



K&L GATES

# Overview of NEC4

Matthew Smith - Partner

# WELCOME

- Welcome to our overview of the new NEC4 ECC
- Briefing coverage:
  - Overview – setting the scene: what's changed, what's the same and where we go from here
  - Programme and time-related issues
  - Key changes to the payment provisions, Main Option clauses and SoCC
  - Other key changes and the extent to which the NEC has addressed some of the perceived 'gaps' in the coverage of the NEC contracts
  - Focus on ECC rather than other forms – topics for another day!

## BACKGROUND TO NEC4

- NEC4 has been a long time coming
  - NEC3 published in 2005
  - Updated in 2013 (LDEND) and via supplements to address specific issues e.g ECI and BIM
  - In parallel:
    - market testing of other forms,
    - accumulation of 'best practice' changes,
    - acknowledgement of Z-clauses that just won't go away
  - All brought together in NEC4 along with a few surprises and points to ponder further

## NEC4 OBJECTIVES

- The NEC stated that it had 3 objectives in drafting NEC4:
  - Provide greater stimulus to good management
  - Support new approaches to procurement which improve contract management
  - Inspire increased use of NEC in new markets and sectors
- As the NEC4 User Guide states “It was to be evolution, not revolution”

## HOW HAS THE DRAFTING SOUGHT TO ACHIEVE THOSE OBJECTIVES?

- **Greater stimulus to good management** – e.g.
  - Refinements to the early warning and programme provisions including ‘treated’ acceptance of the programme
  - Incentivising Scope improvements via whole life cost provisions (X21) and the cost incentives of the new *Contractor’s proposals* provisions (cl 16)
  - Requirement for the Project Manager, when replying to a communication, to give reasons “with sufficient detail to enable the Contractor to correct the matter” (cl. 13.4)
  - Quality management system (new cl 40)

## HOW HAS THE DRAFTING SOUGHT TO ACHIEVE THOSE OBJECTIVES?

- Supporting new approaches to procurement - e.g.
  - Overhaul of X15 to be a D&B option
  - Incorporating ECI into a new secondary option X22
  - Use of new forms such as a multi-party Alliance Contract and new DBO Contract

## HOW HAS THE DRAFTING SOUGHT TO ACHIEVE THOSE OBJECTIVES? (CONT.)

New markets and sectors – e.g.

- Minimising the differences between the ECC and other NEC forms (PSC, TSC etc) to flatten the learning curve for new users
- Providing enhanced guidance – e.g. 4 volumes of Users' Guides dealing with:
  - establishment of a procurement and contract strategy (Vol 1)
  - preparing an NEC contract (Vol 2)
  - selecting a supplier (Vol 3)
  - managing an NEC contract (Vol 4)

## KEY FEATURES OF ECC4

- Basic structure and content unchanged
- Numerous terminology changes (not otherwise of major significance)
- Project management refinements
- Expanded in-contract cost finalisation mechanisms
- Provisions for final assessment to become conclusive
- Incorporation of a party-led dispute avoidance mechanism via senior representatives process

## TERMINOLOGY CHANGES

- Many changes of style rather than substance e.g
  - *Employer* becomes *Client*
  - *Works Information* becomes *Scope*
- Minimising differences between the various NEC contracts
- Changes to better reflect reality e.g
  - Risk Register is re-named the Early Warning Register and risk reduction meetings become early warning meetings
  - Narrowing of the definition of Subcontractor

## NEXT SESSIONS

- Time and programme issues
- Changes to the payment provisions
- Other significant changes

# Programme & Planning implications

Paul Greenwell

# NEC3 v NEC4



Turner & Townsend

Paul Greenwell

05 July 2017

making the difference





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# NEC 3 v 4 Programme & Planning implications

An initial view from the T&T Forensic Planning team

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05 July 2017

making the difference

# Audience Bias Check

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**Who is “for” NEC as a preferred form of Contract?**

**Who is “against”?**

**Contractually agnostic?**

# Introduction

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**The key problem associated with NEC3 in respect of planning and programming**

**How to operate the Contract mechanisms to evaluate Compensation Events (CEs) when the programme approval mechanism has not been successfully maintained.**

