NEC4: Evolution not Revolution

Delivering distinctive, high quality projects across the construction and property industry
What is NEC?

“NEC is a family of contracts that facilitates the implementation of sound project management principles and practices as well as defining legal relationships.”
NEC International Awards based on Clause 10.1

Winner NEC Small Project of the Year 2015 – Rushden Splash Pool

Winner NEC Small Project of the Year 2016 Beanfield & Gretton Primary Schools

Finalist NEC Project of the Year 2017 – University of Warwick Oculus
Spearing Waite LLP - NEC Projects

Anaerobic Digester Plant programme delivered by Qila Energy LLP

Wind Turbine Installations delivered by Harmony Energy Limited

Rail Track Refurbishment programmes delivered by Universal Piling and Construction Limited
What is NEC4?

• First published on 22 June 2017.

• Adds New Contracts to the expanding NEC Suite:
  
  • Professional Service Subcontract - intended to improve integration of the supply chain.  
  • Term Service Subcontract - intended to improve integration of the supply chain.  
  • Design Build Operate (DBO) Contract - Allows flexibility between construction and operational requirements in both time and extent. It is essentially a combination of the ECC (Build) and TSC (Maintain) contracts. It does not include funding provisions typical of DBFO contracts.  
  • Alliance Contract, consultation only for now. This is a multi-party alliance contract based upon an integrated risk and reward model. As such it is different from other contracts in the NEC4 suite but it follows the same structure and principles where possible. It is intended to work in a similar way to PPC2000 – this could be a challenging one to use on a practical basis.
NEC4 Summary

1 Changes to the core clauses including
   • Payment.
   • Insurance and liability.
   • Compensation events.
   • Programme.
   • Defined cost.
   • Terminology changes.

2 New and secondary amended options including:
   • BIM.
   • Early contractor involvement.
   • Design responsibility and contractor’s design & proposals.
   • New collateral warranty provisions.

3 New contracts:
   • The Design, Build and Operate contract.
   • Alliance contract.
What is NEC4?

NEC4 Engineering and Construction Contract (ECC).
NEC4 Engineering and Construction Subcontract (ECS).
NEC4 Engineering and Construction Short Contract (ECSC).
NEC4 Engineering and Construction Short Subcontract (ECSS).
NEC4 Professional Service Contract (PSC).
NEC4 Professional Service Short Contract (PSSC).
NEC4 Professional Service Subcontract (PSS) (new).
NEC4 Term Service Contract (TSC).
NEC4 Term Service Short Contract (TSSC).
NEC4 Term Service Subcontract (TSS) (new).
NEC4 Design Build Operating Contract (DBO) (new).
NEC4 Supply Contract (SC).
NEC4 Supply Short Contract (SSC).
NEC43 Framework Contract (FC).
NEC4 Dispute Resolution Service Contract (DRSC) (previously named the NEC3 Adjudicator’s Contract (AC)).
NEC4 Alliance Contract (ALC) (new to the NEC4 suite, but currently published as a consultation document).
What's new in NEC4?

The main options under ECC are:

Option A: Priced contract with activity schedule (Milestone).
Option B: Priced contract with bill of quantities (Priced).
Option C: Target contract with activity schedule (Re-measure).
Option D: Target contract with bill of quantities (Re-measure).
Option E: Cost reimbursable contract (Cost Plus).
Option F: Management contract (Construction Management).

The main options allow the client to price the project and pay the contractor in different ways. The main options determine the payment mechanism and associated allocation of financial risk between the parties but they do not change the rest of the ECC (except to deal with pricing and payment).

Importantly, the way in which the Scope (previously “Works Information”) is completed radically changes the nature of the contract.
What's new in NEC4?

Changes in Terminology

There are some significant changes in Terminology to take on board as some of the most well used terms have been replaced by new ones as set out below:

- The "Early Warning Register" replaces the "Risk Register" to avoid confusion with the project risk register that may be used for wider project management purposes.

- The problem historically was that parties would assume the “Risk Register” was used to allocate the liability for a risk occurring.

- In NEC3 the Risk Register is used to identify risks to the project so that they can be managed effectively, it does not apportion liability for risks.

- The use of an “Early Warning Register” emphasises the purpose of identifying and managing matters that can effect the project.

- It also prevents confusion with references to “Risk” elsewhere in the contract particularly in relation to the insurance provisions.
Early Warning Register not Risk register

- NEC3 previously referred to a Risk Register which was used as a mechanism to record risks & who was responsible for them.

- NEC 4 replaces the terminology ‘Risk’ with ‘Early Warning’ to focus the team on identifying issues & managing the risk rather than allocating responsibility for them.

- The process or contractual responsibility doesn’t change under NEC4, but NEC4 gives more transparency focusing the parties to concentrate on matters specific to the contract rather than general risks items.

