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NEC4 FMC SPECIAL ISSUE

nec users' group NEWSLETTER

Scottish Fire and Rescue Service, the world's fourth largest, has let a £70 million, five-year NEC4 Facilities Management Contract (FMC) to Robertson Facilities Management. Covering hard facilities management services, the scope includes all planned preventative and reactive maintenance tasks plus minor works projects at its 356 fire stations. Work started in April 2022 and there is an option to extend by 3 years.

NEWS

NEC4 FMC: embedding facilities management best practice

SOFIE HOOPER INSTITUTE OF WORKPLACE AND FACILITIES MANAGEMENT

The NEC4 Facilities Management Contract (FMC) has been embedding best practice procurement in the facilities management sector since its launch in January 2021.

For some time, facilities management professionals had been calling for a procurement tool specific to and meeting the diverse needs of the facilities management sector, as opposed to standard contracts based on construction practices or bespoke, one-off arrangements.

After four years of collaboration between NEC and the Institute of Workplace and Facilities Management (IWFM), the NEC4 FMC was launched to meet that need.

Rooted in collaboration

According to IWFM chief executive Linda Hausmanis, 'The NEC4 FMC is rooted in collaboration and bakes in a number of principles for best practice in procurement, which is fundamentally important to our profession's advancement. It is a key tool for embedding best practice that can help our profession to thrive and grow.'

At the launch of the contract last year, Linda gave special thanks to IWFM's expert steering group, the members of which were drawn from IWFM's procurement and international special interest groups. 'They played an instrumental role in the contract's development. As we all now look to build back better post-pandemic, the contract could not have arrived at a better time.'

Four-year gestation

Andy Candelent, head of FM at Leadec and a member of the IWFM expert steering group, recalls, 'I founded a small working group in 2017 to work on the request from an FM Leaders' Forum for a contract for international use. It soon became apparent that there was in fact no standard form of contract available within the FM industry which was truly fit for purpose. Most were loosely re-worded construction contracts.'

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NEWS

How NEC4 FMC users benefit from continuing support and training

FRANCESCO SALAU NEC PRODUCT DEVELOPMENT

The NEC4 Facilities Management Contract (FMC) combines facilities management (FM) terminology with NEC best-practice procurement principles. This also means FMC users benefit from NEC's global support and training services, plus continuing evolution of the contract to meet their changing needs.

Previously the NEC4 Term Service Contract (TSC) was often used to procure FM works. But the contract and its language are better suited to 'hard' FM, such as structures and mechanical systems. The FM market, led by Institute of Workplace and Facilities Management (IWFM), needed a contract that could also deal with 'soft' FM, such as cleaning and security services. As described by Sofie Hooper on page 1, this prompted a four-year collaboration between the NEC and IWFM, resulting in the launch of the FMC and the Facilities Management Subcontract (FMS) in January 2021.

The Facilities Management Short Contract (FMSC) and Facilities Management Short Subcontract (FMSS) were published later in the year for straightforward, low-risk works, completing this unique new contract suite.

Positive user feedback

A key benefit reported by the fast-growing number of FMC users is the inclusion of service and project orders, which are considered better suited for the type of work done in the FM sector than TSC task orders. This is also due to the language being better aligned with the way the FM sector thinks and works. Not surprisingly, among NEC users the FMC is gradually replacing the TSC where appropriate as existing contracts and frameworks come to an end.

New FMC users who have not previously used NEC contracts have also praised the contract for its simplicity, which along with the modular nature of the contract has empowered them to shape it to suit their circumstances. These factors enable users to realise the benefits of using an NEC collaborative contract in the FM sector, including savings on costs and time and robust risk management.

Certainly the NEC need for 'active management' to achieve these benefits has also been noted by new users. While some consider this to mean a greater focus on administration, it is also recognised that striving for best contract management practice will pay dividends across a project's duration.

Practice notes

NEC's collaboration with the IWFM has continued over the past two years. As with all NEC contracts, various practice notes have been issued since the launch to help FMC users incorporate bespoke contract requirements. So far these include social value requirements, paying a living wage throughout the supply chain, and implications of international and cross-border contracts.