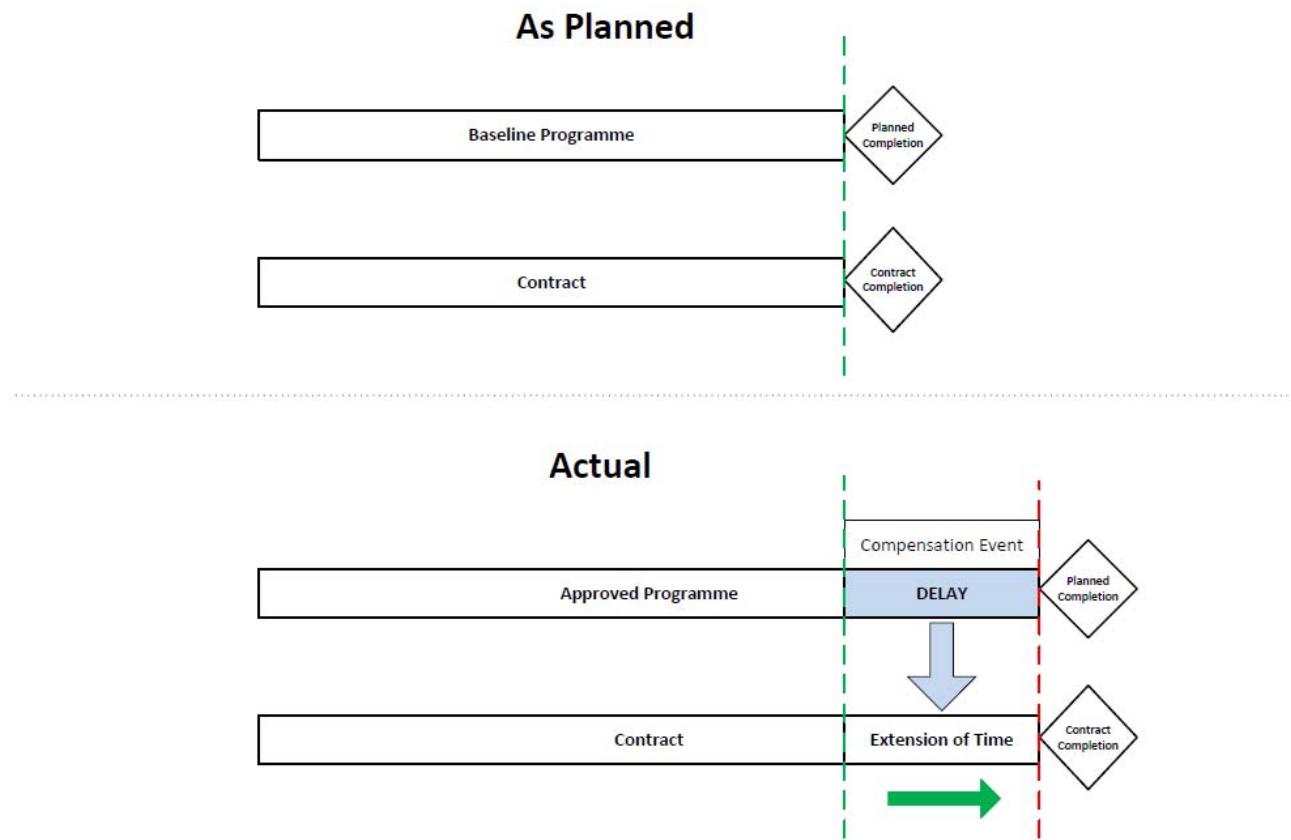
- The volume of CE's overwhelmed the Project Manager
- The Project Manager was rejecting programmes unreasonably
- The Employer Client was influencing the Project Manager etc

