

## NEC3: Common Amendments and Contract Management Issues

### Introduction

- 1 The NEC Suite of Contracts is not universally loved among lawyers. The suite has as many detractors as it has supporters within the profession. Despite this, significant numbers of other industry professionals are happy with the contracts and adopt them in preference to more traditional and, some might say, adversarial contract forms<sup>1</sup> for major construction and engineering projects. The contracts are perceived by supporters as an effective project management tool. They consider this to be the primary objective of the NEC forms over and above achievement of absolute legal precision. Therefore if the contracts are operated sensibly in the spirit of clause 10.1<sup>2</sup>, extensive amendments should not be necessary.
- 2 Should we then leave well alone and use these contracts as drafted without significant amendment, so as not to undermine their basic philosophy<sup>3</sup> Or does the harsher contracting environment that we are currently experiencing demand that we make amendments to remove or to mitigate the effect of the ambiguities and inconsistencies that it is claimed exist in NEC3?<sup>4</sup> Even those who endorse NEC3 enthusiastically, acknowledge that amendments and supplemental drafting are often necessary to address project specific matters as well as issues of interpretation.
- 3 Areas of frequent criticism include the use of the present tense in the contract terms, the simplicity of the language used<sup>5</sup>, inadequate cross referencing between clauses and no clear document hierarchy. Often the context of a clause and its position within the contract will help to determine its meaning, however the drafting does remain vague in some crucial areas of the contract, where specific obligations are not always clearly stated or followed through to their proper conclusion.<sup>6</sup> Undefined sanctions for breach of specific obligations are also problematic.

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<sup>1</sup> It is the primary contract of choice for major projects such as the 2012 Olympics and Crossrail, and has an increased following overseas.

<sup>2</sup> "The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and co-operation."

<sup>3</sup> Changes to risk allocation generally impact on behaviours as well as prices.

<sup>4</sup> One school of thought is that the areas where clarity is absent from the drafting in fact discourage parties from testing the provisions in court.

<sup>5</sup> *Anglia Water v Laing O'Rourke* [2010] EWHC 1529 concerning the interpretation of a contract based on NEC2 terms. Mr Justice Edwards-Stuart's judgment at paragraph 28 is a not uncommon position on NEC drafting style: "I have to confess that the task of construing the provisions in this form of contract is not made any easier by the widespread use of the present tense in its operative provisions. No doubt this approach to drafting has its adherents within the industry but, speaking for myself and from the point of view of a lawyer, it seems to represent a triumph of form over substance." The judgment was not however a wholesale criticism of the contract. Its focus was the interpretation of the dispute resolution mechanism (clauses 90-93 as amended) and the notice requirements in clause 13.

<sup>6</sup> An example of this, and a problem for both contractors and subcontractors arising from the simplicity of drafting, is secondary option clause X7. The issue is the relationship of that clause with the assessment of payments generally under the Contract. Clause 51 says that the PM/Contractor assesses the amount due and clause 50.2 defines the amount due as "the Price for Work Done to Date plus other amounts to be paid to the Contractor/Subcontractor less amounts to be paid or retained from the Contractor/Subcontractor". This suggests that an employer is able to circumvent the need to serve a section 111 notice for liquidated damages, as they can simply deduct them at the assessment stage before coming to the amount due. Instances of employers failing to serve section 111 notices are all too common. It is therefore in a contractor's interest to ensure that, if X7

- 4 Despite the 'plain English' approach of NEC3, no less care should be taken to amend these standard forms than when amending any other contract suite. This paper looks at various common amendments to the contract generated by employers in both the private and public sectors.
- 5 To implement NEC3 effectively, users should not only take steps to modify the contracts carefully where amendment is considered essential, but also to use properly the mechanisms in the contract for pro-active time and cost management. These procedures require the full engagement of the team throughout a project. Early identification and resolution of problems is encouraged. The highly collaborative approach is one of the chief innovations of the NEC contracts and is now being replicated in other popular standard forms. This paper therefore also considers the team based approach and particularly the central role of the project manager, including how that role has developed since the days of NEC2.

