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NEC4

A closer look at the changes in the ECC

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NEC4: A closer look at the changes in the ECC

At the NEC Users Group Annual Seminar on 22 June, the new NEC4 suite of contracts was launched with much fanfare and praise by members of the ICE, Cabinet Office, industry and naturally, the NEC4 Contract Board and drafting team.

The marketing catchphrases of the day for the new suite were 'improvement through collaboration' and 'evolution, not revolution'. The new suite consequently seeks to build upon the successful features of the NEC3 by taking into account feedback from the NEC users group over the past 12 years. The aim of the majority of the changes in the NEC4 ECC are to better reflect current market practices, provide greater clarity and promote enhanced collaboration and more proactive management of projects.

Whilst the new contracts have now been released, the ICE is not going to publish its practical reference guide covering all the changes between the NEC4 and NEC3 ECCs on a clause-by-clause basis until October this year. We set out below a detailed review of the changes made and cover some of their implications for early users and the extent to which they achieve the ICE's stated aims.



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Section 1

General

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Actions

The new ECC contains a number of minor changes to make the ECC more practical, up to date and consistent with the rest of the NEC4 suite of contracts.

Clause 10.1, which underpins the whole NEC philosophy, has been split into two clauses (clauses 10.1 and 10.2) to give even more emphasis to the duty of the Parties to 'act in a spirit of mutual trust and cooperation'. The normal rules of contractual interpretation and the recent authority on this duty will still apply (see our Law-Now on a recent decision considering the application of this duty [here](#)).

11 / 12

Identified and defined terms / Interpretation

The changes to the definitions and interpretation in clauses 11 and 12 are:

- a new definitions of Corrupt Act has been added along with the associated new anti-bribery provision at clause 18 and new right to terminate under clause 91.8, which brings the new ECC in line with the Bribery Act 2010 and the enhanced anti-corruption protections normally required by clients, although the NEC4 ECC still does not make compliance with statutory requirements a contractual requirement like other standard forms on the basis that this is not needed because such compliance is already required by statute;
- the *Employer* is now the *Client*;
- the definition of Fee has been amended so that there is no longer a separate fee percentage for subcontracted works, which was a confusing distinction and bidders often put in the same percentage anyhow;
- the Risk Register has been renamed the Early Warning Register to reflect the fact it is intended to be used as a project management tool and to avoid confusion with the allocation of risks in the contract, although the content of the 'contract' is still not defined and the lack of clarity as to the scope of the contract documents and the risk of inappropriate documents being included in the contract still remains;
- the definition of Subcontractor has been restricted to omit those Subcontractors carrying out off the shelf design only for Plant and Materials, which provides greater clarity and streamlines administration by negating the need for the *Contractor* to go through the approval process for them although the amendment now makes it even clearer that supply only subcontractors do not fall within the definition and clients will need to consider whether this is appropriate for their particular requirements;
- the Works Information has been changed to the Scope for consistency with the entire suite and market usage; and
- the use of masculine pronouns has been replaced with gender neutral pronouns.

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Communication

Clause 13.1 has been simplified for clarity by consolidating all the different types of communication together. A new clause 13.2 has also been added with gives the Parties flexibility to specify the use of a communication system in the Scope. For example, this could be a drop box or cloud based system. This mitigates the risk of communications being sent to head offices by default where no other addresses have been notified. There is also now an option to specify an email address for communications in the Contract Data. Clause 13.4 has furthermore been made more prescriptive by requiring the *Project Manager* to state his reasons for non-acceptance of a communication by the *Contractor* 'in sufficient detail to enable the *Contractor* to the correct the matter', which promotes closer collaboration and communication between the Parties.

Early warning

There is a new requirement on the *Project Manager* to prepare and issue a first Early Warning Register within one week of the *starting date*. A first early warning meeting must also be held within 2 weeks of the *starting date*. Subsequent early warning meetings are then held as before, but no longer than the interval stated in the Contract Data until Completion of the whole of the *works*. The meetings are consequently automatic now even if a relevant matter is not notified by either party. Subcontractors are further expressly permitted to attend early warning meetings to reflect that they often did anyway in practice. These changes are clearly in line with the ICE's desire to achieve more proactive risk management and closer collaboration between the Parties. However, there is no contractual remedy for the *Contractor* if the *Project Manager* fails to prepare and issue the first Early Warning Register on time or at all.

