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## Construction Law Update:

### NEC4 What has changed?

Tom Pemberton

and

James Vernon

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## Introductions

- + Tom Pemberton
  - Partner, Projects and Contracts Advisory
- + James Vernon
  - Partner, Construction Dispute Resolution

## Webinar Outline

1. Recap on NEC forms to date
2. Overview of NEC4 suite
3. Focus on NEC4 ECC
4. Snapshot of NEC4 ECS
5. Conclusions



## Any questions?

- + Please raise these as we go along and following the webinar at [webinars@beale-law.com](mailto:webinars@beale-law.com)



## Recap on NEC



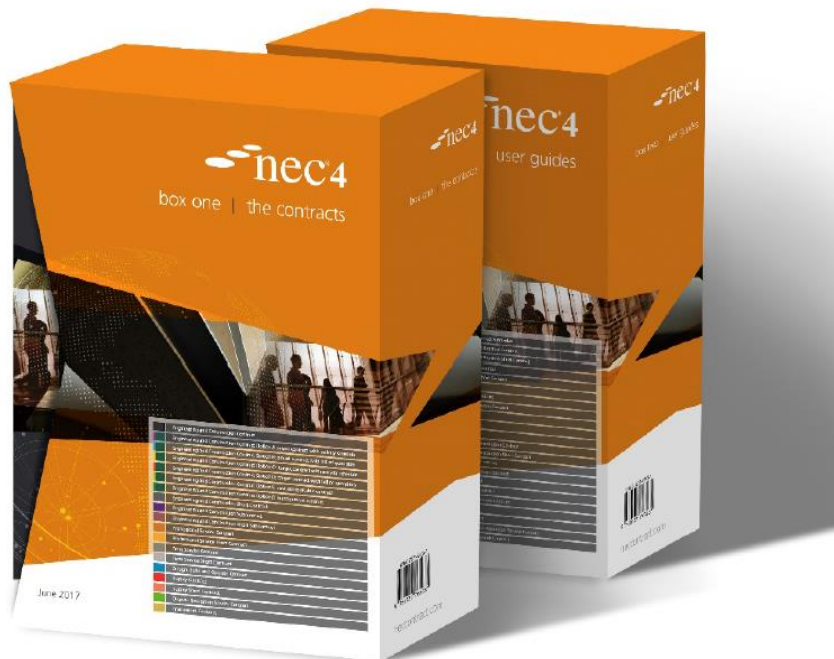
- + NEC3 - most widely used standard forms in the UK infrastructure sector
- + First published by the Institution of Civil Engineers in 1993
- + Expanding family of contracts
- + Endorsement of NEC4 for use in public sector projects by the Infrastructure and Projects Authority (reporting to the Cabinet Office and HM Treasury)
- + Key UK projects, including High Speed 1, London 2012 Olympic Games, Crossrail, HS2 and Highways England
- + International

## The view from NEC – “Evolution not Revolution”

- + New suite of NEC4 contracts published 22 June 2017
- + NEC’s ambitions were to:
  - reflect user feedback and industry developments, and
  - “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 and Guidance Notes



### + **Alliance Contract** (consultation version)

- A multi-party contract based on a “one team” risk and reward model
- Allows “much deeper collaboration”, “reducing the potential for dispute”
- Similar to Australian/Network Rail model (e.g. no provision for dispute resolution!)

### + **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**

- Like the ECC Subcontract, very similar to main contract forms with “buffers”
- No express obligations to comply with Main Contract!

### + **Guidance notes**

- Updated and consolidated.
- Now provided in four distinct volumes for each form, dealing with procurement strategy, contract preparation, supplier selection and contract management.



## NEC under the judicial spotlight



- + 8 reported cases since 2010 (of which there have been 3 in the past year) and counting!
- + NEC drafting style has prompted judicial criticism of “*loose language, which is mostly in the present tense, which can give rise to confusion as to whether and to what extent actual obligations and liabilities actually arise.*” (Akenhead J in *Atkins v Secretary of State for Transport* 2014)
- + But in the same judgment Akenhead J also acknowledged that NEC3 is “*highly regarded ... as providing material support to assist the parties in avoiding disputes and ultimately in resolving any disputes which do arise.*”
- + Similar points apply to NEC4 - core philosophy, structure, and approach to drafting have not changed

# 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

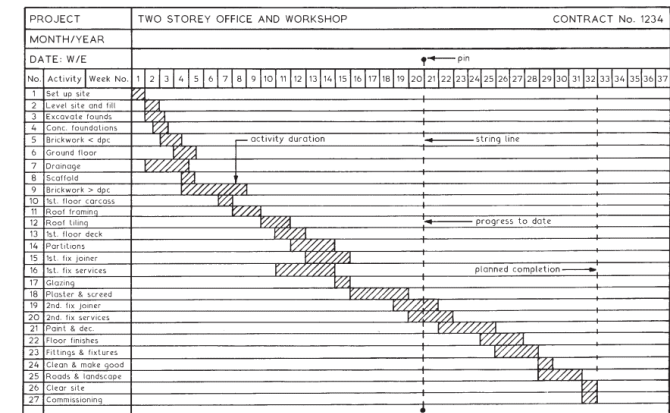
- + Proactive management of risk at the heart of the NEC philosophy
- + Upgrade to the early warning regime in NEC4





