WEBINAR: NEC 4 TO C OR NOT TO C?

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NEC 4 TO C OR NOT TO C?

What is NEC?

NEC are standard forms of contracts, published by the Institution of Civil Engineers (ICE) and are used for construction and engineering projects, or term service arrangement in the UK and internationally. In contrast to JCT, NEC offers more flexibility and claim to provide a fairer balance of risk between parties, and taking a proactive approach in ensuring projects are managed effectively.

Development of the NEC

The NEC was first published in 1993 and various amendments have been made since then. NEC 4 is the current edition of the NEC contracts, published in June 2017 and amended in 2019. NEC4 has been developed to encourage collaboration and mutual trust. The main differences between NEC3 and NEC4 are; the programming changes, the terminology used, and the payment processes.

We are focusing on NEC4, and in particular on Option C. However, if you would like more help and/or advice on the different options, or earlier versions then do let us know.

Types of NEC4

There are various suites of NEC4 and some of the main forms used are as follows:

- Engineering and Construction Contract (ECC);
- NEC4 Professional Services Contract (PSC); and
- NEC4 Term Service Contract (TSC).

We will focus more on ECC. The ECC is mostly used for the appointment of a Contractor on projects such as infrastructure, buildings, highways and power plants.

Key Parties to NEC4

This depends on the type of project, but usually involves:

- Client ("Employer").
- Contractor.
- Subcontractors.
- Project Manager ("PM") (to manage the contract for the Client with the intention of achieving the Client's objectives for the complete project).
- Designer - sometimes design obligations are carried out by the Contractors. However, where designers are appointed, their responsibilities include assisting the Client with pre-construction information, managing health and safety procedures, providing design information, monitoring the construction phase, and ensuring work is carried out in accordance with the construction phase plan.

- Supervisor (to check that the works are constructed in accordance with the contract. They are also responsible for issuing the Defects Certificate)
- Other Consultants (including architects and engineers).

Why use NEC4?

NEC4 is a clear and simple document using language and a structure which are straightforward and easily understood. The advantages of using NEC4 include:

- Stimulating good management and the open communication between the two parties to the contract and consequently the work included in the contract;
- Fair balance of the risk between the parties and proactive risk management; and
- A presumption of a willingness to cooperate to resolve issues amicably.

The above advantages are achieved by implementing a collaborative approach and proactive processes, including systematically managing the quality of the work and enabling parties to notify and agree variations as the works progress, rather than disputing them last minute. The introduction of the Early Warning Register (discussed under clause 11) also contributes to better management of the project.

The NEC 4, ECC options.

The ECC has six main options, based on different mechanisms for payment to the Contractor and offering different basic allocations of risk between the Client and the Contractor. These six options are:

1. Option A: Priced contract with activity schedule.
2. Option B: Priced contract with bill of quantities.
3. Option C: Target contract with activity schedule.
4. Option D: Target contract with bill of quantities.
5. Option E: Cost reimbursable contract.
6. Option F: Management contract.

Options A and B

Option A is ideally suited to design and build, where the Contractor is the sole point of responsibility to the Client. The activity schedule is key, this consists of a list of activities prepared by the Contractor which they expect to carry out in providing the works, i.e. a breakdown of the work. This must cover the whole of the contract price as the Contractor's entitlement to interim payments is assessed on the basis of completed activities and not against percentage complete. The more activities that are listed, the more regular the interim payments. This payment is subject to change if the works are varied or a compensation event occurs.

The Option A contract is similar to the JCT Standard Contract without Quantities, where a description of the works is included in the activity schedule. If the Client prepares the activity schedule then it is essential to ensure it covers all the Works Information because if anything is missed, then it is still the Contractor's responsibilities. The Contractor can take on all the design or part.

With option B, the Client prepares a list of work items and quantities which include methods of measurements that a Contractor must follow. This list of works produced should be in sufficient detail to allow the Contractor to price the works. However, the Contractor will be paid on the basis of actual measurements of the works carried out.

The Option B contract is similar to the JCT Standard Building Contract with Quantities, where the Client specifies the measurements and quality of works in the form of bills of quantities. So, here the Contractor has the risk of carrying out the specified work at the specified rates. Payment is normally on an interim payment basis, but this time allowing payment to be against the quantity (i.e. percentage) of work completed.

Whilst Option A offers more flexibility to the Contractor than Option B, to decide on the specific details, it also imposes greater risk on them. For example, if an issue arises at a later stage due to the activity schedule, then the Contractor will be liable for the information contained within it, and once again carrying out works at its agreed prices and its agreed programme.

Option C and D

Options C and D are used where the extent of the works to be done is not fully defined or where the expected risks are acknowledged to be greater. Unlike Options A and B, here the Contractor and the Client agree the target price and share the financial risk. Meaning, any loss or gain is shared in agreed proportions. Option C is discussed in further detail below.

Option D is a target cost contract with a bill of quantities. To the extent the target cost is missed then there should be pre-agreement as to how cost savings or overruns are to be shared. The timing and accuracy of the bill of quantities is critical.