Contractor's proposals / Acceleration

Two of most significant changes to the new ECC are the *Contractor's* right to issue proposals to the *Project Manager* for value engineering and acceleration. If a value engineering proposal is made to change the Scope (excluding the Scope provided by the *Contractor*) in order to reduce the cost of the *works*, the *Project Manager* has 4 weeks to respond and can reject the proposal for any reason. If accepted, this change to the Scope would be a compensation event and the benefit would be shared between the Parties. In Options A and B, the cost savings would be shared between the Parties in accordance with the *value engineering percentage* under clause 63.12. In Options C and D, the Prices remain the same under clause 63.13 with the Parties potentially sharing in the *Contractor's* share under clause 54. The rationale is that the *Contractor* benefits through being awarded its share and the *Client* benefits through the *works* being delivered for less than the target cost. Clause 16 is limited in its scope as it relates only to value engineering in the context of the cost of the *works*. However, there is an option for the Parties to look at value engineering in the context of whole life costs in Option X21 (see further below).

Value engineering proposals work in parallel with the ability of the Parties to propose an acceleration under clause 36.1 to achieve Completion prior to the Completion Date. In the NEC3 ECC, only the *Project Manager* could propose an acceleration. Now the *Contractor* can also do it. There are also stipulated time periods of 3 weeks for the *Contractor* to provide its proposals and the *Project Manager* to give its reply (before it was just the *period for reply*). If accepted, the acceleration is valued as it was before under clause 36.3.

Requirements for instructions

In clause 17.1, which was previously headed 'Ambiguities and inconsistencies', the *Project Manager* now 'states' (as opposed to 'instructs') how an ambiguity or inconsistency in or between the contract documents should be resolved. This provides greater clarity because the use of 'instructs' was previously confusing in the NEC3 ECC because only an instruction under clause 14.3 could change the Works Information (now Scope). It does however make it clear that any 'statement' by the *Project Manager* under clause 17.1 will not be an 'instruction for the purposes of clause 60.1(1)'; amendments were often made to this effect but contractors in particular should now be aware that it is clear that risk of ambiguities and discrepancies in the contract documents are now clearly theirs.



Section 2

The *Contractor's* main responsibilities

21 Using the *Contractor's* design

The right to the use the *Contractor's* design has been expanded to include other purposes as stated in the contract, not just the Scope. There is also a new requirement on the *Contractor* in clause 22.1 to obtain equivalent rights for the *Client* to use a Subcontractor's design. However, the remainder of this clause is otherwise unchanged requiring the Parties to look to the Scope (and now also the contract as a whole) to see how, if at all, this right has been reduced or enhanced and for which purposes it may be used? This is a clause that will no doubt continue to be amended through Z clauses despite the new enhancements.

26 Subcontracting

The conditions for subcontracting have been broadened. In clause 26.2, in addition to prohibiting the appointment of a Subcontractor that has not been accepted by the *Project Manager*, a Subcontractor must also not be appointed if the *Project Manager* has not accepted the proposed subcontract documents (rather than just the proposed subcontract conditions and/or the proposed contract data in the NEC3) excluding pricing information to the extent they vary from the agreed base form in clause 26.3.

28 Assignment

A new clause has been introduced at clause 28 to permit either party to assign their rights under the contract to another party. The only restriction on this right is that the *Client* cannot assign if the proposed assignee does not intend to act in a spirit of mutual trust and cooperation. This restriction does not apply to a *Contractor's* right to assign, which seems contrary to the NEC's primary philosophy as this omission gives tacit approval to such an assignment by the *Contractor*. Despite the fact that the possibility of a *Client* ever being found in breach of this obligation being very remote, it does not reflect market practice and will likely be amended by the Parties through a Z clause.

29 Disclosure

A new clause 29 has been incorporated to restrict the disclosure of confidential information by the Parties relating to the *works* except when necessary to carry out their duties under the contract or with the *Client's* agreement. As with the assignment, whilst this clause attempts to fill a glaring omission in the NEC3 ECC, it does not reflect market practice and will likely be amended by the Parties through a Z clause.



Section 3

Time

31

The programme

The NEC's programme requirements have always been quite extensive. There is now a new requirement in clause 31.1 that the original programme issued for acceptance must be in the form stated in the Scope which provides the opportunity for greater clarity as to the acceptability of the programme. The biggest change though is in clause 31.3, where there is deemed acceptance now of the original programme submitted by the *Contractor* in the event that the *Project Manager* does not notify acceptance or nonacceptance within 2 weeks subject to the *Contractor* notifying the *Project Manager* of this failure and such failure then continuing for another week. There is also no longer a requirement on the *Contractor* to show the effects of implemented compensation events in each revised programme. In the NEC3 ECC, some considered that this requirement meant notified but unimplemented compensation events did not need to be included in revised versions of the programme. However, this deletion now leaves it possible for the effect of compensation effects: (i) implemented and; (ii) notified but unimplemented, to be excluded from the programme, which seems a backwards step by the ICE.

34

Instructions to stop or not to start work

The *Project Manager* now has a right to expressly omit work from the Scope under clause 34.1 following an instruction to suspend the *works*, which will continue to be valued in the usual way as a compensation event under clause 60.1(4) unless the instruction arose from a fault of the *Contractor*. If the *Project Manager* does not give an instruction to start or restart the relevant work (as before) or - now - to remove the relevant work from the Scope, within 13 weeks from the instruction to suspend, the Parties can terminate the *Contractor's* obligation to Provide the Works under clause 91.6.



