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Construction Law Update The NEC4 suite of contracts are here!

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Introductions

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Beale & Company and CIHT

+ Beale & Company

- Specialist construction law firm; roots trace back to 1838
- 23 Partners, circa 140 staff
- Offices in UK (London and Bristol), Ireland (Dublin) and United Arab Emirates (Dubai)
- Over 40% of firm's turnover relates to international matters
- Recognized in leading directories of law firms (Chambers UK, Chambers Europe and Legal 500) in the fields of construction, engineering, technology and insurance

+ Member of Corporate Partner Scheme of CIHT

+ Regular contributor to Transportation Professional

Webinar Outline

1. Introduction to the NEC4
2. NEC4 – General changes across suite
3. NEC4 Professional Services Contract (PSC)
4. NEC4 Engineering and Construction Contract (ECC)



INTRODUCTION OF NEC4

Recap on NEC



- + NEC3 - most common standard forms for the UK construction and infrastructure sector
- + First published by the Institute of Civil Engineers in 1993
- + Last updated April 2013
- + Large family of contracts: not just the PSC and ECC
- + Office Government Commerce endorsed NEC3 2005 for government contracts
- + Key UK projects, including High Speed 1, London 2012 Olympic Games, Crossrail, HS2 and Highways England
- + Wide use in major projects – only 12% of NEC contracts with project value of less than £250,000.
- + International

NEC4 – First High Profile Use

- + Highways England has unveiled a new Regional Development Partnership (“RDP”) procurement model to replace its Collaborative Delivery Framework
- + The RDP will be broken into 8 lots, divided among 5 regions
- + Under the new RDP arrangement, contractors will be Delivery Integration Partners, designing and constructing motorways and major A-roads under the new NEC4 standard form contracts
- + Practical collaboration and innovation will be encouraged under the RDP
- + The NEC4 contracts contain a number of tools to encourage collaboration



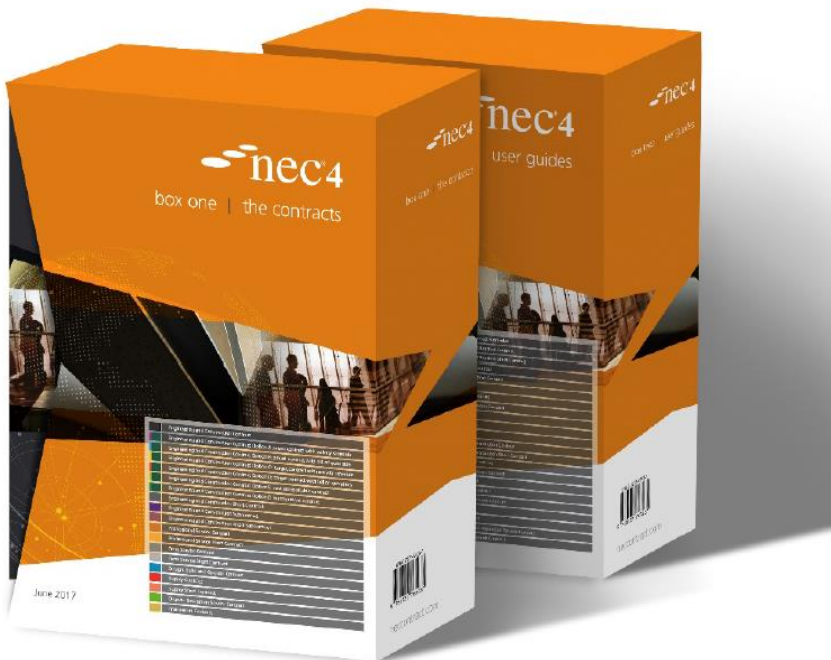
NEC4 – “Evolution not Revolution”

- + New suite of NEC4 contracts published 22 June 2017
- + Aim to:



- + Seeking to “inspire the increased use of NEC in new markets and sectors” (Peter Higgins, chair NEC4 Contract Board)

NEC4 Contract suite



Contracts (16)

ECC & ECC Short

ECS & ECS Short

TSC & TSC Short

TSS (subcontract)