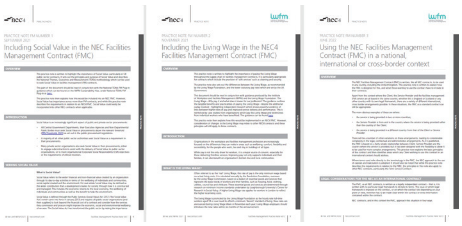
Like all NEC contracts, FMC is written to be independent of any specific legal system so it can be used worldwide with minimum adaptation. For UK users a practice note will soon be issued on The Transfer of Undertakings (Protection of Employment) Regulations 2006, or 'TUPE', which will help them deal with protection of employment rights in FM term service contracts.

Training and networking

NEC is providing ongoing support for the adoption of the FMC across different regions by hosting FM-related events and providing specific FM training courses, helping users get the best value from the contract, including continuing to develop sector-relevant material to achieve this.

In addition, FMC users have shown a strong appetite for more engagement, in particular a space to network, exchange best practice and share resources related to NEC and FM. The recently launched NEC Community App will play a central role in delivering this space in the near future. NEC is keen to hear and understand what kinds of further engagement FMC users across the world will find valuable.

Moving forward, NEC will continue to engage with and support the FM sector by creating market-led solutions built upon the core NEC principles of mutual trust and co-operation.



▲ FMC user benefits include regularly released practice notes

▲ The NEC4 FM contract suite consists of the main FMC contract, the FMS subcontract and the shorter FMSC and FMSS

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He says the working group recommended that IWFM collaborate with a contract specialist like NEC. 'After around four years of hard work by IWFM, IWFM members and NEC, I am proud to have been instrumental in delivering a product which delivers tangible benefits for the wider FM sector.'

Welcomed by industry

Anne Kinder, senior consultant at Nodus Solutions and also an IWFM steering group member, says, 'Efficiency gains can be made by having a single form of contract across our sector, and contract management can be improved through use of NEC4 collaborative principles. But this is just the start: we now need to focus on promoting the contract within our sector over many years to see it become embedded.'

Chris Jeffers, project director and head of facilities management advisory at Mott MacDonald says he too was proud to have been a steering group member. 'This is the first contract focused on FM that has been launched for many years and it's something I believe the industry sorely needs.'

Helping the FM sector

A key benefit of the FMC is that it is specifically developed for the FM sector, so there is better alignment with FM priorities, including market-recognised phrases and definitions. It helps to streamline processes, reducing the potential for problems and promoting best practice in the procurement of FM services.

The contract also offers flexibility to support a variety of FM approaches in procurement and delivery strategies, and supports the building of trust and collaboration, which is vital to a well-functioning FM industry.

NEC4 FMC was developed specifically for the FM sector by an IWFM steering group ▶

Discount for IWFM members

IWFM members benefit from a discount of 15% off the cost of the NEC4 FMC and 10% off the public NEC4 Introduction to FM one day-training course, which includes a free copy of the contract. Members should email IWFM's member and customer engagement team at engagement@iwfm.org.uk or call on +44 1279 712 650 to get a discount code.

iwfm
Institute of Workplace and Facilities Management

NEWS

NEC set to make facilities management in Hong Kong more sustainable

ROBERT GERRARD NEC USERS' GROUP SECRETARY

NEC4 FMC will help Hong Kong's huge FM market become more sustainable

In an expensive and asset-rich place such as Hong Kong, facilities management (FM) is big business. There are many FM professionals, consultants and service providers operating in Hong Kong but considerable variation in how FM services are procured.

This is where NEC can step in, with its global standard NEC4 Facilities Management Contract (FMC) and associated subcontract and short contracts. The contracts will help FM professionals create better tender documents and improve the management of their contracts.

This aligns with the International Facility Management Association (IFMA) Hong Kong Chapter, which aims to, 'advance our collective knowledge, value and growth for Facility Management professionals to perform at the highest level'.

Encouraging sustainability

NEC is a corporate member of the IFMA Hong Kong Chapter and presented at its annual conference in September, entitled 'Integrate 2022: Driving ESG through FM Leadership'. As explained to delegates, NEC4 FMC has various clauses to help FM clients drive sustainability and improve their environmental, social and governance (ESG) performance.

The recently launched secondary option X29 on climate change enables an FM client to contractualise its climate change requirements and state these in the scope. The FM service provider in turn develops a climate change plan to meet those requirements and can be further rewarded if the targets are exceeded, if such a provision is made in the performance table. The service provider can also propose that the scope is changed to reduce the impact of operating and maintaining the client's asset.