Section 4

Quality management

40

Quality management

A new clause 40 has been added requiring the *Contractor* to submit a quality policy statement and a quality plan to the *Project Manager* for acceptance. The *Project Manager* does not have to accept either if it does not allow the *Contractor* to Provide the Works and can instruct the *Contractor* to correct a failure to comply with the quality plan, which is not a compensation event. However, unlike the rest of Section 4 of the ECC, this acceptance procedure must be operated by the *Project Manager* rather than the *Supervisor*. The reasoning for this is unclear and in practice, it is the *Supervisor* who will likely discover any such non-compliance by the *Contractor*. As such, the *Project Manager* and *Supervisor* will need to closely cooperate in monitoring the *Contractor's* compliance with the quality policy statement and quality plan. This change brings the ECC in line with the PSC, which had a similar requirement in the NEC3.

41

Test and inspections

In clause 43.1, the obligation on the *Contractor* and *Supervisor* to 'notify' each other of their tests and inspections has been changed to 'inform'. The ICE's reason for this is that this is a more practical way of communicating and reduces the administrative burden on the Parties.



Section 5

Payment

The NEC3 contained a number of payment anomalies that were not in accordance with market practice. One was that the *Project Manager* assessed the amount due without the *Contractor* first issuing an application for payment. Another was the lack of a traditional final account procedure. The NEC4 ECC has addressed both of these. However, the difficulties in aligning Section 5 and Option Y(UK)2 still remain.

50.2/50.4/ 50.9

Assessing the amount due

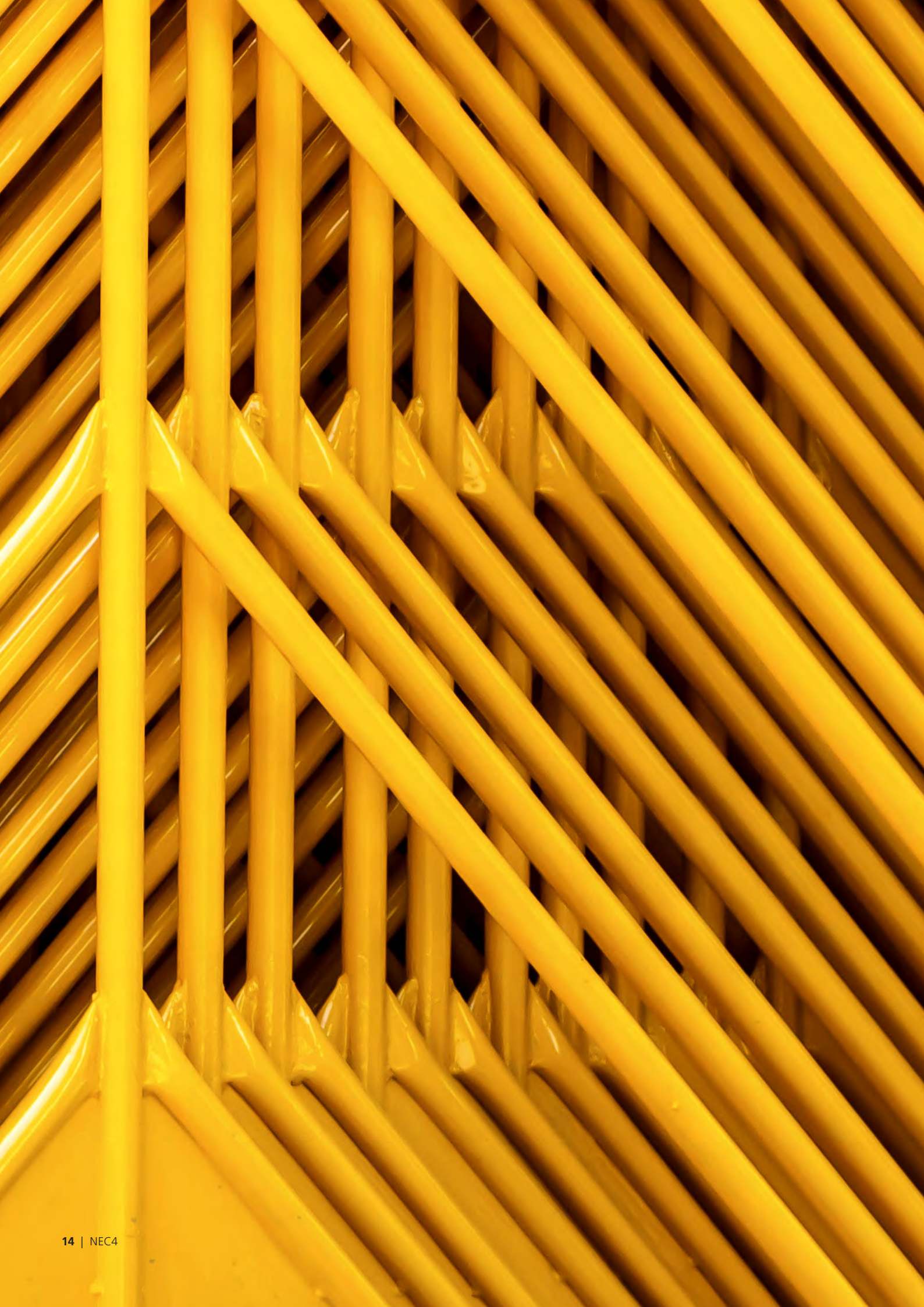
Under a new clause 50.2, the *Contractor* has to submit an application for payment to the *Project Manager* before each assessment date. The *Project Manager* has to consider this application if it is submitted before the assessment date. If the *Contractor* does not do this, the amount due is the lesser of the *Project Manager's* assessment and the amount due at the previous assessment date under clause 50.4: a strong incentive on the *Contractor* to submit the application.