- The change of this wording in NEC4 will promote more collaborative working & stop poor practice of allocating ‘risk owners’ on risk registers & also referring to risk registers in the Contract Data.
Core Clause: 1 General

‘Early Warning’ Meetings rather than ‘risk reduction’

NEC4 refers to ‘Early Warning’ Meetings rather than 'risk reduction meetings’

• Clause 15 states the Project Manager prepares an Early Warning Register & 'early warning meetings' held at intervals no later than the interval stated in the Contract Data.

• This reflects industry best practice with face to face meetings with contractors & their Subcontractors.

• We identify contract risks early & work together to mitigate any delay & additional costs.

• & we encourage early warnings to be raised proactively rather than a mechanism to notify additional costs & delays.
NEC 4 seeks to streamline communication and encourage the use of specific software to implement project management of the contractual mechanisms.

The primary obligation is to do it in writing:
•13.1 Each communication which the contract requires is communicated in a form which can be read, copied and recorded. Writing is in the language of the contract.

The Second element then relates to the use of bespoke software – note it does not compel use of that software:
•13.2 If the Scope specifies the use of a communication system, a communication has effect when it is communicated through the communication system specified in the Scope.
•If the Scope does not specify a communication system, a communication has effect when:
•it is received at the last address notified by the recipient for receiving communications or, if none is notified, at the address of the recipient stated in the Contract Data.

You can still communicate outside the software in writing!
Specified Communication System

Core Clause: I General

Clause 13.2 now prompts the Scope to specify a communication system:

• NEC3 states communication need to issued in a format that can be read, copied & recorded. However, there are various ways this can be done such as letter, fax, e-mail. It can be unclear at times what is a formal communication!

• NEC 4 deals with this by stating an agreed Communication System. A good communication system promotes collaboration as it is transparent to all parties, reduces confusion & therefore less disputes

• Pick Everard use ‘Sypro Contracts Management’. This gives a shared platform to carry out all the notifications required under the contract

• Provides simple to issue communications within contractual timescales.

• No reliance on e-mails that could be missed or not CC'ing the right people.
What’s New with NEC4?

Something every construction lawyer dreads – the same popular phrase with a completely different meaning in the two most popular construction contracts – NEC4 and JCT2016.

No, this is not the Contractor’s response to the Employer’s Requirements but a new core clause (clause 16) which contains a value engineering process. It allows the Contractor to propose a change to the Scope that will reduce the cost of the Works, which the Project Manager may accept and instruct, not accept or request a quotation prior to making a decision.

Clause 36 now provides that the Contractor, as well as the Project Manager, may propose an acceleration to achieve Completion before the Completion Date.

New secondary option X21 (whole life cost) allows the Contractor to propose a change to the Scope in order to reduce the cost of operating and maintaining an asset.

The Contractor shares in the cost savings of any proposals it initiates which is to encourage the parties to work together to improve the overall outcome of the project.
Core Clause: 1 General

Clause 16.1-3. Expression for Contractor to propose changes to the Clients Scope.

63.2 Under Options A & B Client receives the ‘value engineering percentage’ \( \times \) the value of the Compensation event (50% or amount stated in Contract Data Part 2)

- Under NEC3 Options A & B there is little incentive for the Contractor to suggest Value Engineering
- NEC4 gives the contractor the Incentive by giving the Contractor a pre-agreed % of the value of the CE
- Again this promotes collaboration with a win win shared saving incentivisation
- Under options C&D, the benefit is shared as in ECC3 due to 63.11
Clause 31.3 provides for deemed acceptance of the programme by the Project Manager if it fails to respond within the time allowed to a programme issued by the Contractor for acceptance. Under NEC3, there is no provision stating what happens in this situation and this amendment is designed to avoid the impasse that may otherwise exist.

It is therefore critical that sufficient administrative and programming resource is committed to the project by both parties.

The Accepted Programme is a key project management tool that imposes obligations on both parties including the imposition and achievement of Key Dates. It is therefore vital that both parties have reviewed and approved the programme submitted by the Contractor before it becomes the Accepted Programme.
• Under NEC3 Clause 31.3 required the Contractor to reply within 2 weeks but didn’t say what to do if he didn’t, promoting a “wait & see” approach from Project Managers.

• NEC3 stated what had to be included on a programme but it was down to interpretation to how this was formatted…with a penalty of 25% of PWDD if the Project Manager won’t accept the programme, the NEC felt this needed to be reviewed.

• NEC4 now asks the Project Manager to show format of Programme expected of the Contractor, detailed proportionate to value of project & tailored to the requirements of the project.
Clause 50.2 now requires the Contractor to make an application for payment before each assessment date. Under NEC3 ECC, the Project Manager was required to make the assessment and consider any application by the Contractor. If the Contractor does not make an application, it does not get paid. If payment is due to the Client, the Project Manager can make the assessment and certify payment. This approach previously applied only in the short forms of contract. It now applies across the NEC4 suite.