PSC & PSC Short

PSS (subcontract)

Supply & Supply Short

Dispute Resolution
Service

Framework

DBO

Alliance

New

New

NEC4 – New Forms

- + **Alliance Contract** (consultation version – ended on 30 November 2017)
 - A multi-party contract with an integrated risk and reward model
 - Allows “much deeper collaboration”, “reducing the potential for dispute”
 - Similar to Australian/Network Rail model (e.g. no formal disputes!)
- + **DBO Contract**
 - Allows Client “to procure a more integrated whole-life delivery solution”
 - “design, construction, operation and/or maintenance” procured from a single supplier
- + **PSC and TSC Subcontracts**
 - For use with any NEC 4 Main Contract
 - Like the ECC Subcontract, very similar to main contract forms with “buffers”
 - No obligations to comply with Main Contract!



NEC4 – GENERAL CHANGES ACROSS SUITE

General Changes - Summary



- + Basic structure the same, e.g.:
 - Core Clauses
 - Main Option Clauses A-F
 - Secondary Option Clauses (W, X and Y)
 - Cost Components, Contract Data (parts 1 and 2)
 - Z clauses
- + Key clauses have the same effect
- + **Changes include:**
 - **Introduction of new clauses and Secondary Options**
 - **“Tweaks” to existing provisions**
 - **Changes to terminology and for consistency**

General Changes - New Provisions

+ **Corrupt Acts**

- Must not “do a Corrupt Act” and must stop Subcontractors doing so
- Ground for termination

+ **Assignment**

- No limit for either Party, Client assignee must act in spirit of mutual trust and co-operation

+ **Final Assessment**

- Final Assessment to be determined by the Project Manager/ Service Manager
- Conclusive unless condition precedents met

+ **Early Contractor Involvement** (not in PSC)

- Two stage appointment of Contractor

+ **Whole Life Cost** (not in PSC)

- *Contractor* can propose change to scope to reduce operating costs



General Changes - BIM



- + NEC4 “embraces the digital changes”
- + **Information Modelling (X10)**
 - Information Execution Plan and Information Model Requirements
 - Client owns Information Model unless Information Model Requirements say otherwise
 - No specific compensation event
 - Fault or errors are Client liabilities unless due to Defect
 - No liability unless failed to exercise reasonable skill and care
 - Contractor to insure against obligations (ECC)
- + First standard contracts to properly “tackle” BIM (other than CIC Protocol)
- + Consistent with PAS 1192-2 (EIRs and BEPs)
- + A positive step

General Changes – “Tweaks” to NEC3 Position (1)

+ Programme

- Deemed acceptance of programme
- 25% retention until provided

+ Payment

- Client must be paid overpayment
- If no application for payment amount due will not increase (but can reduce)

+ Compensation Events

- Additional compensation events can be included in Contract Data
- New CE for where a quotation is not accepted
- “Dividing Date”

+ Proposed Instructions

- Quotation can be requested before instruction issued



General Changes – “Tweaks” to NEC3 Position (2)



+ Liabilities

- Indemnity replaced with “liability for costs”

+ Early Warning

- Ongoing early warning meetings and register

+ Public Liability Insurance

- Must include “cross liability”

+ Dispute Resolution

- Resolution by *Senior Representatives*
- Dispute Avoidance Board

KEY FEATURES OF THE NEC4 PSC

Key Features - Structure of the NEC4 PSC

- + Core Clauses – apply to all NEC4 PSC
- + Main Option Clauses – different options for how the fee is paid:
 - Option A: Priced contract with activity schedule
 - Option C: Target contract
 - Option E: Cost Reimbursable Contract
- + Secondary Option Clauses
 - X Clauses (i.e. changes in law, parent company guarantee, KPIs etc.)
 - Y Clauses (i.e. PBAs, Construction Act and CRTPA 1999)
 - Z Clauses (amendments!)
- + Schedule of Cost Components (New)
- + Contract Data Parts One and Two
- + Scope



Key Features - NEC4 PSC Contents Page

+ Core clauses

1. General
2. The Consultant's Parties' main responsibilities
3. Time
4. Quality Management
5. Payment
6. Compensation events
7. Rights to material
8. ~~Indemnity~~, Liabilities and insurance ~~and liabilities~~
9. Termination