## Risks and Insurance

### *Risk Management Tools*

- 6 Key risk management tools in the contract are the Risk Register, early warning notices, sanctions for failing to provide early warnings and risk reduction meetings<sup>7</sup>. Clearly these tools need to be used actively (but also sensibly) to be of any real benefit to the parties. Contractors can be guilty of issuing early warning notices indiscriminately, and conversely, employers/their project managers can become complacent: ignoring valid notices, failing to respond to them with timely meetings and becoming embroiled in protracted correspondence on the issues.
- 7 Risk Registers may be a mixed blessing if they are either not properly incorporated in the contract, not kept up to date, or inconsistent with the contract terms. Clause 80.1 sets out the employer's risks, supplemented where appropriate with additional employer's risks specified in the Contract Data Part 1. Entries in the Contract Data can, however, allocate inadvertently additional employer risks, because whilst the intention is that additional employer risks are only entered into the Contract Data Part 1, clause 80.1 refers simply to entries in 'the Contract Data', so enabling contractors potentially to impose additional risks on the employer in the Contract Data Part 2. Adding a minor amendment to the final bullet point of clause 80.1 so that it refers to additional Employer's risks stated in the Contract Data Part 1 will resolve the problem. To avoid risk allocation through the Risk Register itself, the minimum information necessary to keep an accurate record should be included within it, and that information checked to ensure that it does not give rise to any ambiguity or conflict with the contract terms. To support this approach an additional entry might be included in the Contract Data Part 1, stating that the entries in the Risk Register are not intended to alter the clause 80.1 risk allocation.

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applies, liquidated damages cannot be reflected in the assessment and must be the subject of a separate notice (assuming that Option Y(UK)2 and its attendant terminology is used as well). There is also scope to amend X7, as there are none of the more common notification provisions found in other standard forms.

<sup>7</sup> Either the Contractor or the Project Manager can instruct the other to attend a risk reduction meeting.

### *Risks Specific to the Project*

- 8 No standard form can legislate for every possible project risk, and despite the relative flexibility of the Contract Data and Risk Register as mechanisms for allocating and managing risk, NEC3 is no exception. An increasing number of bespoke amendments are being developed for incorporation as Z clauses to address these issues. As might be expected, major procurers such as BAA, London Underground and Network Rail have modified NEC3 terms to meet the demands of the specific environments in which they operate. The Government has also published its own model clauses for public sector schemes<sup>8</sup>. Most employers embarking on NEC based projects will have a range of sector specific issues to address, as well as reflecting in their contract documentation the procedures and policies particular to the individual institution.
- 9 Amendments typically cover such diverse issues as transfer of title (especially in off site goods and materials), testing regimes, performance standards, minimum requirements for record keeping, mechanisms for rejection of work, collateral warranty and/or third party rights and /or manufacturers' guarantee requirements, obligations to mitigate nuisance, safety and quality assurance regimes and handover requirements. These amendments, to a certain extent, will be reflected in the amendments institutions make to other standard form contracts and are not necessarily particular to projects procured under NEC3. The focus is usually on developing those areas of the standard form where certain matters are given perhaps too light a touch or are simply not addressed at all.
- 10 Management of intellectual property rights (IPRs) and issues of confidentiality may be important to local authorities and other public or quasi-public bodies. These matters are particularly significant where state of the art facilities are being developed and/or maintained, where it may be important that the employer is able to take full ownership of the project information generated and to control the information entering the public domain carefully. Major donors may have additional sensitivities about the way in which a project they have funded is publicised. These issues are considered further, below, from a public and quasi public sector perspective.
- 11 Provisions dealing with data protection are often incorporated in conjunction with Z clauses concerning IPRs and confidentiality. Cost management is likely to become a focus for public sector institutions struggling to manage increasingly tight budgets. Audit and inspection rights, as well as requirements for open book costing across the supply chain, may therefore feature in some institutions' amendments to NEC3. Many such institutions also legislate specifically in their contract terms for compliance with current diversity and equal opportunities legislation, and to reflect that institutions' environmental/sustainability requirements, where a green agenda is being pursued.
- 12 The need to produce documentation which responds equally well to refurbishment as it does to new build, will challenge some of the standard provisions of NEC3 and so lead to further modifications. Work within existing structures presents the employer and the contractor with different risks, which need to be addressed in terms of both