The short forms of the NEC3 contract were dealt with in the Universal Piling and Construction Ltd v VG Clements Limited case. In this case the Claimant had obtained an adjudicator’s Decision on the basis of a failure to serve a Payless Notice. The Claimant therefore did not want to make another application as it feared it would simply be a pre-text to start another adjudication (which it was).

The Court decided that the obligation of mutual trust and co-operation required the Claimant to make another application and failure to do so was a breach of contract.
Core Clause: 5 Payment

- Clause 50.4 Payment is now conditional upon the Contractor submitting an application for payment.
- If the Contractor does not submit an application then the amount due will be either the previous assessment or the amount the project manager assesses (e.g. to account for delay damages), whichever is lower.
- It is normal practice for contractors to submit applications for payment.
- Under NEC3, if application was late, the PM had to make own assessment, which was difficult to do without any information.
- NEC4 formalises the requirement to submit applications for payment.
- The default position is that the contractor doesn’t get paid until he submits the application for payment.

Again this is aligning the NEC Contract to formalise what is normal contract practice for the Contractor to submit applications for payment.
• First time that NEC has used final account procedure as the works are supposed to be valued as they go along taking account of the time & money issues as they occur (this is the ideal!).

• NEC says feedback from users indicated strongly that a mechanism to give finality and avoid later challenges would benefit both parties but in a way that is a shame as NEC has lost a unique feature and will encourage “bun fights”.

• Clause 53 provides that:
  – The Project Manager assesses and certifies a final payment, within a specified period after Defects/Termination Certificate.
  – The Contractor may issue its own assessment of the final amount due if the Project Manager fails to do so.
  – The assessment is conclusive as to the final amount due unless disputes resolution procedures invoked in time (53.3).

• ECC main options C, D, E and F allow for Defined Cost and Disallowed Cost to be reviewed and accepted progressively rather than deferring the exercise until project completion.
Core Clause: 5 Final Assessment

- Clause 53.1 the Project Manager makes an assessment of the final amount due
- Clause 53.2 If the Project manager doesn’t make an assessment then the Contractor may issue an assessment to the Client & if the Client agrees then a payment is made within 2 weeks.

It is industry best practice to issue a Final Statement irrespective of the lack of requirement in NEC3.
• Clause 60.1(20) introduces a new compensation event where the Project Manager notifies the Contractor that its quotation for a proposed instruction is not accepted. In other words, the Contractor is entitled to recover the cost of preparing the quotation and this ensures that the Contractor is not left out of pocket if it is required to prepare quotations for numerous proposed instructions, not all of which are accepted or instructed.

• Clients should be aware of the consequences of this change, which may be significant where there are a large number of proposed instructions that are not subsequently accepted or instructed.

• Clause 60.1(21) provides for additional compensation events to be listed in part one of the Contract Data. Under NEC3, additional compensation events could only be included by a “Z” clause amendment. This amendment is therefore intended to allow the parties to agree additional compensation events where appropriate without the need for “Z” clause amendments.
Clause 60.1 (14) and (80.1) ECC3’s ‘Employers risk’ is now ‘Clients liability’

Additional Compensation events:

• 60.1 (20) – Quotation for a proposed instruction that is not accepted
• 60.1 (2) – Additional compensation events stated in the Contract data

61.1 Needs a single communication as apposed to two

• Proposed instructions are dealt with under clause 65 – clearly differentiating from compensation events
• Cost of preparing the quotation is no longer excluded under options A & B
Core Clause: 6 Compensation events

NEC4 Changes to Schedules of Cost Components:

**Short Schedule of Cost Components**
- Subcontractors now Included in schedule
- No people overhead
- Single fee percentage
- Short Schedule of Cost Components not used on Options C&D

**Schedule of Cost Components**
- Subcontractors included in Schedule
- No working area overheads
- Single fee percentage
In terms of ownership of the model/defects liability the Client:
Owns the information model and the Contractor’s rights in all information it provided to create/change the model.

Is liable for:
• a fault or error in the information model other than a Defect in the project information; and
• a fault in information provided by parties other than the Contractor (option X10.7(1)).

The Contractor is only liable for a fault or error in its project information if it failed to use the requisite level of skill and care in providing that information (option X10.7(2)). Thus the Client pays Contractor for resolving non-negligent faults / errors in its project information. NB “Defect” defined as defects in work, is that in itself a fault?
Existing BIM protocols that support BIM level 2 deal with these issues differently, usually providing that:

• Any rights, including copyright, in material and information provided for the model, remain vested in the party providing it
• Other parties, including the client, are given a licence to use such material and information.
• Information providers largely retain liability for errors in their own material.

NEC4 focuses on increasing collaboration across the project team and perhaps paves the way for BIM level 3.
Conclusion – Evolution not Revolution