+ Main clause options

- A. Priced contract with activity schedule
- C. Target contract
- E. ~~Time Based Contract~~
Cost reimbursable contract
- ~~G. Term Contract~~

+ Dispute resolution

- W1 Option W1
- W2 Option W2

+ Secondary Option clauses

- X1 Price adjustment for inflation
- X2 Changes in the law
- X3 Multiple currencies
- X4 Ultimate holding ~~Parent~~ company guarantee
- X5 Sectional Completion
- X6 Bonus for early Completion
- X7 Delay damages
- X8 Undertakings to others
~~Collateral Warranties~~
- X9 Transfer of rights
- X10 Information Modelling
~~Employer's Agent~~

- X11 Termination by the Client
~~Employer~~
- X12 Multiparty Collaboration
~~Partnering~~
- X13 Performance bond
- X18 Limitation of liability
- X20 Key Performance Indicators
- Y(UK)1 Project Bank Account
- Y(UK)2 The Housing Grants,
Construction and Regeneration
Act 1996
- Y(UK)3 The Contracts (Rights of Third
Parties) Act 1999
- Z Additional conditions of contract
- Schedule of Cost Components
- Short Schedule of Cost Components

MAIN CHANGES FROM NEC3 PSC

NEC4 PSC – What hasn't changed



- + General approach the same as NEC3
- + Few changes to fundamental areas, i.e.:
 - spirit mutual trust and co-operation (clause 10.2)
 - early warning notices (clause 15.1)
 - duty of care (clause 20.2)
 - detailed programme requirements (clause 31)
 - compensation events (other than as mentioned) (clause 60)
 - adjudication required before dispute referred to *tribunal* (W2)
- + As with NEC3, NEC4 is a very administrative contract

Main Changes in NEC4 PSC - Service Manager

- + *Service Manager* now administers contract on *Client's* behalf
- + Similar to *Project Manager* role under NEC3 ECC
- + *Service Manager* must act as stated in the contract (clause 10.1) and in a spirit of mutual trust and co-operation (clause 10.2)
- + *Service Manager* (amongst other things):
 - gives notices and instructions (e.g. clause 14)
 - assesses payment (clause 50)
 - assesses compensation events (clause 60)
- + Identity of *Service Manager* will need to be considered carefully
- + Can be replaced on notice (clause 14.5)
- + Does this work in services agreement?



Main Changes in NEC4 PSC - Liability



+ Defects

- Defect – failure to comply with Scope or applicable law
- Only liable for “Defect” if failed to “use the skill and care normally used by professionals providing services similar to the *service*”
- ECC Option X15 similar (no longer refers to Works Information)

+ Consultant ‘s Liabilities

- Failure to exercise duty of care and death/person injury to employees
- Any third party claim arising from the Providing the Services, unless a *Client* liability

+ Contribution

- *Client* liabilities will reduce *Consultant’s* liability for cost – no net contribution clause

Main Changes in NEC4 PSC - Payment

- + Payment no longer simply linked to invoice
- + Consultant must submit:
 - Application for Payment before the *assessment date*
 - Invoice within one week of *Service Manager's* certificate
- + Payment due seven days after the assessment date
- + Final date for payment the later of:
 - 14 days after due date
 - 7 days after receipt of an invoice



Main Changes in NEC4 PSC - Payment (continued)



- + New approach to payment: no longer on a time charge basis
- + Defined Cost used to:
 - determine Price for the Services Provided to Date (other than under Option A)
 - assess compensation events
- + Defined Cost: the cost of components in the Schedule of Cost Components.....
- +less Disallowed Costs in Options C (Target Cost) and E (Cost Reimbursable Contract)
- + Consider applications for payment carefully.

