

# Best Practice Risk Management

PN93: Identifying payment and other risks and how to deal with them



# PURPOSE:

To provide insight and guidance on the following, insofar as getting paid under your contract and dealing with other risks are concerned:



- ◆ risk identification in the tender process when tendering for contracts and practical tips to qualify out of certain risks
- ◆ implementation of professional services contracts and available remedies against the client in the event of late payment as set out in such professional services contracts.

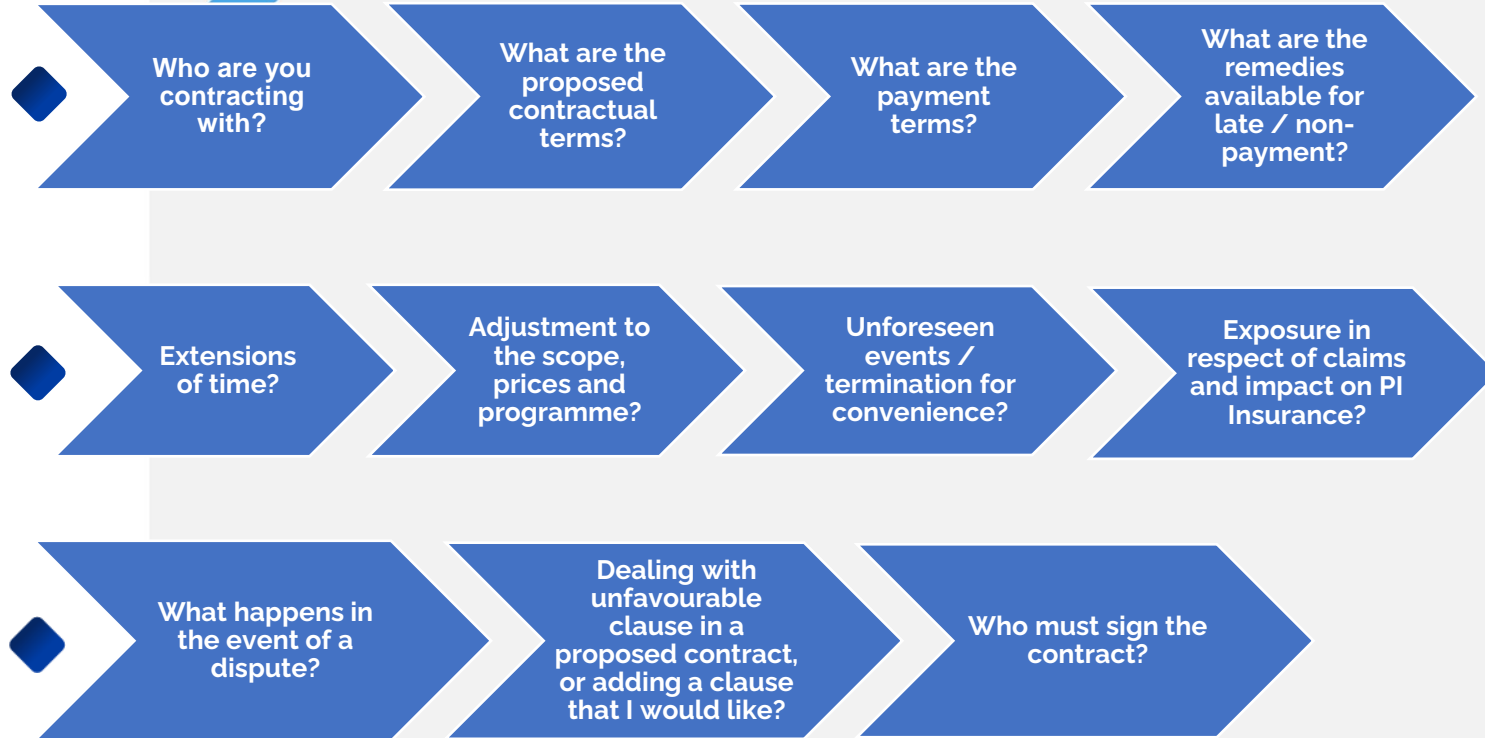


# Introduction

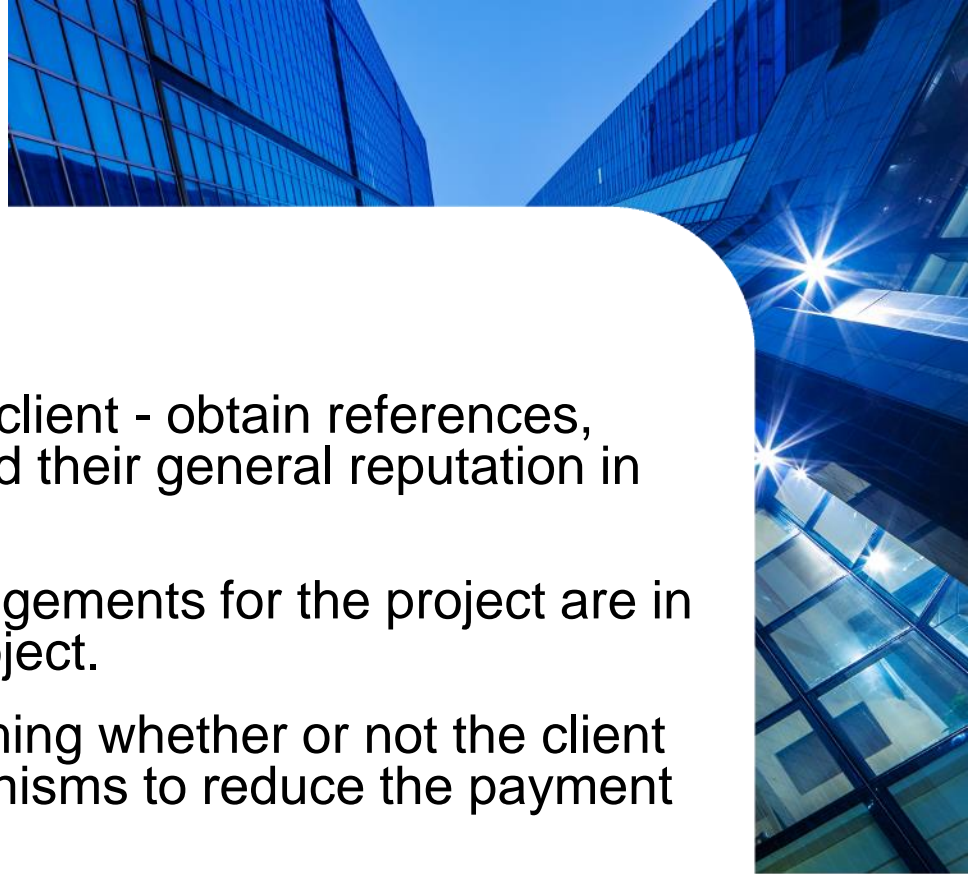
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- ◆ The client and consulting engineer should agree on commercial terms that set out the timing of deliverables and related payments as well as the method of payment that seeks to balance service provider cash flow and client risk
- ◆ Standard form contracts are generally widely understood by those involved in the construction industry and are generally fair to both employer and consultant.
- ◆ Extra care must be taken where the employer changes these standard form contracts (using a set of particular conditions, for example), or their legal teams draft their own set of contract terms and conditions based on the standard form contracts.

# Key risk questions dealt with in PN 93



# Question 1: Who are you contracting with and what is their financial standing and reputation?



- ◆ Establish the track record of a new client - obtain references, establish their financial standing and their general reputation in the industry.
- ◆ Establish whether the funding arrangements for the project are in place and sufficient to cover the project.
- ◆ If there are limited means of confirming whether or not the client is “risky business” there are mechanisms to reduce the payment risk:
  - A payment guarantee
  - Cash positive payment terms



## Question 2. What are the proposed contractual terms?

### **Standard form of agreements used in SA include:**

- ◆ CESA Model Professional Services Agreement (2021),
- ◆ FIDIC Client Consultant Model Services Agreement (2017),
- ◆ NEC 4 Professional Services Contract (2017),
- ◆ CIDB Standard Professional Services Contract (2009),  
and
- ◆ PROCESA Agreement (2021)