In the cost based contracts (main options C, D, E and F), there is a new clause 50.9 under which the *Contractor* notifies the *Project Manager* when the Defined Cost is ready for review. The *Project Manager* then reviews the records made available within 13 weeks and either accepts the *Contractor's* notification or advises of any errors. If the *Project Manager* wants more information, the *Contractor* re-submits such information within 4 weeks. The sanction for the *Project Manager's* non-compliance is that the Defined and Disallowed Costs are deemed accepted, which encourages the Parties to assess such costs regularly as the *works* proceed and not to defer the exercise until the *works* have been completed. This also protects the *Contractor's* cash flow by preventing the *Project Manager* from disallowing costs well after the event. However, unlike other deemed acceptance procedures in the NEC4 ECC, there is no additional notice requirement for the *Contractor* to notify the *Project Manager* of its failure before it is deemed accepted. This procedure will consequently need to be carefully administered by *Project Managers*.

53.1/53.2/ 53.3

Final assessments

There is also a new requirement for the *Project Manager* to issue its final assessment of the payment due to the *Contractor* within four weeks of the Defects Certificate (which was similar to clause 50.1 in the NEC3 ECC) or 13 weeks after a termination certificate under clause 53.1. The *Client* then pays within 3 weeks if agreed. If the *Project Manager* does not make its final assessment in time, the *Contractor* can issue its own final assessment under clause 53.2. The final assessment becomes conclusive evidence of the final amount due under or in connection with the contract if not challenged by the Parties and referred to dispute resolution within four weeks of it being issued under clause 53.3.



Section 6

Compensation events

60

Compensation events

Two notable additions have been made to the list of compensation events. The first is a new event at clause 60.1(20) entitling the *Contractor* to claim its cost of preparing quotations for a proposed instruction, which are not accepted by the *Project Manager*. This will be very welcomed by contractors who have previously had to commit time and resource to prepare such quotations without being able to recoup these from the *Client*. It will also stop *Clients* and *Project Managers* from abusing this procedure now that there is a cost and time consequence to asking for quotations, which are then not accepted. However, savvy clients will look for lower *fee percentages* from contractors as a result.

The second is that additional compensation events may now be added by the *Client* in the Contract Data Part One in accordance with clause 60.1(21). This addition is intended to give the Parties greater flexibility to add additional compensation events without the need for Z clauses or adding to the list of *Client* risk events. However, such greater flexibility should not be at the expense of careful consideration and advice as may be required.

61.1

Notifying compensation events

The requirements for notifying compensation events have been simplified in clause 61.1 so that the *Project Manager* only has to issue a single communication recording both the instruction, notification, certificate or change of an earlier decision and the associated compensation event. However, the drafters of the NEC4 ECC do not appear to have fully achieved their aim because the definition of 'notification' in clause 13.7 provides that any 'notification' must be a separate communication. For this streamlined procedure to operate as intended, clause 13.7 will need to be amended to exclude the notification in clauses 61.1 and 61.2.

The time period for notifying a compensation event has also been extended in clause 61.7 from the *defects date* to the issue of the Defects Certificate (see clause 44.3).

63.1

Assessing compensation events

Clause 63.1 introduces the concept of a 'dividing date' for assessing compensation events. If a compensation event arises from a communication of the *Project Manager* or the *Supervisor*, the 'dividing date' is the date of that communication. For all others, it is the date of the notification of the compensation event. The dividing date determines the period during which actual Defined Cost (before the dividing date) and forecast Defined Cost (after the dividing date) is used to assess a compensation event.

