

NEC4 Professional Services Contract – review of changes from NEC3

Here is a review from GMH Planning Ltd of the significant changes within the NEC4 PSC 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 public training workshop please go to the blog section of our website - www.gmhplanning.co.uk:

General PSC 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
- 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 and the *Service Manager* shall act as stated in contract. Introduction of *Service Manager* to PSC who makes all the decisions and issues instructions and accepts on behalf of the *Client* (like the *Project Manager* under ECC). Most obligations previously stated as the Employer under NEC3 are now carried out by the *Service Manager* under NEC4.
- Clause 10.2 – the Parties and the *Service Manager* act in a spirit of mutual trust and cooperation.
- Clause 11.2 new definitions 14no now rather than 13 previously:
 - Corrupt Act - new defined term
 - Early Warning Register – changed from Risk Register
 - Fee – introduction of fee percentage to be applied to Defined Cost (another new term to specific options)
 - Parties are *Client* and *Consultant* – changed from *Employer* and *Consultant*
 - Subcontractor – rather than Subconsultant and revised definition clarifying supply of people only paid for time they work is exception.
 - Time Charge definition deleted in NEC4 as this will now be paid as part of new Schedule of Cost Components
- Clause 12.1 – amended to confirm contract is gender neutral i.e. no more he/his stated anywhere in contract

NEC4 Professional Services Contract – review of changes from NEC3

- 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 *Service Manager* to confirm reasons for rejection in sufficient detail to allow the *Consultant* to correct the matter. Previously simply stated that they give reasons for rejection.
- Clause 13.6 – clarification with new role of *Service Manager* that they issue certificates to *Client* and *Consultant*
- Clause 14.1 – acceptance of communication or of the work does not transfer liability
- Clause 14.2-14.5 are new clauses addressing the new role of a *Service Manager*
- Clause 14.2 – deals with a *Service Manager* delegating their powers
- Clause 14.3 – *Service Manager* may give an instruction that changes Scope or a Key Date
- Clause 14.4 – *Service Manager* does not give an instruction which require *Consultant* to act in a way outside of its professional conduct
- Clause 14.5 – *Client* may replace *Service Manager* after notifying *Consultant* of their replacement
- Clause 15.1 – now calls it the Early Warning Register rather than Risk Register. Requirement for an early warning for a matter which could change the Accepted Programme has been deleted (which was nonsense anyway - so good!)
- Clause 15.2 – now obligates the *Service Manager* to produce and issue the first Early Warning Register within one week of the *starting date*. *Service Manager* also instructs *Consultant* 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 Subcontractor or 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 *Service Manager* to reissue Early Warning Register within one week of early warning meeting
- Section 16 – now called “Requirement for instructions” rather than “Ambiguities and inconsistencies”
- Clause 16.1 – same principle as before where either side notifies other if they become aware of an ambiguity or inconsistency in documents
- Clause 16.2 – previously clause 17.1 but same principle where by *Consultant* notifies anything they consider illegal or impossible
- Clause 17 – now Corrupt Acts – *Consultant* not allowed to do corrupt acts and nor are their subcontractors/suppliers. This is also a new reason to be able to terminate by *Client* in section 9

Section 2 – Consultant’s (rather than Parties’) Main Responsibilities

- Most headings in this section have been changed – old section 20 “Employers obligations” has been deleted (as elements are covered elsewhere)
- Clause 20.1 and 20.2 are equivalent of old 21.1 and 21.2
- Clause 20.3 – new clause stating *Consultant* not liable for a Defect unless they failed to carry out the *service* using skill and care expected
- Clause 21.1 and 21.2 are equivalent old 22.1 and 22.2

NEC4 Professional Services Contract – review of changes from NEC3

- Clauses 22.1, 22.2 and 22.3 are equivalent old 23.1/23.2/23.3
- Section 23 is equivalent of old section 24 but called **Subcontracting** rather than Subconsulting, but otherwise same principles.
- Clause 23.2 emphasises that *Consultant* does not appoint a proposed Subcontractor until the subcontract documents have been accepted (as the contract requires) as well as their name
- Section 24 is “Other responsibilities”
- Old clause 25.2 has been deleted so 24.2 is now requirement to obey an instruction issues by *Service Manager*. Similarly 24.3 is now requirement to H&S requirements stated in Scope.
- Section 25 – 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 26 – Disclosure – Parties do not disclose information obtained in connection with the works, or publicise the works without *Client’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”.
- Clause 31.3 – if *Service Manager* does not respond to a programme issued for acceptance by the *Consultant*, the *Consultant* can notify this non-response to the *Service Manager*. Failure to respond to the notification within a further week 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).
- New Section 33 – Access to people, places and things
- Clause 33.1 – *Client* provides access as stated in contract data or as shown on the Accepted Programme
- Clause 33.2 – *Client* provides information and things in accordance with Accepted Programme
- Clause 34.1 – *Service Manager* may instruct *Consultant* to stop or not start any work (old clause 33.1)
- Section 35 is now Acceleration (previously 34) – *Service Manager* can no longer instruct quote for acceleration. Either *Consultant/Service Manager* can propose. If BOTH sides are prepared to consider the change, then the *Service Manager* can instruct a quotation to accelerate. Now there are timescales of up to three weeks to produce quotation by *Consultant* and three weeks for the *Service Manager* 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

- Clause 40.2 – emphasises reasons to reject quality policy statement/quality plan and also that any changes to the quality plan should be resubmitted for acceptance.