Option E

Option E is used when an early start to construction is required, but the definition of the work is inadequate or incomplete, even as a basis for target price. For example, urgent building work projects that requires immediate reconstruction, repair or replacement. By using this option, the parties agree levels of the Contractor's overheads and profit. The Contractor carries minimum costs risk and the Client pays the Contractor the actual costs of the works, plus the agreed levels of overheads and profit. This is commonly used for emergency works, eg insurance. The stress here is on commencement of the works and defining scope and price as you go.

Option F

Option F is used in rare circumstances by the Client due to its complexity and the risk involved. Here, the Management Contractor subcontracts the construction works, unless the contract data suggests otherwise. Whilst the Management Contractor is responsible for managing the works, the burden of the cost and therefore risk, remains with the Client. This is because the price remains uncertain and can only be finalised when the design is completed and subcontractor procurement is concluded.

Why use Option C?

We will focus on the provisions contained within the Option C contract. This form of contract is now widely being used in larger infrastructure projects such as HS2[1], Hammersmith connection Tunnel,[2] and Stonehaven flood protection scheme.[3] Parties tend to use this form of contract due to the pain/gain mechanism whereby the Contractor and/or the consultants share the benefits of costs savings and also accept some of the losses.

The difference with Option C is that there is an activity schedule rather than a bill of quantities. So, once again the target cost is agreed. The savings and overruns are agreed and shared between the parties in pre-agreed proportions. The Contractor's estimate price for the works will be part of the defined costs which also includes their costs, overhead and profits. A Contractor is paid this defined cost (clause 11.2(24)) less any Disallowed costs (clause 11.2(26)). The cost of compensation events will also be taken into account.

For example, the parties may agree to share the first 10% of any gain or losses on a 50/50 basis. This enables the parties to set a realistic target, and minimises the risk of the Contractor making an excessive profit or loss. Where there is potential of incurring losses, the Client has the ability to limit their contribution towards the loss above a certain level.

Points to consider when using Option C contract.

- The target price must be realistic based on an accurate estimate of the costs of the completed works. This may be subject to change, depending upon the circumstance. For example, the impact of compensation events. The target price should be set at such a level which allows the parties to work effectively in a co-operative manner, in order to complete the works costs effectively. However, co-operation by itself is not enough to avoid future disagreement. The parties must discuss, define and agree compensation events and price mechanisms. They should also consider agreeing a default provision, which covers the consequences should parties fail to co-operate.

- The Client and the Contractor should be aware that adjustments to the price may be made upon completion of the works. Therefore, to minimise future disputes, while drafting the payment clauses, the Contractor should clarify from the outset, the amount payable by the Client (including the fees), the due date and any other provision which are necessary in relation to payment.

- Choose the relevant option clauses for disputes and the secondary options (W, X, Y and Z) carefully. Often parties include both options W1 and W2 to avoid and resolve disputes without realising that they contradict. The secondary options are widely used by international clients rather than UK clients, to supplement any provisions which are not already included in the core clauses. However, this often leads to duplications, if there is a lack of understanding of the clauses or the provisions are not carefully drafted.

[1] https://www.neccontract.com/About-NEC/News-and-Media/UK-government-launches-NEC-contracts-for-High-Spee
[2] https://www.designbuild-network.com/features/hammersmith-connection-tunnel-7828299/
[3] https://www.scottishconstructionnow.com/article/contractor-selected-for-16m-stonehaven-flood-protection-scheme

Option C- main clauses

Definitions – Clause 11

This clause defines the main terms used throughout the contract, including the party details, start and end dates of the project, the programme of work, fees, costs, price, defects along with other definitions.

It is to be noted that NEC4 Option C has introduced some additional definitions as well as amending some existing ones. Such as:

- "Employer" has been replaced with "Client"
- "Risk Register" has been replaced with "Early Warning Register"
- "Corrupt Acts" has been introduced.

Therefore, it is vital that the definitions stated in the contract are used consistently throughout any documents associated with the contract, to avoid any confusion. We frequently modify the definitions by amending, adding or deleting to meet our client's requirement. For example, if we are acting for the Contractor, we would usually amend the definition of "Completion" under clause 11.2, so that completion occurs once "the Contractor has done all the work, which the Scope states is to be done by the Completion Date and has corrected the notified defects". We would remove any obligation from this definition, which requires the Contractor to complete any further works outside the Scope.

Clause 11.2(21) defines Activity Schedule as:

"*the Activity Schedule is the activity schedule unless later changed in accordance with these conditions of contract"*

Whilst NEC3 Option C Guidance Notes, provide some explanation as to what is the Activity Schedule, the NEC4, Option C merely states that *"the information in the Activity Schedule is not Scope or Site Information".* In other word, the activity schedule mainly includes the method of working rather than the information of the actual works required or site information.

