

Practice Notes Webinar Series

PN 24: Certificates beyond those required by Conditions of Appointment

John de Villiers
14 November 2022



PN 24: Certificates beyond those required by conditions of appointment

Aim of the Practice Note

- ◆ *'To provide guidance in the liability for risks whereto the consulting engineer is exposed after signing any written certification that binds him in a professional capacity beyond those set out in the relevant standard form of professional agreement or construction contract, and that cannot be reasonably inferred as included in the scope of professional services, or that cannot be reasonably inferred as the 'exercising of reasonable skill, care and diligence' covered by the professional services agreement or construction contract, or that are not explicitly stated therein or cannot be taken as implied therefrom.'*

PN 24: Certificates beyond those required by conditions of appointment

Aim of the Practice Note

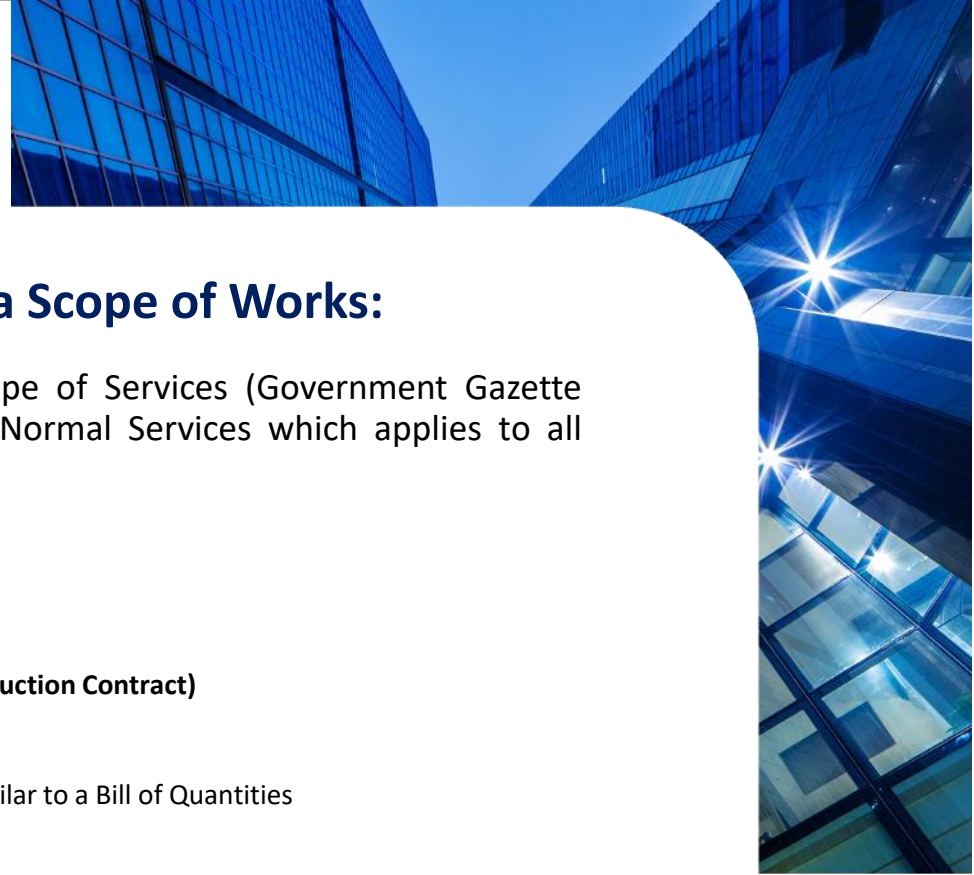
- ◆ In less words: To provide guidance in the liability of risks whereto the Consulting Engineer (CE) is exposed after signing any written certification that binds him in a professional capacity beyond those set out in the Scope of Services in his PSA or in the construction contract, or that cannot be reasonably inferred as the *'exercising of reasonable skill, care and diligence'*.
- ◆ In fewest words: You've entered into a PSA, with an Employer, which is linked to a construction contract. The PSA and construction contract contains the Scope of Services which you will provide. Certain signed written certifications are outside of that scope, may carry risk to you as the CE, and should be avoided.