Main Changes in NEC4 PSC - *Undertakings* (X8) and TPR

- + *Undertakings to others* (rather than collateral warranties) to be required as stated in the Contract Data
- + Required form in the Scope
- + No restriction on form of “*undertaking*”
- + Secondary Option Y3.1 (Third Party Rights) now allows classes of *beneficiaries* to be granted third party rights



Main Changes in NEC4 PSC - Subcontracting and Termination



- + *Service Manager's* acceptance required for any Subcontractor
- + Additional insurance obligations
- + New right for *Client* to terminate if *Consultant*:
 - substantial fails to comply with obligations
 - fails to provide a bond or guarantee (clause 91.2)
 - “substantially” i) hinders Client or Others or ii) breaches H&S regulation (clause 91.3)
- + Sums must be outstanding for 13 weeks (not 8) for the *Consultant* to terminate
- + On termination due to insolvency, non payment or default by the Client amount due includes the amount by applying *fee percentage* to:
 - excess of Prices/Forecast; over
 - Price for Services Provided to Date

NEC4 ECC

Overview of NEC4 Engineering and Construction Contract



+ Basic structure the same, *i.e.*:

- Core Clauses
- Main Option Clauses A-F
- Secondary Option Clauses (W, X and Y)
- Z clauses (inevitably!)
- Schedule/Short Schedule of Cost Components
- Contract Data (Parts 1 and 2)
- Scope (previously Works Information).
- Site Information

+ **Changes include:**

- **Changes in terminology**
- **Introduction of new Core Clauses and Secondary Option Clauses**
- **“Tweaks” to existing provisions**

Changes in terminology

- + *Employer* now *Client*
- + Risk Register/risk reduction meeting now Early Warning Register/early warning meeting
- + Works Information (NEC3 ECC) now Scope (NEC4 ECC)
- + Language is now gender neutral – it/its rather than he/his



NEC4 ECC – Risk management



- + Proactive management of risk at the heart of the NEC philosophy
- + Upgrade to the early warning regime in NEC4

Deemed Acceptance



- + Deemed Acceptance (Clause 31.3) – new addition and a useful tool for Contractors
- + Project Manager has two weeks to accept (or not) a submitted programme
- + If no response, Contractor notifies the Project Manager of the failure
- + If failure continues for further week the submitted programme is treated as accepted
- + Query: a deemed Accepted Programme may not be compliant with Clause 31.2

Revised Programmes

- + Revisions to programme – Clause 32
- + No need to include effects of implemented Compensation Events and notified Early Warning Matters
- + Contractor submits – long stop date is no longer than the interval stated in the Contract Data
- + But no stick to force Contractors to submit revised programmes – Clause 50.5 financial penalty only for first programme

Acceleration – Clause 36

- + Contractor can now propose
- + If Contractor and Project Manager prepared to consider, Project Manager instructs Contractor to provide a quotation
- + Quotation includes changes to the relevant Key Dates and a revised programme
- + Quotation submitted within three weeks of instruction
- + Project Manager replies within three weeks
- + If quotation accepted Project Manager changes Prices, Key Dates and Completion Date and accepts revised programme



New Compensation Events



- + Two new core clause compensation events
- + (1) Quotation for proposed instruction not accepted
- + Follows new Clause 65 for proposed instructions
- + Contractor has three weeks to submit a quotation for a proposed instruction when instructed to do so by Project Manager
- + Project Manager replies by date when proposed instruction may be given
- + Instruction is either issued, not accepted or revised quotations requested
- + If not accepted Project Manager notifies that the proposed instruction is a Compensation Event and for Contractor to submit a quotation

New Compensation Events (continued)

- + (2) Express allowance to agree other Compensation Events
- + Listed in Contract Data Part 1
- + Gives parties flexibility and ability to reflect project-specific risks

Notifying Compensation Events – Clause 61

- + For Contractor notified Compensation Events – eight week period to notify after being aware whether happened or is expected to happen replaced
- + Now eight weeks from when an event has happened
- + Failure to notify within eight week period – no changes to the Prices, Key Dates or Completion Date
- + Unless event arises from the Project Manager or Supervisor giving an instruction or notification, issuing a certificate or changing an earlier decision



Assessing Compensation Events – Clause 63

- + Dividing date introduced
- + Project Manager instruction or notification, issuing a certificate or changing an earlier decision = date of that communication
- + Other Compensation Events = date of notification of the Compensation Event
- + Important for considering actual vs forecast Defined Cost (Clause 63.1) and identifying the relevant Accepted Programme
- + Only assess delay for operations a Contractor has not completed