Under the contract, there is no limit to the number of activities that can be incorporated in the Activity Schedule. Therefore, the onus is on the drafter to include the correct activities in the Schedule. The Activity Schedule is used to assess the Contractor's share by comparing the finally adjusted Activity Schedule to the final Price for Works Done to Date ("PWDD").

Clause 11.2.24 (Defined Costs) and clause 11.2.26 (Disallowed Costs) are the essence of Option C contract as these clauses deal with what is paid and not paid to the Contractor.

Defined Costs

The Contractor shall be paid for items listed in the Schedule of Cost Components (schedule attached at the end of the contract, and includes certain wages paid by the Contractor, costs for equipment, costs for subcontractors etc), minus any deductions defined under Disallowed Costs. In comparison with NEC3, the definition under NEC4 is much simpler. However, the risk lies with the Contractor as the Contractor will not be reimbursed for any items not listed in the Schedule of Costs Components.

Disallowed Costs

These are the costs that will be deducted from the overall amount due to the Contractor, including costs incurred which cannot be supported by any documentation, costs which were incorrectly paid to a subcontractor, and costs which were incurred at the fault of the Contractor (e.g. by failing to follow instructions under the Contract). This differs from the definition under NEC3, which authorises the PM to decide whether any of the costs should be excluded from the Contractor's payment.

The Client can use this provision to deny payment or reduce the amount due to the Contractor and it can also amend this definition to include further exclusions. Therefore, the Contractor should pay particular attention to this definition as it could lessen the amount due to them. In practice, the Contractor should ensure that any claims for payment can be justified.

Particular attention should be paid to the following definitions:

- Clause 15 (Early Warning Register) – This requires the PM and Contractor to provide early notification of any events, which could delay/impact the completion of the project, and describe how this impact can be avoided. The PM compiles this list of events and issues the register to the Contractor within one week of the starting date. A meeting will follow within two weeks of the starting date, and any further meetings can be arranged by either the PM or Contractor, if required.

  This promotes a good management procedure as it minimises risk of delays and also provides the PM and the Contractor an early opportunity to discuss the impact of the delays and mitigate consequences. Failure to give an early warning can affect the Contractor's ability to claim an extension of time and also entitles the PM to disallow the costs claimed by the Contractor.

  Early Warning replaces the Risk Register provision in NEC3, where an early warning would only be added to the register after a risk reduction meeting has been held.

- Clause 16 (Contractor's Proposals) – If appropriate, the Contractor may suggest to the PM, that the Scope of Works should be changed and this will reduce the amount due to the Contractor. The PM decides whether the proposal is accepted or rejected, and responds to the Contractor within four weeks of the submission. In contrast to NEC3 this emphasises the importance of cooperation throughout the contract and requires the Contractor to take a proactive approach.

Contractor's main responsibilities – Clauses 20 – 29

These clauses cover the basic duties of the Contractor, including providing the works, designing the works and equipment, the use of the designs, the Contractor's ability to appoint employees and subcontractors, and other duties (following instructions, rules and regulations).

There is an ongoing obligation on the Contractor to liaise with the PM, including advising on the practical implications of the designs created and before appointing employees or subcontractors to carry out the works. Although the PM decides the appointment of the subcontractor, the Contractor is ultimately liable for the subcontractor's performance, and should ensure that any subcontractors considered, have the requisite skills required to carry out the works.

If a party wishes to assign the benefit of the contract or any rights under it, such party will need to notify the other party of their intention. However, assignments will be made to parties who are willing to Act in spirit of mutual trust and co-operation (clause 28). This clause does not specifically mention whether consent is required for assignment and does not specify any time scale as to when such a notice can be served. Therefore, parties should give careful consideration when drafting this clause.

When acting for the Client, we often insert additional obligations on the Contractor, such as clauses prohibiting nuisance to adjoining or neighbouring land, and indemnifying the Client against expenses or liabilities against such nuisance.

When acting for the Contractor, we reduce the number of obligations imposed on the Contractor and try to minimise the Contractor's risk. Where consent or acceptance of the design is required from the PM, we ensure this is not "unreasonably withheld, delayed or constrained". This limits the PM's discretion.

Time – Clauses 30 – 36

These clauses refer to the start, completion and key dates for the project, including the timescales for the Contractor and PM to agree the programme, any revisions to the programme, access to and use of the site, the Client's duty to take possession of the works and requiring the Contractor to complete the project earlier than the anticipated completion date (acceleration).

The Contractor must be prepared for if the PM requires early completion of the project. However, where this is requested, the key dates will be altered accordingly, along with the prices and programme.

Programme – clause 31 is quite specific as to what the programme should show and these are of course forward looking. However, the Contractor must allow for and therefore record its float in the programme and effectively the critical path. If things go wrong these will be relied on by both parties.

Although this clause mentions the information to be included in the programme, it does not mention a specific form which should be used, other than "the form stated in the Scope". This would be an issue, if the Scope is silent on the form of the programme. Practically, the form of the programme should be agreed, so that it is clear to understand and interpret. This would also be beneficial in case a revised programme is required.

