




SHERQ Risk Management Group

Ensuring Compliance - Assuring Peace of Mind

Guideline on Property Developer Responsibilities

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 2 of 23	Guideline
	Construction Client Responsibilities		

CONTENTS

1 INTRODUCTION 3

2 PURPOSE 4

3 LEGISLATION 5

3.1 Act 38 of 2000 - Construction Industry Development Board Act 5

3.1.1 Section 1 - Definitions 5

3.1.2 CIDB Class of Construction Works - Civil Engineering (CE) 6

3.1.3 Definition of Mechanical Engineering Works (MB) 6

3.1.4 Definition of Electrical Engineering Works - Building (EB)..... 7

3.1.5 Definition of Electrical Engineering Works - Infrastructure (EP) 7

3.2 Act 48 of 2000 - Project and Construction Management Professions Act [PCMPA]..... 7

3.2.1 Section 1 - Definitions 7

3.2.2 Section 18 - Categories of Registration 8

3.3 GNR 84 of 7 February 2014 - Construction Regulations 9

3.3.1 Regulation 1 – Definitions 9

3.4 Construction Work Permit 12

3.4.1 Regulation 3 - Application for Construction Work Permit..... 12

3.4.2 Regulation 5 - Duties of a Client 14

3.4.3 Regulation 6 - Duties of Designers 18


3.4.4 Regulation 7 - Duties of Principle Contractor and Contractor..... 19

3.4.5 Regulation 8 - Management and Supervision of Construction Work..... 20

3.4.6 Regulation 11 - Structures 21

4 DISCUSSION ON CLIENT DUTIES AND RESPONSIBILITIES 22

5 CONCLUSION 23

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 3 of 23	Guideline
	Construction Client Responsibilities		

1 INTRODUCTION

When attempting to interpret legislation there are always two questions which should be asked: -

1. What was the Intention of the legislator?
2. What was the Objective of the legislator?

These are two difficult questions to answer and in doing so, the answers will be subjective. Legislation is not written by a single person, but rather a group of people each with their own objectives and intentions. In the end, they have mostly compromised and then the legal experts need to write the legislation in a way they encompasses groups objectives. Together, the Intention and objective may be deemed to be the Purpose of the legislation and in most cases, the grammatical terminology used in the content, will define the purpose of legislation.

Delegated legislation

Acts of Parliament and other original legislation are often drafted in skeleton form, as the legislative bodies responsible are not able to account continuously for every change in South African society which such legislation would be required to accommodate. Delegated legislation "adds the flesh;" it is "legislation by administration." An original statute thus "orders" or "allows" (in an enabling provision) that legislation be drafted, usually at a lower level of government, to address certain aspects of what the original statute is supposed to remedy. New provincial proclamations and regulations (since 1994) are issued to fulfil the requirements of the prescribing Act, to "add flesh" to it.

Other proclamations and regulations may be made or issued by the conferral of delegated powers. A cabinet minister may be authorised to make regulations according to a prescribing statute, for example, section 43 of the (National) Occupational Health and Safety Act,[Act 85 of 1993] which so empowers the Minister to make Regulations, one of which is the Construction Regulations of 2014 and which is the core of this guideline.

The minister may also delegate his or her functions to any organisation, another statutory body or person. Examples include the Designation of the Chief Inspector and Inspectors of the Department of Employment and Labour.

Delegated legislation usually has no official short title. Regulations issued by GN R84 of 7 February 2014 under section 43 of the National Occupational Health and Safety Act, for example, are known broadly as the "Construction Regulations."

Legislation referred to or quoted in this Guideline should not be deemed to be a comprehensive indication of all applicable legislation as many other legislated requirements exist.



SHERQ Risk Management Group (Pty) Ltd

Doc No.	SA/GL/002	Management System
Revision	3	Health and Safety
Date	2019/09/27	Document Type
Page No.	Page 4 of 23	Guideline
Construction Client Responsibilities		

The Occupational Health and Safety Act [Act 85 of 1993] describes its Purpose as *“To provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work.”*

Any regulation promulgated under the authority of this Act must then incorporate this same Purpose and must be considered in relation to other applicable legislation and the common law principle of Vicarious Liability, which places the onus of ensuring the Purpose is achieved is ultimately of the employer, represented by the Chief Executive Officer and the Client who is paying for and benefiting from work being performed.

2 PURPOSE

To provide guidance for the Clients (Property Developer / Owner), Chief Executive Officers and all Directors and Managers on interpreting and explaining some of their legal obligations when having Construction Work performed.


Comment

As a Property Developer (in legislation, the **“Client”**), Project Manager or Professional representing a Client on a Construction Project, there are various legal requirements you must ensure. There are also some which are outside of your scope or competency, and you must also ensure you are not accepting responsibility or potential liability by doing anything which you are not legally deemed competent to do.

This Guideline is only a very short summary of extracts from limited legislation, with some comments, and is not a methodology to assist in ensuring implementation of a legally required and compliant Health and Safety Management system. There are many other applicable legal requirements which have not been included and this Guideline should therefore not be construed as being the only applicable requirements.