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<sup>8</sup> The OGC's 'Official' Z Clauses

insurance (discussed below) and working practice. Many of the logistical aspects of working within existing (often occupied) buildings can be dealt with in the Works Information. However, there is some value in preparing supplemental clauses for the contract conditions dealing with site security, access regimes, preparation of condition and other site surveys, as well as more traditional provisions for nuisance mitigation.

#### *Key Performance Indicators ('KPIs')*

- 13 Secondary option clause X20 incentivises the contractor to meet specific performance targets by offering a financial reward. KPIs will not be suitable for use in all projects, but are more often than not found in framework agreements and other dynamic purchasing environments. If used, KPIs need to be clearly and unambiguously described in order to best fulfil their purpose. Carefully constructed KPIs promoting good performance should help to manage and/or mitigate project risk. However, X20 imposes no sanction for failing to achieve established targets, other than the potential loss of the incentive payment. Therefore some employers who use KPIs frequently have developed X20 to provide for more rigorous evaluation procedures and for the ultimate sanction of termination if there is a consistent failure to meet the established performance criteria.

#### *Insurance and Insured Risks*

- 14 Amendments to the insurance clauses are largely driven by project specific requirements. Major projects frequently call for the amendment of the insurance provisions regardless of the standard form used for the project.
- 15 Notable omissions from the categories of insurance required by NEC3, are obligations to maintain existing structures and buildings insurance where internal works are being undertaken. Therefore a well advised employer with an extensive portfolio of existing buildings to maintain will legislate for an insurance regime to suit that environment. Where the employer requires the contractor to assume a significant amount of design responsibility under NEC3, the contract should also be modified to ensure that there is an effective mechanism in place for obtaining and maintaining professional indemnity insurance.<sup>9</sup>
- 16 Whilst "risk" and "insurance" are dealt with in the same section of NEC3, it does not necessarily follow that every project risk will be insured. Even if the risk is insured it also does not necessarily follow that the insurance will respond to cover the whole loss. The mutual indemnity given in clause 83.1 is not linked to insurance; it is a standalone indemnity to meet the losses the other party incurs. The insurance is simply there to give the parties some comfort that the other party will have the means to meet those losses. However, as noted above, the extent of the cover

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<sup>9</sup> Design responsibility and liability is not dealt with exhaustively in NEC3, therefore as well as enhanced insurance obligations, an employer might also consider whether provision should be made for a formal design development process and/or more prescriptive duty of care obligations for design.

depends on the policy obtained and maintained, so the insurance may not respond fully to an indemnity claim.<sup>10</sup>

- 17 The basic approach to risk allocation under NEC3 is that any risk which is not the employer's risk is deemed to be the contractor's risk.<sup>11</sup> The likely result is that if an event occurs, the employer will argue that the event does not fall within his list of risks in clause 80.1 and must therefore, by default, sit with the contractor. The contract then goes on to state that the relevant party indemnifies the other in respect of risks which are that party's.<sup>12</sup> However, as noted above, any shortfall in the insurance placed to meet an employer's loss will be the contractor's responsibility in respect of his allocated risks.
- 18 Claims which are due to the use or occupation of the site which are the unavoidable result of the works<sup>13</sup>: there is considerable scope for argument as to the precise meaning of this expression. Whether an event is unavoidable is largely a factor of the amount of money spent and the care taken to avoid it in the first place. Although the clause does not refer to it expressly, it may be intended to cover nuisance or damage to third party property (most likely belonging to adjoining owners) which is unavoidable. For example, if an adjoining owner obtains an injunction on the grounds of nuisance, are the resulting costs met by the employer or the contractor? If they are avoidable, the clause suggests they sit with the contractor. Of course, most categories of nuisance can be avoided if working hours are restricted and more expensive methods of construction are used which may limit noise.
- 19 There is some clarification offered in clause 83.2. This provision states that the parties' responsibilities under the contract must be taken into account in apportioning liability under the indemnity. Some of the contractor's responsibilities will no doubt include measures taken to avoid nuisance as well as an overall obligation to carry out the works as a competent contractor. If the contractor fails to do so then the risk could be regarded as avoidable and so the cost rests with the contractor. However, provided the contractor has complied with the contract and the event is unavoidable then the risk rests with the employer. Until this wording is tested in the courts it will remain unclear as to its precise scope. Employers might consider that neither party benefits from the uncertainty caused by this expression, and so might seek to narrow its scope with more prescriptive drafting. However, the writer has yet to see a particularly well drawn amendment in this context.

