

NEC4 Engineering and Construction Subcontract – review of changes from NEC3

Here is a review from GMH Planning Ltd of the significant changes within the NEC4 ECS contract compared to that of the NEC3 version. We have not identified every single change, but picked out the main differences that if you are relatively experienced with NEC3 you should know/understand if you are to embark on an NEC4 contract anytime soon. In this document we do not generally go into substantial explanation why the changes have been made, but most should be relatively self-explanatory for those already experienced with these contracts. Any underlined words within this document are new NEC4 words added within an existing NEC3 clause.

For how these should be understood in practice, we regularly run public NEC4 Overview workshops to expand upon the practical application of this document. For details of the next training workshop please go to the blog section of our website - www.gmhplanning.co.uk:

General ECS changes

- Better laid out with more separate paragraphs and more bullet points
- Language change – inform or state rather than notify and instruct in some places
- Gender neutral
- Reworded a few more option specific clauses such that they are now core clauses – less option specific

Key:

Additional new NEC4 clause, Point of clarity (always intended), Change to previous clause wording,
Same clause but changed number, Deleted NEC3 clause

Section 1- General

- Previous NEC3 clause 10.1 split into two clauses to emphasise that they should both be adhered to – not one OR the other:
- Clause 10.1 – the Parties shall act as stated in contract.
- Clause 10.2 – the Parties act in a spirit of mutual trust and cooperation.
- Clause 11.2 new definitions 20no now rather than 19 previously:
 - Corrupt Act - new defined term
 - Early Warning Register – changed from Risk register
 - Scope - changed from Works Information
 - Subsubcontractor – revised definition
- Clause 12.1 – amended to confirm contract is gender neutral i.e. no more he/his
- Clause 13.2 – states if Scope confirms use of a contract administration tool (e.g. Cemar, Conject) then the date of communication has effect when entered into that system. Otherwise communications are as before i.e. the address as stated in CD1
- Clause 13.4 – amendment to wording that requires Contractor to confirm reasons for rejection in sufficient detail to allow the Subcontractor to correct the matter. Previously simply stated that they give reasons for rejection.

NEC4 Engineering and Construction Subcontract – review of changes from NEC3

- Clause 14.1 – acceptance of communication or of the work does not transfer liability
- Section 15 is now early warnings rather than previously being 16
- Clause 15.1 – now calls it the Early Warning Register rather than Risk Register
- Clause 15.2 – now obligates the *Contractor* to produce and issue the first Early Warning Register within one week of the starting date. *Contractor* also instructs *Subcontractor* to attend first early warning meeting within 2 weeks of the *starting date*. Also then confirms that later meetings will be as instructed by either side, or as a minimum at the intervals stated in Contract Data. Also states that other people can attend if it would assist to decide actions to be taken.
- Clause 15.3 – extra emphasis on early warning meeting to review previous actions and decide any different actions that need to be taken and who should take them
- Clause 15.4 – obligation on *Contractor* to reissue Early Warning Register within one week of early warning meeting
- Section 16 – now called “*Subcontractor’s Proposals*”
- Clause 16.1 – *Subcontractor* can propose to *Contractor* a change in Scope in order to reduce the amount the *Contractor* pays the *Subcontractor* to provide the works. (*Subcontractor* will benefit through the new *engineering ratio* for options A/B and through *share percentage* for options C/D)
- Clause 16.2 – Within five weeks the *Contractor* accepts the proposal and either a) issues an instruction changing scope, b) instructs a proposed quotation, or c) rejects proposal.
- Clause 16.3 – *Subcontractor* can propose a change to Working Area (previously clause 15.1 under NEC3)
- Section 17 – now titled Requirements for Instructions (previously Ambiguities and Inconsistencies)
- Clause 17.1 – subtle change where *Contractor* states how ambiguity should be resolved rather than “instructs”
- Clause 17.2 – is now illegal/impossible requirement (previously 18.1)
- Section 18 – Corrupt Acts – *Subcontractor* not allowed to do corrupt acts and nor are their Subsubcontractors/suppliers. This is also a new reason to be able to terminate by *Contractor* in section 9

Section 2 – *Subcontractor’s* Main Responsibilities

- Clause 26.3 – confirms that NEC subcontract should be issued for acceptance unless it is an unamended NEC contract (other than with amendments passed down from main contract).
- Clause 28.1 – Assignment – either Party notifies the other Party if they plan to transfer the benefit of the contract or rights under it (nothing more expanded upon this element within guidance notes).
- Section 29 – Disclosure – *Parties* do not disclose information obtained in connection with the works, or publicise the works without *Contractor’s* agreement

Section 3 - Time

- Clause 31.2 - Only change from NEC3 is last line: “A programme issued for acceptance is in the form stated in the Scope”.

