

## Where to Start with NEC? Webinar

Robert Gerrard, Barry Trebes & Ben Walker.

**We've been recommended to use CEMAR platform to manage the NEC4 related tasks & correspondence. What would you recommend? And also, are there any other alternatives out there to CEMAR?**

A. NEC are aware of several contract management systems in the market. NEC4 acknowledges their value and makes provision for their use (see clause 13.2 in NEC4 ECC). However, NEC does not officially endorse any one solution. Parties should consider their joint requirements and evaluate the various tools on offer.

**My council is looking to procure a (circa £900K) contract on NEC Conditions, for repair/refurb work and provision of pre-cast walls, etc., with responsibility for some design placed on the contractor (council to provide approx.dimensions/measurements, with contractor satisfying themselves re details). I'm considering use of NEC4 E&C with Option B (BOQ) - would this be the most appropriate in your view?**

A. In NEC4 ECC, main Options A to F are mechanisms for payment. The Client must choose one main option.

Main option B and main option D both use a Bill of Quantities (BoQ). Option D requires the maintenance of a BoQ as well as the capture of Defined Cost in accordance with the Schedule of Cost Components. Option B is simpler to administer since the Price for Work Done to Date (PWDD) is assessed using the rates in the BoQ.

Main option A and main option B are both priced contracts. Main option A uses a priced Activity Schedule and the PWDD is assessed using the 'lump sum' prices on this schedule. Arguably, main option A is simpler than B to administer as there are no measurements of quantum, just a decision on when each activity is complete.

The decision to use a BoQ or Activity Schedule is a matter of risk allocation between the parties. There is no right answer, although typically a BoQ is appropriate where there is uncertainty as to the volume of work necessary and where the Client holds value for money as preferable to budget certainty.

Such work could still be performed under main option A with a priced Activity Schedule, with the uncertainty of volume carried by the Contractor. By comparison, main option B would remove the risk of uncertain quantities from the Contractor, while affording the Client value for money as the PWDD tracks actual quantity used/performed.

Some Clients prefer the budget certainty of main option A over the value for money of main option B. In this case, the Client may choose to undertake further investigation pre-contract in order to refine Scope and reduce uncertainty.

In summary, the choice of main option B over main option A would typically be where the work was known but quantities uncertain and where the Client held value for money as preferable to budget certainty.

**Will a CPD certificate be provided following this session?**

A. No, you need to record your time spent watching and considering this content and decide how much CPD it is worth according to the rules of your professional body.

**That is an interesting point - if using NEC for the main contract is the recommendation that the Contractor should use NEC for the sub-contracts? Is that a Client or Contractor decision?**

A. "NEC has been authored with subcontracting in mind. Specific subcontracts are available for many of the main contract forms. These have been drafted with consistent management approaches and language to aid the flow of matters between the different contracts comprising a project or service. Particular care has been taken to ensure the timings of contracts and subcontracts are compatible.

The Client may be able to specify that an NEC subcontract is to be used, most likely when using frameworks. NEC believe there is benefit in using NEC contracts throughout the supply chain, although it is still possible to use NEC alongside other forms."

**With an NEC4 contract between us (the design team) and the client, where there is no contractor involved until post 2026, are there any watch-its in this scenario? And also, what recommendations would you have for us hiring sub-consultants as part of the design team?**

A. A Client designed project is a common approach. Hopefully this results in a clear, concise and certain project Scope document, that will afford you a straightforward tender and evaluation when you come to select a Contractor.

Depending on the nature of your works or services, it may be beneficial to engage a Contractor early in the process. Consider 'Early Contractor Involvement'. If there is likely alternative ways to approach the work, or potential for further innovation during construction, teams may wish to make use of NEC4 ECC clause 16 for Contractor proposals and X21 for whole life cost.

A Subcontractor (under your NEC4 PSC) would be engaged by your Consultant, not the Client. Their engagement would not change the obligations of your Consultant to you as Client.

**I have a query relating to NEC4 Professional Service Contract (PSC). A Client I work with has provided contract amendments to the PSC, in doing this they have removed all timelines for responses to CE's and payments. Is there any means of challenging this or are there other timelines that I could request the Client to adhere to?**

A. Without seeing the amendments it is not possible to comment on this specific situation. Removal of all timings relating to compensation events and payment would on the face of it appear unwise. It would be interesting to discover what the Client is worried about in terms of their ability to adhere to these timings.

NEC takes a proactive, contemporary and procedural management approach, rather than a retrospective transactional one. Without clear timings it is difficult to see how momentum would be preserved and how accountability and motivation would be achieved.

Certainly a conversation with the Client would seem appropriate here to understand why they believe this is necessary. Ultimately, one would need to consider whether to enter into this contract. On the face of it, without timings, one might question if it constitutes an NEC contract at all.

