

## Webinar: When to choose the NEC4 Engineering and Construction Short Contract (ECSC)

**5 March 2024**

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Please note the article on the differences between ECC and ECSC here:

‘Comparison of the NEC4 Engineering and Construction Short Contract (ECSC) with the NEC4 Engineering and Construction Contract (ECC)’

Richard Patterson, Mott MacDonald and the NEC Contract Board

NEC website, July 2023

<https://www.neccontract.com/news/comparison-of-the-nec4-ecsc-with-the-nec4-ecc>

### Question/Feedback

**Q1) I'm using the ECSC with SMEs and it's going really really well**

#### Response

That is really good to hear that is the case. If we had managed to speak on the day we would have loved to know what type of works that you are using it for? And what you see as the benefits?

**Q2) Are you saying the ECSC doesn't have a PM or Supervisor just Contractor and Subcontractor?**

#### Response

Correct. The ECSC does not have a PM/Supervisor. The only people involved are the *Client* and *Contractor*. The *Client* carries out the actions equivalent to those of *PM* and *Supervisor* under the ECC.

The *Client* can appoint a *Client's* delegate under clause 14.5.

With the Engineering Construction Short Subcontract (ECSS) we have only *Contractor* and *Subcontractor*.

**Q3) What happens if the Contractor provides the Price List? Would an instruction to correct a mistake in the Price List still be a CE ?**

**Response**

This is the anomaly that Richard was flagging up in the webinar. The simple answer to this is yes. But, should the Client be responsible for a error in the Contractor's Price List?

The contract

"14.3 'The *Client* gives an instruction to correct a **mistake** in the Price List which is

- a **departure from the method and rules** stated in the Price List and used to compile it or
- due to an **ambiguity or inconsistency**'

60.1(12) compensation event:

'The Client gives an instruction to correct a **mistake** in the Price List.'

So 'correctness' of Price List is a *Client* risk!

This does not seem to be equitable if *Client* has asked the bidder to offer its priced items to get paid for the Scope.

In this case the *Client* may choose to delete the above clauses in the 'additional conditions of contract'.

See Richard's article on this:

'Price lists in NEC short contracts and how clients can simplify the process'

Richard Patterson, Mott MacDonald

NEC Newsletter, July 2021, and NEC website

<https://www.neccontract.com/About-NEC/News-and-Media/Price-lists-in-NEC-short-contracts-how-clients-can-simplify-the-process>

**Q4) Should retentions still be used as that can have negative financial implications to contractors/subcontractors and could cause another Carillion situation**

**Response**

Retentions are still favoured by many organisations, but is viewed by many to be rather old fashioned way of dealing with things. For an SME cash flow is of key importance and we think the *Client* should avoid retention.

See:

‘Retentions Payments under NEC Contracts’

Peter Higgins of PD Consult on behalf of NEC, and Andrew Croft of Beale & Company Solicitors LLP and Claire King of Fenwick Elliott LLP on behalf of CLC.

<https://www.constructionleadershipcouncil.co.uk/news/retentions-payments-under-nec-contracts/>

**Q4) Is there dispute resolution clauses built into the contract or should they be included as an additional condition?**

**Response**

Clause 93.1 refers to Dispute Resolution which is done via adjudication.

The ECSC has an optional statement in the *Client’s* Contract Data which reads:

“The United Kingdom Housing Grants, Construction and Regeneration Act (1996) does/does not apply (delete as appropriate)”

It should be noted that this optional statement is only applicable if the works are subject to UK legislation.

**Q5) We use the Short Contract for relatively minor highway improvements, footpaths etc. When Unit Rates are required a Price List of Items and Quantities is adopted. We adopt MCDHW Vol 4 as it gives a structure / item coverage / clear set of rules, so method and rules clearly defined. Do you concur with this approach.**

**Response**

This looks to be a very good use of the ECSC. The ECSC Price List on page 4 of the Contract Data provides a box in which to insert details of “The method and rules used to compile the Price List are...”

