

# NEC CONTRACTS: HOW NOT TO AMEND THEM

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**The new edition of the New Engineering Contract ("NEC") suite of contracts was launched this June: the NEC4. Rather than comment on the new contracts and changes introduced by NEC4 the purpose of this article is to address key failings often seen in the preparation and amendment of these standard forms of contract, whether the NEC3 or NEC4.**

In this article the NEC is referred to generally and references are also made to the following two contracts from within the NEC suite: the Engineering and Construction Contract ("ECC") and the Professional Services Contract ("PSC")

Five key errors are made either singly or more often together when NEC document packages are collated.

- Incorrect use of the main pricing options
- Misunderstanding the role of the Works Information, Site Information and Contract Data
- Structuring amendments to the core and optional clauses incorrectly
- Inconsistent language and drafting style to the NEC
- Incorrect incorporation of specification

## Incorrect Use of the Main Pricing Options

The most common problem is that monthly interim payments can be made as if the activity schedule used in Option A (Priced contract with activity schedule) is merely a breakdown of work to be undertaken similar to a contract sum analysis. It is not. The activity schedule (within Option A only) is a pricing document and the contractor's entitlement to interim payments arises only when the activities listed in the activity schedule are completed. The

document used to describe the works is the Works Information under the ECC.

Consultants new to the NEC approach sometimes simply group the services they are to provide under Option A of the PSC as set out in the RIBA Plan of Work Stages with each stage representing an activity. Unless corrected this could have a hugely adverse impact on the consultant's cash flow as some RIBA Work Stages take many months to complete on sizeable projects.

Confusion also arises when parties confuse the use of the activity schedule in Option C (Target contract with activity schedule) with its use under Option A. In Option C the Contractor is paid the Defined Cost plus the agreed Fee. In this Option the activity schedule is used to assess compensation events and as a management tool.

## Misunderstanding the role of the Works Information and Site Information

The ECC Works Information Guidance is a good place to start to understand the different purposes of the Works Information, Site Information and Contract Data and the relationship between them. The information to be set out in the Works Information is defined in the ECC as information "*which either*



- specifies and describes the works or
- states any constraint on how the Contractor Provides the Works" (ECC3 Clause 11.2 (19))

Conversely, Site Information should only comprise objective information on the physical condition of the Site, its access points, subsoil conditions, service media and surroundings. The purpose of the Site Information document is to assist the Contractor in preparing his tender, his method of working, design and programming.

Why is this important? The only document which, if varied by the Project Manager, entitles the Contractor to a compensation event is the Works Information (ECC3 Clause 60.1 (1)). Additionally, in judging the physical conditions on site in order to assess a compensation event, the Contractor is assumed to have taken account of the information in the Site Information (ECC3 Clause 60.2). It is important for these reasons and others, therefore, that the content of both documents are distinct and as comprehensive as possible.

## Structuring Amendments to the core and optional clauses incorrectly

The NEC (in the Contract Data) provides that additional clauses (known as Z Clauses) may be used to supplement the standard form of contract. The parties are clearly also free to amend the core clauses or optional clauses of the NEC. I have seen several examples of contract packages which have separate schedules of amendments to the NEC core and optional clauses and then separate Z clauses which deal with issues the core clauses or optional clauses ostensibly do not cover. In order to provide a clear understanding of the nature of the amendments to the standard form and to obtain a clear view of how the amendments to the core clauses and the additional provisions relate to each other, it is important that both should be located in the same document.

Z clauses should still reference the clause structure used by the NEC and where possible



should be added to the appropriate clause. For instance, additional obligations or responsibilities on the Contractor in providing the works should generally be added to clause 2. Specific performance or output tests required for energy projects should be inserted within the testing and defects framework of clause 4. Additional risk items or the requirement for professional indemnity insurance should reference clause 8, and so on. Failure to do this makes the administration of the contract more difficult and increases the prospect of discrepancies within the applicable terms.

## Inconsistent language and drafting style to the NEC

There are many who dislike the style and language used in the NEC contracts. In the case of *Anglian Water Services v. Laing O'Rourke Utilities Ltd* [2010] Edwards-Stuart J stated that the use of the present tense "represent[s] a triumph of form over substance". It should be stated also that other members of the judiciary have been very supportive of the aims and content of the NEC over the years. Whatever your view, the task of putting together the Works Information and Z Clauses is not an opportunity to change the drafting style.

The NEC uses a consistent drafting style in an attempt to be as simple as possible. The use of short sentences, bullet points, indentation and the avoidance of adverbs are all covered in drafting guidance notes. It is necessary for those who seek to amend the NEC to be consistent with its ethos. This is not simply an issue of style or consistency for its own sake. There are potential problems in administering or interpreting the contract if an inconsistent approach is adopted.



One example would be the use of tense in the contract. Despite the criticism of the NEC's use of the present tense mentioned above, it is at least used consistently and therefore the intentions of the parties are understood by those adjudicating, arbitrating or otherwise deciding on its terms. What would happen, however, if Z clauses changed the tense? In the event that a new obligation was inserted to state "The Contractor **shall** in carrying out the works..." How would the NEC provision of "The Contractor Provides the Works..." (ECC Clause 20.1) be then interpreted? Would the latter obligation now be seen as simply an objective statement of fact rather than an obligation given the conflicting style of the earlier provision?

### Incorrect Incorporation of Specification

Many practitioners will have seen parties seek to use a generic standard specification used on previous projects for different standard forms of contract on an NEC project without making the necessary changes to reflect the NEC form. The person drafting the contract simply sought to incorporate the specification by using a short cut statement of "all references to Specification shall mean Works Information". Sometimes the shortcut states that the

specification is intended to comprise "both the Works Information and Site Information". This less than diligent drafting ignores, amongst many issues:

- the fact that the positions of Project Manager and Supervisor are likely to be different to Architect or Contract Administrator or Engineer within the specification;
- the roles and responsibilities of Client and Contractor may differ and the authority given to the NEC role of Project Manager will differ also; and
- the acceptance of a communication by a Project Manager under ECC Clause 14.1 will differ from an Engineer's approval in other contract.

### Conclusion

As the NEC is becoming more prevalent throughout the construction industry examples of bad practice in structuring and amending the contract should be less frequently seen. Whilst there are different ways to structure Works Information, Site Information documents and Z clauses consistency in form and structure are required to maximise the project management benefits of the contract and avoid embarrassing ambiguity.

### About the Author

Ian specialises in construction and engineering law, working closely with utility and engineering companies, energy and water industry suppliers, contractors and developers. He normally works on standard form and bespoke construction and engineering contracts in addition to international plant supply and installation, power and fuel supply, and collaboration and research development agreements.



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