The concept of forecasting Defined Cost for the purpose of assessing compensation events has recently been challenged in a Northern Irish case involving an NEC3 PSC. Where compensation events are being assessed (or reassessed) after the *works* in question are completed, the court concluded that an assessment should proceed by

reference to the best information available as to the actual costs and time incurred as a result of the compensation event rather than by way of a genuine forecast (for our Law-Now on this case, see **here**). It remains to be seen whether this decision will be followed in England and, if it is, whether the introduction of the new 'dividing date' concept will be sufficient to overcome it.

Delays are now assessed under clause 63.5 by reference to the Accepted Programme current at the 'dividing date', which seeks to clarify best practice. The starting point is therefore the Accepted Programme. In making the assessment, only those operations which the *Contractor* has not completed and which are affected are changed under clause 9 63.5. This is a factual test according to the ECC's user guide. Accordingly, if the relevant Accepted Programme shows an operation as complete at the assessment date, but which is not, then this needs to be considered when assessing the impact of the compensation event. The converse applies for operations which are not complete on the relevant Accepted Programme, but which are as a matter of fact at the assessment date.

Section 7

Title

74

The *Contractor's* use of material

A new clause 74.1 has been added giving the *Contractor* the right to use material provided by the *Client* only to Provide the Works. This right is also available to Subcontractors.



Section 8

Liabilities and insurance

Section 8 has been significantly revised and renamed to better clarify and reflect the intent of these provisions and market practice and to address insurers' concerns. References to 'risks' have been changed to 'liabilities' throughout.

80.1 *Client's liabilities*

A new '*Client liability*' has been added in clause 80.1 in respect of loss of or damage to property owned or occupied by the *Client* other than the *works* unless such loss or damage arises from or in connection with the *Contractor* Providing the Works.

80.2 *Contractor's liabilities*

The *Contractor's* liabilities, rather than just being all other liabilities save for the *Client's* liabilities, are now specified in clause 81.1 as:

- claims and proceedings from Others and compensation and costs payable to Others which arise from the *Contractor* Providing the Works to the extent these are not *Client* liabilities;
- loss of or damage to the *works*, Plant and Materials and Equipment;
- loss of or damage to property owned or occupied by the *Client* arising from the *Contractor* Providing the Works; and
- death or bodily injury to the employees of the *Contractor*.

This exhaustive list will be welcomed by contractors for greater certainty, but may not go far enough for some clients.

In addition, the risks of damage being caused to the *Client's* property through the carrying out of the *works* is still therefore the *Contractor's* risk (and is still expected to be covered under the *Contractor's* third party liability policy – which is still required to be in joint names) albeit that the ability to cap such liability is retained in Option X18; where contractors are carrying out *works* in existing structures, therefore, this is still no doubt an area which they will need to review carefully.

82 *Recovery of costs*

The general cross-indemnity at clause 83 in the NEC3 ECC has been deleted in line with current market practice and the questionable enforceability of such a wide-ranging indemnity. This has been replaced with a recovery of costs provision in which each Party is liable to the other for events for that they are liable for. Whilst striving for brevity in clauses 82.1 and 82.2, there is some uncertainty over who the Parties are actually paying the other Party or Others? The NEC4 ECC user guide clarifies this as the other Party, but in aiming to produce an easily understood contract, the drafters of the NEC4 ECC should have stated this in these core clauses. Further, there is no procedure for when the *Contractor* will reimburse the *Client* under clause 82.1. This is likely to be unsatisfactory for clients because in the absence of an express time period, the default position is within a reasonable time period. If the *Client* is liable for the event, the *Client* will pay the *Contractor* as stated in clause 82.2, but in accordance with the compensation event procedure (see clause 60.1(14)).

Insurance cover

A new clause 83.1 has been added indicating which of the insurances (if any) the *Client* is to provide as stated in the Contract Data, which was added for clarity and to reflect what was happening in practice.

Insurance policies

Under clause 84.1 (previously 85.2), the parameters for the *Project Manager* accepting an insurance certificate has been reversed from a negative criteria of not complying with the contract to a positive one of accepting if the insurance complies with the contract and if the insurers financial covenant strength is strong enough to meet the insured's liabilities. This placing of a positive obligation on the *Project Manager* to accept if certain criteria are met is unlike other acceptance procedures in the new ECC.

The waiver of subrogation in clause 84.2 has also been extended to include the Parties (not just directors and other employees as before), and the provision previously in clause 85.4, providing that any amount not recovered from an insurer is borne by the Parties according to their respective risks, has been deleted. It is also worth noting that the waiver of subrogation does not extend to subcontractors. The presence of clause 85.4 and the absence of a reference to the Parties in what is now clause 84.2 was relied upon in a Scottish case under the NEC3 ECC to find that the insurance provisions did not displace the Parties' primary liability under the contract for insured events. In light of the changes made in the NEC4 ECC, and a subsequent Supreme Court decision on this topic, that conclusion will need to be considered afresh. For our Law-Nows on this Supreme Court decision and the earlier Scottish case, please see [here](#) and [here](#).