### *Limit of Liability*

- 20 Clauses to limit the contractor's liability are now becoming more commonplace, particularly in relation to major projects, but have still to become a feature of many standard forms. However, NEC3 offers a standard limitation clause in the secondary

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<sup>10</sup> See clause 85.4 which says that "[a]ny amount not recovered from an insurer is borne by the Employer for the events which are at his risk and by the Contractor for the events which are at his risk"

<sup>11</sup> Clause 80.1 lists the employer's risks. Clause 81.1 says that: "... the risks which are not carried by the Employer are carried by the Contractor".

<sup>12</sup> Clause 83.1 - the indemnity is qualified by clause 83.2 which takes into account the extent to which the event was caused by the other party's risk.

<sup>13</sup> Second bullet point clause 80.1

option clauses, clause X18. The clause is drafted so that different limits of liability for different types of loss or damage can be applied. There is scope to include separate financial limits for indirect and consequential loss, damage to the employer's property, design liability and the contractor's total liability. At first glance the clause certainly seems 'pro contractor', but express exclusions from the specific caps can render this option clause less useful to a contractor than might first appear. Employers may therefore be less wary of using X18, and can consider introducing a range of exclusions to limit the benefit to be derived by the contractor from the limitation clause.

- 21 Indirect or consequential losses are those which are not direct losses arising from a breach of contract. Direct losses incurred by the employer are not limited by the X18.1 limitation (unless capped by an overall limit of liability under X18.4 discussed below). A direct loss can, depending on the circumstances, include loss of profit/revenue. Therefore, depending on the nature of the project the loss of profit/revenue arising from, for example, a defect may be the employer's greatest loss and this clause may not operate to limit the contractor's liability if that loss is classed as direct.<sup>14</sup> The direct loss will almost always include the cost of remedying the defect, so the contractor may still be exposed even where X18.1 is included.
- 22 As regards damage to the employer's property, X18.2 limits the contractor's liability to a pre-agreed figure *per event* for damage to such property. The contractor is nevertheless generally required to insure against damage to the employer's property under clauses 84.1 and 84.2. It is assumed that the contractor and the employer will have discussed the necessary insurance required against damage to property at the outset of the project and agreed a suitable level. This may require the contractor to increase his standard level of cover in respect of the particular project. In practice, the employer may agree to the limit being at the same level as the insurance held by the contractor. Depending on the financial strength of the contractor the insurance may be the only available funds to meet a claim and so agreeing a cap in excess of the available insurance is of little value to the employer. Employers are also unwilling to cap the liability at a figure less than the available insurance as they take the view that if the contractor has such insurance then they, as employer, should have the benefit of it. In summary, the limit of liability in the X18.2 is not a significant advantage for the contractor in practice because of the availability of insurance.
- 23 X18.3 allows the contractor's liability for defects arising from his design to be limited. However, the cap only relates to defects not identified in the defects certificate. In other words, the limit is intended to cover latent defects only. If the defect is known about because it is listed in the defects certificate then the limit does not apply. This obviously limits the protection afforded to the contractor by X18.3. In terms of limiting the design risk the contractor may be better placed by ensuring that Option X15 applies (which is a reasonable skill and care obligation

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<sup>14</sup> The only reliable way to exclude liability for a loss of profit/revenue is to do so with express words and Option X18 does not do this.

rather than fitness for purpose) instead of insisting that X18.3 applies. PI policies will generally not cover fitness for purpose obligations in any event and employers are usually more willing to accept a reasonable skill and care obligation in this context.