PN 24: Certification

Various types of Professional Services Agreements (PSA's) which Consulting Engineers enter into

- ◆ Client-Consultant (standard form) (CC) (CIDB's Standard PSA of July 2009)
- ◆ Client-Consultant (short form) (S-F)
- ◆ Joint Venture Agreement (JVA)
- ◆ Sub-Consultancy Agreement (SCA)
- ◆ Pre-Bid Agreement (PBA)
- ◆ any other Professional Services Agreement (PSA)

PN 24: Certification



Consulting Engineer's PSA contains a Scope of Works:

- ◆ ECSA's Guideline for Professional Fees and Scope of Services (Government Gazette March 2021) contains the defined 6 Stages of Normal Services which applies to all engineering disciplines:
 - ◆ 1. Inception
 - ◆ 2. Concept and Viability (often called Preliminary Design)
 - ◆ 3. Design Development (also termed Detailed Design)
 - ◆ 4. Documentation and Procurement
 - ◆ **5. Contract Administration and Inspection (of the Construction Contract)**
 - ◆ 6. Close-out

Under each Stage a list of tasks and deliverables is given, similar to a Bill of Quantities

◆ Additional Services:

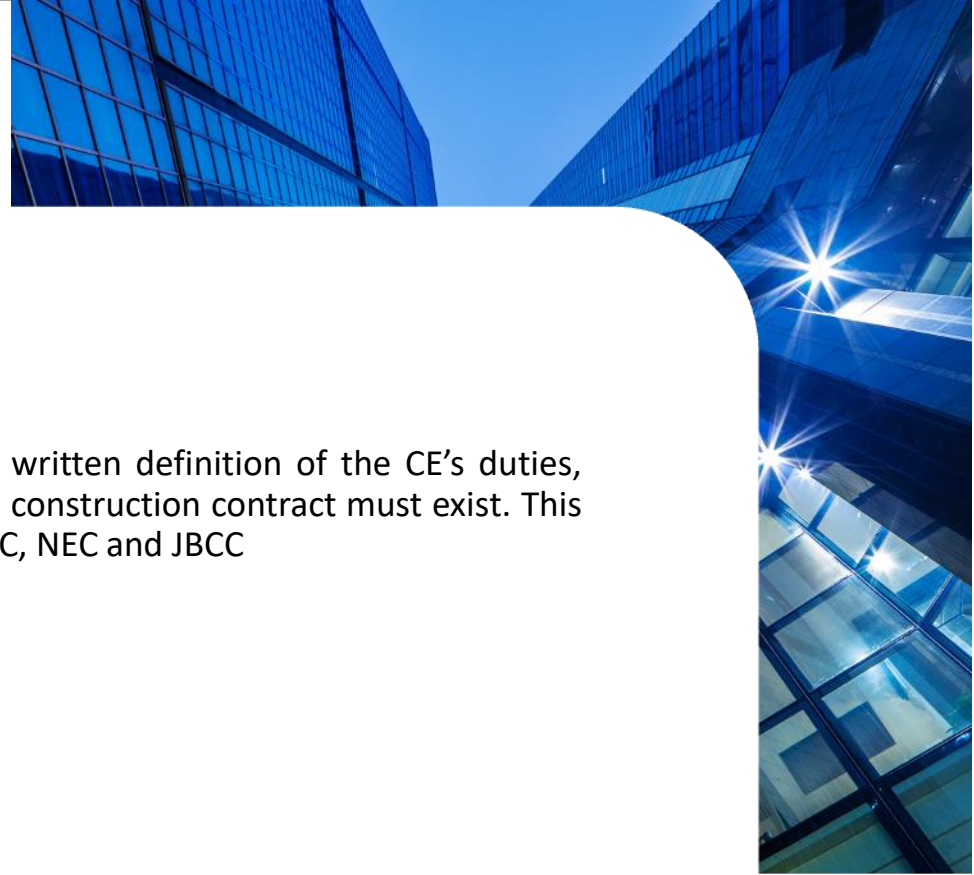
- ◆ Construction Monitoring/Supervision
- ◆ Specialist Subconsultant Services such as Environmental, OHS, Survey, Laboratory Services
- ◆ Arrangements for Wayleaves, Servitudes or Expropriations



