An aerial photograph of a city, likely New York City, with a red overlay indicating construction sites. The overlay covers various areas, including a large section of the city's center and a large area along the waterfront. The text is overlaid on a semi-transparent blue rectangle in the center of the image.

Construction NEC Directory

NEC4 Supplement

New Terminology

4

The main theme of NEC4 is that it represents an evolution rather than a revolution in thinking...

References to project participants as him and his actions are now stated in a neutral voice...

The main theme of NEC4 is that it represents an evolution rather than a revolution in thinking. Many of the changes are therefore updating and adjusting to approach and terminology of the NEC from 2005, when the third edition was published, to 2017. There are four key changes that become apparent early on in reviewing NEC4:

Employer → Client. This is a change really in form rather than substance. It brings the suite of contracts in line with now a single term being used. It also adds to the ease of international understanding of the NEC.

Works Information → Scope. This is again mostly form rather than substance. The term scope becomes common through the suite of contracts and is a more widely recognised industry term. The use of Scope rather than Works Information makes the contract easier to adopt internationally where most of those involved readily understand what is intended by the Scope.

Risk → Early Warning. The risk register has now become the early warning register. This should help with the confusion between an NEC risk register managed by the Project Manager and a more general project risk register which most parties maintain separately.

Gender neutral. This is a small change, again in form more than substance, but is to be greatly welcomed nonetheless. References to project participants as him and his actions are now stated in a neutral voice.

The use of scope rather than works information makes the contract easier to adopt internationally...

New Contracts

4

The NEC suite has expanded again under the fourth edition to incorporate a design, build operate (DBO) contract and an Alliance contract (currently consultative)...

The NEC suite has expanded again under the fourth edition to incorporate a design, build, operate (DBO) contract and an Alliance contract (currently consultative). These are both intended to reflect the modern market place demands on the NEC suite and also to improve its popularity and usage outside the UK.

The DBO contract is intended to focus first on the operation of an asset with the design and build being the enabling phase to the operation. Where the operational phase may be 10 – 20 years, using that as the focal point for the contract is appropriate. While it is possible to achieve a similar outcome by “bolting together” a construction form and a term service contract from the NEC suite, it does not work as well as bringing it all rights and obligations together in one contract. There does however remain a question mark over why, having reached DBO, a financing option was not also provided, even if by way of secondary option (see X – X Clause).

The Alliance contract is intended to be a more fully formed multi-party partnering contract than the standard NEC form, even with the use of X12 (now called multiparty collaboration). The Alliance contract should bring together, under a single contract, all of the key stakeholders for the project. This can carry many advantages from allowing more direct access through the delivery team to an enhanced ability for the parties to the alliance to resolve problems themselves.

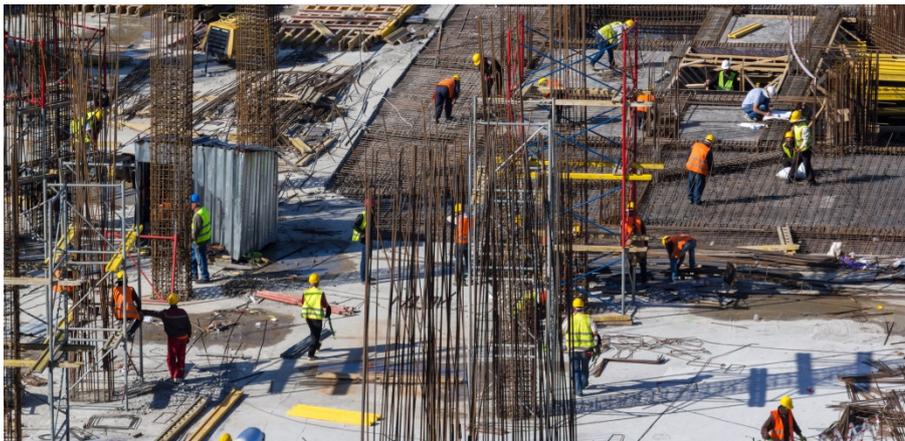
The DBO contract may fall a little behind where other more established forms of the type (FIDIC Gold for example) sit and the Alliance contract is only in consultation. However, the response to market demand is encouraging.



...the response to market demand is encouraging...

Programme

4



The programme has always been a central feature of the NEC suite and a key distinguishing feature between the NEC and other standard forms. Despite the very significant management and project controls feature the Accepted Programme has proven to be there have been a small number of criticisms over how it operates in practice.