NEC4 Engineering and Construction Subcontract – review of changes from NEC3

- Clause 31.3 – two major changes to this clause. Firstly, the Contractor has to respond to a programme issued for acceptance now within three weeks rather than two. Secondly, if Contractor does not respond to a programme issued for acceptance by the Subcontractor, the Subcontractor can notify this non-response to the Contractor. Failure to respond to the notification within a further two weeks would mean that the programme is treated as having been accepted (i.e. deemed accepted).
- Clause 32.1 – deleted requirement to show implemented compensation events on a revised programme. This is to avoid confusion that it was only implemented compensation events that before should be shown – remains to be seen if this causes more or less confusion. Intent is that you HAVE To show effects of non-implemented compensation events but these will only ever be affecting planned Completion (not Completion Date).
- Clause 36.1 – Contractor can no longer instruct quote for acceleration. Either Subcontractor/Contractor can propose. If BOTH sides are prepared to consider the change, then the Contractor can instruct a quotation to accelerate. Now there are timescales of up to two weeks to produce quotation by Subcontractor and four weeks for the Contractor to reply. Also now includes the response to quotation as being a core clause, rather than previously being lost within the main option clauses.

Section 4 – Quality Management

- Section 40 – new section: Quality management system. All previous clauses are then one number more than previous.
- Clause 40.1 - Requirement for Subcontractor to operate a quality management system complying with requirements of the Scope. Quality policy statement and plan to be issued for acceptance.
- Clause 40.3 – Contractor may instruct the Subcontractor to correct a failure to comply with the quality plan – which will not result in a compensation event
- Section 41 – tests and inspections. No real change other than in clause 41.3 where Subcontractor and Contractor inform each other of tests and inspections to be carried out (rather than notify)
- Clause 45.2 – if proposal not to correct defect is accepted – last line says that as well as Prices and Completion date are changed – programme is accepted! No mention of one being required to be issued though previously within that clause.

Section 5 - Payment

- Clause 50.2 – obligates the Subcontractor to submit applications detailing how they have been assessed and to make sure they are in the form stated in the Scope
- Clause 50.4 – if the Subcontractor does not submit an application then the amount due will either be the amount at the previous application or whatever the Contractor assesses – whichever is lower i.e. Subcontractor therefore obligated to put in an application if they want paying within that period.
- Clause 50.5 – previously 50.3 where 25% of Subcontractor assessment is withheld for not submitting first programme for acceptance showing the information the contract requires

NEC4 Engineering and Construction Subcontract – review of changes from NEC3

- Clause 51.1 obligation on *Contractor* to show how the certified payment has been assessed
- Section 53 – whole new section on Final assessment
- Clause 53.1 – final assessment by *Contractor* to be made within four weeks of Defect Certificate issued by *Contractor*, giving details of how it has been assessed
- Clause 53.2 – If the *Contractor* does not make this assessment, *Subcontractor* may issue to *Contractor* an assessment of the amount due, and payment made within three weeks of assessment. Would appear to be a silent deemed acceptance if *Contractor* does not respond (in accordance with 53.3)
- 53.3 assessment of final amount due issued within time stated in contract is conclusive evidence of the final amount due unless party takes action under W1/2/3 i.e. refers matter for dispute