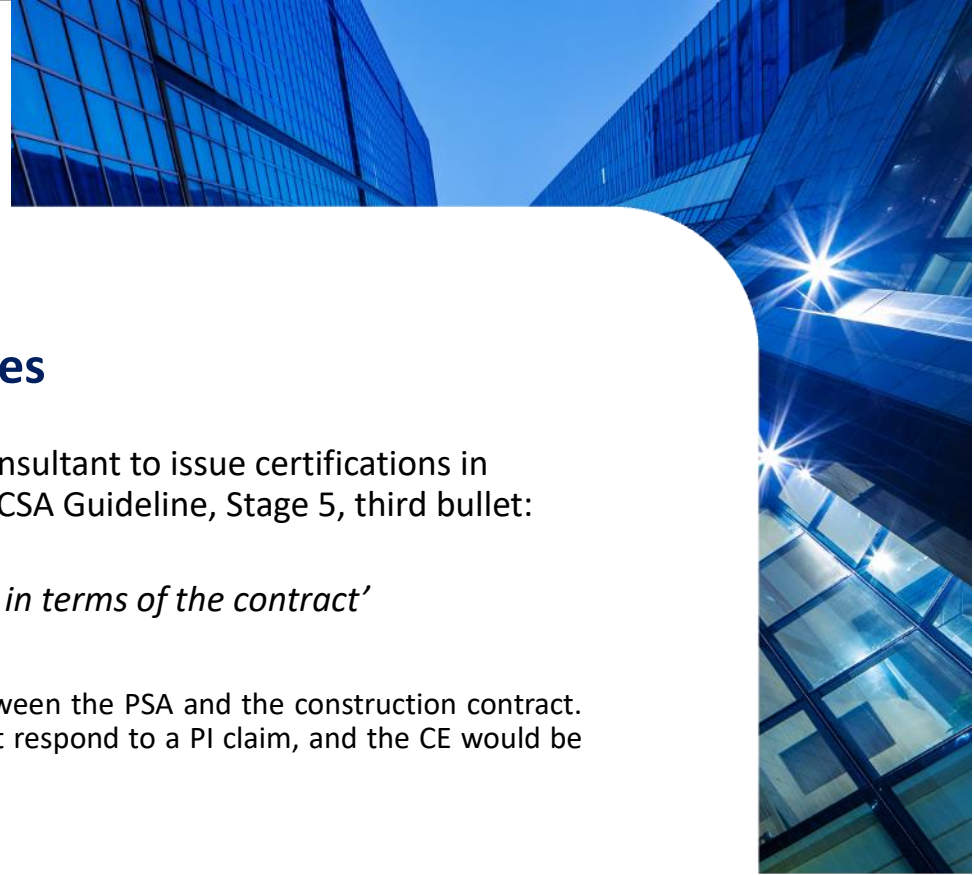
PN 24: Certification

Stages of Normal Services:

- ◆ If Stage 5 is included in the required services, a written definition of the CE's duties, powers and obligations (mandate) in terms of the construction contract must exist. This applies to all forms of contract including FIDIC, GCC, NEC and JBCC
 - ◆ Issuing of Documents, Attending meetings, Inspections
 - ◆ Financial caps on Approvals of Variation Orders
 - ◆ Duties in terms of Contractor Claims and Rulings
- ◆ Mandated certifications:
 - ◆ Interim and Final Payment Certificates
 - ◆ Site Instructions
 - ◆ Documents recording matter of fact
 - ◆ Completion Certificates



PN 24: Certification



Consulting Engineer's Stage 5 Services

- ◆ The contractual obligation and authority of the consultant to issue certifications in terms of a construction contract originates from ECSA Guideline, Stage 5, third bullet:
 - *'Carry out contract administration procedures in terms of the contract'*
- ◆ If the above clause is not in the PSA, there is no link between the PSA and the construction contract. This places the CE at extreme risk as his PI policy may not respond to a PI claim, and the CE would be liable in the case of a contractual matter



