Everyone’s at it! NEC4 to join the growing list of new standard form contracts

The date of publication of the new NEC4 suite of contracts was announced recently. The NEC4 suite of contracts will be made available in June 2017 and key changes will include a new Design Build and Operate Contract, a new Alliance Contract and a new approach to BIM.

This follows the recent publication of a number of updated standard forms of contract by a number of bodies including the ACE, JCT, IChemE and FIDIC.

NEC4

The NEC3 suite was first published 12 years ago and most recently updated in 2013.

The NEC3 contracts are widely used, particularly in relation to civil engineering and infrastructure projects. Recent positive judicial commentary on the NEC3 suite has demonstrated why the forms are popular: in Atkins Ltd v Secretary of State for Transport [2013] the court stated that the NEC3 is “highly regarded” and is seen as “providing material support to assist the parties in avoiding disputes and ultimately resolving any disputes that do arise”.

The NEC4 suite will be published on 22 June 2017. Whilst the suite is not yet available for review, the NEC has outlined the key changes which will be made.

Key Changes

The key changes in the NEC4 suite will include:

1. **Design Build and Operate** – the NEC has stated that the new DBO form will “allow the procurement of a more integrated whole-life

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2. delivery solution’ and will be capable of including “services to be provided before, during and after engineering and construction works are completed”.

This new contract appears to be intended to reflect the general move towards a more integrated approach to procurement and to widen the use of the NEC suite to cater for the process plant industry, where this approach is very common.

3. **Alliance Contract** – following the publication of a guidance note on how the NEC3 contracts could be used to achieve an alliancing approach (see this article), a consultation version of an NEC4 Alliance Contract will be published.

The Alliancing Contract will be intended to “support Clients who wish to take a step forward by fully integrating the delivery team for large complex projects” and will be a “single collaborative contract with a number of participants in order to deliver a project or programme of work”. This looks set to encourage further uptake of the alliancing model following an increasing number of major projects being procured on this basis.

4. **BIM** – the NEC4 suite will include a new secondary option in respect of Building Information Modelling. This will require the production of an “Information Execution Plan” and cover legal issues in relation to BIM such as the Information Model, Information ownership and liability of the parties.

We assume that the NEC4 suite will make it easier to incorporate provisions in respect of BIM in the chosen contract than the current NEC3 suite, in which the BIM provisions were included in a separate “How to” guide.

5. **Collateral Warranties** – a new secondary option will also be included requiring the Contractor to provide collateral warranties and to procure collateral warranties from subcontractors.

In the NEC3 suite this secondary option was only included in the Professional Services Contract.

6. **General updates** – there will also be a number of general updates such as provisions to reflect the Bribery Act 2010 and amendments to make the NEC4 suite as a whole more consistent.

Further information on the NEC4 can be found on the NEC website.
A Positive Step

These updates suggest that the publication of the NEC4 contracts will be a very positive step for the industry as, amongst other things, they will help the suite reflect current practice (such as the increased use of alliancing and the uptake of BIM) and key legal developments. It is possible that the use of the NEC forms will therefore continue to increase following the publication of the NEC4 contracts.

The NEC have not commented on whether the NEC4 contracts will include other provisions to reflect recent legal developments such as (i) a requirement that those in the supply chain are paid within 30 days as required in public sector contracts under the Public Contracts Regulations 2015 or (ii) provisions to reflect the Modern Slavery Act 2015.

The NEC4 does not appear to be fundamentally changing the underlying principles on which the NEC3 suite was based. Accordingly, we expect that the administrative requirements in respect of early warnings, compensation events and the programme will still apply. (As outlined in this note the NEC3 suite requires a proactive approach to contract management and needs to be understood at the outset and managed. The same is likely to apply to the NEC4 contracts.)

Other forms which have been published recently appear to be moving closer to the NEC3 approach. For example, the ACE Professional Services Agreement 2017 includes new mutual obligations to collaborate in a spirit of trust and mutual support and to give early warning notices of any matters likely to affect provision of the Services. Similarly, the IChemE Silver Book includes an obligation to collaborate and early warning provisions. NEC must be doing something right.

We will circulate a further update once the NEC4 contracts has been published and reviewed.

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