- 24 The overall limit of liability in the X18.4 is perhaps of more significance in that it operates as a total limit of liability subject to some 'excluded matters'. A well advised employer will typically exclude the listed matters: damage to the employer's property, delay damages, low performance damages (if X17 applies) or the contractor's share of the "overspend" under target cost Options C and D; and may also decide to introduce some broader exclusions. In effect, therefore, the significant commercial risks (i.e. those which generally not insurable) of delay, performance damages and overspend on the target cost may not be covered by the limit in any event. This option also requires the parties to agree the level of the cap. This will be determined largely by the bargaining strengths of the parties and where the employer has the upper hand the agreed figure may be such that it offers the contractor very little comfort.
- 25 Whilst any limit of liability is beneficial for a contractor, the potential for exclusions from X18 and the reliance placed on the parties to agree an acceptable level for the applicable caps (which will in practice be largely determined by their relative bargaining strengths), can result in limited protection for the contractor in real terms. Therefore, from an employer's perspective, the incorporation of the X18 limitation with some modifications may prove commercially acceptable.

## Compensation Events and Delay

### *Amending Compensation Events*

- 26 The compensation event mechanism enables the determination of matters that are at the employer's risk by compensating the contractor for those risks. Compensation events are of course broader than employer initiated changes and breaches of contract. There are 19 listed events in NEC3 and no distinction is made between events which entitle the contractor to an extension of time, and those which entitle the contractor to additional payment. The time and cost consequences of an event are considered together by the contractor or the PM at the time of the event, and so the mechanism is intended to promote good management.
- 27 This is the theory. In reality it may be very difficult to assess the consequence of the event with any degree of accuracy in 'real time', particularly where events overlap or occur in quick succession. The parties may not have the resources to manage all the assessments, and the cumulative effect of a number of events may be incapable of proper assessment until a project has advanced quite significantly. Pricing is a further issue<sup>15</sup> because assessing cost on the basis of only a forecast of Defined Cost

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<sup>15</sup> CEs are priced not on contract rates but on the basis of Defined Cost. So where work relating to a CE has already been carried out the CE will be priced on the basis of Defined Costs incurred. Where the work has yet to be carried out a forecast of Defined Cost is required, and this can be very difficult for the contractor to assess, particularly in relation to future delaying events and cost adjustments which may be brought about by the CE.

requires the parties to produce a crystal ball to consider the future effects of the event. The tight timescales involved also lead to (at best) conservative assessments and (at worst) to outright disagreements because compensation events cannot be revised at a later date unless the PM has instructed the contractor to apply specific assumptions when asking for a quotation.

28 Common amendments to the list of compensation events in clause 60.1 include:

Event (2) - where the employer does not allow access - this event is frequently amended to preserve the employer's right to disallow or restrict access to parts of the site where the Works Information in the contract provides for these constraints. This is a useful amendment for employers working within an existing building where access is challenging and work may need to be carried out whilst tenants and other third parties remain in occupation of much of the building.

Event (10) - instruction to search for defects - this event is often 'diluted' so instructions to searches are initiated as a result of failures/problems in other areas of the works, or in plant or materials, and the PM has reasonable grounds for believing the fault also lies elsewhere.

Event (11) - delay by Supervisor's test or inspection - this event may be designated to be a compensation event only in limited circumstances, such as where the contract does not provide elsewhere in the contract for such tests to be carried out.

Deletion, or amendment, of event (19) - prevention - this is discussed further below.

Preamble - as with earlier versions of JCT contracts, many employers introduce the concept missing from the standard form, that the listed events are only compensation events to the extent that they are not due to any contractor breach, unlawful act, omission or negligence, and provided also that the contractor has taken 'all reasonable' steps to mitigate the effect of the occurrence of any listed event.