There are many instances where applicable legislation is either not known, understood or implemented, and in some instances, intentionally chosen to be ignored, and therefore Crimes are committed, and the perpetrators may face criminal action. In many such instances many C.E.O’s, Directors, Project Managers, Construction Managers and Contractors approach is one of *“It’s not possible or feasible”* or *“It’s too costly”* or *“It’s too difficult”*. There are possibly even instances where a decision is based on risk of possible consequences being deemed to be minimal in relation to deciding to ignore requirements. A fine for a contravention may be for example, a lot less costly than compliance.

Choosing to ignore the legislation and therefore committing criminal acts, may in fact be a lot costlier than implementing the requirements through well managed processes that are in fact not very difficult or costly, with the right professional assistance.

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 5 of 23	Guideline
	Construction Client Responsibilities		

This Guideline has not considered in detail the requirements as applicable on a Mine. When performing what is deemed to be Construction Work on a mine, there is legislation other than the Mine Health and Safety Act which also applies.

Take some time to read this Guideline and thereafter consider the potential detrimental impacts of non-compliance.

3 LEGISLATION

3.1 Act 38 of 2000 - Construction Industry Development Board Act

3.1.1 Section 1 - Definitions

“Client” means a person, body or organ of state who enters into a contract to procure construction works
“Construction Industry” means the broader conglomerate of industries and sectors which add value in the creation and maintenance of fixed assets within the built environment.

“Contractor” means a person or body of persons who undertakes to execute and complete construction works

Comment

This definition includes both a Principle Contractor and a Contractor and it should be noted when legislation refers to a Contractor, it includes all Principle Contractors also.

“Construction Works” means the provision of a combination of goods and services arranged for the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including building and engineering infrastructure.


Comment

In terms of this legislation, Design services performed by Architects and Engineers may be considered to be Construction Work.

“Project” means a construction works contract or a series of related construction works contracts.

Comment

All related Construction Activities, whether incidental thereto or not, are deemed to be a single project. Both the Director General and the Chief Inspector [Department of Employment and Labour] have clarified this. The example given by them was that a road construction project may not be broken into smaller sections or packages and issued separately in order to avoid compliance. All such packages are to be combined and deemed to be a single road construction project even where separate contracts are awarded. Each package may of course be contracted out separately to different Principle Contractors but the approach from the Client

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 6 of 23	Guideline
	Construction Client Responsibilities		

must be that it remains a single Project with separate Contracts. Likewise, they stated that a housing development is to be combined and not packaged into smaller projects, even if executed in stages. The approach by the Client must be consistent with Construction Regulation 5(1)(k) and 5(4).

Note

The definition of Construction Works includes provision of support and professional services, which may in some instances, include Design, Project Management or Quantity Surveying services, all of which are therefore deemed to be Construction Works in terms of this legislation.

3.1.2 CIDB Class of Construction Works - Civil Engineering (CE)

3.1.2.1 Definition of Civil Engineering (CE)

Construction Works primarily concerned with materials such as steel, concrete, earth and rock and their application in the development, extension, installation, maintenance, removal, renovation, alteration, or dismantling of building and engineering infrastructure.

Examples

Structures such as cooling tower, bridge culvert, dam, grand stand, road, railway, reservoir, runway, swimming pool, silo or tunnel. • The results of operations such as dredging, earthworks and geotechnical processes. • Township services, water treatment and supply, sewerage works, sanitation, soil conservation works, irrigation works, storm-water and drainage works, coastal works, ports, harbours, airports and pipelines.

3.1.2.2 Definition of General Building Works (GB)

Construction Works that:

- a) *are primarily concerned with the development, extension, installation, renewal, renovation, alteration, or dismantling of a permanent shelter for its occupants or contents; or*
- b) *cannot be categorised in terms of the definitions provided for civil engineering works, electrical engineering works, mechanical engineering works, or specialist works.*


Examples

Buildings for domestic, industrial, institutional or commercial occupancies. • Car ports. • Stores. • Walls.

CIDB Grading level 6 has an upper limit of R13 million.

3.1.3 Definition of Mechanical Engineering Works (MB)

Construction Works that:

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 7 of 23	Guideline
	Construction Client Responsibilities		

are primarily concerned with the development, extension, installation, removal, alteration, renewal of engineering infrastructure for gas transmission and distribution, solid waste disposal, heating, ventilation and cooling, chemical works, metallurgical works, manufacturing, food processing and materials handling

3.1.4 Definition of Electrical Engineering Works - Building (EB)

Construction Works that:

are primarily concerned with the installation, extension, modification or repair of electrical installations in or on any premises used for the transmission of electricity from a point of control to a point of consumption, including any article forming part of such an installation.

3.1.5 Definition of Electrical Engineering Works - Infrastructure (EP)

Construction Works that:

are primarily concerned with development, extension, installation, removal, renovation, alteration or dismantling of engineering infrastructure:

- a) relating to the generation, transmission and distribution of electricity; or
- b) which cannot be classified as EB.

Comment

The categories and more specifically the CIDB grading are important as it is referred to and are a “trigger” for requiring and obtaining a Construction Work Permit by the Client. [see below]

3.2 Act 48 of 2000 - Project and Construction Management Professions Act [PCMPA]

3.2.1 Section 1 - Definitions


“Construction Management” is the management of the physical construction process within the Built Environment and includes the co-ordination, administration, and management of resources. The Construction Manager is the one point of responsibility in this regard.

