

NEC4 Term Service Contract – review of changes from NEC3

Here is a review from GMH Planning Ltd of the significant changes within the NEC4 TSC 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 TSC 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 and the *Service Manager* shall act as stated in contract.
- Clause 10.2 – the Parties and the *Service Manager* act in a spirit of mutual trust and cooperation.
- Clause 11.2 new definitions 21no now rather than 16 previously:
 - (4) Corrupt Act - new defined term
 - (5) Defined Cost deleted and old (6) Disallowed Cost is deleted (both now option specific)
 - (6) Early Warning Register – changed from Risk Register
 - (10) Parties are *Client* and *Contractor* – changed from *Employer* and *Contractor*
 - (14) Scope - changed from Service Information
 - (15) Service Areas - new defined term
 - (16) Service Period - new defined term
 - (17) Subcontractor – revised definition
 - (18-21) all new definitions for Task, Task Completion, Task Completion Date and Task Order which used to be within X19
- Clause 12.1 – amended to confirm contract is gender neutral i.e. no more he/his

Key: new NEC4 clause, Point of clarity, Change to previous wording, Same clause re-numbered, Deleted NEC3 clause

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- 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 *Contractor* to correct the matter. Previously simply stated that they give reasons for rejection.
- 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 *Service Manager* to produce and issue the first Early Warning Register within one week of the starting date. *Service Manager* also instructs *Contractor* 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 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 “*Contractor’s Proposals*”
- Clause 16.1 – *Contractor* can propose to *Service Manager* a change in Scope in order to reduce the amount the *Client* pays the *Contractor* to provide the works. (*Contractor* will benefit through the new *engineering ratio* for options A and through *share percentage* for options C)
- Clause 16.2 – Within four weeks the *Service Manager* accepts the proposal and either a) issues an instruction changing scope, b) instructs a proposed quotation, or c) rejects proposal.
- Clause 16.3 – *Contractor* can propose a change to Service Area
- Section 17 – now titled Requirements for Instructions (previously Ambiguities and Inconsistencies)
- Clause 17.1 – subtle change where *Service Manager* states how ambiguity should be resolved rather than “instructs”
- Clause 17.2 – is now illegal/impossible requirement (previously 18.1)
- Section 18 – Corrupt Acts – *Contractor* 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 19 – new section for Task Orders which is now core clause rather than old secondary option X19
- 19.1 *Service Manager* can instruct *Contractor* to submit a quotation for a Task detailing description, starting date/Task Completion Date and delay damages
- 19.2 *Contractor* submits quote for task within three weeks, *Service Manager* replies within two weeks with acceptance/instruction to requote/*Service Manager* will assess self/notice it will not be instructed.
- 19.3 *Contractor* submits revised quote if requested within three weeks
- 19.4 *Service Manager* may extend period for quote/response if the other party agrees
- 19.5 *Service Manager* assesses Task if quote not submitted to sufficient detail or not been assessed correctly
- 19.6 Priced using items from Price list if covered, otherwise assessed as a compensation event is assessed

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- 19.7 Delay damages applicable if Task Completion is later than Task Completion Date
- 19.8 Task Orders are added to Price List and Scope, and are NOT compensation events

Section 2 – Contractor’s Main Responsibilities

- NEC3 sections 21 and 22 have been relocated to NEC4 section 3 (Time) of the contract which does feel more logical.
- Clause 24.3 – 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 26 – 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 27 – Disclosure – Parties do not disclose information obtained in connection with the works, or publicise the works without Client’s agreement

Section 3 - Time

- Major structure change to this section. Clauses 31.1 – 32.2 with regard to Contractor’s plan are relocated from NEC3 section 2 of the contract. Clauses 33.1 – 34.2 are relocated from NEC3 X19 Task Orders which is now a core clause within NEC4 rather than an option
- Requirement to show each Task (i.e. Task Order) at least as a summary on the plan. Previously there was no such contractual requirement. Requirement to show *starting date*, *Completion Date* and planned Completion for each Task as a minimum.
- 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 *Contractor* within the time allowed, the *Contractor* 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 – new clause now stating that progress and effect upon remaining work, how plan to deal with delays and any other changes have to be shown on a revised Plan issued for acceptance.
- Clause 32.2 now confirms that the revised Plan has to be regularly submitted for acceptance, at no longer than the interval stated in the Contract Data
- Clause 33.2 (previously X19.6). Only change from NEC3 is last line: “A programme issued for acceptance is in the form stated in the Scope”.
- Clause 33.3 (previously X19.7) extra reason to reject programme is that it does not represent *Contractor’s* plans realistically. Then also adds if *Service Manager* does not respond to a programme issued for acceptance by the *Contractor* within the time allowed, the *Contractor* 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 34.1 (previously X19.8) – 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

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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 35.1 (previously 31.1) – adds fact that access has to be provided as shown on Task Order programme as well as Accepted Plan
- Clause 36.1 (previously 32.1) – states that Service Manager can also give an instruction to remove work from the Scope