Section 9

Termination

90.3

Termination

A new provision has been inserted enabling the *Client* to not make a certified payment which is unpaid at the date of the termination certificate, if the *Client* terminates due to the *Contractor's* insolvency or default unless otherwise stated in the contract. However, for projects in the UK, this right is restricted to just terminations arising from the *Contractor's* insolvency and subject to the issuing of a pay less notice under Option Y2.4; it should also be noted that this provision applies only after termination and not simply following insolvency.





Section 10

Resolving and avoiding disputes

Options W1, W2 and W3

A new tiered-dispute resolution procedure has been inserted into Options W1 and W2. In short, this provides for a four-week negotiation period between nominated Senior Representatives as the first formal step to resolving a dispute. This step is mandatory for international projects and optional for projects in the UK due to the right to adjudicate at any time under the Housing Grants, Construction and Regeneration Act 1996. The biggest change though to these options is the introduction of a new Dispute Avoidance Board option for international projects similar to the DAB in FIDIC contracts. For more detailed guidance on the procedures and changes in Options W1, W2 and W3, see **here**.

Secondary Options

The NEC4 has introduced more secondary options to give the Parties more tools to pro-actively manage the contract, as well as made a number of other changes to the existing secondary options.

X1

Price adjustment for inflation (used only with options A, B, C and D)

X1.1 – Defined Terms

In paragraph (c), the Price Adjustment Factor (PAF) definition has been clarified as that being at each date of assessment.

X1.2 – Price Adjustment Factor

Under the NEC3 ECC, if either the Base Date Index or the Latest Index changed after having been used in calculating the PAF, the calculation was repeated and a correction made in the next assessment of the amount due. However, under the NEC4, there is no change in the calculation in such an event for simplicity.

X1.3 / X1.4 – Price adjustments

The different price adjustments for Options A and B and Options C and D have been split into separate options for clarity.

X1.5 – Compensation events

Defined Cost assessments (aside from those at base date levels) are now calculated by reference to the dividing date used in assessing the compensation event in line with the change to clause 63.1.

X2

Changes in the law

The *Project Manager's* options to notify the *Contractor* of a compensation event for a change in the law and to instruct the *Contractor* to submit quotations in respect of this compensation event have been deleted for simplicity, as this is already covered in clauses 61.1 and 61.2.

X4

Ultimate holding company guarantee

This secondary option has been renamed the 'Ultimate holding company guarantee'. It follows that the *Contractor* is now required to provide a guarantee from its ultimate holding company instead of an intermediary parent company. However, there is a new alternative for the *Contractor* to propose a guarantee from an intermediary parent company, but this can be rejected by the *Project Manager* if the commercial position of the alternative guarantor is not strong enough to carry the guarantee. These amendments will be welcomed by clients, but perhaps do not go far enough by omitting to give the *Project Manager* the right to reject for other reasons such as the location of the alternative guarantor.

X8

Undertakings to the *Client* or Others

This is a new secondary option for the provision of collateral warranties (referred to as 'undertakings' to make the NEC4 more internationally marketable) from the *Contractor* to Others and its Subcontractors to the *Client* and Others as stated in the Contract Data. This was a glaring omission in the NEC3 ECC that was always amended by clients. This also makes the NEC4 ECC more geared towards the building market. However, no standard forms of collateral warranties have been prepared by the ICE. The Parties must consequently still prepare and agree on the forms they will use. Alternatively, the Parties can still use third party rights under Option Y(UK)3 (see below).

X9

Transfer of rights

This new secondary option has been introduced to give the *Client* the option to own the rights over the material prepared by the *Contractor* and its Subcontractors for the design of the *works*. This is in contrast to the copyright licence already granted to the *Client* under clause 22.1 to use and copy the *Contractor's* and Subcontractors' designs for any purpose connected with the construction, use, alteration or demolition of the *works* (unless stated otherwise in the Scope) and for the other purposes stated in the contract. This amendment seems tailored for the international market where the transfer of such rights is more commonplace in certain jurisdictions.

X10

Information modellings

A new secondary option for the use of Building Information Modelling (BIM) has been incorporated. Users of the NEC3 ECC will recall that previously, the ICE produced Z clauses to incorporate the use of the CIC BIM Protocol. However, in the NEC4 ECC, issues pertaining to the Information Model, ownership of information and the liability of the Parties in respect of the Information Model are expressly set out in this secondary option. The extent to which parts of the CIC BIM Protocol are still used or bespoke procedures adopted instead will need to be agreed by the Parties and set out in the Scope when this secondary option is used, in particular for public sector projects in the UK.

X11

Termination by the Client

The right for the *Client* to terminate the contract for any reason has been removed from clause 90.2 and added as a new secondary option. This change will be appreciated by contractors who disapproved of the automatic inclusion of a termination at will right for the *Client* in the core clauses.