**The problem is well known.**

**The causes numerous.**

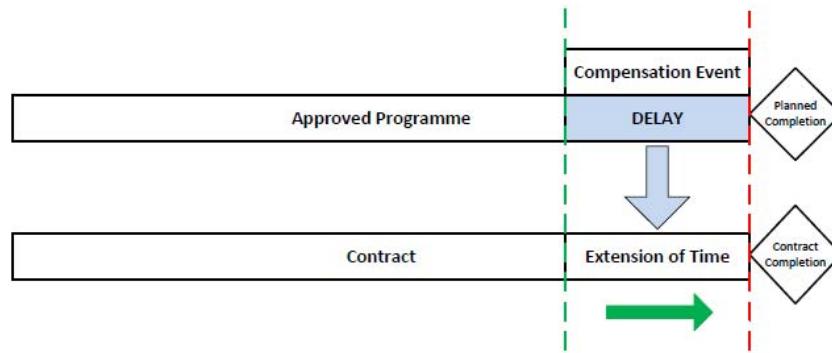
**Has NEC4 given us improvements?**

# What is supposed to happen.

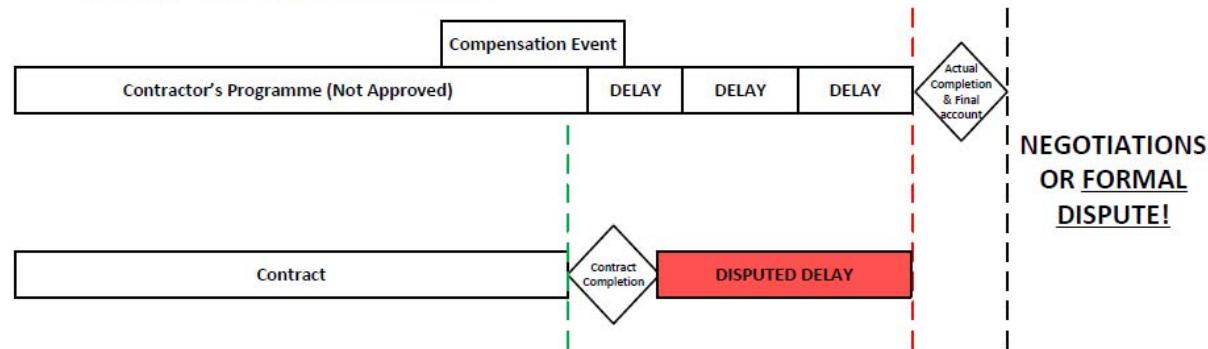


# The Omni-shambles.

NEC's Plan – A Prospective, Proactive Approach



Reality – No Assessment Made



# Does NEC4 help? (part 1 of 3)

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## What are the key Programme & Planning changes?

### 3 - TIME

- 31.2 – “A programme admitted for acceptance is in the form stated in the Scope.” –  
- ‘*You said P6 but we have only got MS Project. Is that OK?*’
- 31.3 - PM failure to accept/not accept ..... *Is this a significant change?*
- 32.1 - Revised programme no longer requires effects of implemented compensation events .... *Or does it? (Refer to 62.2). Will this make Approval of the programme less contentious?* -
- 31.2 - Time risk allowance v Time liability allowance – *no change here.*
- 31.3 - Work information v Scope – *Seems different but the definition is the same.*
- 36 – Acceleration – *The Contractor can now propose acceleration rather than being available only at the Instruction of the PM. The impact of acceptance by the PM is set out within the clause (acceptance of an acceleration quotation includes acceptance of the revised programme, whereas implementation of a CE quotation does not include de facto acceptance of the revised programme.)*

# Does NEC4 help? (part 2 of 3)

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## 6 CE's

- 60.1 - New CE's
  - (20) PM notifies that quote is not accepted – *Can this be used to recover disruption / management time due to multiple quotation requests?*
  - (21) Additional CE's in Contract Data (not in Z clauses).
- 61.4
  - "...has not been notified within the timescale." *Added to list of reasons not to change price and roles. Various switch arounds of assumptions but no apparent changes.*
- 62.2
  - *Prospective programme changes remain – impacted programme approach remains unchanged but see 63.5 below.*

# Does NEC4 help? (part 3 of 3)

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## 63 Assessing CE's

- 63.1 - The dividing date brought to prominence.
  - "dividing date is" - Date of communication of instruction, notification, certificate, change of earlier decision.
- 63.5 – States that the delay to Completion Date due to CE should be measured against the Accepted Programme current at the dividing date – as previously in 63.3 BUT
  - ...and this is the **exciting** bit...
- 63.5 adds the words:

*"When assessing delay only those operations which the Contractor has not completed and which are affected by the compensation event are changed."*
- 63.8 – The assessment of the effect of a CE includes risk allowances for cost and time ...where these are not CE's – *change of definition*.
- 63.9 – New – the assumption that the Accepted Programme can be changed has been deleted from 63.9.