The first, and smaller, point was that in the third edition there was specific reference to implemented compensation events being shown on the Accepted Programme. Some had taken this to mean notified but unimplemented compensation events did not need to be shown. There is now no specific requirement relating to compensation events in clause 32 which defines what must be shown in updating the Accepted Programme. There remains a concern that some will take that change to suggest that no compensations should be shown.

The larger change is at clause 31.3. This now provides that if the Project Manager does not answer a programme submission, the programme will be accepted by default. As with the default mechanisms in the compensation event clauses there is a requirement to notify the Project Manager of his failure first.

While many commentators have been calling for this for change a number of years (particularly following the deemed notification and quotation for compensation events) two issues arise. Possibly you will see a rise in poorly reasoned rejections (and there is a question mark over whether a poor non-acceptance is effective) or you will see poorly constructed programmes accepted by default and issues arising as and when compensation events come to be impacted on it. An interesting change, but it will need to be approached with caution.

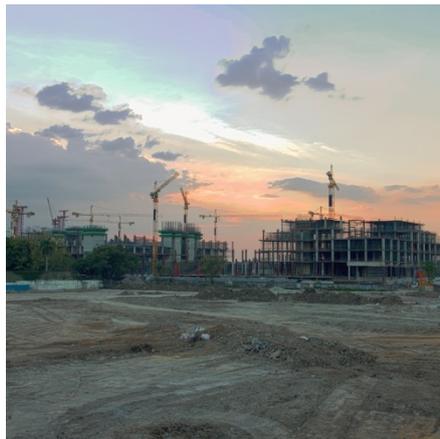
...if the Project Manager does not answer a programme submission then the Contractor can remind the Project Manager and if the failure continues the programme will be accepted by default...

...there have been a small number of criticisms over how it operates in practice...

Contractor Proposals

4

Clause 16, now titled Contractor's Proposals creates just that opportunity...



The proposal can only be given for a proposed change that reduces the amount payable to the Contractor...

In the third edition there was no explicit wording allowing for a Contractor to propose a change and take any share of the savings such a change generated. Clause 16, now titled Contractor's Proposals creates just that opportunity. There are a number of features of this clause to focus on and understand before use:

1. The proposal can only be given for a proposed change that reduces the amount payable to the Contractor. While this is a good starting point it does not cover changes in other costs, perhaps relating to Others or even the Employer's own costs through whole life maintenance or even in design and project management. The breadth of the opportunity therefore appears somewhat hampered (see X-21 for whole life cost).
2. It does not deal with potential time or key date reductions. While it could be argued that the acceleration process already exists for this the feel is not quite the same. More likely, the benefit of time saving is always shared in any event and is predictable based on an up to date and accurate Accepted Programme (see clause 36 now either the Contractor or Project Manager may propose acceleration).
3. Clause 16 proposals lead to a compensation event for changed Scope. Clause 16 does not, however, provide guidance on how that cost saving is to be shared, a key ingredient in incentivising the proposal process. When turning to the core clauses for compensation events, there is no further specific guidance. However, if you keep hunting, you will find 63.12 for Options A&B which leads you to apply the *value engineering percentage*, and 63.13 for Option C&D which repeats 63.3 leaving the proposal saving to the incentive share.



Compensation Events

4

There have been a number of changes throughout part 6 of the fourth edition dealing with compensation events. Some are highly material and likely to change the way the process works, others seems to be more of form than substance.

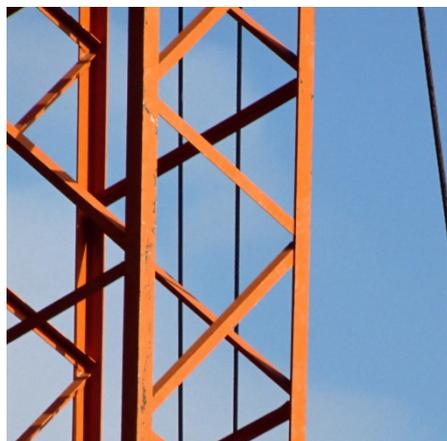
An important change is the introduction of 60.1(20) as a compensation event. This allows for a change to the Prices and Completion Date where the Project Manager asks for a quotation for a proposed instruction which is not then instructed.

While there has been an addition to the NEC for Contractor's Proposal's, there remains the exclusion at 60.1(1) for a change to the Scope provided by the Contractor. This seems to create some tension and may cause significant problems where the Contract Data, Scope or Z Clause make all Scope Contractor Scope.