### *Prevention*

29 Event (19) is the only new (and not simply modified) compensation event in NEC3. The event does not apply where it could be classed as any other compensation event set out in the contract, and the tests for whether it will apply are absolute. This force majeure type event is unlikely to be commonly encountered, however the difficulty with it from an employer's perspective is that it is very broadly drafted and so could cover events which would not otherwise be classed as compensation events, such as subcontractor insolvency.

30 For many projects this leads to the deletion of this event by the employer, and of the corresponding clause 19, so as to avoid the risk of all such events automatically becoming the employer's responsibility. An alternative approach is to delete the second bullet point in this clause<sup>16</sup>, preserving the more sensible first limb of the clause, so allowing only true prevention to qualify as compensation event. A further alternative, to mitigate the effect of the prevention drafting in the contract, is to

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<sup>16</sup> "[an event which] stops the Contractor completing the works by the date shown on the Accepted Programme"

restrict the operation of prevention as a compensation event under clause 60.1 (19,) to (for example) specific events such as strikes and lock outs not specific to the contractor's workforce or subcontractors and/or to the consequences of Government action.

### *Conditions Precedent*

- 31 NEC3 is far more stringent than previous editions of the contract in its approach to contractual notifications and responses, and none more significantly than in respect of compensation events. Potential for both parties to be exposed to additional expense is therefore greater. Clause 61.3 operates as a time bar - if the contractor does not notify a compensation event *within 8 weeks of becoming aware of the event*<sup>17</sup>, he is not entitled to a change in the Prices, the Completion Date or any Key Date specified in the contract<sup>18</sup>. Clause 63.4 confirms that these changes are the only right of the employer and the contractor in respect of compensation events.
- 32 Responsibility for notifying compensation events is, some might say, unhelpfully blurred in NEC3.<sup>19</sup> Either the contractor or the PM may notify a compensation event and the contractor is relieved from the operation of the clause 61.3 time bar where the PM should have notified an event but did not do so. The Guidance Notes attempt to clarify which events should typically be notified by either or both parties, but distinctions are not always clearly drawn, or supported in the contract, which leaves room for ambiguity and therefore doubt over responsibility and potential for dispute.
- 33 The more rigorous approach to the time the PM takes to issue notices and responses is applied in various provisions<sup>20</sup>. Where the PM makes no initial response, the contractor has the option to notify the PM of such failure. If the PM subsequently fails to reply within 2 weeks of the second notice, the contractor's original notice/quotation is deemed accepted. Deemed acceptance under clause 61.4 triggers the submission of a quotation and the process in clause 62.3 is initiated without the opportunity for the PM to register any failure of the part of the contractor, for example, to submit an early warning or to operate clause 61.6 (assumptions). Therefore the employer will only have an option to challenge the quotation in adjudication.
- 34 Whilst these provisions are in keeping with the NEC philosophy of addressing matters as they arise, not retrospectively, they remain challenging and (to many) controversial. It is therefore not unusual for certain users to delete them entirely. This of course calls for other consequential amendments to the contracts.

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<sup>17</sup> Another potential area of dispute, as contractors may argue only recent awareness of an event even if that event took place well in excess of 8 weeks ago. In such circumstances the experienced contractor test should apply.

<sup>18</sup> Further, if the PM does not notify his decision on a contractor's CE claim within the time prescribed the CE is deemed accepted on behalf of the employer.

<sup>19</sup> The PM nevertheless has clear obligations to notify where a CE arises from a PM/Supervisor instruction or where an event changes an earlier decision. The PM must also give an instruction to submit a quotation where the PM is considering issuing a new instruction or changing a decision.