# 64 Project Manager assessment

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- 64.2 – PM can assess if....
  - "The PM has not accepted Contractor's latest programme for one of the reasons stated in the Contract."
    - *A new reason but not really changing anything as previously the PM could assess if there is no Accepted Programme.*
- 65 – Proposed instructions.
  - New – PM may instruct quotation for a proposed instruction.
- 66.3 – Assessment of an implemented CE is not revised except as stated in these conditions.....["correction of forecast upon which the CE was based" is now deleted].
  - As 61.6 – "...the PM notifies a correction." and "60.1 (17) The PM notifies...a correction to an assumption" any conflict between these clauses is now removed.

# And finally....

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## Key points

- 31.2 - Submit in the form stated
- 31.3 - If Project Manager does not notify acceptance – route to acceptance set out.
- 32.1 – Removal of CE identification in Approved Programme. Will this make approval less controversial?
- 63.5 - The dividing line is defined and the limits to impacting as planned programmes may be clearer:
  - "When assessing delay only those operations which the Contractor has not completed and which are affected by the compensation event are changed".
  - Which I take to mean – actual dates remain as actual and impacting of CE starts from that point (the dividing line?).
  - Therefore when implementing 62.2 – "...the programme for remaining work is altered" only for work not completed. The Impacted programme proceeds from an As built base not Baseline or last Approved Programme (whenever that was).
- 66.3 - Forecast can be revisited

## Answers sought on impact of:

- 63.9 - deletion of "and the Accepted Programme can be changed".

# Is NEC4 better than NEC3?

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Marginally

More rearranged

Some wording may be better

I think the limitations on Impacted As Planned approach are positive (but I may be reading more in than is intended).

But NEC form remains a challenge to the orthodox confrontational contractual approach.

Have any opinion changed today (provisionally)?

Thank you.

# A final thought

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All programming tools,  
All records,  
All contracts,  
Are hopeless and appalling,  
But the alternative is nothing,  
And nothing is worse.

If we rail against NEC4 we are as fish who are angry with the sea.

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# Changes to Payment Provisions



Nicola Ellis – Special Counsel



# INTRODUCTION

- Application for Payment
- Final Assessment
- Defined Cost
- Schedule of Cost Components
- Short Schedule of Cost Components
- Compensation Events

## APPLICATION FOR PAYMENT CLAUSE 50.2

- *Contractor* submits application for payment before assessment date:
  - sets out the amount due
  - include details of how the amount was assessed
  - in the form stated in the Scope.
- *Project Manager* considers application in assessing the amount due.
- No timeframe but consider giving *Project Manager* sufficient time to consider the application.

## APPLICATION FOR PAYMENT CLAUSE 50.4

- If no application is submitted, the amount due is the lesser of:
  - “the amount the *Project Manager* assesses as due at the assessment date assessed as though the *Contractor* had submitted an application before the assessment date, and
  - the amount due at the previous assessment date.”

## APPLICATION FOR PAYMENT CLAUSE 50.4

- No application, no increase in the amount due.
- The amount due may decrease, e.g. delay damages.
- Discourages the *Contractor* from not making an application in such circumstances.

## TIMING OF ASSESSMENT DATES

- Assessment dates are at the end of each *assessment interval* until the Defects Certificate or a termination certificate (50.1)
- No additional assessment at Completion.

## FINAL ASSESSMENT CLAUSE 53.1

- *Project Manager* assesses final amount due, if any, no later than:
  - 4 weeks after the Defects Certificate or
  - 13 weeks after a termination certificate.
- *Project Manager* gives details of how the amount is assessed.
- Payment is made within 3 weeks of the assessment or any other date stated in the Contract Data

## FINAL ASSESSMENT CLAUSE 53.2

- If the *Project Manager* does not assess within the times stated, the *Contractor* issues its own assessment to the *Client*.
- The *Client* may agree and then pay within 3 weeks or such other time stated in Contract Data.
- No requirement for a default notice to the *Project Manager*.

