



BRODIES LLP

NEC4

FOR THE RICS – MAY 2018

ABERDEEN • EDINBURGH • GLASGOW • BRUSSELS

www.brodies.com

BRODIES LLP

OVERVIEW

- Two new forms of contract added to the NEC suite.
 - (1) NEC4 Design Build Operate Contract (DBO)
 - (2) NEC4 Alliance Contract (ALC)
- Changes to the existing NEC3 suite to take in “12 years of feedback”
- Changes are intended to be *evolutionary* not revolutionary

DESIGN BUILD AND OPERATE (DBO)

- Intended for use where end user wants whole life delivery solution – so design, construction and maintenance / operation – with a single supplier.
- Needn't be delivered in that order, e.g. supplier might start by maintaining an existing asset and designing and building a replacement during service life to maintain service levels.
- NEC Drafting committee described it as a “solutions contract”.
- Doesn't include financing provisions. So not intended for use where the supplier is assisting in the funding of the project and recovering that during operational phase.

THE ALLIANCE CONTRACT (ALC)

- Published in consultation form in 2017. Subject to feedback expected to launch in 2018 (no firm date yet so far as we know).
- Intended for use where end user wants a single collaborative contract to deliver the project.
- Each of the key project team members would be a party to the ALC, e.g. Client, Contractor, Consultants, perhaps Sub-Contractors too.

THE ALLIANCE CONTRACT (ALC)

- Each party shares in the risk and success of the project.
- Alliance Manager will deal with day with day-to-day administration.
- Each party will nominate someone to sit on the Alliance Board who will take key decisions and attempt to resolve disputes.
- No traditional DRP options included in consultation draft – adjudication omitted.

THE ALLIANCE CONTRACT (ALC)

- Current thinking of the drafting committee is that an unresolvable dispute, e.g. reference to adjudication will bring the ALC to an end – so very much the nuclear option.
- Commercial: intended to mirror current Option E. Consultation form suggests it will not have other main options to choose from.
- Drafting committee anticipate that public sector will embrace idea of closer collaboration.

CHANGES TO THE ECC

Terminology: “Client” now used instead of “Employer”. No more “Works Information”. Now “Scope”. “Risk Register” now “Early Warning Register”.

Core Clauses: What is new?

- Clause 16 – “Contractor’s Proposals”. The Contractor may propose that the Scope is changed to reduce the amount paid to the Contractor. No provision for any sharing of any saving.
- Contractor can also propose acceleration (Cl. 36).
- Clause 18 – “Corrupt Acts” – new term; the Contractor is not to do a Corrupt Act (Cl. 18.1). Termination event under cl. 91.8 (R22) unless was committed by a Sub or supplier and Contractor was not and should not have been aware or informed the PM and took action to stop it.

CHANGES TO THE ECC

Core Clauses (Continued)

- Clause 28 Assignment (Assignment). Now included in core clauses to avoid need for Z clause. Unusual wording so worth reviewing.
- Clause 29 Disclosure. Prohibition on disclosure of documents obtained in connection with the works except when necessary to carry out duties under the Contract (Cl. 29.1). Note also that the Contractor may publicise the works only with the Client’s agreement (Cl. 29.2) – trap for the unwary potentially.
- Clause 40 Quality Management. Requirement to operate a quality management system with complies with the requirements of the Scope.

CHANGES TO THE ECC

Payment: What has changed?

- Clause 50.3 and 50.4 now (essentially) require the Contractor to submit applications for interim payment. Absent an application the amount due at the preceding assessment date will be the amount due (unless further sums are retained from the Contractor at the new asses. date).
- This is an important departure from the approach taken by NEC3 under which the PM could and should have assessed further amounts for payment if due even absent any application.

CHANGES TO THE ECC

Payment continued

- Clause 53 – final assessment. A final accounting procedure has been included in NEC4. Assessment of the final amount due is made four weeks after the Defects Certificate or thirteen weeks after any termination certificate (Cl. 53.1).
- Clause 53.3 provides that any dispute on the final assessment should be referred (depending on which W option applies) within four weeks.
- Clause 53.4 provides that any revised final assessment reached under DRP becomes conclusive unless referred to the tribunal within four weeks.

CHANGES TO THE ECC

Compensation events: What has changed?