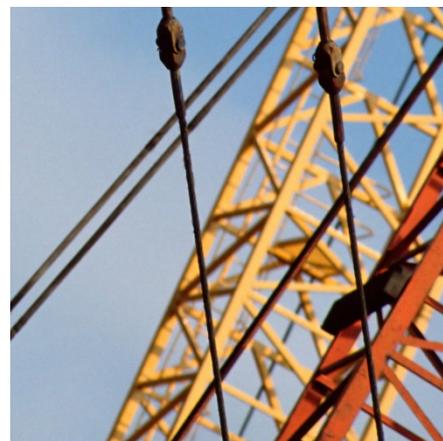
Clause 63.1 has been adjusted slightly to clarify the dividing date for when one uses a forecast and when one uses actual costs incurred. The definition and application is straight forward and relatively simple applied now to both time and money. The simplicity is helpful but gives rise to issues relating to the assessment of delay. More detail on the dividing date in delay analysis is given later (see 4 – Dividing Date).

It is important to note that there has been no clarification around the use of an out of date Accepted Programme, whether it should be updated and if so how, before impacting a compensation event. This seems like a missed opportunity for the fourth edition. Expect to see some industry guidance published on this in the near future.

...allows for a change to the Prices and Completion Date where the Project Manager asks for a quotation for a proposed instruction which is not then instructed...



The simplicity is helpful but gives rise to issues relating to the assessment of delay...



Dividing Date

4

...what happens when the Accepted Programme is updated between occurrence of the event and assessment of the event...



...when it is assessed there will be no delay entitlement...



A challenging feature of a contract, such as the NEC, which uses the same programme for both project management and project controls as well as change management through compensation events is how to identify the right programme update to use.

Under the NEC there will, generally, be a new programme issued for acceptance every month. There is capacity in the contract for intermediate updates in addition. That provides very useful data and information for proactive management of the project. However, as there can then only be one Accepted Programme (being the latest programme accepted) how does one utilise it for assessing the impact on the programme of compensation events. Outside the question of updating where the Accepted Programme may not properly reflect the status of the project immediately before the compensation event (an issue not addressed in the fourth edition) the question arises of what happens when the Accepted Programme is updated between occurrence of the event and assessment of the same event?

In the fourth edition it is quite clear that you use the Accepted Programme current at the dividing date (clause 63.5). However, that can lead to some significant problems. For Contractor notifiable events, for example weather, the Contractor can (and for weather most likely will) take some time to notify the compensation event as it may not be apparent early on. If the Contractor notifies 8 weeks after the event (as it is entitled to under clause 61.3) the Accepted Programme could have been updated twice between the event and the dividing date (being the date of notification). The updated programmes should contain the effects of the compensation event so, when it is assessed there will be no delay entitlement.

ECI and BIM

4

...they provide only a framework and further detail needs to be added to bring them to life...

...secondary options X10 for BIM and X22 for ECI...



Since 2005 when the third edition was launched there has been a significant rise in the use of, and interest in, early contractor involvement (ECI) and the use of electronic modelling of design through to construction, now commonly referred to as building information modelling (BIM).

Supplements to address both of these issues had been released by NEC before the launch of the fourth edition but are now incorporated as secondary options X10 for BIM and X22 for ECI. Although there are standard provisions for the use of both of these they provide only a framework and further detail needs to be added to bring them to life.

In the fourth edition BIM is referred to simply as information modelling. This is, in reality, just a difference in title tying back the contracts engineering roots and to avoid an implications that the process is limited to building rather than a wider range of construction project. Two important terms to understand in relation to BIM in the fourth edition are the Information Model and Project Information both of which are defined at X10.1. The Information Model is the electronic integration of Project Information. The Project Information is information from the Contractor used to build the Information Model. Liability for any failure in the provision of Project Information is on a reasonable skill and care basis.

ECI under the fourth edition is restricted to being with Option C and E type contracts. As ECI will be used to build a Price a cost based approach, such as Option C or E, is needed. The underlying contract is for the whole of the works with acceptance of detailed proposals allowing the project to continue, rather than separate contracts.

ECI under the fourth edition is restricted to being with Option C and E type contracts...

Dispute Resolution

4

W3 establishes a standing dispute avoidance board...

W3 is stated to be applicable only where the HGCRA does not apply, primarily because it requires all disputes to be first sent to the Board which is inconsistent with the requirements of the HGCRA...