## Programme

- + Regularly updated programmes support good project management
- + If programme not identified in Contract Data Part 2, Contractors to submit a first programme to Project Manager (Clause 31.1)
- + Time to submit first programme in Contract Data
- + If no programme in Contract Data and no first programme a quarter of the price for work done to date retained until compliant programme submitted (Clause 50.5)
- + Format of programme stated in the Scope (Clause 31.2)



## 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



## 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
- + Best practice – notify all events when aware including when expected to happen
- + 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

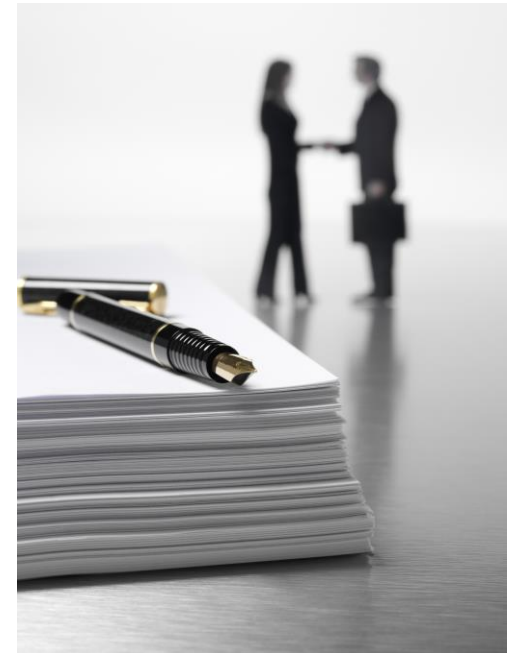


## Assessing Compensation Events – Clause 63

- + 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

## Dispute Resolution and Avoidance

- + Aim for resolving disputes by negotiation
- + W1 – for projects where Construction Act does not apply
- + W2 – for projects where Construction Act does apply
- + W3 – use of a Dispute Avoidance Board where the Construction Act does not apply



## Senior Representatives

- + W2 (and W1) introduces new procedure for referral to Senior Representatives
- + Identified in Contract Data Part 1 (client) and Contract Data Part 2 (contractor)
- + Not be involved in day to day operations of the project
- + Sufficient seniority to negotiate a binding settlement

## Senior Representatives (continued)

- + Parties agree to refer a dispute to the Senior Representatives
- + Referring party – notifies Senior Representatives, other party and Project Manager
- + Notification sets out nature of dispute
- + Within one week of notification each party submits a statement of case
- + Maximum 10 A4 pages plus evidence (can be varied)

## Senior Representatives (continued)

- + Senior Representatives then meet to try and resolve the dispute
- + Three week period from statement of case to the end of the process
- + After three weeks Senior Representatives produce a list of issues agreed and not agreed
- + Agreed issues put into effect by the Project Manager and Contractor
- + The Senior Representatives procedure is not compulsory because of the UK mandatory adjudication provisions
- + Query: evidence from the Project Manager?





## 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



## Engineering and Construction Subcontract

- + NEC4 ECS replicates the key changes to the Engineering and Construction Contract, adopting same drafting approach as NEC3 ECS
- + No general obligation on the *Subcontractor* not to put the *Contractor* in breach of the main contract
- + However, new clause 91.9 specifically refers to “upstream” events: *Contractor* may terminate if its obligation to provide the works in the main contract has been terminated
- + Effect is similar to termination for convenience under new Secondary Option X11 (including right to fee percentage of “unused” Prices)
- + Consider Z clause amendment!



## Conclusions



- + 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!**





## Webinar: General Data Protection Regulation (GDPR) - Preparation for Employers - 2 August 2017, 12.30pm

- + The General Data Protection Regulation (GDPR) comes into effect from 25 May 2018. It will alter how companies deal with personal data, with potential fines for non-compliance of up to €20m or, if higher, 4% of global turn over
- + James Hutchinson will look at the role of a typical employer and cover:
  - Background and overview of the GDPR
  - An employer's existing and new duties to its employees
  - New data rights for employees
  - Changes to subject access rights
  - Personal data breach obligations
  - Steps to take now with under a year to go
- + Register at: [webinars@beale-law.com](mailto:webinars@beale-law.com)

## Contact Details

### Tom Pemberton

+ [t.pemberton@beale-law.com](mailto:t.pemberton@beale-law.com)

+ +44 (0) 20 7469 0416



### James Vernon

+ [j.vernon@beale-law.com](mailto:j.vernon@beale-law.com)

+ +44 (0) 20 7469 0424

