NEC3: The Engineering and Construction Contract
‘An overview’

Delivering Professional Solutions to the Property Industry

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The New Engineering Contract (NEC)

The NEC is a division of Thomas Telford Ltd which is a wholly owned subsidiary of the Institution of Civil Engineers the owner and developer of the NEC

Development/publication of NEC

- Consultative edition 1991
- First Edition 1993
- Second Edition 1995 (ie NEC 2) – name change
- Third edition June 2005 (ie NEC 3)

Amendments issued in

- June 2006
- September 2011 - to comply with the HGCR Act 1996 as amended
NEC 3 : Suite of Contracts

NEC 3 documents

- The Engineering and Construction Contract
- The Engineering and Construction Subcontract
- The Engineering and Construction Short Contract
- The Engineering and Construction Short Sub-Contract
- The Professional Services Contract
- The Adjudicator’s Contract
- Term Services Contract
- Framework Contract
- Supply contract
- Detailed guidance notes and flow charts
Its use stimulates good management of relationships between the two parties to 
the contract and hence of the work included in the contract

It can be used in a wide variety of commercial situations for a wide variety of types 
of work and in any location

- engineering/building/contractor design/international projects

Clear and simple document – using language and a structure which are straightforward and easily understood

- present tense/lack of mandatory language/short sentences
Approach to drafting

- defined terms – capitalised eg “Works Information” (cl.11.2.19)
- specified Terms – are in italics (eg works) and identified within the Contract Data
- clause 10.1
  - The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in the contract and in a spirit of mutual trust and co-operation [emphasis added]
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‘Pick & mix’ approach to creating a project specific contract

- core clauses
- main options clauses
- secondary option clauses
  - general
  - UK specific
- dispute resolution option clauses

Contract Data – Part 1 and Part 2
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Core clauses (structure of contract)

- Core clause 1 - General
- Core clause 2 - The Contractor’s main responsibilities
- Core clause 3 - Time
- Core clause 4 - Testing and Defects
- Core clause 5 - Payment
- Core clause 6 - Compensation events
- Core clause 7 - Title
- Core clause 8 - Risks and insurance
- Core clause 9 - Termination
Main options

- Option A : Priced contract with activity schedule
- Option B : Priced contract with bill of quantities
- Option C : Target contract with activity schedule
- Option D : Target contract with bill of quantities
- Option E : Cost reimbursable contract
- Option F : Management contract

A main option must be selected
Secondary Options (17 Nr)

- Option X1: Price adjustment for inflation
- Option X2: Changes in the law
- Option X3: Multiple currencies
- Option X4: Parent company guarantee
- Option X5: Sectional Completion
- Option X6: Bonus for early Completion
- Option X7: Delay damages
- Option X12: Partnering
Secondary Options (17 Nr) (cont’d)

- Option X13 : Performance bond
- Option X14 : Advanced payment to Contractor
- Option X15 : Limitation of Contractor’s liability for his design to reasonable skill and care
- Option X16 : Retention
- Option X17 : Low performance damages
- Option X18 : Limitation of liability
- Option X20 : Key Performance Indicators
Secondary Options (17 Nr) (cont’d)

- Option Y (UK)2: Housing Grants Construction and Regeneration Act 1996
- Option Y (UK)3: Contracts (Rights of Third Parties) Act 1999
- Option Z: Additional conditions of contact

- Dispute Resolution
  - Option W1: Dispute Resolution Procedure (Non HGCR Act 96)
  - Option W2: Dispute Resolution Procedure (HGCR Act 96 applies)

- Note: references X8 to X11, X19 and Y(UK)1 are not used
  - X8 to X11 in PSC / X19 in TSC / Y(UK) 1?
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Contract Documents?

- **Form of agreement** (see Guidance Notes Appendix 3)
  - Letter of acceptance (?)
  - **Contact data**: part one – **completed by the Employer**
    - Main option / Secondary options etc stated
  - **Contract data**: part two – **completed by the Contractor**
  - **The Contractor’s pricing document**

- **Works Information**
  - **Site Information**
  - Form of tender (see Guidance Notes Appendix 2) (?)
Administration

- **Project Manager** – delegation cl 14.2
- **Supervisor** (eg clause 4 Testing & Defects and clause 7 Title)
- **no** quantity surveyor or architect identified
- Certificates e.g.
  - Completion certificate (cl 30.20) / **Defects Certificate** (cl 43) / Payment certificates (cl 51)
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Communications

- each instruction, certificate, etc, to be communicated in a form which can be read, copied and recorded (cl.13.1)
- take effect when received by recipient at notified address (cl 13.2)
- Contractor and PM to act within timescales set out in contract (cl.13.3)
  - might be a specific period set out in the clause (eg cl 31.3) or reply within the period for reply
- if PM not accept then state reasons (cl 13.4 &13.8)
- Certificates to Employer and Contractor (cl.13.6)
- a notification to be a separate communications (cl.13.7)
Early warning by Contractor or PM (cl.16) as soon as become aware that a matter could cause an increase in the total of Prices / cause a delay in completion / cause a delay in meeting a Key Date / impair performance of works in use

Contractor may give an early warning of any matter which could increase his total cost