## FINAL ASSESSMENT CLAUSE 53.3

- Assessment (by *Project Manager or Contractor*) is conclusive.
- What if the final amount is not agreed?
  - A Party must take action in accordance with the relevant dispute resolution option selected.

## FINAL ASSESSMENT CLAUSE 53.3

- If W1/W2 are selected, a Party:
  - refers to *Senior Representatives* within 4 weeks of the assessment,
  - refers any issues still not agreed to *Adjudicator* within 3 weeks of list of issues not agreed (or when it should have been produced)
  - refers *Adjudicator's* decision to the *tribunal* within 4 weeks of decision.
- If W3 is selected, a Party refers to Dispute Avoidance Board, and then the *tribunal* within 4 weeks of a recommendation.

## FINAL ASSESSMENT CLAUSE 53.4

- Final amount due is changed to reflect:
  - any agreement between the Parties,
  - decision of the *Adjudicator* or DAB unless referred to *tribunal* within 4 weeks.
- A changed assessment is conclusive of the final amount due.

## Y(UK)2: HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996

- Y2.2 – includes when the final amount becomes due:
  - If *Project Manager* assesses after Defects Certificate, 5 weeks after Defects Certificate,
  - If *Contractor* assesses after the Defects Certificate, one week after its assessment,
  - If *Project Manager* assesses after termination certificate, 14 weeks after the termination Certificate.
- Above assessments will be payment notices.
- Notified sum may be zero

## Y(UK)2: HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996

- Y2.4 – if the *Client* terminates for R1-R15 (insolvency), R18 (*Contractor* default) or R22 (Corrupt Acts) and a certified payment is outstanding, it is paid unless:
  - *Client* notifies *Contractor* it intends to pay less or
  - any of R1-R15 occurred after the last date on which the *Client* could have notified that it intended to pay less.

## ACCEPTANCE OF THE DEFINED COST (CLAUSE 50.9 OPTIONS C, D, E AND F)

- Contractor notifies Project Manager when part of the Defined Cost has been finalised and makes available any records. Project Manager must review records and respond within 13 weeks.
- If required, the Contractor provides further records or corrects errors within 4 weeks and Project Manager reviews and responds within 4 weeks.
- Treated as accepted if Project Manager does not notify within time stated.
- Proactively deals with Defined Cost rather than leaving the Contractor's records open indefinitely.

## DEFINED COST

- **Options A and B**, Clause 11.2(23)- all cost goes through the Short Schedule of Cost Components, including in respect of Subcontractors.
- **Options C, D and E**, Clause 11.2(23) - all cost goes through the Schedule of Cost Components, including in respect of Subcontractors.
- **Option F**, Clause 11.2(25) – amounts paid to Subcontractors without paying/retaining twice and the *prices* stated in the Contract Data.

## FEE

- 11.2(10) - Single *fee percentage* replaces *subcontracted fee percentage* and *direct fee percentage*.
- Includes all costs not in Defined Cost together with profit and risk allowances.

## OTHER MAIN OPTION CHANGES

- **Prices** (Options E and F) – forecast Defined Cost for the whole of the works. Common amendment for clarity.
- **Disallowed Cost** (Options C, D, E and F) - costs incurred only because the *Contractor* did not notify of preparation for and conduct of proceedings against a Subcontractor

## **SCHEDULE OF COST COMPONENTS**

- Options C, D and E.
- No option to use SSCC for CEs.
- 4 – Payments to Subcontractors without taking account of amounts paid or retained which would result in the Client paying or retaining twice.

## SCHEDEULE OF COST COMPONENTS

- 5 – Charges
  - Deletion of Working Area overhead.
- 6 and 7 - removal of overhead percentages for
  - manufacturing and fabrication, and
  - design.
- Replaced with people rates in the Contract Data applied to total time spent outside of the Working Areas.