Section 6 – Compensation Events

- Two new compensation events:
- Clause 60.1(20) – *Contractor* notifies the *Subcontractor* that a quotation for a proposed instruction is not accepted
- Clause 60.1(21) – additional compensation events stated in contract data part 1
- Clause 61.1 previous wording split now across 61.1 and 61.2.
- Clause 61.1 states that for compensation events resulting from *Contractor* instruction, the *Contractor* notifies the compensation event at the time of giving the quotation. It no longer states as last sentence “*Subcontractor* puts decision into effect”. Don’t think this changes much but it was a nice point of clarification previously.
- Clause 61.2 states that the *Contractor* includes the request to provide a quote – i.e. one piece of paper to state it is a compensation event and to request the quote
- Clause 61.2 under NEC3 “Proposed Instructions” now clause 65 in NEC4
- Clause 61.4 response to notified compensation event clarifies that if the compensation is not notified within timescales of contract then the *Contractor* would confirm no change to Prices/Key Date/Completion Date
- Clause 63.1 – adds the term dividing date in terms of boundary between actual/defined cost. Dividing date is the date of the instruction/changed decision, or for all other compensation events the dividing date is the date the compensation event is notified.
- Clause 63.2 – now a core clause, whereby agreement to use rates or lump sums may be used to assess change to Prices
- Clause 63.3 (just renumbered from 63.2) If a compensation event reduces Defined Cost, Prices are not reduced except as stated in this contract
- Clause 63.4 (used to be option specific) For a compensation event the Prices are reduced if 1) it was a change to Scope except those proposed by *Subcontractor*, and 2) unless it was a change to Scope proposed by *Subcontractor*, or correcting a *Contractor* assumption within a quotation
- Clause 63.5 (old 63.3) delay to Completion Date assessed as the length of time that due to the compensation event planned Completion is later than planned Completion as shown on the Accepted Programme current at the dividing date. Repeats same rule/principle for Key Dates. Then adds new sentence which is unclear on exactly what it means: “When assessing delay only those operations which the *Subcontractor* has not completed and which are affected by the compensation event are changed”

NEC4 Engineering and Construction Subcontract – review of changes from NEC3

- Clause 63.7 (old 63.5) event can be assessed as though an early warning was given if fact identified by *Contractor* when requesting a quote in line with 61.5
- Clause 63.8 (old 63.6) can include risk which have a significant chance of occurring and are *Subcontractor's* risk under contract
- Clause 63.10 (old 63.8) - ambiguities are assessed for the interpretation most favourable to those who did not create the ambiguity
- Section 65 no longer “implementation” but “Proposed Instructions”
- Clause 65.1 is old 61.2, but adds the fact that *Contractor* states within the instruction when the proposed instruction may be given.
- Clause 65.2 - *Subcontractor* submits quote for proposed instruction within two weeks. *Contractor* responds by the date the proposed instruction may be given. Now clearer responses which are either a) request for revised quote, b) issue of instruction together with notification of the instruction as a CE and acceptance of the quote, or c) quote not accepted.
- Clause 65.3 clarifies that if quote not accepted, *Contractor* may issue instruction, notify as a compensation event and instruct a quotation
- Section 66 – Implementation
- Clause 66.2 – confirms in core clauses that Prices/Completion Date changed at the point the notification of acceptance (although prefer old wording where it said that had to be stated in notification – all be it having been lost in option clauses)

Section 7 - Title

- No real change other than clause 74.1 *Subcontractor's* use of materials – which is right only to provide the works and *Subcontractor* has no other rights

Section 8 - Liabilities and Insurance

- 80.1 changed title to “*Client's* and *Contractor's* liabilities” rather than “*Employer's* and *Contractor's* risk” in NEC3. Same list of liabilities as before, with addition of fault in design within *Contractor* scope or instruction from *Contractor* confirmed as *Contractor* risk
- 81.1 – title changed to “*Subcontractor's* liabilities”, and rather than stating everything else is *Subcontractor* risk now lists *Subcontractor* liabilities in full: Claims or proceedings from Others in connection with the *Subcontractor* Providing the Works / Loss or damage to the works, Plant and Material and Equipment / damage to *Client* or *Contractor* property in connection with *Subcontractor* providing the works / death or injury to employees of the *Subcontractor*.
- What if there is something that occurs that falls between gap of 80.1/81.1? Who's liability would this be??
- Section 82 details recovery of cost

Section 9 - Termination

- Clause 90.2 amended so *Contractor* may not terminate for any reason – but there is a new secondary option X11 that allows them to (but have to expressly include it)
- Clause 91.8 - New additional reason to terminate (22) – Corrupt Act

NEC4 Engineering and Construction Subcontract – review of changes from NEC3

Option A [also same for *option B]

