

# MDA CONSULTING



## FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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**FIDIC – DESIGN STANDARDS**

**INTRODUCTION**

The Construction Industry is made up of many parties each contributing a different specialist skill set to produce the final Product, be it a: building, road, treatment plant or mine.

Designing something that will eventually be built is the responsibility of the engineer, in so far as mechanical or structural works are concerned and the architect, in so far as building works are concerned. The Contractor then provides his skill by taking the design concept and constructing something tangible from it.

Given the specialist skills involved in the initial design phase this article will examine what is the accepted design standard against which the engineer and architect's works should be measured as well as the implications thereof?

**REASONABLE SKILL & DUTY OF CARE VERSUS FIT FOR PURPOSE**

There are a few English law articles,<sup>1</sup> analysis and opinions that crystalize the two distinct standards for

<sup>1</sup> Articles titled "The Contractor's quality obligations: Different concepts under English and German Contract Law" by Jan-Bertram Hillig and "Design liability under NEC3 Problem" by All answers limited, a company registered in England and Wales.

design liability being 'reasonable skill & duty of care' and 'fit for purpose'.

With 'reasonable skill & duty of care' it is based on foreseeability and the expectation that one must take reasonable care to avoid acts, omissions or statements,

which could reasonably be foreseen to be likely to result in injury or loss to other people. 'Fit for purpose' on the other hand is the requirement that the finished works should satisfy and / or deliver the Client's / Employer's requirements.

From the simplified explanation above of these two design standards, it is evident that fit for purpose is more onerous than standard of care. Let's explore the obligations and consequences of these design standards in more detail below:

**REASONABLE SKILL & DUTY OF CARE**

Mackenzie, at page 118 sets out standard of skill & duty of care as follows:

"An architect is expected to be reasonably proficient in his calling and is liable for any ordinary want of skill. He is also expected to proceed with sufficient care and attention in the conduct of the business entrusted to him. He is liable for any loss resulting through his lack of skill or negligence to the person who employs him. In deciding the standard of proficiency required, a court will have regard to the general level of skill and diligence possessed and

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exercised at the time by members of the profession. If an architect (or engineer) deviates from tried and normal standards of construction, the architect (or engineer) is under a special duty to obtain the best advice available about the use of the new techniques and to advise the employer of any potential risks".<sup>2</sup>

This standard is based on the standard of skill of a reasonable professional of similar standing. The onus is not excessively burdensome on the architect or engineer because his performance is measured against that of similar professionals within his field of expertise. Further he would not suffer any undue prejudice because he is not being measured against a degree that is higher than the professional skill he possesses.

According to the GCC<sup>3</sup> standard form of contract, it contains no explicit obligation to ensure that the design is fit for purpose. In terms of sub-clause 4.1.2 liability is limited to design errors or deficiencies in any drawings and loss or damage arising out of the error or deficiency.

Following on from what is contained above, the 1983 South African case of *Randeree*<sup>4</sup> confirms that the accepted industry norm standard for measuring an architect or engineer's design is that the professional must apply *the general level of skill and diligence possessed and exercised at the same time by the members of the branch of the profession to which (he) belongs*.

So if the architect or engineer believes he used the requisite skill and care of a professional in his position and the design fails then he can rely on his professional indemnity insurance to defend any claim of negligence that might be brought against him.

### **FIT FOR PURPOSE**

Murdoch and Hughes, at page 180 - 181 confirm that the courts (English courts) have made it clear that:

“‘Fit for intended purpose’ will fairly readily be implied into a design and build or package deal contract”.<sup>5</sup>

In the South African context and due to how onerous this design standard is it is not ordinarily implied into contracts except where the architect or engineer knows what purpose the design shall fulfill. It may also form an express provision of the agreement contained in the standard form of contract entered into between the parties, for example:

According to sub-clause 4.1 of FIDIC<sup>6</sup> it contains an express provision that the design standard is that the works shall be “fit for the purposes for which the works are intended as defined in the Contract”.

Similarly NEC 3<sup>7</sup> contains an automatic fit for purpose obligation unless the secondary option is selected.

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<sup>2</sup> Mackenzie, *The Law of Building and Engineering Contracts and Arbitration*, 6<sup>th</sup> edition, p.118

<sup>3</sup> General Conditions of Contract for Construction Works, 2<sup>nd</sup> ed. 2010.

<sup>4</sup> *Randeree NNO v WH Dixon and Associates* 1983 (SA) 1 (A)

<sup>5</sup> John Murdoch and Will Hughes, *Construction contracts law and Management*, 4<sup>th</sup> edition, p. 180 - 181

<sup>6</sup> FIDIC Conditions of Contract for EPC/Turnkey Projects, 1<sup>st</sup> ed. 1999 clause 4.1

<sup>7</sup> NEC3 The Engineering and Construction Contract, 3<sup>rd</sup> ed. June 2005.

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There is a further consideration that the professional architect or engineer must bear in mind - what implication accepting the more onerous responsibility of ensuring that the design is fit for purpose will have on his professional indemnity insurance policy?

Generally professional indemnity insurance will only cover claims emanating from professional negligence, in other words a failure to exercise reasonable skill and apply a duty of care in the works. By accepting the higher design standard the architect or engineer may open himself up to personal liability for a claim made on the fit for purpose standard with no subrogation by his professional indemnity insurance.

There is clear prejudice that the architect or engineer would open himself up to by agreeing to this standard.

### **CONCLUSION**

Owing to the implications connected to the different design standards investigated above, it is fair to say that the ordinarily accepted design standard is the application of reasonable skill and a duty of care. The onerous design responsibility and risk associated with a fit for purpose design makes it untenable to simply infer or imply its acceptability. The parties must expressly agree it to.

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