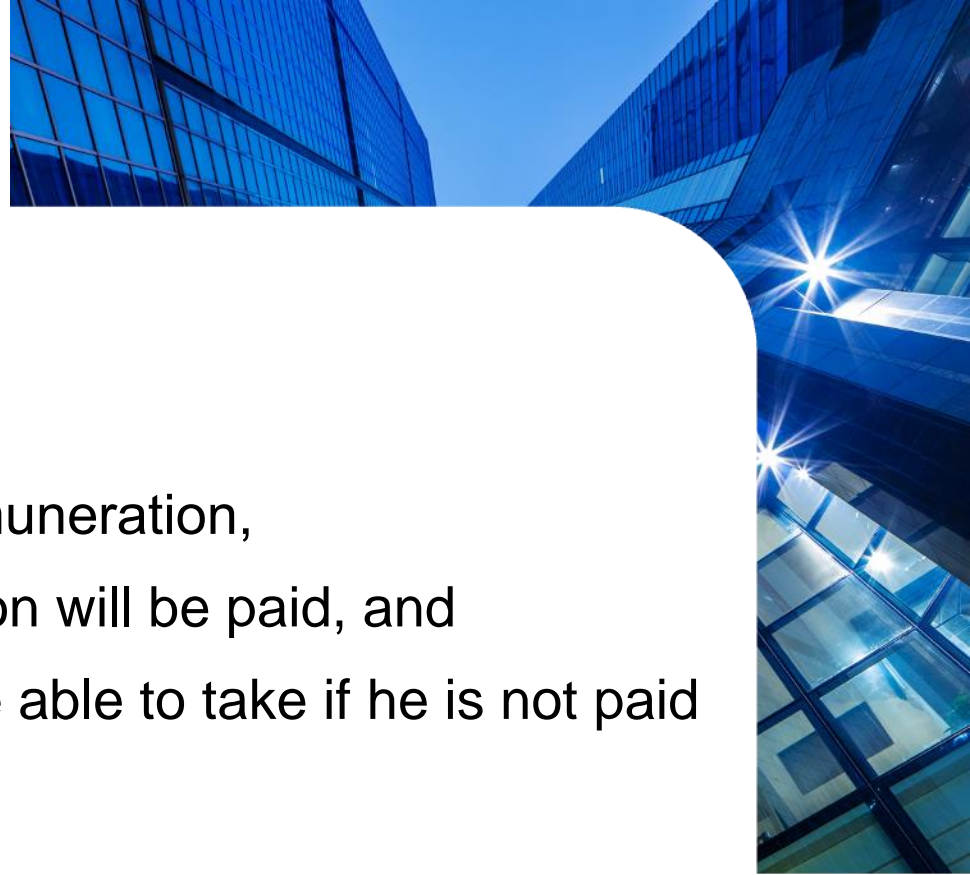
### **BUT:**

It's essential to check the Particular/Special Conditions as set out in the Contract Data

## Question 3: What are the terms of payment?

The agreement should specify:

- ◆ the value of the consultant's remuneration,
- ◆ how and when such remuneration will be paid, and
- ◆ what steps will the consultant be able to take if he is not paid on time.



# Interim Payment Clauses

CIDB July 2009	PROCSA July 2021	FIDIC 2017	NEC4 JUNE 2017	CESA May 2021
<b>Does the contract allow for interim payments?</b>				
Yes	Yes	Yes	Yes	Yes
<b>Frequency of interim payments?</b>				
Monthly	Monthly	Appendix 3 needs to be completed to state frequency of payments, it is not there automatically.	The contract data needs to be completed to set out the assessment interval, it is not there automatically.	Monthly



# Interim Payment Clauses

CIDB July 2009	PROCSA July 2021	FIDIC 2017	NEC4 JUNE 2017	CESA May 2021
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## Time for payment of invoices

30 Days	On receipt	28 days	<p>The service manager assesses each payment claim within 1 week of each assessment date. The consultant invoices within 1 week of the assessment. The employer pays by the later of</p> <ul style="list-style-type: none"> <li>• one week after invoice</li> <li>• three weeks after the assessment date.</li> </ul>	30 days.
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## If there is a disputed invoice, is there a clause that deals with this?

