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Construction Law Update:
NEC3 Professional Services
Contract –
“not to be left in the drawer!”

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Introductions

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Webinar Outline

1. Introduction to the NEC3, including their use in the current market.
2. Quick summary of the NEC3 Professional Services Contract (NEC3 PSC).
3. Key features of the NEC3 PSC.
4. Project Manager's role under NEC3 ECC, and *Costain v Bechtel [2005]*.
5. Highlight of recent NEC3 reported cases.
6. Conclusions.



Introduction to NEC3

- + Most common standard forms for the UK construction and infrastructure sector.
- + First published by the Institute of Civil Engineers in 1993.
- + Large family of contracts: not just the NEC3 PSC and ECC.
- + Distinct aims:
 - Utilises clear and simple language and avoids legal jargon;
 - **Stimulates good project management and mitigates/manages risk;**
 - **Encourages collaboration - “The Employer and the Consultant shall act as stated in this contract and in a spirit of mutual trust and co-operation” (Clause 10.1).**
- + Office Government Commerce endorsed NEC3 2005 for government contracts.
- + Key UK projects, including High Speed 1, London 2012 Olympic Games, Crossrail, and Highways England.
- + Wide use in major projects – only 12% of NEC contracts with project value of less than £250,000.
- + International.
- + **Current edition is NEC3 April 2013.**



Professional Services Contract (NEC3 PSC)

- + *“The Professional Services Contract is intended for use in the appointment of a supplier to provide professional services. It can be used for appointing project managers, supervisors, designers, consultants or other suppliers....”*
- + Very different to other standard forms (i.e. ACE, CIC, RIBA etc.).
- + For example, is a **project management tool** which is procedural along with a higher administrative burden.
- + Flexible – different “Options” to be selected for different project needs.



Engineering and Construction Contract (NEC3 ECC)



- + *“This contract should be used for the appointment of a contractor for engineering and construction work, including any level of design responsibility.”*
- + Very different to other standard forms – i.e. JCT.
- + Mainly used on infrastructure projects in the UK and less so in the building and development sector.
- + Similar in style to the NEC3 PSC.
- + **Project management tool** and NEC3 ECC administered by a project manager.

NEC3 Suite of Contracts

- + Engineering and Construction Contract (ECC)
- + Engineering and Construction Subcontract (ECS)
- + Engineering and Construction Short Contract (ECSC)
- + Engineering and Construction Short Subcontract (ECSS)
- + Professional Services Contract (PSC)
- + Professional Services Short Contract (PSSC)
- + Term Service Contract (TSC)
- + Term Service Short Contract (TSSC)
- + Supply Contract (SC)
- + Supply Short Contract (SSC)
- + Framework Contract (FC)
- + Adjudicator's Contract (AC)



Structure of the NEC3 PSC



- + Core Clauses – apply to all NEC3 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: Time based contract
 - Option G: Term 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 – often extensive!).
- + Contract Data Parts One and Two.
- + Scope / Works Information.

NEC3 PSC – Contents Page

+ Core clauses

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

+ Main clause options

- A. Priced contract with activity schedule
- C. Target contract
- E. Time based 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 Parent company guarantee
X5 Sectional Completion
X6 Bonus for early Completion
X7 Delay damages
X8 Collateral warranties
X9 Transfer of rights
X10 Employer's Agent
X11 Termination by the Employer

X12 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

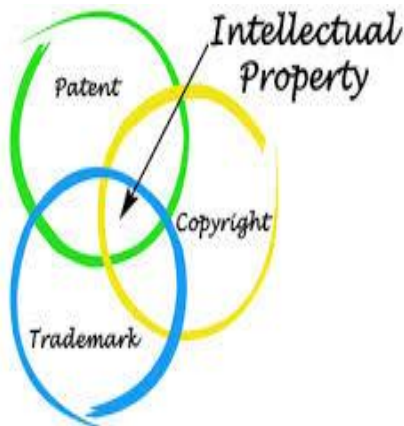
Z Additional conditions of contract

Key Features of NEC3 PSC - Standard of Care

- + Standard of care is the “skill and care normally used by professionals providing services similar to the services”, (*Clause 21.2, NEC3 PSC*).
- + As NEC3 PSC written in present tense – assumption of strict obligations:
 - Clause 30.3 - “Consultant does works ... by the Key Date”;
 - Clause 21.1 – “The Consultant Provides the Services in accordance with the Scope”;
 - Clause 25.1 - “The Consultant obeys an instruction ... given to him by the Employer”.



Intellectual Property



- + *“Employer has right to use the material provided by the Consultant for the purpose stated in the Scope” (Clause 70.1, NEC3 PSC).*
- + *“Consultant may use the material provided by him ... for other work unless stated otherwise in the Scope (Clause 70.4).*
- + Scope will determine extent of the licence.
- + Ambiguity over the intellectual property licence granted under NEC3 PSC.

Limits of Liability

- + Limits under clause 82 of the NEC3 PSC.
- + Cap on total liability – limits total liability to Employer in contract and tort: **to be stated in the Contract Data.**
- + Excluded Matters – including LDs, IPR infringement, and loss/damage to third party property.
- + Net contribution clause – limits Consultant’s liability to proportion of the Employer’s losses for which the Consultant is responsible.
- + Limits under Option X18:
 - Cap on indirect and consequential loss.
 - No liability for Consultant for a matter unless he is notified before the “end of the liability date”.