If the revised programme is not accepted by the PM, the parties will work in accordance with the original programme. However, for revised programmes, there is no timescale in which the PM is required to respond, nor is the PM's silence deemed acceptance of the revised programme. When we act for the Contractor, we limit the period in which the PM is to respond and ensure the revised programme is not rejected unreasonably. We also state that if the PM fails to respond within the time limit, that is deemed acceptance of the new programme.

Unlike JCT, NEC4 refers to completion rather than practical completion. Clause 35 of NEC4 refers to the take-over of works. The standard period in which the Client would take over the works is 2 weeks after completion (clause 35.1). It is not compulsory for the Client to take

over the works before the completion date, unless specified in the Contract Data and is therefore in favour of the Client. A reason why the Client would not want to take over the works early is because they would not want to accept the future risks, such as losses and damages under clause 80.1 which states the Client is liable for *"loss of or damage to the works taken over by the Client….subject to a few exceptions"*.

If the Client uses any part of the work before completion has been certified, the Client has taken over the works unless, if the use is for *"a reason stated in the Scope"* or to *"suit the Contractor's method of working"* (clause 35.2). This provision is ambiguous as it may be interpreted differently by both parties. This clause indicates unplanned take over. To avoid risk, where the Client plans to take over a certain section of the works early, we usually advise such a Client to use secondary option X5 (sectional completion). This will clarify when and how the Client will take over a certain section of the works and whether there will be any financial penalty if the Contractor misses such key date.

Take over will be certified by the PM whether it has occurred in full or in part. The aim is to prevent any future disputes between the Contractor and the Client regarding the occurrence of take over. However, the Contractor must note that PMs are appointed by the Client and hence there are possibilities of them being biased.

Compared with other forms of contract, for example FIDIC, take over in NEC is less comprehensive. FIDIC, on the other hand, for example clauses 29 and 30 of FIDIC Yellow Book *("conditions of contract for electrical and mechanical works- 3rd edition"),* sets out a definitive list of the requirements which must be met for take over to occur, making it easier to follow.

Quality Management– Clauses 40 – 46

These clauses focus on the Contractor's responsibility to search for defects, by carrying out tests and inspections, providing materials and samples for testing and inspecting, and dismantling and re-covering work under the supervision of the supervisor. The detailed provisions relating to testing demonstrate that this Option is likely to be used in more complex projects and/or in projects where a detailed take-over procedure is going to need to be discussed and agreed between the parties to replace or at least supplement clause 41. For example, if the Client is required to repeat a test or inspection after a defect is found, the PM shall not include the Contractor's cost of carrying out the repeat test.

Where any defects are found, the Contractor is required to remedy the defect, regardless of whether he receives notice from the supervisor to do so. If the Contractor is given access to the site, and fails to remedy the defect, then the cost is assessed by the PM, so not necessarily based on actual costs, and the Contractor pays the amount.

However, the Contractor and PM may accept that the defects do not need to be remedied, by altering the works information. Under such circumstances, the Contractor is required to submit a quotation with a reduced price. Where the Contractor is not given access to the site to rectify a defect, the Contractor pays the amount assessed by the PM to rectify the defect, and the defect is deemed accepted.

In contrast to NEC4, JCT contracts, in particular the Design and Build 2016, does not impose an obligation on the Contractor to actively search for defects. The Contractor is merely required

to rectify any defects notified by the Client, unless the Client states otherwise. NEC4 therefore, puts the Client in a stronger position and provides a mechanism to deal with defects.

The NEC4 and JCT contracts are similar in terms of recovering the costs of any unrectified defects from the Contractor. Where the defects are not rectified under JCT due to the Client's instructions, the Client can deduct the cost of the defective works from the total sum due to the Contractor. The difference in NEC is that deduction is based on a simple assessment by the PM.

Payment – Clauses 50 – 55

There are various sub-clauses in relation to payment, including:

Clause 50- Assessing the amount due. This explains how the PM assesses the amount due at each assessment date and considers any payment applications made by the Contractor. This clause imposes a responsibility on the PM to correct any amounts that are wrongly assessed. Unlike NEC3, NEC4 requires the Contractor to submit an application for payment to the PM before each assessment date which includes details of the amount due and how it has been assessed. Clause 50.9 imposes an obligation on the Contractor to provide records, demonstrating that the defined cost has been correctly assessed. If further records are requested to correct any errors, this must be provided within 4 weeks.

Clause 51- Payment. This lists the key timescales that the PM is required to follow in terms of certifying payments. Where the amount due is corrected at a later stage, due to an error made by the PM or following an adjudicator's decision, interest on the correcting amount is payable. If a party under NEC4 is required to pay tax to the other party under the law, such tax can be added to any payment made under the contract. Note that the standard form envisages a payment period of 3 weeks from an assessment date. How many contracts will maintain that period? Also, NEC4 declines to use statutory terms such as due date and final date for payment. This demonstrates international use of NEC4, where adjudication may not yet exist. However, use of Y (UK) 2.