Yes, Notice of the dispute must be given before the due date for payment (within the 30 Days referred to above)	Yes, 30 calendar days notice must be given of the dispute, with reasons	Yes, 7 calendar days of the employer's intention to withhold payment with reasons. Must not delay payment on the undisputed portion.	No. Invoices are issued based on service manager's assessments. Can refer a dispute about the assessment of the <u>final amount due</u> within four weeks, but interim assessments need to be treated as "Any other dispute"	Yes, 4 days notice prior to the date on which the fee payment becomes due with reasons but shall not delay payment on the remainder of the invoice.
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## Question 4 – What are the remedies available for late / non-payment?

- ◆ Failure to make payment in accordance with the contract is a breach of contract.
- ◆ The aggrieved party then becomes entitled to one or more of the remedies prescribed either in terms of the contract or alternatively at common law as a result of the other party's breach
- ◆ Our law and most breach provisions in contracts oblige the aggrieved or innocent party to give notice of breach to the other party.

# Interest and Suspension

CIDB July 2009	PROCSA July 2021	FIDIC 2017	NEC4 JUNE 2017	CESA May 2021
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## If the client pays late, is there a clause that entitles the consultant to interest?

Yes. prime + 2% calculated from the due date for payment	Yes, prime + 2% calculated from the due date for payment	Rate of interest to be set out in Appendix 3	Yes, interest rate is required to be set out in the contract data.	Yes, prime + 2% calculated from the due date for payment.
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## If the client pays late, is there a clause that entitles the consultant to suspend the services?

No	Yes,	Yes	No	Yes
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## What is the notice period required if the consultant desires to suspend the services for late payment?

No clear right to suspend for late payment	Consultant must issue notice of breach and allow 14-calendar days for the client to remedy the breach (i.e. make payment)	7 calendar days' notice (NB employer should not have issued a notice stating the reasons for on-payment in accordance with clause 7.5)	No clear right to suspend for late payment	No notice per 4.6(1) – immediate suspension if not paid within 30 days from the due date for payment
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# Termination on Non-payment

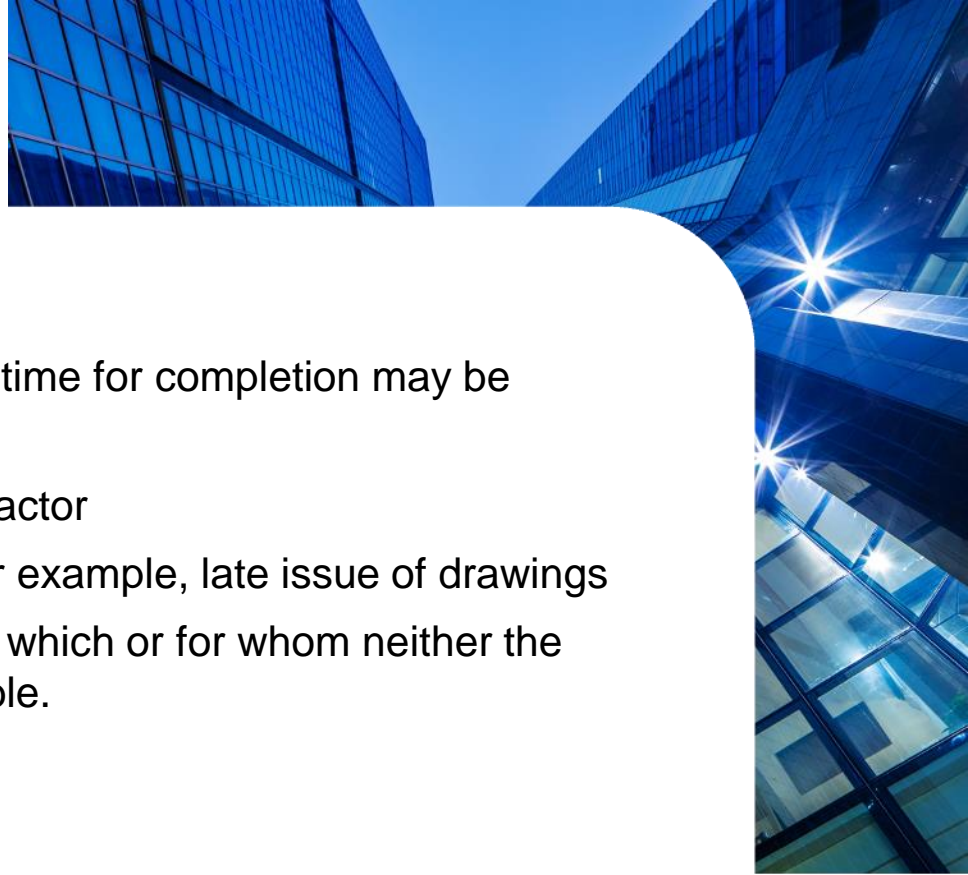
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CIDB July 2009	PROCSA July 2021	FIDIC 2017	NEC4 JUNE 2017	CESA May 2021
<b>Is there a right to terminate the contract if the client fails to make payment?</b>				
Yes	Yes	Yes	Yes	Yes
<b>What are the notice requirements if the consultant desires to terminate the contract?</b>				
45 Days	Consultant must issue notice of breach and allow 14-calendar days for the client to remedy the breach (i.e. make payment)	Services need to have been suspended for more than 42 calendar days, consultant may then give 14 calendar days' notice to terminate.	13 weeks after the due date for payment. (Note NEC3 allows termination within 8 weeks of the issue of a notice to the employer that payment is overdue)	30 days notice to terminate the agreement if not paid within 30 days of the due date for payment