Risk allocation and management

- + **Heart of NEC 3 suite:** contracts encourage proactive management of risk.
- + Give an early warning notice of any matter which Employer/Consultant becomes aware of which could:
 - Increase the total of the Prices;
 - Delay Completion;
 - Change the Accepted Programme;
 - Delay meeting a Key Date;
 - Impair the usefulness of the Services; and
 - Affect the work of the Employer + others (*Clause 15.1, NEC3 PSC*).
- + Also, any matter which could increase the total cost.
- + Risk Reduction Meeting: proposals/solutions (and *Clause 15.2 and 15.3, NEC3 PSC*).
- + Risk Register updated (*Clause 15.4, NEC3 PSC*).



Risk allocation and management (contd ...)

- + Failure to give an early warning can have an effect on the assessment of a variation (compensation event).
- + If extra time/costs have been incurred because of failure to give an early warning then extra time/cost will not be recoverable in a compensation event (*Clauses 61.5 and 63.5, NEC3 PSC*).
- + Process is concerned with risk management to ensure there are minimal surprises.



Compensation Events



- + NEC3 PSC - 12 variation / compensation events (*Clause 60.1, NEC3 PSC*).
- + Strict time limit of eight weeks for notification of compensation events.
- + Strict time limits also apply to:
 - The Employer accepting or rejecting the Consultant's notification of a compensation event (one week).
 - The Consultant's submission of a quotation giving his assessment of the cost and time consequences of the event (two weeks from instruction).
 - The Employer's acceptance or rejection of a quotation (two weeks).
- + The Employer ultimately decides if an event qualifies as a compensation event (*Clause 61.4, NEC3 PSC*) and assesses a compensation event (*Clause 64.1, NEC3 PSC*).
- + **Notification of a compensation event is a condition precedent to entitlement (*Clause 61.3, NEC3 PSC*).**

Programming, Completion, Key Dates, Defects

- + NEC provides clear and objective requirement for a detailed programme, together with method statements and continuous updates (*Clause 31.1, NEC3 PSC*).
- + Consultant needs to be sure that they have sufficient resources to keep to the programme and manage its administrative burden.
- + Key Dates – *“The Consultant does the work so that the Condition stated in each Key Date is met by the Key Date.”*
- + Option X7 provides for “*Delay Damages*” (i.e. Liquidated Damages) if work not completed by Completion date.
- + Unusual provision to correct defects up to the “*defects date*” set in Contract Data (*Clause 41.1, NEC3 PSC*).



Main Option Clauses – Pricing



- + Option A: Priced contract with activity schedule
- + Option C: Target contract
- + Option E: Time based contract
- + Option G: Term contract



Helpful pointers - <https://www.neccontract.com/About-NEC>

HISTORY

**HOW NEC3
WORKS**

WHY NEC?

**NEC3
DICTIONARY**

GOVERNMENTS

PARTNERSHIPS

ENDORSEMENTS

TESTIMONIALS

NEWS & MEDIA

**NEC EARLY
WARNINGS**

The Project Manager – Role and Duties in ECC

- + Administers the NEC3 ECC and is generally the Employer’s agent.
- + Emphasis on **project management and partnership** - duty is to champion NEC philosophies.
- + Central role and effectively “runs the show”.
- + Duty of impartiality and balancing the interests of the employer and contractor:
 - Issuing instructions;
 - Assessing the amount due;
 - Issuing the Termination Certificate;
 - Maintaining the risk register;
 - Reviewing the Contractor’s design;
 - Monitoring progress; and
 - Assessing compensation events and early warning notices.
- + Role of the Project Manager under an NEC3 ECC may be more complex and onerous than an alternative form.



Costain v Bechtel [2005]



- + Bechtel was the lead party in a consortium appointed as Project Managers for HS1.
- + The contract: *'The Employer, the Contractor and the Project Manager act in the spirit of mutual trust and co-operation and so as not to prevent compliance by any of them with the obligations each is to perform under the Contract.'*
- + Costain concerned that Bechtel administering the contract unfairly and adversely to them.
- + Bechtel argued that the Project Manager was obliged to look after the Employer's best interests and therefore owed no duty to act impartially.
- + Held: Project Manager had duty to **act impartially between the Employer and the Contractor**, and balance interests.

Practical Tips for Project Managers (under NEC3 ECC)

- + Project Manager should be seen as a driver more than an administrator.
- + Not traditional “sort it out at the end” approach.
- + Ensure understanding and awareness of contract mechanisms – i.e. early warning notices and compensation event process from the outset.
- + Use templates/precedent forms – agree a joint approach.
- + Keep track (e.g. a register) and circulate to all parties.
- + Regularly review contentious quotations.
- + Lead the process.



Recent NEC3 Cases – not many!

- + Limited disputes because of the collaborative and risk management nature (and also adjudication).
- + Akenhead J in *Atkins Ltd v Secretary of State for Transport [2013]*: despite the “siren or other voices which criticise [the NEC3] for some loose language” they are “highly regarded” and are seen as “providing material support to assist the parties in avoiding disputes and ultimately resolving any disputes that do arise”.
- + Slight increase in recent years but due to wide use of NEC3 suite.
- + Example cases:
 - *RWE npower Renewables Ltd v JN Bentley Ltd [2014]*;
and
 - *Mears Ltd v Shoreline Housing Partnership Ltd [2015]*.



Conclusion

- + NEC3 most widely used forms in UK market (but not only form).
- + Designed as a management tool and a stimulus to the parties to adopt best practice in project management.
- + Encourages proactive resolution and “*partnership*” – collaboration.
- + Be proactive and ensure you have adequate support; note can be administratively demanding and expensive therefore dedicated resources are required.
- + Act in accordance with the contract – read the contract and stick to timescales.
- + If operated properly there is limited scope for disputes.
- + **Not to be left in the drawer!**



Approaching Webinars: April 2016



- + NEC3 Engineering and Construction Contract.
- + Managing Legal Risks on Construction and Engineering Projects in the Middle East.
- + **Dates to be confirmed and invites will follow soon.**

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