“Construction Project Management” is the management of projects within the Built Environment from conception to completion, including management of related professional services. The Construction Project Manager is the one point of responsibility in this regard.

“Professional” means a person who is registered in terms of section 19(2)(a);

“Registered Person” means a person registered under one of the categories referred to in section 18;

Comment

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 8 of 23	Guideline
	Construction Client Responsibilities		

A Construction Project Manager may be appointed by a Client or a Contractor and Professional Registration remains a legal requirement for both.

3.2.2 Section 18 - Categories of Registration

(1) *The categories in which a person may register in the project and construction management are*

(a) *professional, which is divided into*

(i) *Professional Construction Manager; or*

(ii) *Professional Construction Project Manager; or*

(b) *candidate, which is divided into*

(i) *Candidate Construction Manager; or*

(ii) *Candidate Construction Project Manager; or*

(c) *specified categories prescribed by the council.*

(2) *A person may not practise in any of the categories contemplated in subsection (1), unless he or she is registered in that category.*

(3) *A person who is registered in the category of candidate must perform work in the project and construction management professions only under the supervision and control of a professional of a category as prescribed.*


Comment

It is in terms of this legislation that the South African Council for the Project and Construction Management Professions (SACPCMP) exists.

In terms of Subsection (2), no person may practice, whether for a Client or a Contractor, as a Project Manager, Construction Manager or Health and Safety Agent, unless registered and in good standing with the SACPCMP.

The use of the word “*may*” in Section 18(1) must not be construed as allowing an option to register or not, but rather an option only to select a category in which a person MUST register in order to undertake or perform any of the prescribed functions or duties within that category. [see below for penalties for non-compliance]

There are numerous instances where Architects or Engineers or other non-registered persons [not registered with the SACPCMP] are appointed by the **Client** to fulfil the role of **Project Manager**, albeit under the guise of another title, e.g. Project Co-ordinator, Planner, Client Agent, etc. If such a person is performing any of

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 9 of 23	Guideline
	Construction Client Responsibilities		

the functions and duties defined as being in the Scope of Services of a Professional Construction Project Manager, then s/he is a Project Manager irrespective of the title endowed. The implications of doing so whilst not being registered and in good standing are dire, and in fact could lead to prosecution and the delaying of all works on the project.

Health and Safety Professionals are categorised under Sub-Section 1(c). It is important to note that they are deemed by law to be professionals and depending on their role, are viewed on the same level as engineers and architects and their legal duties and their functions are similarly legislated.

3.3 GNR 84 of 7 February 2014 - Construction Regulations

3.3.1 Regulation 1 – Definitions

“Agent” means a competent person who acts as a representative for the client

Comment

This is a Health and Safety Agent [the Clients Health and Safety representative] as opposed to a Clients Project / Site Agent or Manager and they must be registered as either A Professional Construction Health and Safety Agent [PrCHSA] or a Construction Health and Safety Manager [CHSM].

“Client” means any person for whom construction work is being performed

Comment

The Client can only ever be the person who is in effect paying the final account and who will benefit from the construction works by “owning” the structure after completion. Commercially and contractually, a Principle Contractor may be referred to as a client of a Contractor in that they compensate such Contractor, but the Principle Contractor is only a conduit for monies originating from the Principle Contractors Client. The Principle Contractor is a customer of the Contractor and NOT their Client.

“Competent Person” means a person who

- a. *Has in respect of the work or task to be performed the required knowledge, training and experience and, where applicable, qualifications, specific to that work or task; and*
- b. *Is familiar with the [OHS] Act and with the applicable regulations made under the Act*

Comment

Take cognisance of the very wide ambit of this definition. To act as a Clients Project Manager, Construction Manager, Health and Safety Agent [Professional Agent or Manager] or as an Architect or Engineer, competence MUST be demonstrated and in some legislated instances having a Qualification is a

**SHERQ Risk Management Group (Pty) Ltd**

Doc No.	SA/GL/002	Management System
Revision	3	Health and Safety
Date	2019/09/27	Document Type
Page No.	Page 10 of 23	Guideline
Construction Client Responsibilities		

requirement. Where professional registration with another body is a requirement, such is also a requirement to be deemed competent.

To be legally deemed as competent, even a professional must demonstrate knowledge of the OHS Act and relevant Regulations.

Also, of importance, is that competency is directly related to the work or task required to be performed.

“Construction Work” means any work in connection with

- a. The construction, erection, alteration, renovation, repair, demolition or dismantling of or addition to a building or similar structure, or
- b. The construction, erection, maintenance, demolition or dismantling of any bridge, dam, canal, road, railway, runway, sewer or water reticulation system, or the moving of earth, clearing of land, the making of excavation, piling, or any similar civil engineering structure or type of work

Comment

This MUST be read in conjunction with the same definition as described above in the CIDB Act. [see above]

Also note that although reference is made to “ANY WORK”, however, it does not include all Design work as Construction Work.

