

NEC4 contracts now published

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The NEC has recently published its much anticipated next generation suite of contracts, NEC4.

The NEC has chosen the phrase “evolution not revolution” to describe the NEC4 suite. The new suite remains true to the NEC’s philosophy that collaboration is key to successful project delivery.

Introduction

The principle of collaboration was at the heart of NEC3 and earlier NEC forms. The same can be said for the NEC4 suite, which builds on NEC3. It retains the core clauses of NEC3, and the obligation on the parties to act in a spirit of trust and mutual co-operation. The distinctive style of NEC3 using the present tense, which has tended to divide opinion amongst commentators, remains throughout.

This article provides an overview of selected key changes in the NEC4 suite. Our previous article ([click here](#)), provides background to the form and uptake of the NEC3 contract, and provides a preliminary summary of the NEC4 suite.

Key Changes to Optional Clauses

In the NEC4 forms, additions have been made to the optional clauses to facilitate tailoring without the need for extensive bespoke amendments.

For example, the NEC has amended the optional dispute resolution clauses for use where the UK Housing Grants Construction and Regeneration Act 1996 does not apply to the works under the contract (for example, where the contract is for works outside the UK). These changes will be of particular relevance for international users of NEC.

Such changes include the introduction of an option for a standing Dispute Avoidance Board (DAB), which is appointed at the outset of the project and makes scheduled visits to the site throughout the works. The DAB is to make non-binding recommendations to the parties to assist them in resolving any “potential disputes”, however following any such recommendation either party has a period of four weeks in which to express its dissatisfaction with the DAB’s recommendation and commence an arbitration (if arbitration is selected). It is unclear as to what status a DAB’s recommendation has, and whether a party has a right to arbitrate, if a notice of dissatisfaction is not given within the four week window.

If the parties do not select this DAB option, then a new tier has been included in the dispute resolution process requiring the parties to submit disputes to their senior representatives for negotiation before the dispute is referred to adjudication.

In addition, other key changes have been made to the optional clauses in the NEC4 forms:

- Optional clause X15 has been amended such that the Contractor is liable for defects resulting from its failure to carry out the design “*using the skill and care normally used by professionals designing works similar to the works*”. This develops upon the equivalent requirement under NEC3 for the Contractor to

use “*reasonable skill and care to ensure that his design complie[s] with the Works Information*”. However, it falls short of imposing a fitness for purpose obligation on the Contractor, which is often sought by employers.

- An optional clause has been included requiring the contractor to provide collateral warranties to third parties, and to procure such collateral warranties from its subcontractors.
- New clauses have been included to address building information modelling, early contractor involvement and value engineering.

Key Changes to Core Clauses

Amendments and additions to several core clauses have also been made, including:

- a mechanism for deemed acceptance of the programme after two weeks of submission of the programme by the contractor, in the event that the project manager fails to raise any objections;
- clauses to cover bribery and corruption, and a new right to terminate if the contractor commits a corrupt act (or, in certain circumstances, where a subcontractor commits a corrupt act);
- an assignment clause, which provides both the client and the contractor with a right to assign without the need for the other’s consent. We expect that this clause will be subject to amendment in many cases, as a right for the contractor to assign without consent is not generally accepted by clients (particularly where project finance is in place); and
- clauses addressing issues of confidentiality and disclosure of information concerning the project.

In addition, there has been a standardisation of certain terminology, including: replacement of “*Works information*” and “*Service Information*” with “*Scope*”; and replacement of “*Employer*” with “*Client*”. Interestingly, despite the move to standardise existing terminology, the new suite introduces alternative terminology for industry standard terms. For example, the term “*undertakings to others*” is used to refer to collateral warranties.

The New Contracts

The NEC4 suite debuts two new additions: a Design Build and Operate (DBO) form and an Alliance contract. By way of brief summary:

- the DBO form is intended to provide a one stop shop for a single supplier of design, construction and operation or maintenance. The DBO form allows for a range of different services to be provided during the lifecycle of the contract; and
- the Alliance contract has been drafted with large, complex projects in mind. This is the first multi-party NEC contract. The vision of the Alliance contract is one of collaboration between all parties to share the risks and benefits involved in carrying out a project. The Alliance contract is published in consultation form at this stage. The NEC expects a consultation period of six months.

Conclusion

The NEC mantra is that good project management makes for successful, on time and on budget, projects. At their core, both the NEC3 and NEC4 suites are collaborative contracts which assume the involvement of an experienced and diligent project manager to administer them. This should always be borne in mind.

The NEC4 suite contains some potentially useful additions and amendments. However, the brevity of some key secondary clauses (which relate to issues such as collateral warranties and contractor’s design responsibility) mean that bespoke amendments are likely to continue in many cases.

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