NEC4 Professional Services Contract – review of changes from NEC3

- Clause 40.3 – emphasises that *Service Manager* may instruct the *Consultant* to correct a failure to comply with the quality plan – which will not result in a compensation event
- Clause 41.2 – emphasises that Scope is treated as having been changed to correct a defect when *Service Manager* has assessed cost of an uncorrected defect.
- Section 42 – Accepting Defects
- Clause 42.1 – Now option to propose a defect is not corrected
- Clause 42.2 – *Consultant* submits quote and if accepted it changes Scope, Prices and Completion Date accordingly.

Section 5 - Payment

- Clause 50.1 – *Service Manager* rather than *Consultant* decides dates of first assessment and occur periodically until four weeks after defects date or until termination.
- Clause 50.2 – obligation on application to be in form as stated in Scope
- Clause 50.4 – if the *Consultant* does not submit an application then the amount due will either be the amount at the previous application or whatever the *Service Manager* assesses – whichever is lower i.e. *Consultant* therefore obligated to put in an application if they want paying within that period.
- Clause 50.5 – new clause aligning with ECC where 25% of *Consultant* assessment is withheld for not submitting first programme for acceptance showing the information the contract requires
- Clause 50.6 – extra clause adding clarity that the *Service Manager* corrects any incorrectly assessed amounts in later payment certificates
- Clause 51.1 - *Service Manager* certifies payment within one week of the assessment date. Obligation on *Service Manager* to show how the certified payment has been assessed. Emphasises that a payment is made by *Consultant* to *Client* if a change in the amount due is less than previous. Invoice submitted by the Party for who payment is due and paid within one week of the *Service Manager's* certificate.
- Clause 51.2 – each certified payment is made by latter of one week after invoice or three weeks after assessment date (or other period stated in Contract Data)
- Clause 51.5 – clarity that any tax the law requires a Party to the other as added to any payment.
- Clause 52.1 – new definition to PSC of Defined Cost stating all costs not included in Defined Cost are included within the fee. Confirms Defined Cost is made up of rates and percentages stated in Contract Data and other amounts at open market or competitively tendered prices including discounts and rebates taxes that can be recovered.
- Section 53 – whole new section on Final assessment
- Clause 53.1 – final assessment by *Service Manager* to be made within four weeks of Defect Certificate issued by Supervisor (or 13 weeks after termination), giving details of how it has been assessed.
- Clause 53.2 – If the *Service Manager* does not make this assessment, *Consultant* may issue to *Client* an assessment of the amount due. If *Client* agrees, payment made within three weeks of assessment. Would appear to be a silent deemed acceptance if *Client* 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

NEC4 Professional Services Contract – review of changes from NEC3

Section 6 – Compensation Events

- Four new compensation events so now 16 rather than 12
- Clause 60.1(1) – two exceptions now to an instruction changing Scope – in order to accept a Defect or change to Scope provided by *Consultant* at their request or in order to comply with Scope provided by *Client*
- Clause 60.1(9) – new - an event which is the *Client's* liability stated in contract
- Clause 60.1(10-12) from previous – become 60.1(11-13) under NEC4 but otherwise the same
- Clause 60.1(14) – new - *Service Manager* gives an instruction correcting information provided by the *Client*
- Clause 60.1(15) – new - *Service Manager* notifies the *Consultant* that a quotation for a proposed instruction is not accepted
- Clause 60.1(16) – new - 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 *Service Manager* instruction, the *Service Manager* notifies the compensation event at the time of giving the quotation. It no longer states as last sentence “*Consultant* 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 *Service Manager* 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 *Service Manager* would confirm no change to Prices/Key Date/Completion Date
- Clause 63.1 – change in terminology now where previous Time Charge has been replaced with Defined Cost. This clause also adds the term “dividing date” in terms of boundary between actual/forecast 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 *Consultant*, and 2) unless it was a change to Scope proposed by *Consultant*, or correcting a *Service Manager* 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 *Consultant* has not completed and which are affected by the compensation event are changed”
- Clause 63.7 (old 63.5) event can be assessed as though an early warning was given if fact identified by *Service Manager* 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 *Consultant's* risk under contract