“Contractor” means an employer who performs construction work

Comment

These are both Principle Contractors and their Contractors performing Construction Work and wherever a requirement is placed on any Contractor, it is also applicable to all Principle Contractors.


“Design” in relation to any structure, includes drawings, calculations, design details and specifications.

Comment

This becomes of utmost importance as Designers cannot only provide a drawing alone. They must provide all of these together.

“Designer” means

- a. A competent person who
 - (i) Prepares a design
 - (ii) Checks and approves a design
 - (iii) Arranges for a person at work under his or her control to prepare a design, including an employee of that person where he or she is the employer; or

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 11 of 23	Guideline
	Construction Client Responsibilities		

- (iv) *Designs temporary works, including its components*
- b. *An architect or engineers contributing to or having overall responsibility for a design*
- c. *A building services engineer designing details for fixed plan*
- d. *A surveyor specifying articles or drawing up specifications;*
- e. *A contractor carrying out design work as part of a design and building project; or*
- f. *An interior designer, shop-fitter or landscape architect*

Comment

The normal process for a conventional building, is for an architect to provide a design and the relevant professional engineers to supplement it. A structural engineer would for example, design concrete and rebar and be required to sign off after a site inspection, authorising the casting stages.

The Client however remains responsible to ensure the various designers are competent and where professional registration is required, are so registered. This is the duty of the Clients Health and Safety Agent [Professional Agent or Manager] where one has been appointed, who shall verify competence and where necessary authorise the Contractor to appoint Designers in the case of Temporary Works.

They should NEVER be assessed by the Clients Professional Construction Project Manager who may normally not be competent to assess and to determine competency.

“Health and Safety File” means a file, or other record containing the information in writing as required by these regulations


“Health and Safety Plan” means a site, activity or project specific documented plan in accordance with the client’s health and safety specification

“Health and Safety Specification” means a site, activity or project specific document prepared by the client pertaining to all health and safety requirements related to construction work.

Comment

The Client is responsible to compile Risk Assessments and Health And Safety Specifications which are to be provided to Designers prior to any Design and to Contractors prior to pricing / tendering. These must be done by a *“Competent Person”* and should never be attempted by the Clients Project Manager alone as s/he is not deemed competent in this regard.

There is both a dilemma and a contradiction in the legislation in that the onus to compile a Health and Safety Specification lies directly with the Client. The Client may however delegate this only to a Health and Safety Agent [Professional Agent or Manager] appointed by such Client and not to anyone else. The dilemma is that there is not always an obligation on the Client to appoint a Health and Safety

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 12 of 23	Guideline
	Construction Client Responsibilities		

Agent [Professional Agent or Manager] and then, if the Client has not appointed a Health and Safety Agent [Professional Agent or Manager], the Client must themselves **PERSONALLY** compile the Risk Assessment and Health and Safety Specification without delegating it. In most instances the Client is not competent to do so. This is discussed in more detail under Regulation 5 in paragraph 3.4.3. below.

They, along with proof of the issuing thereof, must also be contained in the application for the Construction Work Permit where applicable.

3.4 Construction Work Permit

3.4.1 Regulation 3 - Application for Construction Work Permit

1. *A client who intends to have construction work carried out, must at least 30 days before that work is to be carried out apply to the provincial director in writing for a construction work permit to perform construction work if the intended construction work will-*
 - a. *Exceed 180 days*
 - b. *Will involve more that 1800 person days of construction work; or*
 - c. *The works contract is of a value equal to or exceeding thirteen million rand of Construction Industry Development Board (CIDB) grading level 6*
2. *An application contemplated in subregulation (1) must be done in a form similar to Annexure 1*
3. *The provincial director must issue a construction work permit in writing to perform construction work contemplated in subregulation (1) within 30 days of receiving the construction work permit application and must assign a site specific number for each construction sit*
4. *A site specific number contemplated in subregulation (3) must be conspicuously displayed at the main entrance to the site for which that number is assigned.*
5. *A construction work permit contemplated in this regulation may be granted only if—*
 - (a) *the fully completed documents contemplated in regulation 5(1)(a) and (b) have been submitted; and*
 - (b) *proof in writing has been submitted—*
 - (i) *that the client complies with regulation 5(5)*
 - (ii) *with regard to the registration and good standing of the principal contractor as contemplated in regulation 5(1)(j); and*
 - (iii) *that regulation 5(1)(c), (d), (e), (f), (g) and (h) has been complied with. ...*

**SHERQ Risk Management Group (Pty) Ltd**

Doc No.	SA/GL/002	Management System
Revision	3	Health and Safety
Date	2019/09/27	Document Type
Page No.	Page 13 of 23	Guideline
Construction Client Responsibilities		

6. *A client must ensure that a principle contractor keeps a copy of the construction permit contemplated in subregulation (1) in the occupational health and safety file for inspection by an inspector, the client, the clients authorised agent, or an employee.*
7. *No construction work contemplated in subregulation (1) may be commenced or carried out before the construction work permit and number contemplated in subregulation (3) have been issued and assigned.*
8. *A site specific number contemplated in subregulation (3) is not transferable.*

Published Notes from Gazetted Construction Regulations Guidelines [GNR 489 of 02 June 2017]

