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NEC3 Issues and Common Amendments

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Why amend?

"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."

Anglia Water v Laing O'Rourke [2010] EWHC 15-29


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Why amend?

- To clarify language used
- To establish document hierarchy and add cross referencing
- To incorporate project specific requirements
- To address new legislation

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Structure (1)

ECC Contract Conditions

- Core Clauses: Sections 1 to 9
- Main Option Clauses: A to F
- Options W1 and W2: Dispute Resolution
- Secondary Option Clauses: 20 in the standard form
- Option Y: HG CRA 1996
- Option Z: Supplemental Conditions


Schedule of Cost Components ('SCC')

- Shorter Schedule of Cost Components ('SSCC') for valuing compensation events

Contract Data

- Part One - Employer
- Part Two - Contractor


Appendices

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Structure (2)

E C C Core Clauses


- General
- Contractor's main responsibilities
- Time*
- Testing and Defects
- Payment*
- Compensation Events*
- Title
- Risk and insurance*
- Termination

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Structure (3)


Pricing: Options A-F

- A - Priced with activity schedule
- B - Priced with bill of quantities
- C - Target cost with activity schedule
- D - Target cost with bill of quantities
- E - Cost reimbursable
- F – Cost reimbursable management contract

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Structure (4)

<u>Contract Data – Part One</u>	<u>Contract Data – Part Two</u>
<ul style="list-style-type: none">• Provided by the Employer• Describes the Works• Works Information• Access dates• Key dates• Completion/Sectional Completion dates	<ul style="list-style-type: none">• Provided by the Contractor• The Programme• Contract Completion Date• Activity Schedule• (Bill of Quantities)• Schedule of Cost Components

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Innovations



- **Modular structure**
- **Collaborative risk management: early warnings, risk reduction meetings, risk registers**
- **Ongoing "real time" assessment and management of delay**
- **Rigorous approach to notices and other contractual communications**

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Common Amendments (1): Risk



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Risk ...

- Status of risk register (16.4)
- Z clauses to address project specific risks
- Revisions to insurance clauses (80-83)
- Limitation of liability (x 18)
- Key performance indicators (x 20)

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Common Amendments (2): Compensation Events/Delay

- Revisions to Clause 60.1
- Clause 19
- Conditions Precedent in clauses 61, 62 & 64
- Key Dates

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Clause 60.1: 19 Compensation Events

- Access - Clause 60.1(2): limiting the operation of this clause to the access requirements in the Works Information
- Defects - Clause 60.1(10): creating other exceptions to this CE so that the instruction is not a CE if given as a result of failures/problems in other similar Plant/Materials or if the PM has reasonable grounds for believing such failures/problems exist
- Tests - Clause 60.1(11): clarifying that delay is necessary and so not a CE if it arises from the proper carrying out of any test
- Prevention - Clause 60.1(19): deleting or modifying this clause

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Clause 19: Prevention


19.1 If an event occurs which

- stops the *Contractor* completing the works or
- stops the *Contractor* completing the works by the date shown in the Accepted Programme

and which


- neither party could prevent and
- an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would be unreasonable for him to have allowed for it

the *Project Manager* gives an instruction to the *Contractor* stating how he is to deal with the event.

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Conditions Precedent

- 61.3 – failure to notify a CE within 8 weeks of becoming aware of the event = no entitlement to extra time or money
- 61.4 – PM has one week to respond to Contractor's notice of a CE
- 62.6 – if PM fails to respond within 2 weeks to Contractor's quotation for a CE, quotation is treated as accepted
- 64.4 – if PM fails to assess a CE, Contractor can make its own assessment. If PM fails to respond to that assessment within 2 weeks it is treated as accepted

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Clause 30: Key Dates

- Key Dates are not sectional completion dates
- Contractor must give early warning(s) if Key Dates are likely to be missed
- If Key Dates are not met, the Employer's only sanction is to recover or to disallow costs which he or she incurs as a result of employing other contractors to carry out the work as a direct result of the Contractor's failure to complete by such Key Dates

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**Common Amendments (3)
Public Sector Projects**


- Copyright and Confidentiality
- Audit Rights
- Non discrimination
- Anti Corruption
- OGC "Official" Z clauses

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Common Amendments (4) : New legislation

Bribery Act 2010


- Passed 8 April 2010
- Comes into force in April 2011
- Consolidates existing legislation
- Not restricted to just the UK or UK companies
- The UK courts have jurisdiction if the offence is committed by someone with a close connection with the UK or by a corporation who does business in the UK regardless of where the alleged offence was carried out

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Bribery Act 2010


Covers

- Section 1: Bribery - the offering, promising or giving of an advantage
- Section 2: Being bribed - as requesting, receiving or agreeing to receive an advantage
- Section 6: Bribery of foreign officials
- Sections 7-9: Corporate offence of failing to prevent bribery

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Bribery Act 2010

- **Sections 7-9 – Corporate offence of failing to prevent bribery**
Defence: if the organisation has “adequate procedures” in place to prevent bribery
- **For Government guidance go to:**
www.justice.gov.uk/consultation/briberyactconsultation.htm;
- But current guidance is only high level and is not prescriptive about best practice

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Bribery Act 2010: Penalties and practical steps

- Companies are subject to unlimited fines
- Individuals face unlimited fines and imprisonment (up to 10 years)

At the start of the procurement ask:

- What does your contract say?
- What about the contractual chain?
- What are your obligations not only up but down the chain?
- How can they be enforced?

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Anti corruption: a typical Z clause

Clause Z-11

"The Contractor does not, and ensures that its employees, agents Subcontractors and Indirect Subcontractors do not, pay any commission, fees or grant any rebates to any employee, officer or agent of the Employer or any member of the TfL Group nor favour any employee, officer or agent of the Employer or any member of the TfL Group with gifts or entertainment of significant cost or value nor enter into any business arrangement with employees, officers or agents of the Employer or any member of the TfL Group other than as a representative of the Employer, without the Employer's prior written approval."

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Managing the team



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Project Manager's Role

- Role is critical to the outcome of the project, therefore competence is essential
- NEC3 does not prohibit in-house appointments – external PMs are however often desirable
- Unlike ICE, no need to name an individual
- PM may delegate his actions on notice to the contractor
- No express duty of impartiality, however note *Costain Ltd and Others v Bechtel Ltd (2005)* where judge held (albeit in connection with NEC2 terms) that the PM was required to act fairly and impartially
- Case for impartiality is stronger under NEC3 as PM now required to assess amounts due between the parties

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Project Manager's Role

- More than 50 specific duties under ECC3
- Most significant duties – 'to act as stated in the spirit of mutual trust and co-operation'; to issue certificates; to give early warnings; to issue instructions; to decide completion date and certify completion; to accept programme and any revised programmes; to assess costs and amounts due for payment; to assess and implement compensation events; to issue termination certificate; to certify final payment following termination.

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Conclusions

- NEC contracts are now firmly established in the contractual landscape of UK Procurement
- The innovations in the contracts may be open to some criticism, but are in general beneficial, and with good management may be implemented effectively
- The contracts can be improved by careful amendment
- Do not ignore the contract once it is in place: USE IT