**Thank you for the webinar. I understand your comments with respect to discussion with the supply chain on the amendment of any particular clause or approach, to suit the purpose of the project, but if the matter is being negotiated on behalf of the Contractor and employer by lawyers, frequently you many find that their negotiation approach is not collaborative, but in protecting their Client's interest. What do you do when you (a) see a clause slipped in that your not sure of with respect to underlying motive, during negotiation and (b) when you have under the pressure of reaching commercial close, with that clause that hasn't been considered in the manner which you indicated, during negotiation, and have been landed with administrating that contract?**

A. This is a common issue, worsened in a number of ways including; lack of knowledge as to how the standard NEC conditions operate together; inappropriate and unhelpful risk allocation; pursuit of inappropriate strategy on the basis 'this is how we always do it'; verbose drafting; use of Latin and other language not in common use etc....

Tackle these items early. Clients should know that even appropriate amendments can cause uncertainty and confusion if not properly explained. It is in everyone's interest to avoid confusion. Compel your legal advisors to use the drafting guidance for option Z, available in NEC4 guidance volume 2.

This advocates a clear statement as to why standard conditions present an issue, explaining the outcomes and objectives of any proposed amendment. It recommends the use of NEC language and drafting conventions, ensuring the style and readability is consistent with the rest of NEC. Lawyers should take the time to ask Clients what is important to them and reflect this in the appropriate allocation of risk.

Lawyers could be required to consider the official NEC guidance and flow charts. For each amendment, how is this guidance (and flow charts) to be changed? Why? How? What is the mischief you are seeking to address? If undertaken as a check and a session held for lawyers to present this to the project team, it can often expose flaws in proposed amendments, as unintended consequences are uncovered. Ultimately, the activity of amending the contract should consider its practical application with those charged with administering it.

**How can collaborative Scope considerations be achieved in a competitive tender situation or on existing frameworks?**

A. Consider using X20 or X12 and setting KPIs around strategic outcomes. This should motivate all parties to do what's in the best interest of the outcomes. Examples might be customer satisfaction, reduction in complaints, time to resolution, number of days of lane closures, etc...

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**Can you put the link to that Scope Guidance Document Ben Walker referred to at around 33 mins into the recording please?**

A. Please search for [NEC4 Engineering and Construction Contract User Guide Volume 2: Preparing an NEC4 ECC](#). Within this volume is a coded / tabulated structure, offered as a sensible template for approaching the drafting of Scope. As well as ensuring clear presentation, compatible with other NEC documents, it covers the 20-30 references in the conditions of contract that rely on a statement in the Scope.

**Based on my experience, one of the issues with not accepting the programme is at many occasions, a submitted programme doesn't come with minimum quality requirements and just has been submitted in order to satisfy clause 31.**

A. The best solution to this is insist on a programme pre contract particularly if negotiating. Think about the cost to tenderers in a competitive tendering situation. You can then work with the Contractor to agree its format and presentation. These attributes can then be included in the Scope, pre-contract, as requirements for how the programme is to be presented.

**A 'Z' clause? What is that?**

A. Secondary Option Z is an optional clause that affords the Client the ability precontract, to superimpose additional conditions of contract. These additional conditions may work to amend or remove existing conditions of contract or to add new ones. Care should be taken when drafting z clauses to ensure they are compatible with NEC's procedures. Guidance on how to draft them is available in NEC4 ECC User Guide Volume 2.

**In all NEC interventions, I have heard about "collaboration" however it is obvious that each party will collaborate as long as it is in their interest. Did the industry think about having neutral "collaboration lead" for all contracts to ensure BEST POSSIBLE OUTCOMES for everyone? Even more for Public Funded Programmes and Projects. Thanks.**

A. Collaboration is about working together to achieve the same thing. It is therefore important to be clear about that thing. Furthermore, it is helpful to root at least some of the 'thing' in purpose and outcomes. Collaborating towards 'what's and how's' is important too, but these are susceptible to change.

If the thing we are collaborating around changes post contract, then your assertion that collaboration may give way to self-interest appears sound. To help protect against this, alignment of incentives with a stable outcome should ensure that collaboration continues despite tactical change, which is often held as inevitable in our industry.

**Why do you think that our industry is immature? Possibly because we do not retain our expertise, perhaps?**

A. Certainly, we are seeing a change in how contracts are approached, with a growing recognition that behaviours and culture play a key role in successful contracting. We are mature in terms of technical ability but perhaps immature when it comes to using the 'correct' modern day behaviours so many organisations long for.

**The change of the PSC under NEC4 to cost based contract has made the PSC far less simple and increased the cost of administration for both parties with cost estimators needing to be engaged by parties to support the contracts. Whereas NEC 3 PSC provided for simple rates and prices. Please could you advise if there is any movement to returning the PSC back to rated/ price-based contract?**

A. NEC4 PSC main option A the Short Schedule of Cost Components uses people rates only for compensation events. Main options C and E use Defined Cost as defined in the Schedule of Cost Components. As you state many Consultants preferred the simplicity of rates and prices, but why can't actual Defined Cost mean that for consultants as well as Contractors? Certainly, we have experienced many Consultants advocating open book approaches for Contractors, so why not for them too? The world seems to be going more towards transparency and fair dealings, so why have just one sector in a closed book situation? The recent high inflation has shown that the actual costs of many of the cost components may well out strip the agreed rates and prices in a contract and framework and in some cases these rates have been reviewed early to ensure that the Consultant is fairly compensated. So, yes more administration but less risk than stated rates and prices. But there's a choice here, option A (lump sum, changes via rates and prices) or option C/E, open book based on Defined Cost.