## Question 5 – How does the agreement deal with extensions of time?

The reasons for delay and disruptions to such time for completion may be classified in three groups:

1. Events caused by the client or contractor
2. Events caused by the consultant, for example, late issue of drawings
3. Events or persons causing delay for which or for whom neither the client nor the consultant is responsible.



# Extensions of Time

CIDB  
July 2009

PROCSA  
July 2021

FIDIC  
2017

NEC4  
JUNE 2017

CESA  
May 2021

**If the client the client delays the consultant, is there a clause that entitles the consultant to an EoT?**

Clause 3.9.1 lists the events which might give rise to a change in the period of performance and contract price. Under clause 3.9.2 the service provider is required to submit proposals to change the contract price or period for completion within six weeks.

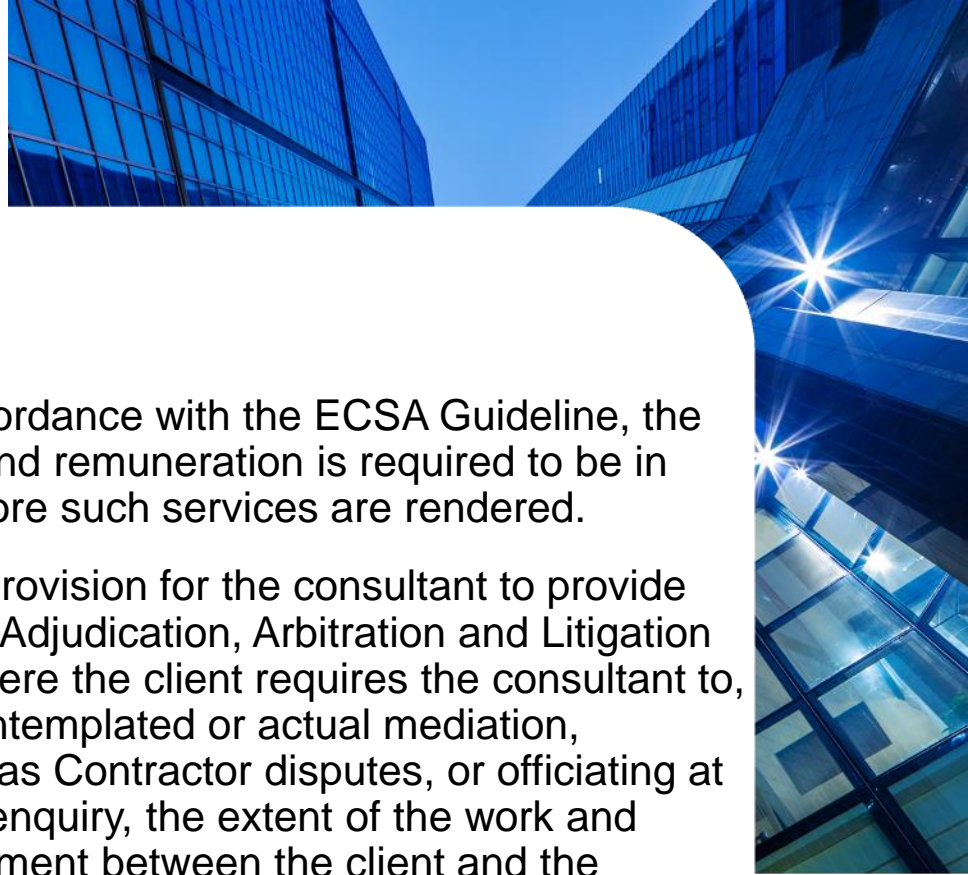
No specific clause dealing with EoT's resulting from a delay caused by the client