- a) **Refer to exemption issued by the Chief Inspector.**
- b) **The 30 days required to issue a Construction Work Permit is on condition that all correct and fully completed documents are submitted as per the attached list of items (not limited to) to be submitted with the construction work permit application.**
- c) **Where any person aggrieved by any decision taken by an inspector in relation to the application of a Construction Work Permit under a provision of this regulation may appeal against such decision to the chief inspector in terms of Section 35.**
- d) **The Construction Work Permit shall be issued to the Client for whom the Construction work is conducted.**

Comment

The exemption referred to in a) as at the date of this Guideline is as follows: -


“A client who intends to have construction work carried out, must at least 30 days before that work is to be carried out apply to the provincial director in writing for a construction work permit to perform construction work if the intended construction work starts from the 7th August 2018 and will -

1. exceed 365 days and will involve more than 3600 person days of construction

work; or

2. the tender value limit is grade 7, 8 or 9 of the Construction Industry Development Board (CIDB) grading.”

Where the requirement is that a construction permit be acquired, the Client MUST appoint a person or organisation to act as their Health and Safety Agent [Professional Agent or Manager]. Such representative must be registered and in good standing with the SACPCMP and must also be competent with regards to the type of construction activities to be performed. A person who, for example, has only experience on construction of roads is not competent to manage health and safety on a conventional building or high-rise project.

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 14 of 23	Guideline
	Construction Client Responsibilities		

This role can never be fulfilled by the Clients Project Manager.

3.4.2 Regulation 5 - Duties of a Client

1. A client must

- a. **Prepare a baseline risk assessment for an intended construction project**
- b. **Prepare a suitable, sufficiently documented and coherent site specific health and safety specification for the intended construction work based on the baseline risk assessment contemplated in paragraph (a)**

Comment

Hazard Identification and Risk Assessments and Specifications **MUST** be done by persons competent to do them. They are the responsibility of the Client personally and **may** be delegated only to a Health and Safety Agent [Professional Agent or Manager] and no-one else.

Note


There are situations where a Client is not obliged to appoint a Health and Safety Agent [Professional Agent or Manager] and in most instances the Client will not be competent to do these themselves. No-one else may do them and the Client, by doing these themselves accepts responsibility and liability by doing them personally. [see Paragraph 4 below]

- c. *Provide the designer with the health and safety specification contemplated in paragraph (b)*
- d. *Ensure that the designer takes the prepared health and safety specification into consideration during the design stage;*

Comment

Consider who would be competent to assess whether or not every Designer has complied. Doing this is the responsibility of the Client personally and **may** be delegated only to a Health and Safety Agent [Professional Agent or Manager] and no-one else.

- e. *Ensure that the designer carries out all the responsibilities contemplated in Regulation 6*
- f. *Include the health and safety specification in the tender documents*
- g. **Ensure that potential principle contractors submitting tenders have made adequate provision for the cost of health and safety measures**
- h. **Ensure that the principal contractor to be appointed has the necessary competencies and resources to carry out the construction work safely;**

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 15 of 23	Guideline
	Construction Client Responsibilities		

Comment

Consider who would be competent to assess whether or not every Principle Contractor complies. Doing this is the responsibility of the Client personally and **may** be delegated only to a Health and Safety Agent [Professional Agent or Manager] and no-one else.

- i. Take reasonable steps to ensure co-operation between all contractors appointed by the client to enable each of those contractors to comply with these Regulations;*
- j. Ensure before any work commences on a site that every principal contractor is registered and in good standing with the compensation fund or with a licensed compensation insurer as contemplated in the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993);*
- k. Appoint every principal contractor in writing for the project or part thereof on the construction site;*
- l. Discuss and negotiate with the principal contractor the contents of the principal contractor's health and safety plan contemplated in regulation 7(1), and must thereafter finally approve that plan for implementation;***

Comment

Consider who would be competent to assess whether or not every Principle Contractor has complied. Doing this is the responsibility of the Client personally and **may** be delegated only to a Health and Safety Agent [Professional Agent or Manager] and no-one else.

- m. Ensure that a copy of the principal contractor's health and safety plan is available on request to an employee, inspector or contractor;*
- n. Take reasonable steps to ensure that each contractor's health and safety plan contemplated in regulation 7(1)(a) is implemented and maintained;***

Comment

This must be verified during monthly audits and inspections. [see "o" immediately hereunder] Doing this is the responsibility of the Client personally and **may** be delegated only to a Health and Safety Agent [Professional Agent or Manager] and no-one else.

- o. Ensure that periodic health and safety audits and document verification are conducted at intervals mutually agreed upon between the principal contractor and any contractor, but at least once every 30 days;***
- p. Ensure that a copy of the health and safety audit report contemplated in paragraph (o) is provided to the principal contractor within seven days after the audit;*

**SHERQ Risk Management Group (Pty) Ltd**

Doc No.	SA/GL/002	Management System
Revision	3	Health and Safety
Date	2019/09/27	Document Type
Page No.	Page 16 of 23	Guideline
Construction Client Responsibilities		

- q. **Stop any contractor** from executing a construction activity which poses a threat to the health and safety of persons which is not in accordance with the client's health and safety specifications and the principal contractor's health and safety plan for the site;

Comment

Consider who would be competent to carry out Legal Compliance Audits and Inspection on your behalf.

