increasingly restless about the lack of delivery and wasteful expenditure
 - lack of spending throttles the industry and the economy resulting in shrinkage and loss of intellectual capital
- **A SCM system that works engenders trust in Government systems**
- **Success breeds success. A good story is a good story for everyone both the teller and the protagonist**
- **As engineers we also need to remind ourselves that the aim of delivering infrastructure is not limited to providing a service but also includes creating a sustainable environment by creating skills and employment in the beneficiary communities**

DEFENDING YOUR TURF

- **Sometimes you can take a horse to water but you cannot make it drink**
- **What to do when officials commit fraud or act irregularly or unlawfully and are just not interested in remedying their faults and failures**
- **If fraud is suspected Corruption Watch is a very effective organisation, alternately the office of the Public Protector or the specialist Compliance Office in the National Treasury**
- **Complaints lodged with either National Treasury or the Public Protector take time to be addressed as the offices are swamped with the number of complaints but not always staffed adequately to deal with them**
- **Whilst a sound relationship with clients is certainly desirable it is not always achievable and in the interests of not offending a specific client one should not roll over and passively accept all that comes from them**
- **Injustices are injustices and they must be rectified irrespective of whether they lead to redress or not otherwise they will become the new norm and eventually destroy the fabric of our hard earned freedoms**

DEFENDING YOUR TURF (cont.)

- **Engineers are averse to militancy yet we have seen that the only way in which unionised labour is heard is by being a cohesive unit (an injury to one is an injury to all). We should strive for the same cohesion – unity equals strength.**
- **Do not be passengers and allow the proverbial freight train to run out of control. As much as one wants to retain clients do you really want to retain clients who are guilty of corruption and gross incompetence?**
- **Corruption in the public sector is stealing from the poor**
- **Depending on the stage at which you feel you have been wronged there are different actions that can be taken**

DEFENDING YOUR TURF – TENDER STAGE

- Section 217 of the constitution requires that the tender process, preceding the conclusion of contracts with the State for the supply of goods and services, must be 'fair, equitable, transparent, competitive and cost effective'. National Treasury - General Procurement Guidelines: No one bidder is to be favoured by the manner in which a tender document is compiled
- The Appeal Court held in Millennium Waste vs Limpopo Tender Board that the tender process is the exercise of an administrative function. Bill of Rights S33 titled “Just administrative action”: Everyone has the right to administrative action that is lawful, reasonable and procedurally fair
- Where the tender documents are vague or poorly detailed or inadequately defined it is possible to invoke the PAJA [S3(1) of PAJA – Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair]
- The first step is requesting clarifications detailing what is incorrect, what requires to be rectified, what information is missing and how the shortcomings should be rectified with a date by which the answers should be provided or alternately a request for an extension of the time for submission of the bid if the missing information is critical to your ability to meet the deadline

DEFENDING YOUR TURF – TENDER STAGE (cont.)

- In the event of the procurement official not being forthcoming by the given date the official should be informed that the intention is to launch an application for an interdict halting the process because it contravenes the provisions of PAJA (and a number of other National Treasury Guidelines and Regulations) with the specific reasons detailed and the Regulation and Act Clause references
- If legal counsel was not the author of the previous correspondence he/she would certainly take over from here onwards

DEFENDING YOUR TURF - AWARD STAGE

- **Adjudication and award stage are the stages where the most fraud, irregularities and injustices are committed**
- **The wording in the tender documentation determines whether information to be supplied is mandatory or not. The use of the word may or will/shall followed by the word disqualify has very different meanings and consequences notwithstanding that the intentions could be the same**
- **The word may is indicative of a suspensive condition that can be both possible and not possible i.e. there is no certainty when the word may is used, therefore disqualification for not meeting the suspensive condition is optional and unless part of precedent can be impugned**
- **The word will/shall is indicative of a suspensive condition that can only but be possible, in other words there is certainty when the word will/shall is used, therefore disqualification for not meeting the suspensive condition is not optional and unless excised by precedent cannot be impugned**
- **The best practice is to submit all documentation and sign all tender forms however mistakes are made and often disqualification for what is perceived as a trivial reason does happen and is very hard to accept**

DEFENDING YOUR TURF - AWARD STAGE (cont.)

- **It is almost certain that a tender cannot be considered for award if the following are fatally flawed, defective or deficient:**
 - **Signed and completed Form of Offer and Acceptance**
 - **Signed and completed Authority to Bind Signatory**
 - **Lack of registration on SARS Central Supplier Database**
 - **Non attendance of a compulsory meeting**
 - **Incomplete or unsigned SBD/MBD forms although where the wording is not peremptory there are question marks as to whether they can result in exclusion or not. At this stage the only forms with peremptory statements are the Declaration of Interest and Tenderers Past Supply Chain Management Practices and the Certificate of Independent Bid Determination**
 - **The requirements for tender and document submission must be read in conjunction with Part T1 Tendering Procedures and Part T2 Returnable Documents as there can be contradictions which can affect the validity of a bid (for example one stating possible exclusion for non submission whereas the other requiring submission failing which there will be exclusion)**

DEFENDING YOUR TURF - AWARD STAGE (cont.)