Clause 4.4 deals with delays and lists the causes for which the consultant would be entitled to an EoT. Clause 4.3.3 requires that the parties promptly give notice of any specific , actual or probable future events or circumstances which may adversely affect or delay the services.

Clause 60.1 lists 16 events which are compensation events including a change to the completion date or meeting a key date and for which an early warning needs to be issued in terms of Clause 15.1. Under clause 61.3 the consultant must notify a compensation event within eight weeks of the event occurring.

Clause 4.9 lists the causes for which the consultant may request an EoT. The consultant is required to notify the client timeously where an extension of time becomes necessary.

## Question 6 – How does the agreement deal with adjustment to the scope, prices and programme?



- (a) For additional services as defined in accordance with the ECSA Guideline, the agreement on such additional services and remuneration is required to be in writing and if possible, be concluded before such services are rendered.
- (b) In addition, the ECSA Guideline makes provision for the consultant to provide additional services relating to Mediation, Adjudication, Arbitration and Litigation proceedings and similar services and where the client requires the consultant to, inter alia, assist with or participate in contemplated or actual mediation, arbitration or litigation proceedings such as Contractor disputes, or officiating at or attending courts and commissions of enquiry, the extent of the work and remuneration should be subject to agreement between the client and the consultant.



# Variations

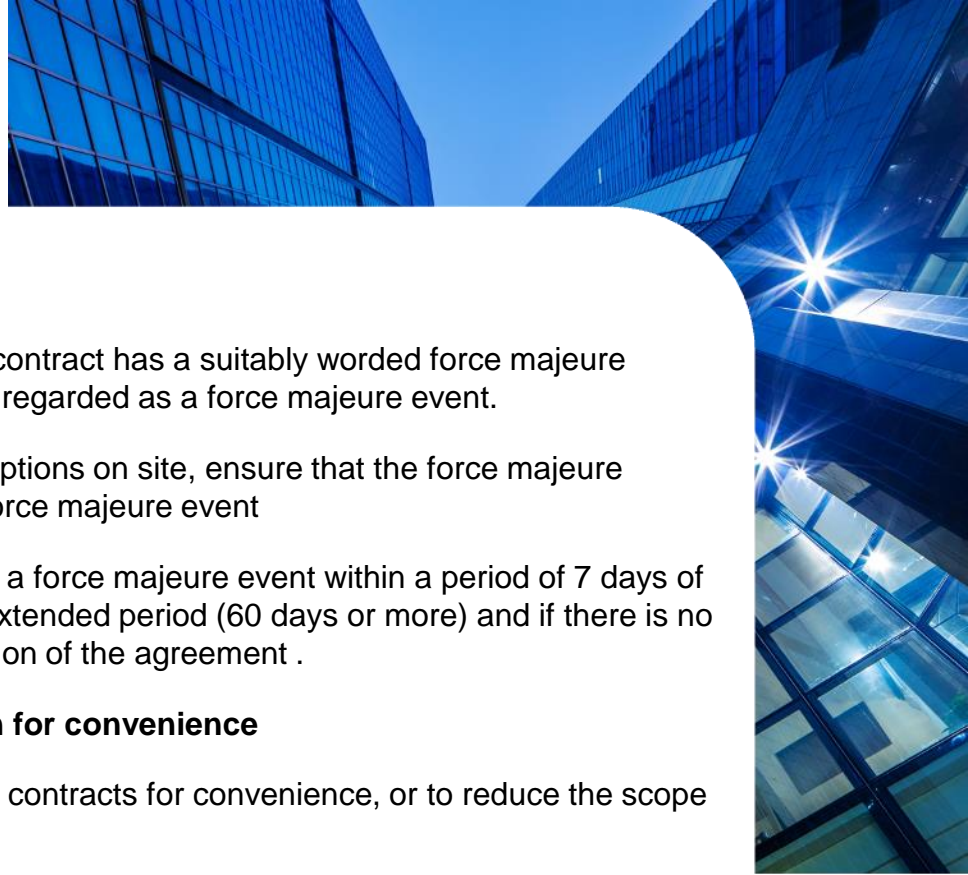
CIDB July 2009	PROCSA July 2021	FIDIC 2017	NEC4 JUNE 2017	CESA May 2021
<b>Is there a variations clause?</b>				
Yes	Yes	Yes	Yes	Yes
<b>What are the notice requirements for variations?</b>				
If consultant and employer do not agree on value of variation, under Clause 3.9.2 the consultant has <u>6 weeks from becoming aware of an event</u> to submit proposals to change the contract price or period of completion.	No notice requirements	Under clause 5.1.3 the consultant shall give notice of variation <u>as soon as reasonably practical</u> . There is a 14 day period for the client and consultant to agree the value and impact on the programme of the variation, or, if time is of the essence, the client may issue a notice to commence work. See clause 5.2.4	If the service manager instructs a change to the scope they notify the consultant that the instruction is a compensation event – core clause 61.1. The consultant must notify the service manager (core clause 61.3) <u>within 8 weeks</u> of becoming aware of the compensation event.	Under Clause 2.5 the consultant is required to give <u>written notice to the client on becoming aware of</u> any matter which may change or has changed the scope, cost or timing of the services or the works.