X12

Multiparty collaboration (not used with Option X20)

This secondary option has been renamed 'multi-party collaboration' from 'partnering' to better reflect its intent. The definition of 'Partners' has also been expanded in Option X12.1(1) to include those parties who have a contract in connection with the subject matter of the contract.

X14

Advanced payment to the Contractor

The timing in which the advance payment will be made has been changed in Option X14.1. Under the NEC3 ECC, the *Employer* had to pay it within 4 weeks after the Contract Date or within four 4 weeks of the later of the Contract Date and the provision of the advanced payment bond. In the NEC4 ECC, the amount is now included by the *Project Manager* in the assessment made at the first assessment date or the next assessment date after the *Client* receives the advanced payment bond. Following this assessment, it is then paid as normal. This change simplifies the payment procedures by aligning it with the usual assessment process and gives the Parties flexibility to determine when this payment will be assessed through the fixing of the *assessment interval*.

X15

The Contractor's design

One of the biggest criticisms of the NEC3 ECC was that it did not provide for a design and build option within the *conditions of contract*. Instead, the *Contractor's* design responsibilities were to be set out in the Works Information. However, as this is such a key risk allocation between the Parties, it was commonly dealt with by way of Z clauses. This secondary option has consequently been renamed and amended and expanded as follows:

- the *Contractor's* standard of skill of care for its design obligations has been amended so that its design compliance with the Works Information is no longer expressly required, although compliance with the Scope is still required under clause 20.1 and there is no priorities clause, so fitness for purpose issues may still arise (see our Law-Now on a recent Supreme Court decision considering such obligations [here](#)),
- the standard required in relation to such design has been adjusted to 'professionals designing works similar to the *works*' rather than that of contractors. Nonetheless the burden of proof would still appear to be on the *Contractor* to show that it did use the requisite degree of skill and care in relation to the design;
- the *Contractor's* right to use the material it provides under the contract for other work unless ownership has vested in the *Client* (see Option X9 above) or it is otherwise stated in the Scope has been added;
- the *Contractor's* obligation to retain copies of design documents for the period for retention has been added; and
- professional indemnity insurance requirements have been added.

Whilst Parties may find some of these changes useful, the amended skill and care and professional indemnity insurance requirements in particular do not go far enough to satisfy the requirements of most clients. Further, the main problem of allocating the *Contractor's* design responsibility in the Scope has not been addressed. Therefore, in contracts where the *Contractor* agrees to take full design responsibility for the *works*, Z clauses will still be utilised by the Parties for clarity.



X16

Retention (not used with Option F)

A new Option X16.3 has been added for the *Contractor* to provide the *Client* with a retention bond instead of a retention if agreed by the Parties. The *Project Manager* may reject the proposed bank or insurer if its commercial position is not strong enough to carry the bond (see above comments for Option X4).

X18

Limitation of liability

A new Option X18.1 has been included to clarify that if any limits to the *Contractor's* liability are stated in the Contract Data for this secondary option, then such limits apply. This has been added for clarity and to head off arguments where the Contract Data has been drafted with inconsistencies between sections 1 (General) and X18 (Limitation of Liability).

X21

Whole life cost

As noted above, this new secondary option has been added to allow the *Contractor* to make a proposal to change the Scope in order to reduce the cost of an asset over its lifecycle. The *Project Manager* can give any reason for not accepting the proposal under Option X21.3 and there is no deemed approval sanction if the *Project Manager* does not respond within the *period for reply*. If the *Contractor's* proposal is accepted, the *Project Manager* changes the Scope, the Prices, the Completion Date and the Key Dates accordingly and accept the revised programme, but the change to the Scope is not a compensation event under Option X21.5.

X22

Early Contractor involvement (used only with Options C and E)

The Z clauses previously published by the ICE for early contractor involvement in 2015 have now been directly incorporated as a new secondary option. ECI permits the *Client* to appoint the *Contractor* at an early stage to input into the design process to innovate and eliminate risks to achieve better cost and time certainty for the *works*. However, this does not provide a framework for instructing enabling works, which would need to be done under a separate enabling works contract.

Y(UK)2

The Housing Grants, Construction and Regeneration Act 1996

Option Y2.2 has been amended to accommodate the new final account procedure by setting out the dates in which the final payment becomes due and aligning this with the default notice procedure in the HGCR 1996. A new Option Y2.4 has also been added to give the *Client* a right to not make a certified payment following termination due to reasons:

- R1 to R15, R18 or R22 if it has issued a valid pay less notice; or
- R1 to R10, if such reason occurred after the last date in which it could have issued a valid pay less notice, in line with the HGCR 1996.