- r. *Where changes are brought about to the design or construction work, make sufficient health and safety information and appropriate resources available to the principal contractor to execute the work safely; and*
- s. **Ensure that the health and safety file contemplated in regulation 7(1)(b) is kept and maintained by the principal contractor.**

Comment

Consider who would be competent to carry out Legal Compliance Audits and Inspection on your behalf.

2. **Where a client requires** additional work to be performed as a result of a design change or an error in construction due to the actions of the client, **the client must ensure** that sufficient safety information and appropriate additional resources are available to execute the required work safely.
3. **Where a fatality or permanent disabling injury occurs** on a construction site, **the client must ensure** that the contractor provides the provincial director with a report contemplated in section 24 of the Act, in accordance with regulations 8 and 9 of the General Administrative Regulations, 2013, and that the report includes the measures that the contractor intends to implement to ensure a safe construction site as far as is reasonably practicable.

Comment

Failure of the Client to ensure the reporting of such incidents, may result in criminal action.

4. **Where more than one principal contractor** is appointed as contemplated in subregulation (1)(k), **the client must** take reasonable steps to ensure co-operation between all principal contractors and contractors in order to ensure compliance with these Regulations.
5. **Where a construction work permit is required** as contemplated in regulation 3(1), **the client must, without derogating from his or her health and safety responsibilities or liabilities, appoint a competent person in writing as an agent** to act as his or her representative, and where such an appointment is made the duties that are imposed by these Regulations upon a client, apply as far as reasonably practicable to the agent so appointed.

**SHERQ Risk Management Group (Pty) Ltd**

Doc No.	SA/GL/002	Management System
Revision	3	Health and Safety
Date	2019/09/27	Document Type
Page No.	Page 17 of 23	Guideline
Construction Client Responsibilities		


6. **Where notification of construction work is required** as contemplated in regulation 4(1), **the client may**, without derogating from his or her health and safety responsibilities or liabilities, **appoint a competent person in writing as an agent** to act as his or her representative, and where such an appointment is made the duties that are imposed by these Regulations upon a client, apply as far as reasonably practicable to the agent so appointed: Provided that, where the question arises as to whether an agent is necessary, the decision of an inspector is decisive.
7. **An agent** contemplated in subregulations (5) and (6) **must—**
 - (a) **manage the health and safety on a construction project for the client;** and
 - (b) **be registered with a statutory body** approved by the Chief Inspector as qualified to perform the required functions;
8. When the chief inspector has approved a statutory body as contemplated in subregulation (7)(b), he or she must give notice of that approval in the Gazette.

Published Notes from Gazetted Construction Regulations Guidelines

- a) **Regulation 5(1)d must be read with regulation 6, the duties of the designer and a written report must be submitted to the Client by the Designer as proof of compliance with the afore said regulation.**
- b) **Regulation 5(1)(i) Where there are multiple principle contractors (or contractors) on site appointed by the client, the client shall coordinate cooperation between contractors to ensure health and safety control, read with regulation 7(4). Regulation 5 (5); (6) and (7).**
- c) **Where a client specifies which contractors a principal contractor must appoint the duties as specified in 7(1)(c)(iii) shall be applicable to the said client.**
- d) **A client may appoint a Construction Health and Safety Agent or Construction Health and Safety Manager based on the scope and risk profile of construction work to represent him/her on matters of health and safety. Provided that, where the question arises as to whether a Construction Health Safety Agent or a Construction Health and Safety Manager is necessary, the decision of an inspector is decisive.**

Comment

This is where the importance of having an appointed competent Health and Safety Agent [Professional Agent or Manager] comes into play. They should be involved at conception stage in order that the Hazard Identification and Risk Assessments and Specifications can be made available to the Designers in advance of any Design and to ensure compliance with this legislation as a whole.

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 18 of 23	Guideline
	Construction Client Responsibilities		


Some of these requirements are performed by way of audits and inspections to be performed only by a competent person. It is a legal requirement that the Client personally, or the Clients Health and Safety Agent [Professional Agent or Manager] perform these.

Where a Construction Work Permit is required, the Client has no option other than to appoint a competent Health and Safety Agent [Professional Agent or Manager] who is registered with the SACPCMP and who **MUST** then manage all aspects of Health and Safety on the project on behalf of the Client. Such representative can be either a registered Agent or a Manager.

