NEC4 Professional Service Contract

BRIEFING NOTE TWO: Liability – Expanding the Consultants’ risk

The NEC4 suite of contracts was published on 22 June 2017. In the second of a series of briefing notes considering the significant changes to the NEC3 Professional Service Contract (“PSC”) we consider the Consultant’s liability under the NEC4 PSC.

The Consultant’s liability under the NEC3 PSC was limited 1) to the amount stated in the Contract Data Part One, other than for the excluded matters (clause 82.1) and 2) to the proportion of the Employer’s loss for which the Consultant was responsible (clause 82.2). Clause 82.2 was essentially a shortened net contribution clause. Further, the NEC3 PSC required the Consultant to indemnify the Employer against claims as a result of an infringement by the Consultant “of the rights of others”, i.e. generally speaking breaches of third party intellectual property rights (although this was ambiguous).

The NEC4 PSC takes a very different and more complex approach to liability. Whilst clause 82.1 (the limit of liability – now clause 87.1) is unchanged, the scope of the Consultant’s liability has increased.

Firstly, the NEC4 PSC requires the Consultant to pay to the Client any cost as a result of a “Consultant liability” (clause 82.1). The Consultant’s liabilities are provided in clause 81.1 and include costs incurred by Client as a result of the Consultant’s failure to exercise the required skill and care and death or personal injury to the Consultant’s employees. This is not unreasonable. However, the Consultant’s liabilities also include claims from, and compensation payable to, third parties as a result of the Consultant Providing the Service, i.e. providing the services in accordance with the Contract.

This means that the Consultant must pay costs incurred by the Client even though the Consultant has complied with the Contract. The Consultant therefore takes the risk of, for example, any third party agreements the Client enters into in relation to the Services and of any third party interests which may be prejudiced by the project. This is a real additional risk and may not be consistent with professional indemnity insurance coverage, as liability can arise even though the Consultant will not have been negligent or in breach of contract. We do not think this was the intention of the NEC and it is very unfortunate. We recommend that this is an area that is amended by a suitable Z clause.

The Consultant’s liabilities are expressed as not including the matters stated as being Client liabilities in clause 80.1. The Client’s liabilities are claims from third parties due to i) an unavoidable result of the service or ii) negligence, breach of statutory duty or interference with any legal right by the Client, its employees or any person contracted to it. Any additional liabilities stated as such in the Contract Data and any faults of the Client, its employees or any person contracted to it are also Client liabilities. The guidance notes to the NEC4 PSC suggest that this makes any matters for which neither the Consultant nor its Subcontractors are responsible a Client liability, however unfortunately we think that the drafting (as described above) is much narrower than this.
The liability position under the NEC4 PSC is therefore very complex, but in our view, the effect of it is that the Consultant is responsible for all avoidable third party claims arising from the services which are not caused by the Client or its contractors or consultants, even if the Contract is complied with by the Consultant. This expands the Consultant's liability as it goes much further than making the Consultant responsible if it infringed the “rights of others” as was the position under the NEC3 PSC.

The NEC4 PSC does not include clause 82.2 of the NEC3 PSC. Instead, the obligation to pay costs as a result of a Client or Consultant liability is reduced to the extent an event for which the other Party was liable contributed to those costs, taking into account each Party’s responsibility (clause 82.3). This is a much narrower net contribution clause as it only applies to the Party's liabilities; it does not apply to any claim under the PSC which is not as a result of a Consultant liability.

As outlined above, the NEC4 PSC takes a very different approach to the scope of a consultant's liability, which exposes the Consultant to additional risk. The liability arrangements will also be difficult to apply in practice. Consultants will need to consider their liability under the NEC4 PSC and if necessary make appropriate amendments to clarify their position.

February 2018

If you would like to discuss anything covered in this article please contact:

Will Buckby
Partner
T + 44 (0) 20 7469 0411
E w.buckby@beale-law.com

Andrew Croft
Associate
T +44 (0) 20 7469 0412
E a.croft@beale-law.com