Under the third edition there were no real options around dispute resolution save for a choice of Tribunal, effectively between arbitration and litigation. While there were options W1 and W2 the choice didn't arise as one was compulsory where the Housing Grants, Construction and Regeneration Act (HGCRA) applied.

Under the fourth edition W1 and W2 remain as the primary options dealing with the HGCRA. However, added to both W1 and W2 is now an escalation provision. This allows (where the HGCRA applies) or requires that the parties refer any dispute first to senior representatives to meet and discuss as many times as they consider necessary.

In addition to the escalation provision a new optional provision has been added, W3. This secondary option provides for the establishment and use of a Dispute Avoidance Board to help the parties resolve any disputes prior to submission to the Tribunal. While W3 is stated to be applicable only where the HGCRA does not apply, primarily because it requires all disputes to be first sent to the Dispute Avoidance Board which is inconsistent with the requirements of the HGCRA, it could be used as long as consensual words, such as those for escalation under W2, are added.

W3 establishes a standing Dispute Avoidance Board . That means that a 3 person board is established at the outset and meets regularly (standing rather than ad hoc) and does not decide any dispute referred to it by the parties. It simply offers guidance (avoidance rather than adjudication). That said, if a recommendation is made it becomes binding if no dissatisfaction notice is issued in four weeks.



Liabilities and Insurance

4

Section 8 of the NEC, under the third edition, was titled “Risk and Insurance” and dealt with what was then referred to as risk events. This has been reworked to title Section 8 in the fourth edition “Liabilities and Insurance” with commensurate changes in the language throughout. The use of the term “risk” in the third edition was somewhat softer than describing and defining liabilities but perhaps in turn led to some misunderstanding about the distinction between risks in the context of section 8 (really meaning liabilities) and risks in the context of early warning (really meaning chance of a future event occurring).

Section 8 had in fact generated more case law under the third edition than any other section of the contract. Much of that case law and guidance has now somewhat fallen away with the changes in this part of the fourth edition. The references to cross party undertaking and their impact on insurance and liability have been removed making the whole section much simpler and easier to operate.

Clause 80.1 makes clear that liabilities or payments to Others are to be met by the Client where they relate to occupation of the site for the works. This however needs to be read in conjunction with the linked Contractor Liability to Others where the claim or cost arises in connection with the Contractor Providing the Works. Understanding the interplay between these two provisions will be important.

Section 8 also, in the third edition, made clear that anything that wasn't an Employer Risk was a Contractor Risk. Under the fourth edition 80.1 provides a list of Client Liabilities while 81.1 provides the equivalent for Contractor Liabilities. There is no longer a catch all statement for any liability not appearing on either list.

The use of the term “risk” in the third edition was somewhat softer than describing and defining liabilities but perhaps in turn led to some misunderstanding ...



There is no longer a catch all statement for any liability not appearing on either list...



Third Party Issues

4



...should reduce one area of need to Z clause provisions in order to meet the need of funder in particular...



The third edition was a contract suite focused very much on bi-lateral relationships, that is, the contractual relationship between the two relevant parties. The fourth edition has done more to address this shortfall by core clause 28 regarding assignment, secondary option X4 as an improved parent company guarantee (now called ultimate holding company guarantee) and X8 as a form of collateral warranty (now called undertaking to Client or Others).

These changes bring the fourth edition very much more in line with usual practice in the market at present, both internationally and domestically in the UK. This should reduce one area of need to Z clause provisions in order to meet the needs of funders in particular, which is vital if NEC is to spread beyond being just a UK public sector focused contract.

It is perhaps slightly surprising that assignment has made it to the core clauses where the other third party provisions are retained as secondary options. Another unusual feature, which seems more intent than enforceable, is the requirement in clause 28.1 that the Client will not assign if the party receiving the benefit of that assignment does not intend to act in a spirit of mutual trust and cooperation. This not only seems difficult to apply but also appears a tacit acceptance that a Contractor can make such an assignment.

While X8 provides a mechanism for introducing an obligation to procure and provide undertakings to the Client and Others it is a bare mechanism. The form and content of the assignment still has to be agreed and it is not clear yet whether the NEC intends to publish a standard for undertaking for use with this secondary option.

...the Client will not assign if the party receiving the benefit of that assignment does not intend to act in a spirit of mutual trust and cooperation...

Payment

4

Clause 53 now provides for a final payment mechanism...

