



NEC4. So, what's changed?

GARY COWARD – ASSOCIATE DIRECTOR, DRIVER TRETT UK IDENTIFIES SOME OF THE KEY CHANGES IN THE FOURTH EDITION OF THE NEC FORM OF CONTRACTS, ALMOST A QUARTER OF A CENTURY AFTER IT WAS FIRST INTRODUCED.

Since its first publication in 1993, revised in 1995, with the third edition issued in 2005, the use of the NEC suite of contracts has continued to grow and is now the contract form of choice for nearly all government projects in the UK.

Following responses from industry and twelve years of learning, on 22 June 2017, the NEC released the fourth edition with its objectives to, “inspire an increased use in new markets; provide greater stimulus to good management; and support new approaches to procurement that improve contract management”.

This article summarises some of the key changes.

New forms of contract

There are four new forms of contract:

- Design build and operate (DBO) form of contract.

The incorporation of this new contract provides an indication of the increasing popularity that the NEC contract is gaining internationally, where traditionally there is a greater demand for DBO contracts. This contract will be an alternative to the FIDIC Gold book.

- Alliancing form of contract (currently in consultative form).

This is a multi-party contract that is for use on large and complex projects. It is a cost reimbursable contract which is based upon an integrated risk and reward model.

- Professional services subcontract.

This will be used on the more complex services procurement projects, where sub consultancy arrangements are required.

- Term services subcontract.

Similar to the professional services subcontract this is seen as a welcome

addition to the NEC suite. Used for the appointment of a subcontractor, for a period of time, to manage and provide a service where the contractor has been appointed under an NEC4 main contract.

Terminology

There appears to have been a desire by the NEC to modify terminology to an existing recognised industry standard. However, I would suggest that appears to have been only partly successful when you read the first two bullet points below, for example.

- Employer is now the Client. Other forms of contract such as JCT and FIDIC use the term Employer!
- The term “undertakings to others” (secondary option clause X8) is used with reference to collateral warranties!
- Risk Register is now Early Warning Register. This aligns with clause 15 and will hopefully eliminate potential confusion with other project risk registers that may exist. Time intervals for Early Warning meetings are now to be stipulated in the Contract Data. In practice this has been happening, but has now been formalised.
- Works Information (clause 11.2(19)) is now the Scope (c 11.2(16)).
- Core clause 4 - Testing and Defects is now Quality Management.
- Core clause 8 - Risks and Insurance is now Liabilities and Insurance.
- A change to gender neutral. For example references to ‘he’ have been replaced by ‘it’.

Contract changes

- A new paragraph has been added to clause 31.3 (the Project Manager’s (PM) acceptance of the programme) whereby a Contractor can seek deemed acceptance of the programme if the PM fails in his obligations to notify acceptance or non-acceptance. It is suggested that this has been introduced to deal with the consequence of the PM’s failure to act in accordance with his obligations. It is hoped that this will encourage the PM to respond to the programme submission, resulting in a realistic programme that can be used as a good management tool and also reduce the number of disputes relating to which programme should be used for the evaluation of time impacted compensation

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events.

- The Schedule of Cost Components (SCC) has been rationalised with the use of only one version (full or short) for each contract. There is now only one fee percentage applied to Defined Cost eliminating the arguments of Fee on Fee. For example, the mis-application of subcontract and direct fee percentages. The application of a fee percentage for Working Area overheads and People overheads has been removed, with the relevant items being paid as Defined Cost. Subcontractor costs have also been moved into the SCC. The intention is to make the whole process of establishing cost, and the compilation of Defined Cost and compensation event quotations, more straightforward. There should now be less confusion of where certain costs have been included.
- The Contractor now has to submit an application for payment (clause 50.2) otherwise they won’t get paid. In practice this is simply formalising something that already happens, but was silent in NEC3.
- Progressive agreement of Defined Cost (clause 50.9 with Options C to F). This is a Contractor led process enabling it to periodically close out its Defined Cost, an example being its completed subcontractor accounts. This will require an increased level of effort to keep on top of cost records throughout the project. The aim is to encourage progressive agreement and eliminate the quarrelsome audit on disallowed costs months after the project has been completed. The PM has “no later than thirteen weeks” to review.
- Final assessment. The PM assesses and certifies the final amount due “no later than four weeks” after issue of the Defects Certificate (clause 53.1). Failure to do so, will allow the Contractor to issue its assessment (clause 53.2). This is to be “conclusive evidence” (final and binding) unless referred to a dispute by either party within four weeks. The contract uses the word “refers” rather than “notify” to dispute resolution, therefore should the parties fail to agree they will need to have all their documentation ready and in good order, as four weeks to draft a referral may be a challenging time frame. Having said that, this final assessment should be a relatively simple process if the parties have progressively agreed Defined Cost

during the life of the project, as is the intention of NEC4.

- Compensation Events. Two new events have been added. Clause 60.1[20] where the PM notifies that a proposed instruction is not accepted. This new clause enables the Contractor to recover its cost of preparing the quotation. Clause 60.1[21] includes for additional compensation events to be agreed between the parties and stated in clause 6 of the Contract Data.
- A new clause 16 introduces the option to share a saving resulting from a Contractor value engineering proposal. This is stated as 50% in the Contract Data but can be agreed. This applies only to an Option A and B contract (clause 63.12), as the cost savings are shared with an Option C for example. Worthy of note is that the costs of preparing quotations in Option A and B contracts are now also permissible.
- A new main option clause W3 for the use of a Dispute Avoidance Board on projects where the Housing Grants Construction and Regeneration Act (HGCRA) 1996 does not apply. This is seen by many as a step towards making the NEC a rival to FIDIC on the international scene.
- Clients can now only terminate “at will” if secondary option X11 is included, as opposed to clause 90.2 in NEC3 “may terminate for any reason”.

Other new clauses

Other new clauses incorporated into NEC4:

- 18 – Corrupt Acts. Client may also terminate under new clause 91.8.
- 28 – Assignment.
- 29 – Disclosure.
- X8 – Undertaking to others.
- X10 – BIM.
- X21 – Whole life cost.
- X22 – Early Contractor Involvement.

So, what’s changed?

In truth, not a great deal. NEC4 will feel and operate in much the same way as NEC3. There are changes to processes, some subtle, some not so subtle. The NEC refer to it as “evolution not revolution”. For the changes to bring about the improvements sought by the NEC, all users should take the time to have a look at NEC4.

Oh, and a bit of advice, you might also want to start updating those Z clauses. ■