In contrast to JCT, this contract provides limited rights to the Contractor in the event of non-payment. Interest is payable on late payments, but is it enough to cover the loss incurred by the Contractor? What about the Contractor's right to suspend works if they have not been paid? This right is of obvious benefit to the Contractor. It is a statutory right, but not actually referenced.

A Client should ensure that they employ a PM who fully understands what "Defined Costs" are. This definition is poorly understood and includes:

- amount of payments due to subcontractors;
- but not including:
    - retention
    - payment due from subcontractors to the Contractors
    - costs to correct defects
    - payments to third parties
    - equipment, supplies and services
- does include:
    - costs in the schedule of Cost Components
    - less Disallowed costs.

The schedule of Cost Components is used to assess compensation events and determine Price for Works Done to Date ("PWDD"). The details are inserted into Part 2 of the Contract Data by the Contractor, and are detailed at pages 58-61 of the contract.[4]

Clause 52- Defined Cost. All the costs not included in the Defined Cost are deemed to be included in the Fee, which also allows for profit. The definition of Defined Cost varies between Options A to F to reflect the treatments of the costs of subcontractors. In Option C, payments to subcontractors are included in the Defined Cost for both the assessment of compensation events and for the calculations of the price for the works done to date. A schedule of Fee includes costs for overheads, insurance premium, tax, sureties and Contractor's profit.

Clause 53- Final Assessment. This clause explains when and how the PM assesses the final amount due to the Contractor and the consequences of failing to challenge that assessment within specific timescales (basically 4 weeks) and the chosen options. It also sets out the timeframe as to when such payment becomes payable.

Clause 54- The Contractor's share. This clause explains how the PM assesses the Contractor's share of the difference between the total price and the PWDD. Where there is a gain resulting from savings, the Contractor is paid his share and where there is a loss, i.e. price for the work is in excess of the total price, then the contactor has to share the loss. This is of course subject to agreement and the relevant strengths and weaknesses of the parties at the outset, as to information available to them and understanding and acknowledgment of risk, and bargaining position.

Clause 55 – The Activity Schedule. This clause clarifies that the activity schedule mainly includes the method of working rather than the information of the actual works required or site information).

<u>Compensation Events – Clauses 60 – 66</u>

These clauses list the events that may occur, and may entitle the Contractor to an extension of time and costs. However, this is on the basis that the event is a compensation event under the contract, it has not arisen from the Contractor's fault, the event has happened, the notice requirements were satisfied, and the event has effect on cost, completion or meeting a key date.

It is important for the Contractor and PM to pay attention to the notices required under clause 61, and the time limit in which they are required to be served. A Contractor can be denied an extension or costs if they fail to give notice (within 8 weeks).

Thus, the Contractor must notify the PM within 8 weeks of becoming aware of a compensation event. The Contractor may be required to submit quotations for works.

[4] NEC4 Option C contract. This includes payment for (costs of people directly employed by the contractor, such as wages, overtime payment, travel, pension, death benefit etc.) Payment for equipment listed in contract data (hired, leased, owned by the contract, purchased (if value is changed over the time, this includes the difference between the purchase price and market price)). Payment for Plant and Materials (purchasing, delivering, providing and testing). It also includes payment for subcontractors, charges (gas, electricity etc), manufacturing and fabrication, design and insurance.

Where the compensation event arises from the PM or the supervisor giving an instruction or notification, issuing a certificate or changing an earlier decision, the PM is required to notify the Contractor of the event at the time of that communication. The notification will include an instruction for the Contractor to submit quotations.

The PM will respond to the Contractor's notification of a compensation event within one week of their notice, or a longer period agreed with the Contractor. If no response is received from the PM within the time allowed, the Contractor shall notify the PM. If a response is not received for a further two weeks after the Contractor's notification, this deems the PM accepts the event is a compensation event and the Contractor can submit quotations.

However, if the PM decides the Contractor did not give an early warning of the event which an experienced Contractor should have given, or if the effects of a compensation event are too uncertain to be forecast reasonably, the PM states this in the instruction to the Contractor to submit quotations, along with assumptions about the event in the latter situation. Assessment of the event is based on these assumptions, which if incorrect, the PM notifies a correction.

These compensation event clauses are beneficial to the Contractor, as opposed to JCT because the list of events is broader, and the Contractor may be entitled to both time and costs under one claim, where progress of the works is delayed and the necessary conditions are met. However, under JCT contracts, time and costs are dealt with separately.

Under the JCT contract, there is also a higher burden of proof on the Contractor, when claiming an extension of time. The Contractor must constantly use his best endeavours to prevent delay and do all that is reasonably required to the satisfaction of the Client. What does "best endeavours" actually mean? What if the Contractor uses his best endeavours, but the Client requires further works to be carried out? The NEC4 does not impose such an obligation on the Contractor. However, the Contractor may not be entitled to an extension of time if the Contractor failed to give an early warning to the PM, of an event/ matter which may affect the progress of the works.