# Variations and CPA

CIDB July 2009	PROCSA July 2021	FIDIC 2017	NEC4 JUNE 2017	CESA May 2021
<b>What are the notice requirements for increasing the contract amount or time period for performance of the services?</b>				
Consultant required to submit proposals to the employer within 6 weeks of becoming aware of the event described in clause 3.9.1	There does not seem to be any notice requirements	As soon as reasonably practicable	8 weeks from becoming aware of the event (core clause 61.3)	None stipulated – Consulting Engineer makes a request.
<b>Is there a price adjustment clause for inflation?</b>				
Yes, clause 13.6.2.	Not directly, no.	Yes, but only if so stated in Appendix 3 [Remuneration and Payment].	Yes, but only if Option X1 is selected.	None, unless specified in Appendix A2

# Question 7 – how does the contract deal with unforeseen events / termination for convenience?



## (a) Exceptional Event (FIDIC) / Force Majeure

- (i) Where using a bespoke contract, ensure that the contract has a suitably worded force majeure clause which identifies all occurrences that will be regarded as a force majeure event.
- (ii) In the wake of the current construction mafia disruptions on site, ensure that the force majeure clause includes business forum disruptions as a force majeure event
- (ii) In addition, there should be a requirement to notify a force majeure event within a period of 7 days of its occurrence and where this event exists for an extended period (60 days or more) and if there is no end in sight, there should be provision for termination of the agreement .

## (b) Reductions in scope of the supply / termination for convenience

- (i) Employers / Clients like to have the right to cancel contracts for convenience, or to reduce the scope thereof in their discretion.
- (ii) This type of clause is found in contracts, however, the right of the consultant to any benefits under the contract (such as getting paid costs incurred in anticipation of completion of the whole of the Services, or getting 10% of the full fees on the project under Clause 4.2.10 of the ECSA Guideline) is often removed.



# Force Majeure

CIDB July 2009	PROCSA July 2021	FIDIC 2017	NEC4 JUNE 2017	CESA May 2021
<b>Does the contract include a force majeure clause?</b>				
Yes, not in breach provided the other Party has been informed as soon as possible and all reasonable precautions, due care and reasonable alternative measures have been taken.	Yes, see clause 17.6 states that should either party be prevented by a cause beyond its control from performing its obligations, it may suspend or terminate the agreement.	Yes, termed "Exceptional Event", notice shall be provided within 14 days of becoming aware of the event, and such party shall be excused from its obligations for as long as the Exceptional Event persists.	Yes. Clause 15.1 read with clause 18.1.	Yes, see clause 4.4
<b>Does the contract provide for payment once a force majeure has been notified?</b>				
Yes, see clause 8.3.3,	Clause 17.5 covers payment of the consultant in the event of termination (other than a termination ito clause 17.2 (consultant breach),	Yes, see clause 4.6.3.	Yes Refer to 15.4 read with 60.1(1), i.e. a Compensation Event	Yes, see clause 4.4
<b>Is there a provision for termination?</b>				
Yes, clause 8.4.1(e), where the period persists for 60 Days or more	Yes, see clause 17.6	Yes, refer to clause 6.4.2(b)) where the period of suspension resulting from an exceptional event occurring has exceeded 168 days	Yes, but only at the option of the Employer- see clause 90.2 read with clause 91.7	Yes, see clauses 4.5 (by the client) and 4.6 (by the Consulting Engineer)