In the third edition there were two anomalies that were often referred to and which often ended in the addition of Z-clauses. Those anomalies were that the starting point for an interim payment was assessment by the Project Manager and that there was no definitive final account process. These issues have both been addressed in the fourth edition.

Clause 50.2 now provides that the Contractor submits an application before each assessment date setting out the amount it considers is due. This brings the payment mechanism in line with the rest of the industry and reflects what, in reality, was happening in any event. Clauses 50.3 and 50.4 then go on to distinguish the amount due depending on whether the Contractor has made an application or not. Essentially 50.3 provides the standard calculation of price for work done to date, plus any amount to be paid, less any amount to be retained. 50.4 then goes on to say that if the Contractor does not make an application then the Project Manager assesses as if the Contractor did make an application. It does seem that the fourth edition has made heavy going of a relatively simple concept.

Clause 53 now provides for a final payment mechanism. The starting point for the final assessment, unlike interim assessments, is with Project Manager and it is only in default of the Project Manager assessing in time that the Contractor then makes an application to the Client, not the Project Manager. The assessment, whether Project Manager or Contractor driven, is conclusive evidence of the final amount due immediately and can only be challenged through W1 (senior representatives), W2 (adjudication) or W3 (dispute board) subject to essentially a four week time period. Reference to the Tribunal direct does not prevent conclusivity



Clause 50.2 now provides that the Contractor submits an application...

Cost Components

4

The fourth edition has certainly looked to evolve, rather than revolutionise the SCC...



...the recovery of cost from subcontractors has been simplified...

The NEC suite has always adopted the use of the schedule of cost components (SCC) for pricing compensation events and assessing interim payment under some of the main options. It is of such central importance to payment that even relatively small problems tend to generate significant comment (very much like the compensation event provisions in section 6 of the contract).

The fourth edition has certainly looked to evolve, rather than revolutionise the SCC through a number of small tweaks and improvements. There are five key changes to note:

Subcontractor cost. In the third edition payments to subcontractors had been cost based so the Contractor had to remove any subcontractor fee. That has been simplified so the Contractor now recovers whatever it pays to subcontractors.

Working area overhead. This was intended to be a simple mechanism in the third edition and before to recover sundry items. As it became very complex and controversial to apply in practice it has been removed. Now everything must be claimed separately as cost items.

Amounts payable tied to contract. Under the third edition people costs were based on time worked in the working area. This caused problems for people working outside the working area and in defining some costs, such as bonuses. The fourth edition simplified this to costs incurred for time worked on the contract, though perhaps it should have been in Providing the Works.

Single fee percentage. In the third edition there were two fee percentages; one for the Contractor and the other for subcontractors. As the recovery of cost from subcontractors has been simplified so this fee percentage, which was often misunderstood and misapplied, has fallen away.

Short and full SCC. In the third edition the shorter SCC could be used under all the main options for assessing the value of compensation events, whereas the full SCC was used in Options C, D and E for assessing the amount due at interim payments. The fourth edition has simplified this so that Options A and B use the shorter SCC and C, D, E use the full SCC for all purposes.

Other Notable Changes

4

...if the Client terminates at will then the Contractor is paid its fee on the outstanding balance of the



In the process of evolution rather than revolution there are numerous small changes throughout the fourth edition that add to or alter the approach from the third edition...

In the process of evolution rather than revolution there are numerous small changes throughout the fourth edition that add to or alter the approach from the third edition. A few of those other issues are identified below:

Termination. Section 9 of the NEC remains relatively unchanged. However, Option X11 has been added to allow for the Client to terminate the obligation to Provide the Works for any reason. The process and amount due as a result are essentially the same as where the Contractor terminates for default or insolvency of the Client. Therefore, if the Client terminates at will, the Contractor is paid its fee on the outstanding balance of the work.

Quality Management. A new clause 40 has been added to the fourth edition requiring the Contractor to produce a quality policy statement and a quality plan both to be issued to the Project Manager for acceptance. While it is perhaps a little strange that the quality plan and statement go to the Project Manager rather than the Supervisor the contractualisation of this requirement and focus on quality is a good step forwards.

Corrupt Acts. Provision against the Contractor undertaking any such acts and requiring the Contractor to take steps against any subcontractor undertaking corrupt acts which the Contractor knows or should know about is now at core clause 18. It is not clear why the Contractor is referenced rather than the Parties.

Publicity. Core clause 29 has been added to the fourth edition to restrict how project information is used other than to Provide the Works.



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