3.4.3 Regulation 6 - Duties of Designers

The designer of a structure must

- a. *ensure that the applicable safety standards incorporated into these Regulations under section 44 of the Act are complied with in the design;*
- b. **take into consideration the health and safety specification submitted by the client;**
- c. **before the contract is put out to tender, make available in a report to the client**
 - (i) *all relevant health and safety information about the design of the relevant structure that may affect the pricing of the construction work;*
 - (ii) *the geotechnical-science aspects, where appropriate; and*
 - (iii) *the loading that the structure is designed to withstand;*
- d. **inform the client in writing of any known or anticipated dangers or hazards relating to the construction work, and make available all relevant information required for the safe execution of the work upon being designed or when the design is subsequently altered;**
- e. *refrain from including anything in the design of the structure necessitating the use of dangerous procedures or materials hazardous to the health and safety of persons, which can be avoided by modifying the design or by substituting materials;*
- f. *take into account the hazards relating to any subsequent maintenance of the relevant structure and must make provision in the design for that work to be performed to minimize the risk;*
- g. **when mandated by the client to do so, carry out the necessary inspections at appropriate stages to verify that the construction of the relevant structure is carried out in accordance with his design: Provided that if the designer is not so mandated, the client's appointed agent in this regard is responsible to carry out such inspections;**

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 19 of 23	Guideline
	Construction Client Responsibilities		

- h. when mandated as contemplated in paragraph (g), stop any contractor from executing any construction work which is not in accordance with the relevant design's health and safety aspects: Provided that if the designer is not so mandated, **the client's appointed agent in that regard must stop that contractor** from executing that construction work;
- i. when mandated as contemplated in paragraph (g), **in his or her final inspection** of the completed structure in accordance with the National Building Regulations, **include the health and safety aspects of the structure** as far as reasonably practicable, declare the structure safe for use, and issue a completion certificate to the client and a copy thereof to the contractor; and
- j. during the design stage, **take cognisance of ergonomic design principles** in order to minimize ergonomic related hazards in all phases of the life cycle of a structure.

Comment

The Clients appointed Health and Safety Agent [Professional Agent or Manager] would be required to verify compliance on the behalf of the Client and in cases where the Designer has not been mandated to carry out inspections, to carry out all required inspections. These would include amongst others, verification of construction as per the approved (by the Client personally or where appointed, the Clients Health and Safety Agent [Professional Agent or Manager] in advance) Inspection and Test Plans and in writing authorising the continuation of activities.

Published Notes from Gazetted Construction Regulations

Regulation 6 (1) (c) - Designers must ensure that designs are accompanied by a report as required in terms of this regulation.


Comment

Designers (Architects and Engineers) cannot submit drawings only. See the definition of what a Design is deemed to be and all must also be accompanied by the report referred to.

3.4.4 Regulation 7 - Duties of Principle Contractor and Contractor

(1) *A Principle Contractor must*

- a. *provide and demonstrate to the client a suitable, sufficiently documented and coherent site specific health and safety plan, **based on the client's documented health and safety specifications contemplated in regulation 5(1)(b), which plan must be applied from the date of commencement of and for the duration of the construction work and which must be reviewed and updated by the principal contractor as work progresses;***

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 20 of 23	Guideline
	Construction Client Responsibilities		

b. *open and keep on site a health and safety file, which must include all documentation required in terms of the Act and these Regulations, which must be made available on request to an inspector, the client, the client's agent or a contractor; and*


c. ...

Comment

The full requirements prescribed in Regulation 7 have not been included but suffice to say that all of them **must be managed by the Client personally or Clients Health and Safety Agent [Professional Agent or Manager]**. A Clients Project Manager or an Architect or Engineers will not be deemed competent to ensure compliance with this regulation. One of the specific requirements is that a full audit and inspection be performed on each Principle Contractor and each of their (Sub) Contractors at intervals not exceeding 30 days by the Client personally, or where appointed, the Clients Health and Safety Agent [Professional Agent or Manager].

3.4.5 Regulation 8 - Management and Supervision of Construction Work

- (1) *A principal contractor must in writing appoint one full-time competent person as the construction manager with the duty of managing all the construction work on a single site, including the duty of ensuring occupational health and safety compliance, and in the absence of the construction manager an alternate must be appointed by the principal contractor.*
- (2) *A principal contractor must upon having considered the size of the project, in writing appoint one or more assistant construction managers for different sections thereof: Provided that the designation of any such person does not relieve the construction manager of any personal accountability for failing in his or her management duties in terms of this regulation.*
- (5) *A contractor must, after consultation with the client and having considered the size of the project, the degree of danger likely to be encountered or the accumulation of hazards or risks on the site, appoint a full-time or part-time construction health and safety officer in writing to assist in the control of all health and safety related aspects on the site:*
- (6) *No contractor may appoint a construction health and safety officer to assist in the control of health and safety related aspects on the site unless he or she is reasonably satisfied that the construction health and safety officer that he or she intends to appoint is registered with a statutory body approved by the Chief Inspector and has necessary competencies and resources to assist the contractor*
- (7) *A construction manager must in writing appoint construction supervisors responsible for construction activities and ensuring occupational health and safety compliance on the construction site.*

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 21 of 23	Guideline
	Construction Client Responsibilities		

(8) *A contractor must, upon having considered the size of the project, in writing appoint one or more competent employees for different sections thereof to assist the construction supervisor contemplated in subregulation (7), and every such employee has, to the extent clearly defined by the contractor in the letter of appointment, the same duties as the construction supervisor: Provided that the designation of any such employee does not relieve the construction supervisor of any personal accountability for failing in his or her supervisory duties in terms of this regulation.*

Comment

The full requirements prescribed in Regulation 8 have not been included but suffice to say that all of them **must be managed by the Client or Clients Health and Safety Agent [Professional Agent or Manager].**

Note

It is required that the Construction Manager, Construction Supervisors and Health and Safety Officers (and any assistants appointed) **MUST** be competent and it is the **Clients responsibility to verify competency** prior to appointing any Principle Contractor. In terms of regulation 8(5) **all Contractors** and not only the Principle Contractor **MUST appoint Health and Safety Officers** and the **Client MUST** ensure that provision for the cost of them has been included in their tender / quote.