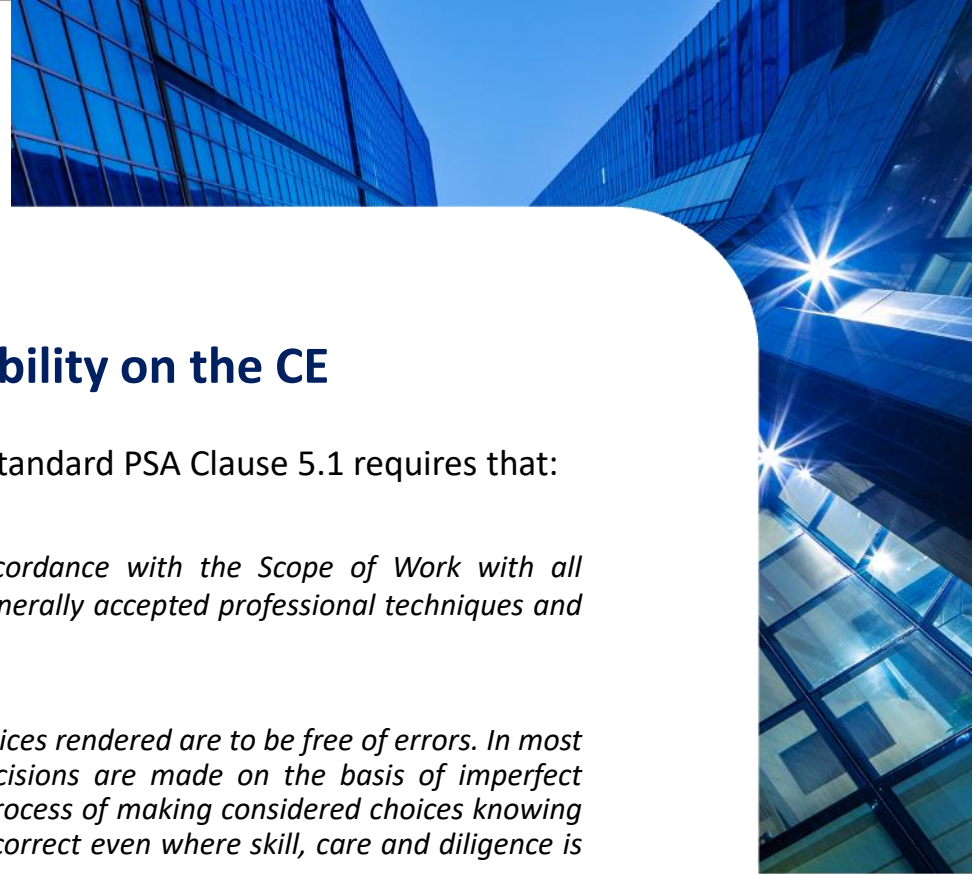
PN 24: Certification

Two types of potential liabilities to a Consulting Engineer:

- ◆ Contractual liability
- ◆ Delictual liability



PN 24: Certification



Certificates imposing contractual liability on the CE

- Clause 3(1) of the ECSA Code of Conduct & CIDB Standard PSA Clause 5.1 requires that:

'The Service Provider shall perform the Services in accordance with the Scope of Work with all reasonable skill, care and diligence in accordance with generally accepted professional techniques and standards.'

- *'There is no requirement in PSA's that the professional services rendered are to be free of errors. In most forms of engineering, assessments are required and decisions are made on the basis of imperfect information. This requires engineering judgement, i.e. a process of making considered choices knowing that there is a possibility that the choice made may be incorrect even where skill, care and diligence is exercised.'*
- The CE becomes contractually liable if a breach of clause 5.1 is established against him



PN 24: Certification



Certificates imposing liability on the CE

Certificates that are beyond the CE's duty to 'exercise reasonable skill, care and diligence'

- ◆ 'I hereby certify that the structural work will be constructed in accordance with the undermentioned SANS specification...'
- ◆ 'All such work will receive adequate engineering site supervision to ensure that the required standards are complied with'
- ◆ 'All structural drawings are complete'
- ◆ 'The consultant's design is *Fit for Purpose*'

The CE's PI likely doesn't cover such certifications.