## SHORT SCHEDULE OF COST COMPONENTS

- Only Options A or B.
- Payments to Subcontractors
- People Rates applied to time spent within Working Areas
- Replicates ‘charges’ section in SCC
- No people overhead
- Rates for people instead of overhead percentages for manufacture and fabrication and design (as in SCC).

## COMPENSATION EVENTS

- New compensation events:
  - 60.1(20) – Quotation for a proposed instruction which is not accepted
  - 60.1(21) – Additional compensation events stated in the Contract Data
- Clause 63.1 introduces a ‘dividing date’
  - for events arising from the *Project Manager* or *Supervisor*, the date of the communication
  - otherwise the ‘dividing date’ is the date of the notification of the compensation event

## PROPOSED INSTRUCTIONS CLAUSE 65

- *Project Manager* may instruct the *Contractor* to submit a quotation for a proposed instruction
- If the *Project Manager* does not reply to a quotation, it is not accepted.
- 60.1(20) CE is given for quotation which is not accepted.
- Cost of preparing quotations for CEs is no longer excluded under Options A and B.

## SCOPE CHANGES

- **Clause 16 Contractor's Proposals**
  - *Contractor* may propose changes to the Scope to reduce cost.
  - If it is accepted, it is treated as a CE and the Prices are reduced (using the *value engineering percentage* for Options A and B).
- **X21 Whole Life Cost**
  - the *Contractor* may propose a change to reduce the cost of operating and maintaining an asset.
  - If accepted, not a CE.

# Further significant changes

Inga Hall – Special Counsel

## NEW CLAUSES

- Corrupt Acts (cl 11.2(5) and 18)
- Assignment (cl 28)
- Disclosure/publicity (cl 29)
- Quality Management System/Plan (cl 40)
- Undertakings to *Client* or Others (X8)
- BIM (X10)
- Whole Life Cost (X21)
- ECI (X22)

## NEW CLAUSES: CORRUPT ACTS

- Corrupt Acts
  - New defined term (cl 11.2(5))
  - Defined generically rather than with reference to specific legislation (e.g Bribery Act) to be jurisdiction-neutral
  - Z-clause amendment likely to tighten definition
  - Contractor must not do a Corrupt Act and must take action to stop a Subcontractor's/supplier's Corrupt Act of which it is or should be aware (cl 18.1, 18.2)
  - Obligation to flow this down into subcontracts (cl 18.3)

## NEW CLAUSES: ASSIGNMENT

- New assignment clause (cl 28):
  - Either Party notifies the other if they intend to assign the contract or any rights under it
  - Only qualification is that the *Client* may not assign if the receiving party “does not intend to act in a spirit of mutual trust and co-operation” – how would the *Client* know?
  - Neither cl 28 or 29 covered in User Guide
  - Z-clause amendment likely to add ‘usual’ additional qualifications re restrictions on Contractor’s right to assign, notice requirements, and numerical limit

## NEW CLAUSES: DISCLOSURE & PUBLICITY

- New disclosure and publicity clause (cl 29):
  - Neither Party to disclose “information obtained in connection with the *works* except when necessary to carry out their duties..” (cl 29.1)
  - *Contractor* only to publicise the *works* with the *Client’s* agreement (cl 29.2)
  - Both very limited provisions, expansion via z-clause amendment is likely e.g
    - Defined categories of information
    - Sources of information
    - Necessary exclusions (public domain, professional advisers, employees etc.)

## NEW CLAUSES: QMS

- Section 4 (Defects) now begins with a new quality management system clause:
  - *Contractor* obliged to operate a QMS – detailed requirements to be included in Scope (cl 40.1)
  - Scope could say no QMS needed but unlikely – most contractors would operate one anyway
  - Quality policy statement and quality plan to be provided to the *Project Manager* for acceptance within time scales set out in Contract Data (cl 40.2) – obligation regardless of whether the Scope requires any particular form of QMS
  - The *Project Manager* can instruct the *Contractor* to correct a failure to comply with the quality plan (not a CE) (cl 40.3)
  - Implications of failure to comply with acceptance process not clear – Disallowed Cost?