NEC4 Professional Services Contract – review of changes from NEC3

- 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 for proposed instructions, but adds the fact that *Service Manager* states within the instruction when the proposed instruction may be given.
- Clause 65.2 - *Consultant* submits quote for proposed instruction within three weeks. *Service Manager* 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, *Service Manager* 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 old 70.3 and 71.1 concerning disclosing information and publicising services have been deleted, but are covered elsewhere now more logically

Section 8 - Liabilities and Insurance (name changed)

- 80.1 new clause titled *Client's* liabilities. Highlights that *Client's* liabilities stated in contract, fault by *Client* or person employed/contracted by them, claims from Others which were unavoidable result of service are all *Client* liabilities.
- 81.1 – changed to *Consultant* liabilities, and lists *Consultant* liabilities in full: Claims or proceedings from Others in connection with the *Consultant* Providing the Service / Cost incurred by *Client* arising from *Consultant* to use skill and care expected / death or injury to employees of the *Consultant*.
- 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 83 now insurance cover which was previously 81
- Section 84 – more specific detail on provision of insurance policies
- Clause 85.1 – new clause clarifying *Client* may insure an event which *Consultant* has not that contract requires them to, and recover cost accordingly
- Section 86 – now details Insurance by the *Client*
- Section 87 – limitation of liability which is old clause 82 but no significant change

NEC4 Professional Services Contract – review of changes from NEC3

Section 9 - Termination

- Much more detail added to termination section and aligned more closely with ECC
- 90.2 gives a termination table listing Party, reason, procedure and amount due.
- Section 91 – new section listing reasons for termination which then link back to termination table
- Clause 91.1 to 91.8 – list the 22 reasons for termination
- Section 92 – now “Procedures on termination” and links back to table in 90.2
- Section 93 – now “Payment on termination” and links back to table in 90.2

Option A

- Clause 11.2(16) – new definition of Defined Cost which is the cost of the components in the new Short Schedule of Cost Components
- Clause 11.2(19) New term for People Rates which are included within contract data part 2.
- Clause 20.4 – same as old clause 21.3 where *Consultant* provides forecast of total expenses for whole of service.
- Old clause 62.7 cost of preparing quotations for compensation events is excluded has been deleted
- Clause 63.13 – if for a compensation event the new People Rates do not include a rate for category of person required, *Service Manager* and *Consultant* agree a new rate. If they can't agree, *Service Manager* assesses based on other rates, and that rate becomes the new People Rate for that category of person

Option C [* and option E]

- *Clause 11.2(17) – new definition of Defined Cost which is the cost of the components in the new Schedule of Cost Components, less Disallowed Cost
- *Clause 11.2(18) – new definition of Disallowed Cost which is very similar to the definition used in ECC and any of these elements occurring will allow costs to be deleted from *Consultant* assessment
- *Clause 20.5 – same as old clause 21.3 where *Consultant* provides forecast of total expenses for whole of service.
- 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 *Consultant* to notify to *Service Manager* when parts of Defined Cost have been finalised and records available to demonstrate it has been correctly assessed. *Service Manager* reviews records within 13 weeks notifying either a) acceptance, or b) further records are needed, or c) *Consultant* errors in assessment. If further records required these are to be provided within four weeks, and *Service Manager* has to accept or notify own assessment within further four weeks. If the *Service Manager* does not notify a decision within time stated then *Consultant* assessment is treated as being deemed accepted.
- *Clause 52.3 – more detail on records to be kept

Option G – Term Contract – now deleted from NEC4.

NEC4 Professional Services Contract – review of changes from NEC3

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

Secondary Options

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

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

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

X10 – Information modelling

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

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

Schedule of Cost Components

- New section highlighting how Defined Cost will be assessed for options C and E. This is very different from what previous users of PSC will be used to
- 1 People – similar to section 1 of ECC where it lists in detail what costs are applicable in assessing people cost and is very detailed
- 2 Subcontractors
- 3 Charges – also referring to a new *overhead percentage* identified in Contract Data part 2
- 4 Insurances – clarifying insurable events and insurance premiums are excluded

Short Schedule of Cost Components

- New section highlighting how Defined Cost will be assessed for options A. This is very different from what previous users of PSC will be used to. Very brief compared to the full Schedule of Cost Components
- 1 People – much simpler than full schedule and is calculated by applying People Rates from contract data
- 2 Subcontractors
- 3 Insurances – clarifying insurable events and insurance premiums are excluded

NEC4 Professional Services Contract – 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 in section 6
- space for exchange rates under option C/E
- new section for resolving disputes which includes space for senior representatives (W1/W2)
- *Client's* liabilities listed under section 8
- data to fill in for X8/X10

Data part 2

- new *Consultant* fee percentage
- inclusion of people rates for option A
- inclusion of overhead percentage for options C & E