Contractor's design (Option X15)

- + Standard now consistent with that required under NEC4 PSC and the burden of proof has been “unreversed”:
 - NEC3: “The *Contractor* is not liable for Defects in the works due to his design so far as he proves that he used reasonable skill and care to ensure that his design complied with the Works Information.”
 - NEC4: “The *Contractor* is not liable for a Defect which arose from its design unless it failed to carry out that design using the skill and care normally used by professionals designing works similar to the *works*.”
- + Professional indemnity insurance
- + Retention of documents

Payment (Section 5)



- + Contractor now required to submit application for payment before each assessment date (clause 50.2)
- + Assessment of final amount due (new Clause 53):
 - Timing of assessment and certificate
 - Contractor to assess if PM fails
 - Assessment conclusive unless formally disputed
- + Finalisation of Defined Cost (Options C to F):
 - Notification by Contractor
 - Response by PM
 - Consequence if PM fails to respond
- + Changes to the Schedule of Cost Components (for Options A and B) and Short Schedule of Cost Components (for Options C, D, and E)
- + Reversion to single *fee percentage*

Liabilities and insurance (Section 8)

- + Section 8 significantly revised, partly in response to insurers' concerns
- + “*Employer's risks*” and “*Contractor's risks*” now “*Employer's liabilities*” and “*Contractor's liabilities*”
- + *Contractor's* liabilities now itemised (rather than being all risks other than those carried by the *Employer* as under NEC3 ECC clause 81) and should be covered by insurance
- + Indemnities in clause 83 replaced by “recovery of costs” wording in clause 82 – no substantive change?
- + New requirement for professional indemnity insurance (where Option X15 applies)

Other changes – Contractor's proposals

+ **Contractor incentivised to propose value engineering savings (Clause 16):**

- Contractor may propose a change to the Scope to reduce cost
- If it is accepted, the Project Manager issues an instruction accordingly. This will have effect as a compensation event except that
 - for options A and B, the Prices are reduced by applying the *value engineering percentage* (50% unless otherwise stated in the Contract Data) to the total cost saving
 - for Options C and D, the Prices are not reduced (so the cost savings are shared by applying the Contractor's share)

+ **Whole life costs (Option X21)**

- *Contractor* may propose a change to reduce the cost of operating and maintaining an asset
- If accepted, not a compensation event, but PM changes Scope, Prices, Completion Date and Key Dates accordingly and accepts revised programme

Other new provisions to note

- + Corrupt Acts (clauses 11.2(5) and 18)
- + Assignment (clause 28)
- + Disclosure/publicity (clause 29)
- + Quality Management System/Plan (clause 40)
- + Undertakings to *Client* or Others (X8)
- + Information Modelling (Option X10)
- + ECI (Option X22)
- + Termination by Client for convenience (Option X11) - moved from core clause 90.2

NEC4 – Conclusion (PSC)



- + NEC4 does make some significant changes to the NEC3
- + Liability for design Defects is a useful amendment for consultants and some of the changes should limit Z clauses
- + BIM Secondary Option a positive step
- + The PSS is a useful addition but needs to be considered carefully
- + Additional risks (e.g. liability for third party claims, no net contribution clause, ultimate parent company)

NEC4 – Conclusion (ECC)

- + NEC4 improvements to be welcomed
 - Deemed acceptance of programme
 - Provisions for assessment of final amount due and (for Options C, D and E) final Defined Cost
 - Design liability under Option X15 – “unreversal” of burden of proof
 - Reversion to single fee percentage and simplified administration of Short Schedule of Cost Components
- + New Options to reflect current practice and common Employer/Client requirements in relation to collateral warranties (“Undertakings”), Information Modelling etc BUT we expect the use of a significant number of Z clauses to continue with the NEC4
- + Be proactive and ensure you allow adequate management resource given administratively demanding and expensive requirements of NEC4
- + **NEC4 (as with NEC3) not to be left in the drawer!**