**Have you (NEC drafters) thought of incentivising the employment of sufficient planning resource at the outset, penalising if this is not done?**

A. Not properly resourcing an NEC4 (or any) contract can negatively impact on performance and outcomes. This provides a natural sanction on Clients; one would hope that education around what's needed will make the advantages and disadvantages clear to see. Additionally, several compensation events deal with the Client not acting in accordance with the contract, ensuring the Contractor is compensated for performance falling short of their obligations.

**What are the accreditation courses we can approach and how to start with them. Any suggestions for people who are students and want to learn about NEC.**

A. See [www.neccontract.com](http://www.neccontract.com). Best to start with training - introductory courses and build experience on real contracts. Then, with some practical experience and intro courses under your belt, go for accreditation. There is always more to learn so enjoy the journey.

**I am an old school QS, was used to using JCT and SBCC. I have been in Oil & Gas using Logic for the last 15 years. I am back now in the Building Industry and finding it hard to get my head around the NEC4 - are there any pointers or advice you would give? I am doing the NEC4 Course at the end of the month and struggling with the prerequisite courses!**

A. Read and understand the defined and identified terms. Don't assume to know what they mean. NEC breaks convention in a few of these, e.g. Plant, Equipment etc. Use the index to navigate around the clauses, explore how they are related.

Understand NEC's prospective approach to change management. Understand too the approach of using an event's impact on cost as a default basis of assessing change - not a deconstruction and reconstruction of contract pricing - this is a major difference.

Worth also looking in the role of the programme as a contemporary management tool and early warning as a sensible approach to proactive risk management.

It's best not to look for equivalents - some of the concepts are unique to NEC. There are various commentaries, we like Brian Eggleston's book.

### **When do you issue clause 26 to Client pre or post subcontract signing?**

Clause 26 only comes into effect post contract. So, Subcontractor appointment post contract is subject to clause 26. It is possible precontract to identify subcontractors as part of the tender.

**How engaged do you feel Clients are with regards to the things you've spoken about today, in terms of wanting to get contracts right up front? As a Contractor we seem to deal with incomplete/poor project data on virtually every project, which suggests Clients are just not 'getting it'. NEC seems to be chosen just for the sake of it (or because it's dictated to them by a procurement framework), rather than because of the benefits it can bring. Feels like Clients could do with some education on NEC and good practice, instead of just firing their outline concept out there for pricing, and dealing with all the holes later.**

A. This is a fair observation and seems to accurately illustrate the behaviours of some Client organisations. Your reasoning for why this is happening also appears to be well founded. But it is important to note there are many more Clients who do understand and 'get it'.

It is likely that Clients who are not performing well in this regard have a lack of understanding. It doesn't seem likely that proper preparation and resourcing of contracts would be ignored in the knowledge of how they work. The solution has to be more awareness as to the substance of doing it properly and the pitfalls of not. An aspiration to contract in a modern, collaborative way is not in itself enough.

### **Can NEC 4 contain Order of precedence Defence Estates' conditions include within a Z Clause?**

A. This is not necessary. Those drafting the documents are responsible for ensuring they do not contain inconsistency or ambiguity. For NEC4 ECC, see clause 17.1 and 17.2 for what to do in the case of problems.

In relating to Scope, an instruction is given to change the Scope by the Project Manager to resolve the matter. This is not a compensation event if in relation to Scope provided by the Contractor for its design, that needs changing in order to comply with the Scope provided by the Client. (See clause 60.1(1)).

If an instruction is necessary to resolve ambiguity or inconsistency between Scope documents provided by either party, then clause 63.10 sets out how a resulting compensation event assessment should be approached. Essentially that the assessment favours the party that did not introduce the ambiguity or inconsistency.

### **Is there a limit to the number of compensation events on a contract?**

A. If the question is asking about compensation event types, then no, there is no limit. Additional compensation events can be added precontract by listing them as objectively testable scenarios in the corresponding entry of Contract Data part one. This brings them into clause 60.1(21) of the NEC4 ECC by example. Z clauses may be used to delete certain compensation events. Whether adding or removing, this is about risk allocation.

If the question is asking about volumes of compensation events, then the answer is again no. There is no limit to how many compensation events either party may notify post contract. This will be a function of how good the Scope document was and the circumstances and environmental factors influencing the project.

**Can you include Disallowed Cost in the Fee under ECS Option E?**

A. Tenderers can allow for whatever they so wish to in their Fee when tendering but of course the higher it is, the less chance they may have of winning the bid. In principle, the Fee should include all things not recoverable as Defined Cost, so in principle, yes. But do you really expect Disallowed Cost to occur when tendering?