## NEW CLAUSES: X8 UNDERTAKINGS

- NEC4 now includes a collateral warranties option:
  - The *undertakings to Others* are set out in the Contract Data (X8.1)
  - *Contractor* obliged to arrange for *Subcontractor undertakings* to Others and to the *Client* (X8.2 and 8.3)
  - Bespoke forms to be included in Scope (no NEC4 forms)
  - Required to be completed within 3 weeks, but no sanction if not (likely Z-clause amendment)

## FURTHER SIGNIFICANT CHANGES TO EXISTING CLAUSES

- Design and intellectual property rights
- Subcontractors
- Defects
- Liabilities and insurance
- Termination
- Dispute resolution
- Secondary Options

# DESIGN AND IPR

- No substantive changes to clauses 20 – 23
- New IPR provisions - Not centrally contained in one clause
  - CI 22.1
    - new obligation for *Contractor* to obtain equivalent rights from Subcontractors for *Client* to use Subcontractor's material
    - stops short of licence requirements often included via Z-clauses
  - CI 74.1
    - new provision stating that the *Contractor* has the right to use material provided by the *Client* - but only to Provide the Works - and that the *Contractor* may make this right available to a Subcontractor
  - X9 Transfer of Rights
    - transfer of *Contractor's* rights over design materials to *Client*
    - Extensions and carve outs to basic position set out in Scope – clause only as good as content of Scope
    - Obligation on *Contractor* to arrange equivalent transfer from Subcontractors
  - X15 RSC provisions

## DESIGN AND IPR (CONT.)

- X15 reasonable skill and care standard has shifted
- No single-point design responsibility drafting, often added as an additional secondary option via Z-causes

## SUBCONTRACT ISSUES

- Clearer definition of who a Subcontractor is (11.2(19) to remove ‘routine’ suppliers)
- Tightening of the *Project Manager* approval process in cl 26 i.e. all subcontract documents (except pricing information) now to be provided for review, not just *conditions of contract*
- No change to the list of express reasons for non-acceptance, and Z-clauses expanding that list are common

## DEFECTS

- QMS obligations (cl 40)
- Greater clarity over when the Defects Certificate is issued (cl 44.3)
  - NEC3- at the later of the *defects date* and the end of the last *defect correction period*
  - NEC4 – at the *defects date* if there are no notified Defects or otherwise at the earlier of
    - the end of the last *defect correction period* and
    - the date when all notified Defects have been corrected
  - *Contractor* on the hook until all notified Defects in fact corrected, rather than being ‘timed out’

# RISKS V LIABILITIES

- NEC3 approach:
  - Anything that was not an *Employer's* risk (set out in cl 80.1 s.t Z-clause amendment) was a *Contractor's* risk (cl 81.1)
  - Nothing could fall between the gaps
- NEC4 approach:
  - Terminology changes to “*Client's* liabilities”
  - Scope of cl 80.1 largely unchanged other than fault/design fault provision expanded
  - Matters which are *Contractor's* liabilities now listed in cl 81.1 – a non-exhaustive list
  - User Guide gives no guidance on the new approach

## LIABILITIES AND INSURANCE

- The *Contractor's* liabilities (unless stated in the Contract Data as being *Client's* liabilities) listed in cl 81.1 are liabilities typically covered by insurance i.e.
  - Claims and proceedings arising in connection with the *Contractor Providing the Works*
  - Loss of, or damage to the works, Plant, Materials and Equipment
  - Property loss or damage
  - Death or bodily injury

## LIABILITIES AND INSURANCE (CONT.)

- CI 81.1 does not contain any ‘catch all’ provision regarding other liabilities – Clients likely to seek to address perceived gap via Z-clause amendment
- NEC4 removes reference to “indemnity” with the NEC3 cl 83.1 mutual indemnity provision replaced with “recovery of costs” provisions
  - CI 82.1 – *Contractor* to pay any cost which the *Client* has paid (or will pay) as a result of an event for which the *Contractor* is liable