- *Clause 11.2(23) – Defined Cost no longer excludes the cost of preparing quotations for compensation events
- *Clause 11.2(26) New term for People Rates which are included within contract data part 2.
- Clause 55.1 – extra line to say if activities on the Activity Schedule do not relate to Scope, *Subcontractor* corrects activity schedule.
- *Clause 63.12 confirms that changes to *Contractor* Scope proposed by *Subcontractor* and accepted, the Prices are reduced by an amount calculated by applying the value engineering percentage in contract data part 1 (Contractors need to be careful they get this right way round as the Prices are reduced by the percentage amount stated in contract data i.e. if you wanted to give the *Subcontractor* 30% benefit the percentage should be 70%). This is unique to options A&B.
- *Clause 63.16 – if for a compensation event the new People Rates do not include a rate for category of person required, *Contractor* and *Subcontractor* agree a new rate. If they can't agree, *Contractor* assesses based on other rates, and that rate becomes the new People Rate for that category of person

Option C [also same for *option D, ^option E]

- *^ Clause 11.2(24) Simpler definition of Defined Cost which no longer states amounts paid to Subsubcontractors – this is now a section in schedule (4) but same essence.
- *^ Clause 26.4 – default is that *Subcontractor* submits pricing information in proposed subcontract documents unless *Contractor* agrees no such submission is required
- Clause 31.4 deleted – so no obligation under option C for items on the activity schedule to relate to programme, or option/requirement to revise and have accepted
- *^ Clause 50.9 – allows *Subcontractor* to notify to *Contractor* when parts of Defined Cost have been finalised and records available to demonstrate it has been correctly assessed. *Contractor* reviews records within 14 weeks notifying either a) acceptance, or b) further records are needed, or c) *Subcontractor* errors in assessment. If further records required these are to be provided within three weeks, and *Contractor* has to accept or notify own assessment within further five weeks. If the *Contractor* does not notify a decision within time stated then *Subcontractor* assessment is treated as being deemed accepted.
- *Clause 63.13 verifies that change to *Contractor* Scope proposed by *Subcontractor* will NOT reduce the total of the Prices – and so assessed as part of the *Subcontractor's* share.

Section W changed from “Dispute Resolution” to “Resolving and Avoiding Disputes”.

W1&2 - add an extra requirement that says first try to resolve with senior representatives, and if not resolved then go to Adjudication

NEC4 Engineering and Construction Subcontract – review of changes from NEC3

Secondary Options

X4 – renamed “Ultimate holding company guarantee” from “Parent company guarantee”

X8 – Undertakings to *Client* or *Others* – *Subcontractor* gives undertakings to *Others* and *Client* as stated in contract data

X9 – Transfer of Rights – *Contractor* owns *Subcontractor* rights over material prepared for design of works except as stated in Scope

X10 – Information modelling

X11 – Termination by *Contractor* – *Contractor* may terminate for a reason not identified in termination table

X12 – renamed “Multiparty Collaboration” – split into Identified terms / Actions / Collaboration / Incentives

X15 - renamed “*Subcontractor’s Design*”

X16 – Retention – clause 16.3 introduces a retention bond if stated in contract data or agreed by a *Contractor*

X21 – Whole Life Cost – *Subcontractor* can propose change to Scope to benefit operating cost/maintenance. Quotation accepted or not accepted. If accepted, *Contractor* changes Scope/Prices/Completion Date accordingly. Change to Scope is not a compensation event.

Schedule of Cost Components

- 11 – amended to say wages and salaries for people working on the contract, rather than “when working within the working area”
- 41 – Subsubcontractors
- 5 – Charges – better laid out and clearer
- 6/7/8 previous 5/6/7 (Manufacture and Fabrication / Design / Insurance) - no manufacture percentage or design percentage anymore

Short Schedule of Cost Components (note short not shorter!)

- 1 – addition to second bullet where people can be paid who are not within the working areas, but adds “proportionate to the time they spend in the working area”, which would seem even more restrictive than NEC3?

NEC4 Engineering and Construction Subcontract – review of changes from NEC3

Contract Data

new layout which encourages it to be filled out electronically

Data part 1

- adds in address for electronic communications for individuals
- *early warning interval* included
- optional statements are included within relevant contract section rather than at end
- adds space to add in additional compensation events
- space for exchange rates under option C/D/E
- new section for resolving disputes which includes space for senior representatives (W1/W2) data to fill in for X8/X10/X22

Data part 2

- only one *Subcontractor* fee percentage – no Subsubcontractor fee
- no people/working area overhead
- inclusion of people rates for option A/B, and for designers/manufacture for all options

Professional Service, Term Service and Supply contracts all use Defined Cost in the same way as ECS contracts