Clauses 63 and 64 deal in some detail with the assessment process. Firstly, as to the compensation event relating to what is taken into account regarding costs and the impact on the programme. Then dealing with how the impact of the compensation event will be awarded.

The comfort that a Client should take is that there are very limited grounds for a Contractor's quotation being imposed by default (clause 62.6).

The way in which NEC is written means that you look at and consider examples and working through the clauses methodically. The clauses rarely rely on cross-referencing, but more a step by step process.

Best advice is to think of examples during negotiation of the contract that might apply. Work through the clauses and see if you are still in agreement at the end.

Title – Clause 70-74

If plant and materials are brought within the working areas, title will be transferred to the Client. The title of plants and materials which are outside the working area but marked by the supervisor, will also pass to the Client. If they are removed from the working area, title will

pass back to the Contractor subject to the approval of the PM. It is the Contractor's responsibility to remove any equipment from the site when it is no longer needed, unless the PM states otherwise.

Any object found at the site shall be notified to the PM, and the Contractor has no title to this object.

Any materials provided by the Client, can be used by the Contractor or the subcontractor to provide the works.

Given the issues of Contractor, supplier and even Client insolvency, careful consideration should be given to the transfer of title, which might not accord to payment.

On site, issues are frequently complex and there may be additional "storage" and how will that be dealt with?

This clause should be carefully drafted, and the Contractor should ensure they understand when they retain ownership of equipment or any other objects, they bring on site, and when this ownership is transferred to the Client.

Liabilities and Insurance – Clauses 80 – 86

These clauses are very important as they mention the liabilities carried by the Client and Contractor. In contrast to NEC3, NEC4 lists the liabilities for both the Client and the Contractor, rather than stating that the Contractor accepts all risks which are not carried by the Client.

The Contractor and Client are able to recover costs which they have paid on behalf of each other and is not at their risk. Their liability shall be reduced if those events contributed to such losses.

The Client and the Contractor are required to provide and maintain the insurances in accordance with clause 83, unless the contract data states otherwise. The policy certificates for both the Contractor and Client need to be provided to the PM in accordance with clause 84 and 86. If insurance is not obtained by the Contractor, the Client may obtain the relevant insurance at the Contractor's cost.

It is always best advice to speak to your insurance broker and describe the nature, value and duration of works; any specific risks and/or circumstance and ask if the broker/insurer has special requirements? Better to know at the outset and resolve than at the end and have no insurance.

Termination – Clauses 90 – 93

If either party wants to terminate the Contractor's employment, they must provide details of the reason for termination to the PM, and if the reason complies with the contract, the PM may issue a termination certificate.

The Client and Contractor may terminate the contract in accordance with the termination table in clause 90.2:

Termination Party	Reason	Procedure	Amount Due
The Client	R1-R15, R18 or R22 R17 or R20 R21	P1, P2, and P3 P1 and P4 P1 and P4	A1 and A3 A1 and A2 A1 AND A2
The Contractor	R1-R10, R16 or R19 R17 or R20	P1 and P4 P1 and P4	A1, A2 and A14 A1 and A2

The Client's rights to terminate are more extensive. The table refers to Reasons R1 to R20 and these are then ascribed to be either both parties or a single party's reason; The Procedure P1 to P4- so what will happen depending on the particular Reason relied on; and the amount due A1 to A4. The Reasons are frequently amended and also time limits and/or additional notices being added is not uncommon.

Option Clauses

NEC contracts contain additional clauses which the parties are meant to discuss and agree whether to use or not.

These options may be because of the Jurisdiction and applicable law, such as between W1 and W2, which are both adjudications, but one where the Housing Grant Act applies and one where it doesn't.

W3 is a dispute avoidance board, which is more common outside England.

There are a number of secondary option clauses. These are defined fairly neutrally but just as much attention must be paid to their review and potential amendments to any other clauses. These can be applied hopefully using common sense e.g. sectional completion (X5) and the requirement for a performance deed (X13).

However, some of these options require careful consideration – delay damages (X7) or Contractor's design (X15). Does the standard working go far enough, or too far? Does it actually cover what you want?

There are a number of other options, the Schedule of Cost Components and the Contract Data. The Contract Data is split into 2 parts; to be completed by the Client and the Contractor. The information, dates and figures are critical. Many time parties fail to complete vital parts of this and that either leads to a dispute, a bigger dispute or a black hole.

Z Clauses

This is the way in which amendments to the contract are made. Most unusually for a standard form, they are actually provided for.

Set out below is a table of a few draft Z clauses which are Client and Contractor bias. These are a sample and, in each instance, might be drafted in a stronger or more collaborative manner.