Y(UK)3

Contracts (Rights of Third Parties) Act 1999

This secondary option has been amended for flexibility so that beneficiaries of third party rights do not have to be named specifically in the Contract Data at the time the Parties enter into the contract. Instead, they can be identified by class or description in the Contract Data in line with the C(RTP)A 1999 with the specific names subsequently notified by the *Client* to the *Contractor* once they become known.

Schedule of Cost Components (SCC)

The NEC4 ECC has removed the need for two cost schedules to be used in administering the different main options. The SCC consequently now applies only for main Options C, D and E and the Shorter Schedule of Cost Components (SSCC) no longer applies to these main options. This means that Defined Cost and compensation events are both determined and assessed for payment respectively by reference to the SCC for main Options C, D and E for simplicity. The same is true for the SSCC and main Options A and B, but only in relation to the assessment of compensation events.

People

In item 1, the rule for people's wages have significantly changed so that if a person's normal place of work is within the Working Areas, their time spent working 'on this contract' will be included within Defined Cost as opposed to just their time spent within the Working Areas to accommodate more flexible working practices. In item 12, these payments made to people (eg. bonuses, overtime, absence due to sickness, etc.) have been clarified as those payments only relating to work on the contract. In item 13, the payments for these benefits has been qualified as those payment made in accordance with people's employment contracts. Payments made to people for meeting the requirements of the law in sub-item (i) has been replaced with a narrower item of contributions, levies or taxes imposed by law. The item of medical aid at sub-item (m) has also been expanded to include health insurance.

Equipment

In item 2, the clarification that the cost of Equipment included the 'cost of accommodation but excluding Equipment cost covered by the percentage for Working Areas overheads' has been deleted (see below comments in Charges regarding Working Areas overheads).

Subcontractors

Subcontractor costs have been moved across from clause 11.1 into the SCC in items 4 and 41. The *Contractor* can recover as part of its Defined Cost all payments made to Subcontractors for work they carry out without taking into account amounts paid or retained for such things as retention, uncorrected Defects and Key Dates in the ECC which could result in the Client paying for these twice. This principle is more generally stated in the NEC4 ECC compared to the exhaustive list of such items in the definition of Defined Cost in the NEC3 ECC, which gives greater flexibility to the operation of this provision.

Charges

Telephone and internet charges have been added to item 51. Buying or leasing buildings with the Working Areas has also been added to item 53(b), but specialist services has been deleted from sub-item (h). More crucially, charges for the Working Areas overhead costs calculated by reference to the percentage for Working Areas overheads has been deleted from old item 44. These must now be claimed as individual cost items in the SCC. Payments made for the removal from Site and disposal or sale of materials from excavation or demolition has further been added at item 54.

Manufacture and fabrication

New rates for time spent by people manufacturing and fabricating Plant and Materials outside the Working Areas has been added in item 61 and replaces the previous hourly rates for the categories of employees listed in the Contract Data and the amount for overheads in old item 52.

Design

New rates have also been inserted for people in the Contract Data who have spent time on the design of the *works* and Equipment outside of the Working Areas in item 71. This replaces the previous hourly rates for the categories of employees listed in the Contract Data and the amount for overheads in old items 6 and 62.

Short Schedule of Cost Components

The changes to the SSCC follow those made to the SCC save for those described below.

People

Item 11 has been amended so that the *Contractor* only has to justify the time people spent in the Working Areas to recover these payments at the People Rates, but the right of the *Contractor* to recover amounts paid for meeting the requirements of the law and for pension provisions has been deleted.

Subcontractors

Since the SSCC is only used to assess compensation events, there is no similar double-recovery prohibition in new item 4.1 to that in the SCC.

Conclusion

Whilst the NEC4 ECC is stated to be an evolution and not a revolution, it does contain a large number of amendments (as evidenced by this note) that users will need to become familiar with to administer this new contract effectively. The NEC4 ECC is a step in the right direction, but for many it will not go far enough in some areas to address certain perceived deficiencies in line with common project requirements and current market practices. The drafters of the NEC4 ECC acknowledged during its launch that it is not perfect and that they will continue to improve the ECC through consultation and feedback from the NEC Users Group. Users of the NEC4 ECC will consequently have to carefully consider whether the new changes are appropriate and sufficient for their needs on a project by project basis.

Conclusion

Whilst the NEC4 ECC is stated to be an evolution and not a revolution, it does contain a large number of amendments (as evidenced by this note) that users will need to become familiar with to administer this new contract effectively. The NEC4 ECC is a step in the right direction, but for many it will not go far enough in some areas to address certain perceived deficiencies in line with common project requirements and current market practices. The drafters of the NEC4 ECC acknowledged during its launch that it is not perfect and that they will continue to improve the ECC through consultation and feedback from the NEC Users Group. Users of the NEC4 ECC will consequently have to carefully consider whether the new changes are appropriate and sufficient for their needs on a project by project basis.



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