- New compensation event: Clause 60.1 (20) The Project Manager notifies the Contractor that a quotation for a proposed instruction is not accepted. Plus any compensation event listed in Contract Data Pt.1.
- Cl. 61.3, eight weeks from becoming aware of the event happening.
- Assessing compensation events: default remains Defined Cost for work done, forecast Defined cost for work not done plus Fee (Cl. 63.1).
- Change to Clause 63.5 (was 63.3) to provide that *"When assessing delay only those operations which the Contractor has not completed and which are affected by the compensation event are changed"*.

CHANGES TO THE ECC

Compensation events continued

- Changes to provisions on programme. Now a deeming provision if the PM does not notify acceptance or non-acceptance of the Contractor's programme. The Contractor can notify the PM and if the failure persists for a further week the programme is treated as accepted (Cl. 31.3).
- Requirement to include the effect of implemented CE's in revised Cl. 32 programme has been removed. This is to avoid any misunderstanding that non-implemented CE's are to be excluded. They are not.
- The hope is that the changes identified will go some way to resolving the current impasse which tends to emerge where multiple CE's occur and the PM/Contractor cannot agree these in real-time which leads to a breakdown in the contract machinery.

CHANGES TO THE ECC

Liabilities And Insurance

- Formerly Risk and Insurance. Client liabilities now specifically listed. Includes a fault in the design contained in the Scope provided by the Client (Cl. 80.1).
- Recovery of costs dealt with at Clause 82 – indemnity wording gone. Clause 82.3 provides that recovery can be reduced if the other Party has contributed to the costs. The reduction is to be proportional, having regard to the extent that the event in question contributed.
- Traditional waiver of subrogation now included at Clause 84.2. So extends to the Client and Contractor, not just directors and employees.

CHANGES TO THE ECC

Main Option Clauses

- New Clause W3 – provides for a Dispute Avoidance Board (“DAB”). Not for use where the HGCR 1996 applies.
- Clauses W1 and W2 amended to include dispute escalation procedures with Senior Representatives. Envisages a four week process during which parties attempt to resolve dispute. Note that no evidence presented in that period as part of the process can later be relied upon before an adjudicator or the tribunal.
- Adjudication remains mandatory first step under W2 prior to any referral to tribunal.

CHANGES TO THE ECC

Secondary Option Clauses

- X4 parent company guarantee amended to ultimate holding company guarantee. Under X4.2 an alternative company within the group can also be offered for acceptance by the PM.
- X8 (NEW) – Collateral Warranties. NEC4 does not call them that so they are called “Undertakings”. No draft form of undertaking is provided.
- X10 (NEW) BIM. Provisions attempt to deal with liabilities and these sit with the Client except if arising from the Project Information, which is defined as the information provided by the Contractor which is used to create or change the Information Model. No specific BIM protocol identified.

CHANGES TO THE ECC

Secondary Option Clauses continued

- X11 (NEW) Client termination at will. Note, this right has been removed from the core clauses.
- X12 Partnering, now “Multiparty Collaboration”.
- X15 – reverse burden on Contractor now removed. *“The Contractor is not liable for a Defect which arose from its design unless it failed to carry out that design using the skill and care normally used by professionals designing works similar to the works”* (X15.1).
- X15.5 – requirement for Contractor to hold PII.

CHANGES TO THE ECC

Secondary Option Clauses continued

- X21 (NEW) Whole Life Cost. The Contractor may propose to the PM that *“the Scope is changed in order to reduce the cost of operating and maintaining an asset”*.
- X22 (NEW) Early Contractor Involvement (only for use with Options C and E). For use where Client wants to involve Contractor at an early stage to participate in the design development.

CHANGES TO THE ECC

Commercial Changes

- Short Schedule of Cost Components. This schedule is no longer used to assess compensation events in Options C, D and E. Previously both schedules were used in Options C, D and E because the Short schedule was used for CE's.
- Short Schedule used in Options A and B only. Pre agreed People rates.
- Rules around People costs have been amended to clarify recovery of costs for those not ordinarily in Working Areas but who are there on occasion.
- No subcontract Fee. Only one Fee percentage now applied to Defined Cost.

SUMMARY

Main Changes

- Additional core clauses – intended to reduce reliance on Z clauses.
- Additional secondary option clauses with similar aim, e.g. Undertakings.
- Interim payment regime changed to require an application from contractor and a final accounting procedure included.
- Changes to programming and compensation events have been made to try and resolve project deadlock but look relatively unambitious.
- Move towards more Contractor involvement: Contractor Proposals, Acceleration (not just from PM) and New options X21 and X22.