Section 4 – Quality Management

- Section 40 – new section: Quality management system. All previous clauses are then one number more than previous.
- Clause 40.1/2 - Requirement for *Contractor* 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 – *Service Manager* may instruct the *Contractor* to correct a failure to comply with the quality plan – which will not result in a compensation event
- Section 41 – tests and inspections (previously 40)
- Clause 41.3 - No real change other than *Contractor* and *Service Manager* inform each other of tests and inspections to be carried out (rather than notify)
- Clause 41.5 – Additional sentence to confirm a payment dependent upon a *Service Manager* inspection becomes due in the period if the *Service Manager* has not done a test or inspection or if it is delayed not for the *Contractor's* fault
- Clause 43.1 and 43.2 – previously NEC3 clause 42.1 split into two clauses but no change in principle
- Clause 44.1 and 44.2 - previously NEC3 clause 43.1 split into two clauses but no change in principle

Section 5 - Payment

- Clause 50.2 – obligates the *Contractor* 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 *Contractor* 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. *Contractor* therefore obligated to put in an application if they want paying within that period.
- Clause 50.5 – previously 50.3 where 25% of *Contractor* assessment is withheld for not submitting first programme for acceptance showing the information the contract requires
- Clause 51.1 obligation on *Service Manager* to show how the certified payment has been assessed
- 51.2 Certified payment is made by the later of 1) one week after the Party receives an invoice from the other, or 2) three weeks after assessment date or other period stated in contract data
- 51.3 – additional reason added to which interest payment would be due which is an amount due is corrected in a later certificate in relation to a mistake or a compensation event
- Section 53 – whole new section on Final assessment

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- Clause 53.1 – final assessment by *Service Manager* to be made within thirteen weeks after the end of the Service Period, or period stated in Contract Data or issue of termination certificate. Four weeks of Defect Certificate issued by *Service Manager*, giving details of how it has been assessed. Payment made within one week. Final payment made within one week or three weeks after the assessment date.
- Clause 53.2 – If the *Service Manager* does not make this assessment, *Contractor* may issue to *Client* an assessment of the amount due. If *Client* agrees, payment made within one week 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 or W2 i.e. refers matter for dispute

Section 6 – Compensation Events

- Clause 60.1 (4) – Contractor receives a Task Order (relocated from NEC3 X19)
- Clause 60.1(16) – *Service Manager* gives an instruction to correct a mistake in the Price List
- Clause 60.1(17) – *Service Manager* notifies the *Contractor* that a quotation for a proposed instruction is not accepted
- Clause 60.1(18) – additional compensation events stated in contract data part 1
- Old Clause X19.10(6) deleted which made prevention type events a compensation event. Probably limited times it would be used.
- 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 “*Contractor* 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 61.7 – Period to notify a compensation event is extended to eight weeks after end of Service Period
- Clause 62.6 – This is simply the second half of NEC3 clause 62.5 which is now split into two clauses (62.5/62.6)
- Clause 63.2 – 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. Deleted previous wording about how the effects of Defined Cost will be assessed which is now covered in Schedule of Cost Components.
- 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 *Contractor*, 2) change in the Affected Property, 3) instruction to correct a mistake in Price List, or 4) correcting a *Service Manager* assumption within a quotation

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- Clause 63.6 delay to Task 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 Contractor has not completed and which are affected by the compensation event are changed”
- Clause 63.8 (old 63.6) 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 63.9 (old 63.7) can include risk which have a significant chance of occurring and are Contractor’s risk under contract
- Clause 63.11 (old 63.9) - ambiguities are assessed for the interpretation most favourable to those who did not create the ambiguity
- Clause 64.1 – includes Service Manager assessment of a compensation event when a Task is affected and the Contractor has not submitted or not had revised Task Order programme accepted
- Clause 64.2 – Service Manager assess plan for remaining work when assessing a compensation event if there is no Accepted Plan, or it has not been submitted as required by contract or it has been rejected. Then repeats same principle for Task Order programme
- Section 65 no longer “implementation” but “Proposed Instructions”
- Clause 65.1 is old NEC3 clause 61.2, but adds the fact that Service Manager states within the instruction when the proposed instruction may be given.
- Clause 65.2 - Contractor 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

- Clause 70.1 - Client’s title to Plant and Materials – title passes to Client once Plant and Materials are brought into the Service Areas. Title passes back to Contractor if they are removed with permission
- Clause 72.1 – Contractor’s use of material – Contractor has right to use material provided by Client only to Provide the Service.