<sup>20</sup> (a) Clause 61.4 - failure to reply to a contractor's notice of a CE (b) Clause 62.6 - failure to reply to a quotation and (c) Clause 64.4 - failure to assess a compensation event where the PM is required to do so under Clause 64.1

### *Key Dates - Clause 30*

- 35 Key Dates are an innovation in NEC3 potentially beneficial to both parties. Key Dates are essentially milestones by which work is required to have reached a specific point. However, the contract does not (without amendment) recognise the potential need to co-ordinate work with the work of others<sup>21</sup> and where the contractor fails to meet a Key Date, the sanctions for failing to do so under clause 25.3 are more limited than an employer might ordinarily expect. For example, an employer in such circumstances is only entitled to claim the cost of completing the work (whether under the same contract or procured through the services of others). Consequential loss due to late running of the project cause by a missed Key Date or Dates is irrecoverable. This is an aspect of the contracts which is ripe for amendment from an employer's perspective, particularly where Key Dates are of greater (financial) significance for the project than the Completion Date itself.

### *'Public Sector' Amendments, Anti Fraud/Anti Corruption and Similar Clauses*

#### *OGC "Official" Z Clauses*

- 36 The Office of Government Commerce's published Z Clauses are optional, but nonetheless useful for certain projects. They are drafted for compatibility with both NEC3 and public sector terminology. These clauses deal specifically with confidentiality and the application of the Official Secrets Act 1989 (and where applicable, the Atomic Energy Act 1946) as well as legislating for more practical security matters, such as site admittance, security passes and restrictions on photography. The clauses are not lengthy and some users may choose to expand upon them.

#### *Confidentiality, Freedom of Information and Copyright*

- 37 The confidentiality obligation in the OGC Official Clauses is a basic non-disclosure provision<sup>22</sup>. However, many major employers prefer to adopt more rigorous confidentiality provisions tailored to their own operational needs and sensitivities. There is usually an express requirement in such terms to include equivalent obligations in the sub-tier contracts and, for clarity, a statement about the types of information (if any) to which the restrictions do not apply. To reflect current legislation it is also usual to include a statement that any disclosure required to comply with the Freedom of Information Act 2000 or the Environmental Information Regulations 2004 is a permitted disclosure.
- 38 Rather than obtaining a bare licence to use copyright material for project related activities, the employer may insist upon an assignment of all the contractor's intellectual property rights, granting a licence back to the contractor and its subcontractors for the sole purpose of executing the project. There may also be

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<sup>21</sup> Clause 30.3: "The Contractor does the work so that the Condition stated for each Key date is met by the Key Date"

<sup>22</sup> "The Contractor does not use or disclose information concerning the contract obtained either by the Contractor or by any person employed by him except for the purposes of the contract."

specific obligations incorporated in the relevant Z clause, for procuring and maintaining software licences and for securing similar rights for project stakeholders.

#### *Discrimination*

- 39 Public bodies or quasi-public bodies will be concerned to include detailed provisions addressing the raft of anti-discrimination legislation that now exists, as well as to reflect in the contract terms their own policies for reducing racism and gender discrimination and promoting equal opportunities.

#### *Anti Corruption*

- 40 Many major procurers have developed boilerplate Z clauses to discourage fraud and imposing prohibitions on corrupt gifts and commission payments. We will see further innovations in this area to address the requirements of the Bribery Act 2010, which comes into force in April 2011. The Act's application is not restricted to UK companies or activities within the UK. The UK courts have jurisdiction if the offence is committed by someone with a close connection to the UK or by a corporation who does business with [within?] the UK, regardless of where the alleged offence was carried out. Sections 7-9 of the Act make it a corporate offence to fail to prevent bribery. Infringing companies will be subject to unlimited fines, as will individuals (with the additional penalty of up to 10 years imprisonment).

- 41 The Government has published some initial guidance to accompany the legislation<sup>23</sup>, although such guidance does not go so far as to identify best practice procedures. Practical steps can however be taken now, reinforced by appropriate contract amendments. At the procurement stage the employer is best advised to establish clear obligations up and down the contractual chain and to consider how they can be enforced.

- 42 Some employers already address in some detail these, and wider, conduct issues. TfL use NEC 3 with specific additional provisions incorporated as Z Clauses. These provisions include, inter alia, obligations in respect of compliance with TfL policies, corrupt gifts, conflicts of interest, commission payments, audit and inspection. Bodies such as TfL cannot actively review compliance with all these provisions given the resources required to do so effectively, but if they become aware of a potential breach, steps can be taken to enforce the contract terms.