Clause Title	Clause	Client or Contractor bias
***Z2 Client's* title to Plant and Materials**	Z2.1 The value of Plant and Materials outside the Working Areas is excluded from the Price for Work Done to Date unless • [the Plant and Materials is within the United Kingdom,] • the Contractor demonstrates to the satisfaction of the PM that the Contractor has unencumbered title to the Plant and Materials, • the Plant and Materials is stored separately and is clearly and visibly marked as for the Client and this contract, • the Plant and Materials is adequately protected against water, theft, vandalism and other casualties, • the Plant and Materials is insured against loss or damage while stored or in transit to the Working Areas for its full reinstatement value under a policy of insurance protecting the interests of the Parties in respect of the usual insured risks for the period until it is brought within the Working Areas and • the Contractor has provided an off site materials bond for the value of the Plant and Materials. Z2.2 The off site materials bond is issued by a bank or insurer which the PM has accepted. A reason for not accepting the proposed bank or insurer is that its commercial position is not strong enough to carry the bond. The bond is in the form set out in the Works Information. Z2.3 Where the value of Plant and Materials outside the Working Areas is included in the Price for Work Done to Date • the Contractor's title in the Plant and Materials passes to the Client, • the Contractor does not remove it from where it is stored except for use on the works and • the risk of loss or damage to the Plant and Materials remains with the Contractor. Z2.4 The value of Plant and Materials within the Working Areas is excluded from the Price for Work Done to Date unless	Client bias as there are more obligations on the Contractor to prove retention of the title to plants and materials.

	• title in the Plant and Materials has already passed to the Client under clause 70 or • the Contractor demonstrates to the satisfaction of the PM that the Contractor has unencumbered title in the Plant and Materials. Z2.5 The Contractor's title in Plant and Materials passes to the Client when it is brought within the Working Areas, but (subject to clause 80.1) the risk of loss or damage to the Plant and Materials remains with the Contractor. Z2.6 The Contractor does not remove Plant and Materials within the Working Areas from where it is stored except for use on the works or with the PM's permission. Z2.7 The title to Plant and Materials passes back to the Contractor if it is removed from the Working Areas with the PM's permission."	
Z4 Co-Ordination	Z4.1 The *Contractor* agrees to cooperate and liaise with the *Client*, the *Client's* other Contractors, advisors and any other persons and parties which the *Client* may acting reasonably identify to the Contractor from time to time in relation to the coordination, integration and interface between (i) the design, programmes, works and *works* to be performed by such other Contractors, advisors, persons and/or parties and (ii) the *works* and the *Contractor's* performance of its obligations under this *Contract*. For the avoidance of doubt, the *Contractor* shall not be responsible for the coordination of the *Client's* other contractors, advisors and any other persons or parties engaged by the *Client*. The *Contractor* however shall comply with all reasonable instructions issued by the *Client* in respect of the coordination, integration and interface of the *works* and the *Contractor's* performance of its obligations under this *Contract* with any other goods and/or, works relating to the *Project.*	Client bias as this imposes further obligations on the Contractor to uphold the concept of mutual trust and co-operation.
Z6 Right of Access to the Site	Z6.1 The *Client* shall give the *Contractor* right of access to, and possession of, all parts of the *Site* within the time (or times) stated in the Contract Data. The right and possession may not be exclusive to the *Contractor*. If, under the *Contract*, the *Client* is required to give (to the *Contractor*) possession of any foundation, structure, plant or means of access, the *Client* shall do so in the time and manner stated in the Specification.	Contractor bias as it imposes obligations on the Client to ensure access to the site is given to the Contractor and permission is not unreasonably withheld.

	Z6.2 For the purposes of carrying out its obligations under the Contract the Client shall give the Contractor right of access to and possession of, the Site for the period from the starting date to the completion date. The Client shall give the Contractor right of access to the Site for a further period of 14 Days from the completion date to allow the Contractor to carry out its obligations pursuant to the Contract. Z6.3 Notwithstanding this clause Z6, the Client may, with the Contractor's consent, not to be unreasonably withheld or delayed, use or occupy the Site or the works or part of them, whether for storage or otherwise, before the completion date provided that such use or occupation shall not materially impede the Contractor from carrying out the works. Before the Contractor gives its consent to such use or occupation, the Contractor or the Client shall notify the insurers and obtain confirmation that such use or occupation will not prejudice the insurance. Subject to such confirmation, the Contractor's consent shall not be unreasonably delayed or withheld. Z6.4 If an additional premium requires to be paid, the Contractor shall notify the Client of the amount of it. If the Client continues to require such use or occupation, the additional premium shall be added to the Price and the Contractor shall if requested produce the receipt for it to the Client.	
Z15 Disclosure of Information	Z15.1 A Disclosure Request is a request for information relating to this contract received by the Client pursuant to the Freedom of Information Act 2000, the Environmental Information Regulations 2004 or otherwise. Z15.2 The Contractor acknowledges that the Client may receive Disclosure Requests and that the Client may be obliged (subject to the application of any relevant exemption and, where applicable, the public interest test) to disclose information (including commercially sensitive information) pursuant to a Disclosure Request. Where practicable, the Client consults with the Contractor before doing so in accordance with the relevant Code of Practice. The Contractor uses its best endeavours to respond to any such consultation promptly and within any deadline set by the PM and acknowledges that it is for the Client to determine whether or not such information should be disclosed.	Client as the Contractor has to comply with any request for disclosure and it must use its best endeavours when responding.