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Section 8 - Liabilities and Insurance

- Clause 80.1 - changed title to *Client's* liabilities rather than Employers risk in NEC3. Broadly same list of liabilities as before but slightly reworded in some places.
- Clause 81.1 – changed to *Contractor* liabilities, and rather than stating everything else is *Contractor* risk now lists *Contractor* liabilities in full: Claims or proceedings from Others in connection with the *Contractor* Providing the Service / Loss or damage to the Plant and Materials before they are included in the Affected Property/ damage to Affected Property/ death or injury to employees of the *Contractor*.
- 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 *Client* 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 91.7 - New additional reason to terminate (21) – Corrupt Act
- Old clause 91.7 (21) deleted where the Employer could terminate if an event which the Parties could not reasonably prevent has substantially affected the Contractor's work for a continuous period of more than thirteen weeks (R21)
- Clause 92.2 P4 – different process to follow than NEC3 which is Contractor leaves Service Area and removes equipment (rather than providing Services and other things Service Information requires at end of Service Period)

Option A

- Clause 11.2(22) – new Defined Cost definition to introduce in accordance with Short Schedule of Cost Components.
- Clause 11.2(25) previously 11.2(17) – definition of Price for Services Done to Date includes statement that completed work is without defects of which the correction of would delay the work of Contractor, Client or Others
- Clause 11.2(27) New term for People Rates which are included within contract data part 2.
- Clause 11.2(28) – definition of the Prices renumbered from NEC3 11.2(19)
- Old Clause 20.5 – deleted requirement to provide forecast of total of Prices at intervals stated in contract data (why was this ever needed for option A?)
- Clause 31.4 – relocated from NEC3 clause 21.4 to show items on Price List relate to plan/Task Order programme.
- Section 55 Price List – clauses 55.1-3 relocated from NEC3 section 54 but same wording
- Clause 60.2 – new clause mirroring ECC option B clause 60.4 where a difference in the final quantity and the quantity stated for an item in the Price List is a compensation event if: difference does not result from change to scope, difference caused Defined Cost per unit to change, and rate multiplied by final quantity is more than 0.5% of the total of original Prices
- Clause 63.12 confirms that changes to *Client* Scope proposed by *Contractor* and accepted, the Prices are reduced by an amount calculated by applying the value engineering percentage in contract data part 1 (Clients need to be careful they get this right way round as the Prices are

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reduced by the percentage amount stated in contract data i.e. if you wanted to give the Contractor 30% benefit the percentage should be 70%).

- Old Clause 63.13 deleted – so cost of preparing quotations for compensation events is no longer excluded from assessment of compensation events.
- Clause 63.15 – if for a compensation event the new People Rates do not include a rate for category of person required, Service Manager and Contractor 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 [*also same for option E]

- *Clause 11.2(23) – new Defined Cost definition to introduce in accordance with Schedule of Cost Components.
- *Clause 11.2(24) – whole new detailed list of disallowed costs similar to ECC contract
- *Clause 11.2(26) – previously 11.2(18) definition of Price for Service Provided to Date which now states it is forecast of what Contractor will have paid before next assessment date, rather than the cost the Contractor has paid
- *Clause 11.2(28) – the Prices renumbered from NEC3 clause 11.2(20)
- *Clause 24.4 – default is that Contractor submits pricing information in proposed subcontract documents unless Service Manager agrees no such submission is required
- *Clause 50.7 – previously 50.6 with regards payments, currency and exchange rates but same wording
- *Clause 50.9 – allows Contractor 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 four weeks notifying either a) acceptance, or b) Contractor errors in assessment. If the Service Manager does not notify a decision within time stated then Contractor assessment is treated as being deemed accepted.
- Section 54 – renumbered from NEC3 section 53 to assess Contractor's share but clauses 54.1-54.3 all otherwise same wording
- *Clause 60.2 – new clause mirroring ECC option B clause 60.4 where a difference in the final quantity and the quantity stated for an item in the Price List is a compensation event if: difference does not result from change to scope, difference caused Defined Cost per unit to change, and rate multiplied by final quantity is more than 0.5% of the total of original Prices

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

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Secondary Options

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

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

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

X19 – Termination by Either Party – previously X19 under NEC3 was Task Orders which is now a core clause under NEC4.

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

X23 – Extending the Service Period – nice easy mechanism to extend Service Period if both Parties are in agreement

X24 – The Accounting Periods – a way of ring fencing annual amounts due each accounting period and finalising all costs each year (rather than at end)

Y(UK)2 The Housing Grants Act - Y2.2 – more specific on when payment is made

Schedule of Cost Components – new for use with options C & E

- Pretty much as comprehensive as the SCC used within ECC contract and same headings as ECC with exception of section 7:
- 1 – People
- 2 – Equipment
- 3 – Plant and Materials
- 4 – Subcontractors
- 5 – Charges
- 6 – Manufacture and Fabrication
- 7 – Shared Services outside the Service Area
- 8 – Insurance

Short Schedule of Cost Components

- Same eight headings as full schedule above but each section is less content as this is only used to assess compensation events under option A so less detailed.

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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
- value engineering ration added for option A
- 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/X19/X23/X24

Data part 2

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