Making reference to the Manual of Contract Documents for Highways Works (MCHW) vol 4, which has clear measurement rules and item coverage, etc is a very good way to fulfil this requirement.

**Q6) Follow on to previous, as regards Price List we have " activity type items ", similar to Option A.**

**Response**

The flexibility of the ECSC means that you have the choice of Response:

The ‘Price List’ contains:

lump sum items (akin to ECC Option A)  
and/or  
quantity \* rate (akin to ECC Option B)

So a ECSC is a ‘priced’ contract.

The Price List Includes a requirement to state ‘the method and rules used to compile the Price List’.

If quantities are used this will be like ‘*method of measurement*’ in ECC options B and D.

**Q7) We also use a Price List with a mix of unit rates relating to quantities, and lump sum (activity type) items. With lump sum type items, the Contractor is responsible for establishing the quantities from the Scope, ( Assuming Scope is correct !! ), otherwise it’s a compensation event.**

**Response**

If the Scope is incorrect the *Client* will be required to change the Scope (clause 14.2) and that will cause a compensation event (Clause 60.1(1)).

If the *Client* wants the *Contractor* to take the quantity risk for a piece of work it should require a lump sum item for that piece of work. If the *Client* wants the bidder to write the item descripts for lump sum items in the Price List it should look also at our response to question 3, above.

**Q8) does the design clause change liability for design to the client with his acceptance?**

**Response**

**The ECSC only has the one simple clause 20.2 which reads:**

‘The *Contractor* does not start work which the *Contractor* has designed until the **Client has accepted that the design** complies with the Scope.’

In relation to acceptance, clause 14.4 states, “The *Client’s* acceptance of a communication from the *Contractor* or acceptance of the work does not change the *Contractor’s* responsibility to Provide the Works or liability for its design”

Therefore, acceptance does not transfer design liability to the *Client*.

As highlighted in the webinar any requirements in relation to design submission, time periods for review and reasons for non-acceptance need to be carefully considered and included in the Scope.

**Q9) Does the lack of an agreed programme have a potential detrimental effect upon contractors whereby a client misses a crucial deliverable date eg access - hence no standing time charges can easily be made?**

**Response**

The clause for assessment of delay to the Completion Date does not mention the programme as the programme is only requires to the extent that the Scope states that one is require, which could of course be not at all. . It is simply:

Clause 63.6: ‘A delay to the Completion Date is assessed as the length of time that, due to the compensation event, Completion is forecast to be delayed.’

However, having a programme provides an objective test for the impact of a change event. So, the lack of a programme or regularly recorded progress and/or site allocation sheets and records will always be detrimental on all contracts.

**Q10) Working Areas are not stated, so Contractor cannot claim for people working from home as part of defined costs for C Es, is this correct.**

**Response**

The definition of Defined Cost for the ECSC 11.2(6) only refers to:

“People employed directly or indirectly by the Contractor on the site, calculated by multiplying each of the People Rates by the total time appropriate to that rate”

So, there is not such thing as Working Areas in the ECSC.

Clause 63.1 deals with assessing compensation events which only affect the quantities of work. Clause 63.2 states:

“For other compensation events, the change to the Prices is assessed as the effect of the compensation event upon

- the actual Defined Cost of the work already done,
- the forecast Defined Cost of the work not yet done and
- the resulting Fee”

Therefore, when pricing an ECSC a Contractor needs to consider how they will recover their costs of people outside the site. The way to do this is to make an allowance in their proposed Fee.

**Q11) Could you provide example projects of when the short contract would be preferred over the full ECC. i.e examples of project size or a limit on project value?**

**Response**

As discussed, the issue is complexity rather than project value. The whole point of the article and the presentation was to help people

- become better aware of the ECSC
- recognise the key differences between the ECC and the ECSC

and so be able to choose.

A good example where it is very appropriate is for relatively small ground investigation contracts.

**Q12) Subcontractors using the ECSC are unlikely to have any members available to be on a dispute boards. What are the suggestions to ensure clients are not mistreating the dispute clause?**

The ECC4 has new option W3 for a Dispute Avoidance Board. That is not an option in the ECSC. The whole ECSC is focused on collaboration – early warning, sorting out compensation events as we go along etc. We hope that the dispute procedure in ECSC will not be well used!