- **Areas where there are lingering doubts as to whether a tender can be disqualified or not are:**
 - **Lack of a signature on forms which are mandatory and which have no effect on the bid (refer to the Millennium Waste ruling)**
 - **Lack of a signature or completion of forms which are not mandatory and which have no effect on the bid**
 - **Documents which are mandatory, are available in the public domain and the omission of which has no effect on the bid (e.g. professional registration and similar documents)**
 - **Documents which are not mandatory**
 - **Confusion between certified copies of documents or copies of certified documents where exclusion for non submittal is not clearly defined. Are copies adequate and originals only required before entering into a contract?**
- **This is a complex part of the functions of the executive and one where we must all contribute to making the system as uniform as possible and beyond question and reproach**
- **The efforts by the Gauteng Provincial Administration are to be commended and it is hoped that in time to come more provinces, central government departments and SOEs will follow suit**

DEFENDING YOUR TURF - AWARD STAGE (cont.)

- **What to do if a tender has been incorrectly awarded? Bite the bullet or fight back?**
- **Principles are expensive to uphold and whilst one would like to see a justice system where principled and honest people overcome all odds against them, it is unfortunately seldom the case**
- **When challenging an award you need to determine first whether the award has been unlawful or irregular.**
- **An unlawful award would usually involve an element of fraud, carries some form of criminal sanction, should always be challenged and will be set aside otherwise courts would be seen upholding a corrupt system**
- **When dealing with irregular awards however courts have considered different criteria altogether and certain decisions have certainly left many a person perplexed**
- **The law is just, not fair, just not fair; Lady Justice wears a blindfold.**
- **Courts have always upheld irregular awards if in their opinion setting the award aside at that point in time would result in an unjust burden on the public however this has not always been the case**

DEFENDING YOUR TURF - AWARD STAGE (cont.)

- The later any action is left the more unlikely the action is to succeed as appointed tenderers have incurred costs to which they are entitled. Often tender awards which are intended to be published immediately are not which also makes challenges more difficult to mount
- Tender award results and the successful bidder's details should be published in the public domain within 14 days of the bidder receiving confirmation that his bid has been selected (this is according to a number of Treasury Instructions)
- This seldom happens usually purposely as it can effectively stunt a challenge if the award is simply irregular and the challenger has to submit a PAIA application to obtain information

DEFENDING YOUR TURF – TAKING ACTION

- **If an application is to be launched (as a guideline the cost of an urgent application would probably be upwards of R 20,000.00 if unopposed, if opposed upwards of R 50,000.00)**
- **Enforcement of justice through the courts is not for the faint hearted or the tight fisted. Justice is not free.**
- **In the instance of blatant incompetence and on advice from your counsel the cost order sought should be against the individuals as opposed to their employer**
- **The tide is turning and Justices have indicated their disquiet with truant public servants who have shown blatant contempt for rules and regulations or have used rules and regulations to avoid scrutiny.**
- **In NUM vs City Power, K Satchwell J indicated that it was unfair to punish ratepayers for the gross incompetence of the city officials. Justice Ngoepe has echoed these sentiments a few weeks ago. Justice Swain indicated similar views in Vukukhanye Personnel Services CC v Ethekwini Municipality and Others as early as 2010.**

SCM SOLUTION

- **The ideal SCM procedure that should be enforced is as follows:**
 - All bids are opened in public and prices read out in public
 - Bidders are informed of their exclusion during the functionality evaluation giving reasons for the exclusion
 - A window period is allowed for objections to be lodged and answered, excluded bidders who have validly objected are reinstated
 - The valid bids are analysed by the Bid Evaluation Committee
 - Once the Bid Evaluation Committee has completed its work its recommendations are made public and delivered to the Bid Adjudication Committee
 - A window period is allowed for objections to be lodged and answered, excluded bidders who have validly objected are reinstated
 - Once the Bid Adjudication Committee has completed its work its recommendations are made public and delivered to the Chief Accounting Officer
 - The appointment of the successful bidder by the Chief Accounting Officer is made public

SCM SOLUTION (cont.)

- **A system that places information in the public domain has built-in checks and balances and is designed to avoid or at least reduce lengthy litigation that stalls delivery**
- **Excluded bidders are given reasons for their exclusion and the opportunity of objecting to their exclusion at every stage of the process**
- **We all know our competition so improprieties are easy to flag at the specific bid process stage**
- **We need buy-in from bureaucrats, once they support a transparent system, politicians will have little choice but to follow or they will be seen as being supportive of a system that has proven to be prone to manipulation and riddled with corruption**
- **New legislation affects your future not our past as much as it may account for it**
- **Where and when can you make a difference ?**
- **If you want change you must support change by becoming involved, it is your right and your duty. Speak up or shut up!**
- **Change affects your future not your past so if you want to be part of the future you must become an agent for change**

EVERY CLOUD HAS A SILVER LINING



Questions ?!?