## LIABILITIES AND INSURANCE (CONT.)

- Cl 82.2 – *Client* to pay any cost which the *Contractor* has paid (or will pay) to Others as a result of an event for which the *Client* is liable – *Contractor's* own costs will be recovered through the CE mechanism
- “any cost” reference in cl 82.1 and 82.2 less clear than NEC3 indemnity reference to “claims, proceedings, compensation and costs” – likely to be narrowed by amendment
- Cl 82.3 – NEC3 reduction for contributory fault provision remains
- NEC3 cl 82.1 positive obligation on the *Contractor* to promptly replace/repair damage to the *works* etc. until issue of the Defects Certificate has been deleted

# INSURANCE PROVISIONS

- Insurance provisions largely unchanged other than:
  - New obligation on the *Client* to provide stated insurances (under NEC3 only the *Contractor* had an express obligation to do so) – cl 83.1
  - Reference now made to the strength of the insurer's commercial position as a factor which the *Project Manager* can take into account in accepting insurances – a common Z-clause amendment (cl 84.1, 86.1)
  - Reference to PI cover now included in X15
  - NEC3 cl 85.4 deleted i.e. that any amount not recovered from an insurer was borne by the party who bore the risk of the event – significant in the context of the liability gap which potentially now exists in NEC4 between *Client's* liabilities (cl 80.1) and *Contractor's* liabilities (cl 81.1)

## TERMINATION

- Termination provisions also largely unchanged, other than:
  - NEC3 *Employer's* termination for convenience right (NEC3 cl 90.2) deleted and replaced with a Secondary Option clause (X11) but procedures and amounts due unchanged
  - Termination for a Corrupt Act in certain circumstances included as a new reason (cl 91.8, R22)

## DISPUTE RESOLUTION (W2)

- Provision made in W2.1 for referral to *Senior Representatives* if the Parties agree
- Process is drafted tightly re length of submissions and time period allowed for this stage (W2.1(2), (3))
- Not disclosable in any subsequent proceedings
- Equivalent provisions also included in W1 and a new W3 (Dispute Avoidance Board) included – not applicable for Construction Act contracts

## SECONDARY OPTION CHANGES

- X4 – PCG
  - reference included to PCG coming from the ultimate parent (a common Z-clause amendment)
  - scope for the *Contractor* to proposed alternate mid-structure guarantor instead
- X12 – Partnering
  - now called “multiparty collaboration”
  - A ‘softer’ in-contract alternate to new Alliancing Contract approach?
- X15 – RSC
  - appears to reverse burden of proof:
    - NEC3 – *Contractor* not liable for design defects if he could prove that he used “reasonable skill and care to ensure that his design complied with the WI”
    - NEC4 – *Contractor* not liable unless it failed to carry out design using “the skill and care normally used by professionals designing works similar to the works”.

## SECONDARY OPTION CHANGES (CONT.)

- X15 – RSC (cont.)
  - may not be consistent with standard PI insurance obligations
  - ‘professionals’ an ambiguous term: cf engineer, architect, D&B builder
  - Additional provisions at X15.3-X15.5:
    - *Contractor* can use material it created under the contract on other projects unless Scope says otherwise or ownership transferred under other IPR provisions (X15.3)
    - New obligation for the *Contractor* to retain design documents for the *period of retention* (X15.4) – linked to common Z-clauses re Minimum Record obligations and audit rights
    - PI insurance obligation included at X15.5 (commonly addressed as a Z-clause amendment to insurance provisions) – not expressly linked to other Section 8 insurance obligations

## SECONDARY OPTION CHANGES (CONT.)

- X16 – Retention
  - New X16.3 providing for a retention bond if stated in the Contract Data
  - Not expressly stated to be in lieu of retention sum, but clearly the intention
  - No form of retention bond provided by NEC

## Z CLAUSES STILL LIKELY TO BE NEEDED?

- To further develop new provisions e.g assignment
- To address issues which remain unchanged in NEC4 e.g
  - Contract Date definition and linkages to a form of agreement and order of priority clause
  - Construction-standard warranties and undertakings regarding deleterious materials, integration with other works etc.

## SLIDES WILL BE AVAILABLE

- <https://www.klgatesconstructionlawblog.com/>

# QUESTIONS?



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