PN 24: Certification

Delictual liability

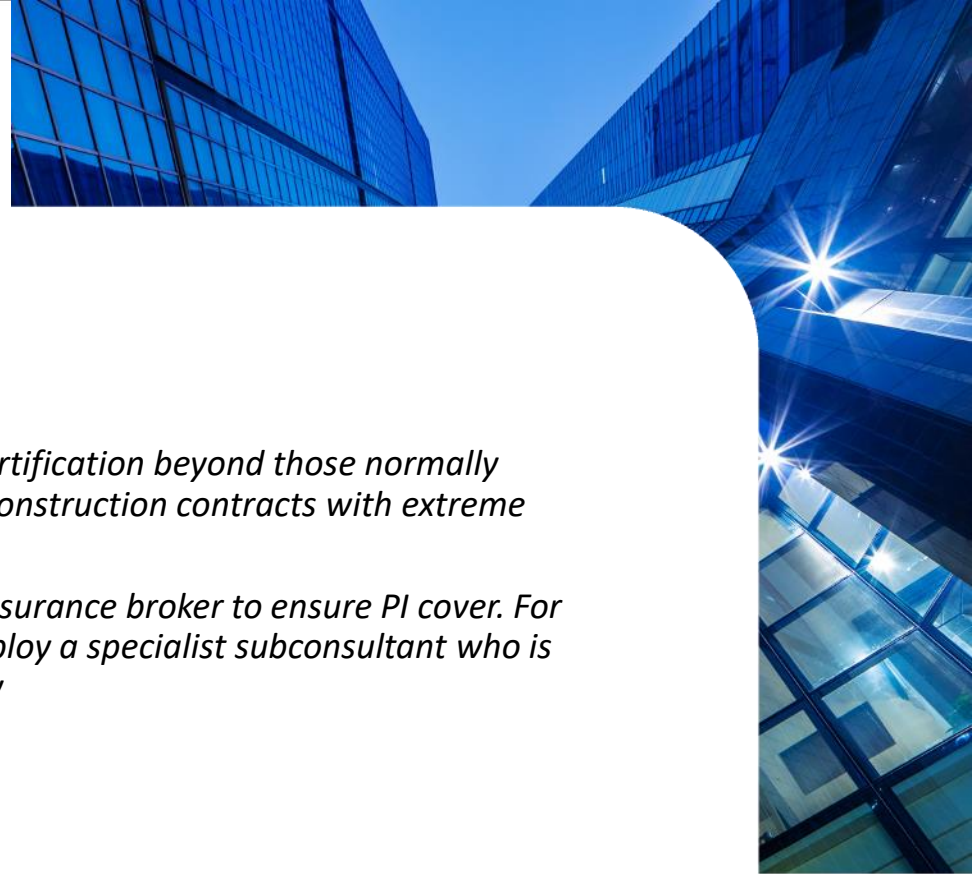
- ◆ *'a civil wrong consisting of an intentional or negligent breach of duty of care that inflicts loss or harm, and which triggers legal liability for the wrongdoer'*
- Example: Claim for damages by a third party who suffers loss or damage as a result of acting on a certification that is incorrect or beyond your contractual obligation

PN 24: Certification

When issuing certificates, the CE should:

- ◆ Avoid attracting liability that is beyond his duty to exercise ‘reasonable skill, care and diligence’ by following these principles:
 - ◆ Avoid absolute obligations
 - ◆ Choose the wording of certifications carefully
 - ◆ Certificates should record that you have no obligation beyond exercising reasonable skill, care and diligence in issuing such a certificate
 - ◆ You may add a disclaimer such as ‘use at own risk’
 - ◆ The basis you used to source and compile information should be recorded, such as level of supervision
 - ◆ Do not certify matters in respect of which you do not have the appropriate level of competence
 - ◆ Specify the persons whom the certificate is intended for. Add that it is not intended for the information of any third party
 - ◆ Study the scope of works and ensure that the certificate will not impose extraordinary duties on the CE
 - ◆ If a certificate is requested by the Employer, which could attract liability, speak to your PI broker

PN 24: Certification



In closing:

- ◆ *It is therefore advised to treat any request for a certification beyond those normally required under usual standard form of PSA's and construction contracts with extreme caution*
- ◆ *Discuss the scope of the certification with the PI insurance broker to ensure PI cover. For specialist certifications it may be necessary to employ a specialist subconsultant who is then added temporarily to your PI insurance policy*



**‘Your Partner in Enabling
Consulting Engineering
Excellence’**