Secondary option X12 on multiparty collaboration allows an FM client to set key performance indicators for sustainability provisions through key members of the supply chain. Targets for sustainability provisions can also be set in the performance table (see clause 53).

Furthermore, the FM service provider can propose changes to the scope to create value-engineering savings through clause 16. Finally, secondary option X21 on whole-life cost allows the FM service provider to propose changes to the scope to reduce the cost of operating and maintaining the client's asset.

A good fit with FM

NEC's aim in Hong Kong is to promote the use of FMC in the FM industry and dramatically improve the sector's commercial outcomes. No other contract suite aspires to improve the procurement and delivery process rather than just facilitate it.

Like all NEC4 contracts, the FMC is designed around the following three principles. First, it stimulates good management of the relationship between the two parties to the contract and, therefore, of the work involved in the contract. Second, it can be used in a diverse range of situations, for a wide variety of work and in any location around the world. And third, it is clear, simple and written in plain English, using language and a structure which is straightforward and easily understood.

NEC will be promoting the FMC and associated contracts at future FM events in Hong Kong. Academia can play a part too, by teaching NEC principles to the region's next generation of FM professionals. NEC will also be providing comprehensive training and consultancy to FMC users in Hong Kong from its local office.

Making the change

Changing to a different form of contract is never a simple step to make. But NEC is a modern, standardised contract written in a very readable style. It encourages users to do more of the right thing in contract management in a collaborative way.

If the industry is serious about changing the FM professional landscape in Hong Kong and achieving increasingly urgent sustainability targets, then the NEC4 FMC will be an invaluable tool for users to rise to the challenges that lie ahead.

PRACTICE

Understanding the NEC4 FMC service orders and performance table

ROSS HAYES NEC CONSULTANT

KEY POINTS

- NEC4 FMC differs from NEC4 TSC in its terminology, service orders and performance table, all of which make it more suited to the FM sector.
- Service order requirements need to be drafted with care to ensure sufficient detail on service orders, payments and response times.
- Separate to the scope, the performance table sets targets for performance and responses for under or over achievement.

The NEC4 Facilities Management Contract (FMC) has much in common with the established NEC4 Term Service Contract (TSC). But in addition to changes in terminology, it has two significant features that distinguish it from the TSC and make it more appropriate for the facilities management (FM) sector: service orders and the performance table.

Service orders are reactive call-off orders to instruct the service provider to carry out certain response works. The performance table is separate from the scope and states targets the service provider is to achieve. It also sets out payment adjustments if performance is above or below the target.

Service orders are vital because almost every major FM contract includes some reactive response work, for example a catering contract where there is a special function one evening, or a housing repairs contract where there is a need to repair a damaged front door. The performance table is needed because every FM client is concerned with their service provider's performance, which is often vital to keeping their own customers satisfied, from tenants and employees to users and visitors.

Service orders and their requirements

Defining an FMC service order is easy: it is part of the anticipated service but ordered only when required, and it can be priced or costed from the price list or defined cost. As such it is not a compensation event.

What is more important is the drafting of the FMC service order requirements. These are written as part of the scope and detail how the service orders will work. They include what sort of work can be instructed this way, how the work is to be instructed, how it will be paid for and how quickly the service provider needs to respond.

For example, the service order requirements could say that service orders can be instructed via a call centre, by email from a building manager, or only by the service manager. But what happens when an operative gets to the job and finds it is not as instructed? Instead of, say, a small plaster repair the whole wall needs replastering. What does the operative do? Call for instructions? Send photographs from their tablet to the service manager? Just replaster the whole wall because they have that authority? All these potential questions need to be answered in the requirements.

As to payment, is it a price for the work each time it is ordered? Is the contract a semi- or fully comprehensive price where some or all of the cost of the work is included in the basic service cost, a price per property approach? Again, all these points need to be addressed in the requirements.

With regard to the response time of the service provider, what should it do to record the work as complete and therefore, on an Option A priced contract for example, be ready for payment? Once again, the requirements need to detail this.

Performance table

The FMC defines the service the client wants and, like all NEC4 contracts, this is detailed in the scope. But unlike a project contract, where the end asset is the 'performance', an FM service contract is more concerned with the day-to-day performance of the service provider.

