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Construction Law Update: NEC4 Professional Services Contract

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25 July 2017

Introductions

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Webinar Outline

1. Introduction to the NEC4
2. NEC4 – General changes across suite
3. Key features of the NEC4 PSC
4. Main Changes from NEC3 PSC
5. Other Professional Services Contracts
6. Our view on the NEC4 PSC and Conclusions



Any questions?

- + Please raise these as we go along and following the webinar at webinars@Beale-Law.com





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



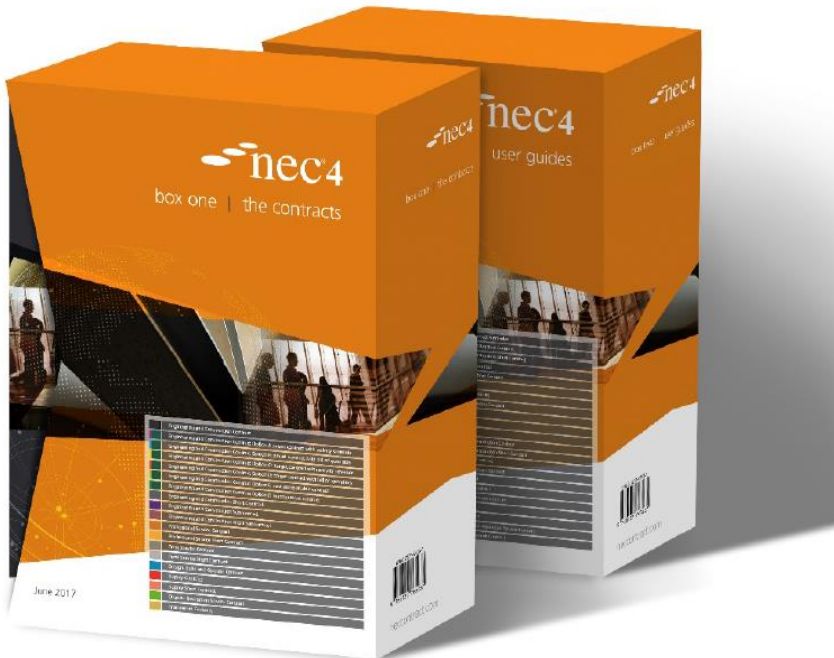
NEC4 – “Evolution not Revolution”

- + 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)

- 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, but the ownership position is a concern

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? Likely to just be the Client...



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)
- Positive changes

+ 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 – significant risk

+ 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
- + Very administrative
- + Ensure your business manages this – to maximise payment entitlement!



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)
- + Beware any widening of Disallowed Costs!
- + Does this payment approach fit in with your business model?



Main Changes in NEC4 PSC - Subcontracting and Termination

- + *Service Manager's* acceptance required for any Subcontractor
- + Additional insurance obligations – very administrative
- + 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



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
- + Not restriction on form of “*undertaking*”
- + Secondary Option Y3.1 (Third Party Rights) now allows classes of *beneficiaries* to be granted third party rights
- + If Option X8 applies:
 - the number of *undertakings* should be limited
 - form of *undertaking* in Scope reviewed
- + If Y(UK)3 applies limit identity and classes of beneficiaries

Other Professional Services Contracts

Other Professional Services Contracts

- + **Professional Services Short Contract** – limited changes
- + **Professional Services Subcontract:**
 - A new form
 - *Conditions of Contract* - similar to PSC
 - “buffers”, e.g. certification two weeks not one week from assessment date (clause 51.1), compensation events to be notified within 7 weeks not 8 (clause 61.3) and final date for payment 14 days from invoice (not 7) (Y(UK) 2.2)
 - Right to terminate - if Main Contract terminates (clause 91.9)
 - BUT no general “back to back” drafting included



Helpful pointers

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

<https://www.neccontract.com/NEC4-Products>

**NEC4:
CONTRACTS**



NEC4: BOOKS



NEC4: TRAINING



**NEC USERS'
GROUPS**



NEC AWARDS



NEC EVENTS



OUR VIEW ON THE NEC4 PSC AND CONCLUSIONS

NEC4 PSC – Conclusion



- + 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 is more administrative than the NEC3
- + **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

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