**Q13) If a dispute crystallises and Y(UK)2 is included in the short contract (but the works are not deemed 'construction operations' under the HGCRA) are you still able to refer to adjudication? ! Or do you have to go straight to a tribunal?**

**Response**

This is a really good question.

NEC ECSC Contract Data includes:

'The United Kingdom Housing Grants, Construction and Regeneration Act (1996) does/does not apply

(delete as applicable)'

This then determines whether Page 17 applies:

'IF THE UNITED KINGDOM HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996 AS AMENDED BY THE LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION ACT 2009 (THE ACT) APPLIES TO THE CONTRACT, THE FOLLOWING ADDITIONAL CONDITIONS APPLY.'

The Act allows adjudication at any time and that is reflected in the ECSC.

We are not lawyers but whether or not a contract comes under the act will – in dispute – be determined by the Act itself and not by the choice made by the Client in the Contract Data!

**14) Shockingly a lot of Procurement people don't understand contracts**

**Response**

As we stated in the webinar:

‘Read the \_\_\_\_ Contract’ - RT\_C. It is absolutely essential to do so.

Then ‘Talk and Listen to Each Other’ – TALTEO then

Do what it says in the \_ Contract – DWISIT\_C!

**Q15) And that's what we do for GI, we use the ECSC with no problems whatsoever**

**Response**

You, have just made Richard’s day. And great to hear that you are using the ECSC with no problems whatsoever.

For reference:

‘Guidance on Using NEC for Ground Investigations’

Richard Patterson, Mott MacDonald and the NEC Contract Board

NEC website, July 2023

<https://www.neccontract.com/news/new-guidance-on-using-nec-for-ground-investigations>

**Q16) What is the risk of using an ECSC form of contract on a higher complexity project?**

**Response**

Good question, where to start! On higher complex projects it is likely that the management techniques and risks are likely to be much more demanding. There are simply a lot of detailed provisions in the ECC that are not available when setting up the contract – eg Sectional Completion, Key Dates, inflation protection. And in manging the contract the simpler (some might say simplistic!) ECSC compensation event process might not be helpful – eg the default acceptance of a quotation if the *Client* does not respond on time.

**Q17)Would you not always want a programme in the short contract?**

**Response**



It is always useful to have a programme however simple or complicated. Given that the ECSC is for simple projects and works which are very often over a short period of time maybe just days, weeks or a few months rather than years. They may be one off or stand-alone works. In such situations it may be that detailed sophisticated programme requirements may not be required.

However, as highlighted in the webinar you could have simple work over a short period of time with key interfaces, which does require more detailed programme requirements.

The programme can be as simple or as detailed as you require depending on the key contract factors.

**Q18) Also, a brief runover of dispute resolution process would be helpful. Scope, defects, CE events disagreements... It came from a contractor....**

#### **Response**

Is it ever such things ever brief! Anyway, here we go:

- **Scope**

The Contractor's obligation in clause 20.1 is to "Provide the Works in accordance with the Scope"

Completion is the objective test of:

"11.2(1) Completion is when the *Contractor* has completed all the works in accordance with the Scope except for correcting notified Defects which do not prevent the Client from using the works or others doing their work"

- **Defects**

"11.2(4) A Defect is a part of the works which is not in accordance with the Scope"

So, the test of a Defect is the Scope.

- **CE disagreement**

The CE process in the ECSC is very much streamlined. In clause 62.2 the Client either

"Acceptance of the Contractor's quotation or a statement that it does not agree with the quotation and details of their own assessment"

As Richard stated and Barry re-iterated the key to all the NEC process is to Talk And Listen To Each Other- TALTEO.

If you do not agree with the Client's assessment then under clause 93.1 the dispute is referred and decided by the Adjudicator.

**Q19) Thank you for the presentation. I found it useful.**

**thanks gents!**

**Response**

We are very pleased that you found the webinar useful and good luck using the ECSC.