Competency includes registration with the SACPCMP as is described above.


3.4.6 Regulation 11 - Structures

2. ***An owner of a structure must ensure that***

- a. *inspections of that structure are carried out periodically by competent persons in order to render the structure safe for continued use;*
- b. *that the inspections contemplated in paragraph (a) are carried out at least once every six months for the first two years and thereafter yearly;*
- c. *the structure is maintained in such a manner that it remains safe for continued use;*
- d. *the records of inspections and maintenance are kept and made available on request to an inspector.*

Comment

These are duties imposed on the Client (Owner) of any Structure both during construction and after completion of construction. This requirement remains in effect after occupation and these records are to be kept in the consolidated health and safety file provided to the owner.

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 22 of 23	Guideline
	Construction Client Responsibilities		

4 DISCUSSION ON CLIENT DUTIES AND RESPONSIBILITIES

There are both dilemmas and contradictions in the legislation in that there are various duties imposed on various parties involved in different aspects and stages of Construction.

The first dilemma is that of the Client, in that the Client has various duties as prescribed in Construction Regulation 5, however in the case of Construction Regulation 2, where the Structure is intended to be a single-story dwelling which the Client will personally occupy, the Client is exempt from Regulation 5 in its entirety. This must also be read with the current exemption, which only triggers the need for a construction work permit on other structures where the CIDB grading is or exceeds 7 [forty million rand] or construction will exceed 365 days or 3650 man-days, and where not, again the Client is exempt from complying with Regulation 5. How will the Client have any idea of these at conception stage?


The Client may have a budget that exceed the forty million rand but until the construction works is put out to tender, they have no idea whether the actual construction works will exceed forty million rand. The need to appoint a Health and Safety Agent [Professional Agent or Manager] may not be known at conception stage. Where the need does not exist for a Construction Work permit, the Client is not obliged to appoint a Health and Safety Agent [Professional Agent or Manager] nor to Comply with Regulation 5.

The second dilemma is that of the Designers, in that Construction Regulation 6(1)(b) specifically requires that each Designer “*take into consideration the health and safety specification submitted by the Client*”. Construction Regulation 2 only exempts the Client from certain duties and not a Designer. If the Client is then exempt from performing a Risk Assessment / Profile and from compiling a Health and Safety Specification, there are none to provide to the Designers and so what must the Designer consider?

The third dilemma is that of the Client, in that the Designer is required to “*before the contract is put out to tender, make available in a report to the Client – (i) all relevant health and safety information about the design of the relevant structure that may affect the pricing of the construction work; (ii) the geotechnical-science aspects, where appropriate; and (iii) the loading that the structure is designed to withstand*” and “*inform the client in writing of any known or anticipated dangers or hazards relating to the construction work, and make available all relevant information required for the safe execution of the work upon being designed or when the design is subsequently altered*”.

The designer MUST provide them to the Client but where an exemption has been triggered the Client need not do anything with or about them. (or must they?)

The fourth dilemma is that of the Contractors, in that the “*principal contractor must - (a) provide and demonstrate to the client a suitable, sufficiently documented and coherent site-specific health and safety plan, based on the client's documented health and safety specifications contemplated in regulation 5(1)(b)*”

	SHERQ Risk Management Group (Pty) Ltd		
	Doc No.	SA/GL/002	Management System
	Revision	3	Health and Safety
	Date	2019/09/27	Document Type
	Page No.	Page 23 of 23	Guideline
	Construction Client Responsibilities		

Again, what if the Client is exempt from providing one. What is then expected from the Principle Contractors and Contractors?

Comment

This brings us back to the Introduction to this Guideline and the Questions, in the Construction Regulations, What was the Intention of the legislator and What was the Objective of the legislator? More importantly, What was the Purpose of the legislator when legislating the Construction Regulations and of the Chief Inspector when granting the exemption?

When considered with the Purpose of the superior legislation, the Occupational Health and Safety Act in this case, which is to hold the most senior persons and organisations responsible to provide and maintain a safe work place, based on assessment of risks and implementation of suitable systems of control, one cannot surmise that the purpose of the exemption was to exempt the Client 100% from common law responsibilities and thereby indemnify their potential liabilities. It all comes down to the Reasonable Person principle.

Would a Reasonable Client not comply to the best of their abilities with legislated (and moral) obligations to provide as much information and resources that may be reasonable to prevent injuries, even if exempt from doing so, specifically in that Construction Regulation 5(6) provides that they “MAY” appoint A Health and Safety Agent [Professional Agent or Manager] to assist with the management of health and safety aspects on the project?

The exemptions will require testing in a court of law and most unfortunately this will likely be the result of a catastrophe.

5 CONCLUSION

As the Client, ensure that you do act as a reasonable person and consider professional assistance, especially where you are not yourself competent to ensure various aspects of legislation are complied with.

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