Risk Register is a register of risks listed in the Contract Data (cl 11 (14))

- PM to enter early warning matters on Risk Register (cl 16.1)
- Risk reduction meeting (cl.16.3) / PM to review Risk Register following decisions at meeting / issue to Contractor
Programme

- programme identified in Contract Data part one
  - Contractor submits a programme to PM for acceptance (cl.31.1)
- Accepted Programme (cl.11.2.1)
- PM has 2 weeks to accept or notify of reason for not accepting (cl.31.3)
- Cl.31.2 sets out what the Contractor is to show on each programme
Programme

- revised programme (cl.32)
  - content /submission procedure
- assessment of compensation events
- relationship between ‘programme’ and ‘activity schedule’
  - Contractor to provide information showing how each activity relates to the programme submitted for acceptance (cl 31.4)
- Contractor changes method of working
  - programme and activity schedule to relate to each other
Defects

- terminology
  - Defect - a defined term (cl. 11.2(5))
  - defects date
  - defect correction period (weeks – one period)
  - Defects Certificate (cl. 11.2.(6))
- until defects date the Supervisor can instruct the Contractor to search for Defects (cl.42.1)
  - Contractor to correct Defects whether notified or not (cl. 43.1)
- the Supervisor may notify a Defect at any time before defects date (cl.42.2)
Defects

- prior to Completion Contractor to correct notified defects if it would prevent Employer/others doing their works (cl. 11.2(2))

- after Completion Contractor to correct notified defects **before** end of *defects correction period* (cl. 43.2)

- **Supervisor** issues **Defects Certificate** at the later of the *defects date* or last *defects correction period* (cl. 43.3)
  - for the last notified defect

- accepting defects / uncorrected defects(45)
  - **PM assessment**
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Defects Time table

Notified defect 1

Completion Certificate

Defects prior to completion

DCP for Defects notified prior to completion

DCP 1

Defects Date

Defects Certificate

Notified Defect 2

DCP 2
Payment (cl.50)

- PM assesses amount due at each **assessment date** and certifies amount within **1 week of assessment date**
  - first assessment date **decided by PM**
  - thereafter assessment interval as stated in Contract Data **until** 4 weeks after issue of the Defects Certificate **and** at Completion of the whole of the works
- **Y (UK)2 HGCR Act 96 and September 2011 amendments**
Payment (cl.50)

- Amount due (50.2)
  - the Price of Work Done to Date
  - plus other amounts to be paid to the Contractor
  - less amounts to be paid by or retained form the Contractor
    - e.g. delay damages

including any tax e.g. VAT
Payment (cl.50)

- the amount due at the Assessment Date (50.1) - different terminology e.g. Price for Work Done to Date

  - **Option A** (11.2(22))
    - each group of completed activities
    - each completed activity not in a group

  - **Option C** (11.2(23))
    - amount of payments due to subcontractor
    - cost of components in Schedule of Cost Components
    - less **Disallowable Costs** (cl 11.2(25))
Payment (cl.50)

- **Option C**
  - total which PM forecasts will have been paid by the Contractor before the next assessment date (11.2(29))
  - Contractor to keep records and allows PM to inspect (52.2)
  - Contractor’s share (53)
    - ‘pain/gain’ mechanism
    - two assessments – Completion / final payment
- Contractor
  - prepares forecast of total Define Cost (cl 20.4)
Compensation events

- **no** separate ‘extension of time’ or ‘loss and/or expense’ provisions
- **both ‘time’ and ‘money’** addressed under ‘compensation events’ cl 60
- there are 19 compensation events (listed at cl.60.1) which if occur not the fault of the Contractor e.g.
  - change in Works Information (cl. 60.1(1)) - **Employer act**
  - weather (cl.60.1(13)) - **neutral!**
- Employer could add to the list at tender stage - set out in Contract Data
Compensation events

- notification of event by PM or Contractor (cl 61)
  - has happened or is expected to happen
  - event changes Prices/Completion Date/Key Dates
- procedure premised upon submission of Contractor’s quotations
  - process prospective not retrospective?
- quotations (cl 62)
  - includes changes to Prices/Completion Date(s)/Key Dates – details to be included
  - alterations to Accepted Programme
Compensation events

- Price adjustments - valuation based on Defined Costs (cl 63.1)
  - assessment date - instruction or should have instructed
- delay - effect on planned completion (63.3)
- procedural timescales placed upon
  - Contractor to submit quotations
  - PM to respond - consequences for PM!

- PM can undertake his own assessment (cl.64) if
  - Contractor fails to submit a quotation
  - Contractor’s assessment is not correct
Compensation events

- changes to the Prices - valuation based on Defined Costs (cl 63)
  - actual Defined Cost on work done
  - forecast Defined Cost on work not yet done
  - Fee

Schedule of Cost Components or Shorter Schedule of Cost Components

- People
- Equipment
- Plant & Materials
- Charges
- Manufacture & fabrication
- Design
- Insurance
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Compensation Events: Timetable

- Notification of CP
  - <1 wk>
  - Failure to respond? C notice – 2 wks

- PM’s decision
  - <3 wks>

- C submits quotation
  - <2 wks>

- PM replies
  - Failure to reply? C notice – 2 wks
Questions