

Does EPC equal evil, painful contract?

 By [Jurg van Dyk](#)

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Even though Engineer, Procure, Construct (EPC) contracting is quickly becoming the norm in the South African construction industry, especially in projects in the infrastructure and energy sectors, a large portion of the construction fraternity approaches EPC contracts with great circumspection, to put it mildly.



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To add to the pressure of entering into EPC contracts in these sectors, parties to project financed deals will often find that the lenders require that an EPC contract be entered into as a result of the certainty (whether it be actual or perceived) that is afforded to an employer, and hence a lender, under an EPC contract.

Historically, the South African construction industry did not have significant exposure to EPC contracts. The industry is however au fait with the local JBCC contracts, the FIDIC red and yellow books and in some instances with the NEC suite of contracts. None of these construction contracts are EPC contracts, but are either "design build" or contracts to construct, with no design responsibility.

All of this leads one to the question - why are contractors reluctant to contract on the basis of EPC contracts? In essence an EPC contract is a contract in terms of which the contractor undertakes to engineer, procure and construct a facility, based on the employer's requirements (this term is used in a generic sense and not in the same sense as under FIDIC), which will usually include the performance specification to be met by the contractor. The employer's requirements under an EPC contract may contain differing levels of design, but ultimately the employer is purchasing an operational facility, which it expects to be delivered on a certain date and at a certain price. I would dare to say that this is not worlds removed from a "design build" contract, such as the FIDIC yellow book. If one performs a comparison between the FIDIC yellow book ("design build") and the silver book (EPC), the following main differences are apparent:

- In the EPC contract there is no engineer, as in the "design build" contract. The project management function is left to the employer. The EPC contract makes provision for the owner's representative, who has limited functions.
- Under both contracts the contractor is responsible for the design and construction of the facility, and the contractor guarantees fitness for purpose.
- As regards risks, the EPC contract requires the contractor to accept the risks relating to unforeseen physical conditions and errors in the employer's requirements.
- Certain risks that are carried by the employer under the "design build" contract are not carried by the employer under the EPC contract. These risks relate to use or occupation of the site by the employer, design of any part of the works and any operation of the forces of nature.

In entering into EPC contracts, contractors need to focus on risk mitigation strategies. The following are examples of such strategies, based on the additional risks carried by a contractor under the standard FIDIC EPC contract:

- Prior to contracting the contractor needs to carefully scrutinise the employer's requirements for errors. In short the contractor needs to satisfy itself that, within the parameters furnished by the employer, the contractor is able to meet the functional guarantees required by the employer.
- Of the unforeseeable physical conditions, the most treacherous is sub-surface conditions. Contractors should do everything possible to identify any problematic situations that may arise and, to the extent possible, make provision for such risks occurring. The same applies to the operation of forces of nature.
- The EPC contract needs to clearly provide for circumstances under which the employer may use or occupy the site, and the conditions attached thereto.

Once the contractor knows what he is signing up for, it is a commercial decision whether the contractor can accept the allocated risks by making provision therefor, whilst remaining competitive in the market.

Furthermore, one needs to have regard to the specific conditions of any EPC contract. The mere fact that a contract is termed as an EPC contract, does not necessarily imply that the contractor would be required to take on risks which it would not be able to mitigate against. A contract is an EPC contract when it requires the contractor to engineer and design the facility, procure the materials and services required for the facility, and constructs the facility, whether by itself or through subcontractors. Whether the contractor, under an EPC contract, takes on risks which it would not be required to take on under a "design build" contract, is a matter that is to be negotiated between the parties.

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