# Limitation of Liability

CIDB July 2009	PROCSA July 2021	FIDIC 2017	NEC4 JUNE 2017	CESA May 2021
<b>Does the contract include a limitation of liability clause?</b>				
Yes, limited to either the sum insured in respect of insured events and in respect of uninsured events the sum stated in the Contract Data, or in the absence of an amount, then to an amount equal to twice the fees payable to the Service Provider	Yes, clause 7.2	Yes, see clause 8.3.1 read with clause 8.4.1	Yes. Clause 87.	Yes, see clause 6, specifically clauses 6.2 and 6.4
<b>Does the contract provide for a limit on the compensation due under the contract?</b>				
Yes, as per the above – refer also to clause 13.5.2 which includes a waiver of all claims insofar as the aggregate compensation which might have been payable exceeds the aforesaid maximum amount payable.	Clause 7.2 provides that the maximum amount is as per the schedule and where no amount is stated, then the maximum amount shall be twice the fees payable by client to the consultant.	Per 8.3.1 the maximum amount is limited to the amount stated in the Particular Conditions, without prejudice to any financing charges under sub-clause 7.2.2 or sub-clause 8.4.1.	Per 87.1 amount stated in the Contract Data	Yes, see clause 6.4 – twice the fee, unless a fixed amount is specified in the Specific Data

# Dispute Resolution

CIDB July 2009	PROCSA July 2021	FIDIC 2017	NEC4 JUNE 2017	CESA May 2021
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## Does the contract provide for dispute resolution?

Yes, see clause 12 which provides for a 4-tier approach i.e. Settlement; Mediation; Adjudication; Arbitration	Yes, see clause 18 which provides for <u>mediation</u> and thereafter arbitration	Yes, see clause 10 has a 3-tier approach i.e. Amicable dispute resolution; Adjudication; Arbitration.	Yes. See Main Option Clause W1 which provides for a 3-tier approach i.e. Amicable settlement; Adjudication; referral to the Tribunal.	Yes, 3 tier approach per clause 8 - Amicable dispute resolution; <u>Mediation</u> ; Arbitration
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## What is the time period for providing notice of the dispute?

No time period stipulated	No time period stipulated	No time period stipulated	See sub-clause W1.1 – time periods vary depending on the event giving rise to the dispute	No time period stipulated for Amicable Dispute Resolution or Mediation however referral to arbitration to take place within 90 days of the date of notice from either party or of the date upon which the mediator declares that the mediation has failed.
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# Question 10 – Dealing with unfavourable clauses in a proposed contract, or when there is a clause missing

- ◆ A qualification to a client's proposed contract is simply a way to respond to the client's request for tender / proposal as a "counteroffer" to certain terms and conditions of that request for tender / proposal.
- ◆ Such a qualification would be added to the Consultant's tender / proposal which would then open the door to negotiation on this particular point.

# Question 11 – Who must sign the contract

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- ◆ Signatories to contracts on behalf of companies are required to have the requisite authority to sign such contracts (you would have seen the requirement for a company resolution authorising a certain person to sign the contract on behalf of the company).
- ◆ The same would apply to the signing of any amendments to the contract. Ensure that the contract is properly signed by parties who are duly authorised to represent the entity in question.
- ◆ It is imperative, at the outset, to establish the person/s with necessary authority to represent the client (not only with regard to the signing of the contract) but also in respect of the making of necessary decisions, issuing of instructions etc. under the contract.
- ◆ This authority should be confirmed in writing to avoid any issues further down the line.

**Thank You!**



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