#### NEC3: Stimulus to Good Management?

- 43 Much is demanded of the Project Manager under NEC3<sup>24</sup>, and to a slightly lesser extent, its earlier incarnations. Many of the problems faced by parties using NEC3 are that the scope of the role is often misunderstood and/or the Project Manager administers the contract as if it was a 'traditional' alternative form. The role is also very resource heavy, as the project manager has to shoulder much of the administrative burden.

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<sup>23</sup>[www.justice.gov.uk/consultation/briberyactconsultation.htm](http://www.justice.gov.uk/consultation/briberyactconsultation.htm)

<sup>24</sup> Brian Egglestone's book 'The NEC3 Engineering Construction Contract - A Commentary' (Third Edition) cites more than 50 duties for the PM to perform, including the assessment and valuation of compensation events.

- 44 The burden of the breadth of the role is increased by the demanding response time required by the contract and mentioned above. A failure to respond results in deemed acceptance of a contractor's notification or quotation. This is clearly a strong incentive for the Project Manager to act decisively and in a timely fashion, however, from an employer's perspective, there is a risk that if the Project Manager 'drops the ball' the contractor's interpretation of events/costs will stand.
- 45 The status of the Project Manager, whether or not he/she is an 'employer's man', has been considered in some detail<sup>25</sup>. The general view is that the Project Manager has a duty to act impartially, and this conclusion is all the more significant in the context of administering compensation events. *Costain v Bechtel* confirms that where the Project Manager is required to hold the balance between the employer and the contractor, the project manager has the normal duties of a certifier. The project manager is therefore only the employer's man in performing specific functions.
- 46 Some employers are keen to adapt the Project Manager's duties to meet their own specific needs. The employer's role is much less 'hands on' unless the balance of responsibility is revised by amendment. However, where Z clauses impose additional duties or alter the balance of the Project Manager's obligations, the employer should ensure that the Project Manager is aware of, and capable of meeting, the requirements of the changes made.

#### New Zealand Experience

- 47 NEC forms have become popular over the past 5 years in the power and water sectors, and are the preferred contracts for a number of local authorities. NEC is generally perceived as a good 'fit' for the New Zealand contracting market, which is not large, and which relies heavily on a collaborative approach. As in the UK, the nature and scope of the amendments made to the standard forms vary considerably in quality and complexity. The insurance and payment clauses are most often amended to meet the specific requirements of a project. Modifications to the standard form to reflect the requirements of the Construction Contracts Act 2002<sup>26</sup> have been prepared, and are currently under consideration with a view to publication by the NEC soon.
- 48 The emphasis on proactive project management in the NEC suite has generally been welcomed by those performing the PM role, although for some it has taken time to adapt to the demands of the contract (for example, in terms of information management and 'real time' assessment of compensation events). Compiling the Works Information has also proved challenging for some, particularly where NEC is adopted as the project contract part of the way through a procurement process which commenced on the basis of a 'traditional' specification and drawings approach.

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<sup>25</sup> Most notably in the context of NEC2, see *Costain v Bechtel* [2005] EWHC 1018. The Employer was not joined in the dispute. Bechtel was part of the CTRL project management consortium and Costain was a consortium contractor. The contract was target cost contract and the target moved significantly during the course of the works. Jackson J determined that the PM was required to act fairly and impartially.

<sup>26</sup> The equivalent of the HGCR in New Zealand.

## Conclusion

- 49 Employers currently working with NEC3, or with its predecessor NEC2, generally do amend the standard form. Extensive amendments often move the contract away from its origins as a collaborative procurement tool towards a more adversarial document, therefore major changes should be made with caution. NEC3 can nevertheless be improved with careful amendment. Used actively and with a close eye on its terms, some of the shortcomings of the existing drafting can also be overcome. NEC3, whether amended or un-amended, is not a contract which should be filed on signature. It should be the constant companion of the team throughout the project.