	Z15.3 When requested to do so by the PM, the Contractor promptly provides information in its possession relating to this contract and assists and co-operates with the PM to enable the Client to respond to a Disclosure Request within the time limit set out in the relevant legislation. Z15.4 The Contractor promptly passes any Disclosure Request which it receives to the PM. The Contractor does not respond directly to a Disclosure Request unless instructed to do so by the PM.	
Z17 Priority of Documents	Z17.1 If there is any ambiguity or inconsistency in or between the documents comprising this contract, the priority of the documents is in accordance with the following sequence: • [this Agreement,] • the completed Contract Data, • the additional conditions of contract, • the other conditions of contract, • the Works Information and any other document forming part of the contract.	This is neutral and we usually incorporate this clause in the contract to avoid disputes where inconsistencies are found.

Critique of NEC

Any review of a contract is not really complete without some general comments about what could be important within a contract, or simply what the most common issues are. Once again this is not a comprehensive list, but designed to raise awareness and to encourage analysis of its clauses and general intent.

- mutual trust and co-operation – not defined (*Costain v Tarmac*[5])
- plain English- lacks sufficient information and one word normally means very different things to different people. Plain English for someone based in the UK is not the same as for someone based abroad.
- lack of cross referencing between clauses – most clauses are stand alone, but obvious interaction in some clauses. Need to understand each clause very clearly.
- pro-active management of contract agreed – by both parties – this starts in the negotiation stage and with discussion of and agreement of activity schedule and schedule of components.
- portrayed as an easy to use contract- very procedurally heavy and stepped process with dates and action.
- large number of options as between contracts and within contracts- parties can struggle to know which is the correct form and which options to use- may highlight imbalance between Client and Contractor.
- reliance on PM- experienced PM essential and one with real experience – can be disastrous if not.

[5] [2017] EWHC 319 (TCC). Mutual trust and co-operation were considered in this case in line with good faith and held that a mutual trust and co-operation is a general obligation to act fairly and exploiting the other party.

- reliant on individual parties' knowledge of experience – can lead to very unequal partners and unequal bargaining position.

Case Law

RWE Npower Renewables Ltd v J N Bentley Ltd [2013] EWHC 978 (TCC) NEC3 Engineering and Construction Contract

- In this case there were two section 2 descriptions of the works and a dispute arose over the date for completion.
- It was held there was no material ambiguity between the descriptions of section two, and the works had not been completed. The judgment was formed on the basis that the contract documents need to be interpreted as a whole, and the priority of documents clause stated all the documents were "deemed to form and be read and construed as part of this Agreement".

Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd [2017] NIQB 43 NEC3 Professional Services Contract

- This case considered how to assess compensation events under an NEC 3 contract where the compensation event is being retrospectively assessed. It was held that the assessment of the effect of the compensation event should be calculated by reference to the actual cost incurred by the consultant rather than its forecast cost.

Dossan Enpure v Interserve Construction [2019] EWHC 2497 TCC

- In this case, the dispute arose from a joint venture agreement ("JVA"), entered into by the claimants and the defendant ("the parties"), for the purpose of carrying out up-grade works to the Horsley Water Treatment works for Northumbrian Water Limited ("NWL"). The parties also entered into an NEC 3 Option C contract with NWL. As per the agreement, NWL made monthly interim payments into the JV account which were paid out in agreed shares to the parties. However, since November 2018, the de-fendant refused to authorise the release of any further interim payments to the claim-ant from the JV account.
- The defendant amongst other arguments, claimed the claimant was only entitled to in-terim payments based on the "pain/gain share" arrangement under NEC3 Option C. The defendant further argued that the pain/gain share mechanism does not only apply on completion but can be applied at an interim stage.
- Judgment: Mrs Justice Jefford DBE held that the claimant was entitled to the release of its share of the interim payments. She further states that allocation of pain and gain occurs after the completion of the works and not on an interim basis.

  paragraph 13 of Her Ladyship's judgment "*During the course of the works, the Con-tractor is paid by reference to the Price for Work Done to Date which reflects what the Contractor has paid and which falls within the definition of Defined Cost plus the Fee. The Prices operate as the target cost. Following completion of the works, there*

is a comparison of the Price for Work Done to date with that target and an assessment of the extent to which the Contractor will benefit from any saving (against the target) or bear the cost of any overrun. That is the pain/gain sharing nature of the contract and the allocation of pain and gain occurs after the completion of the works and not on an interim basis. That, in my view, is clear from clause 53.3. There is no other provision for the assessment of the Contractor's share at any earlier stage."

Costain v Tarmac [2017] EWHC 319 (TCC)

Mutual trust and co-operation were considered in this case in line with good faith and held that a mutual trust and co-operation is a general obligation to act fairly and exploiting the other party.

BARTON LEGAL LIMITED