At its simplest, the contract can state what is required and, if that is not delivered, the service provider's obligation to provide the service can be terminated. But most clients want a more nuanced approach, identifying targets they would like their service provider to achieve. They wish to encourage the service provider and want to know what it proposes if things start to slip. This is the purpose of the FMC performance table, which is a core part of the FMC and not an option.

Experience shows that almost every FM contract has some performance targets, and often deductions for missing those targets rather than benefits for over achieving them. The FMC performance table replaces the TSC secondary options X17 on low performance damages and X20 on key performance indicators (KPIs). It sets outs performance targets, often in the form of KPIs, and the response to under or over achievement. It can also include targets for the recently published NEC4 secondary option X29 on climate change.

A key point to remember is that the performance table is not scope. This means the service manager cannot instruct a change to the performance table; it can only be changed as result of specific contractual events, such as a compensation event. It also means that if the service provider fails to achieve a target, it does not have to correct it; the consequence of the failure would need to be addressed in the performance table.

For example, if the scope states the service provider has to respond to an emergency service order to make something safe within 2 hours, this is a required performance standard. If the service provider does not respond within 2 hours, this failure cannot be remedied. In practice the service provider could still attend, but no longer on time, and it is this time failure that the FMC performance table can be used to address.

Conclusion

Neither the FMC service order requirements nor the FMC performance table require clients to provide information that is new to FM contracts. What the FMC makes clear is where the detail should be found and what powers service managers have to change it. This is important, for it is particularly against these two sections of the contract that the service provider will have priced its risk.

"At its simplest, the contract can state what is required and, if that is not delivered, the service provider's obligation to provide the service can be terminated. But most clients want a more nuanced approach, identifying targets they would like their service provider to achieve. They wish to encourage the service provider and want to know what it proposes if things start to slip. This is the purpose of the FMC performance table, which is a core part of the FMC and not an option."

PRACTICE

How to reduce whole-life cost with NEC4 FMC options X21 and X27

DAVID HUNTER DANIEL CONTRACT MANAGEMENT SERVICES

KEY POINTS

- Operating and maintaining assets are a major part of their whole-life costs.
- NEC4 FMC provides clients and service providers with mechanisms and incentives for reducing whole-life costs.
- Changing the scope to reduce whole-life costs can be proposed by the service provider under option X21 or instructed by the service manager under option X27.

The whole-life cost of assets is becoming an ever-more important factor in investment decisions. Rising energy prices, inflation and climate change have all shifted the focus beyond initial capital expenditure. Maintenance and operation costs over 30 years can now be up 200 times the initial capital cost for construction (Evans et al., 1998).

The NEC4 Facilities Management Contract (FMC) makes provision under secondary option X21 for changes to be made to the scope to reduce whole-life costs. Similar provisions exist in the NEC4 Facilities Management Subcontract (FMS) and have been in other NEC4 contracts since 2017.

Reductions in whole-life cost using X21 are not intended to reduce payments by FM clients to their service providers. Proposals by the service provider to reduce payment are the subject of clause 16, for which the service provider is incentivised by sharing savings under the efficiency percentage (main option A, clause 63.12) or by increasing their gain share (main option C, clause 55/63.13).

Managing change under X21

The service provider initiates the X21 process by proposing to the service manager that the scope is changed to reduce whole-life costs. Proposals needs to be made with enough confidence that the change will bring about a real reduction in the costs of operating and maintaining the affected property (X21.1).

Before making any formal proposals, the contract implies the need for early engagement with the service manager to see if the change is something they are prepared to consider. The service manager will need to consult with the client and ideally involve the service provider in a tri-partite informal discussion.

A proposed change to the scope using X21 is a change made after the parties have entered into the contract. It is therefore possible that the proposals have already been considered and discounted. Nevertheless, if the service manager is prepared to consider changing the scope, the service provider submits a quotation to the service manager for acceptance.

The contract requires the quotation to include: a detailed description of the proposed change; the forecast cost reduction to the client of the affected property over its whole life; an analysis of the resulting risks to the client; the proposed change to the prices and the performance table; and a revised plan showing any changes to the timing of the service.

Following consultation on the quotation, the service manager either accepts it or states their reasons for not accepting it. Either way the service manager is required to respond to the service provider's quotation within the period for reply stated in contract data part one (X21.3). When preparing FMC contract data, consideration should be given to including an exception to the standard period for reply to other communications. This is because the length of time the service manager will need to make a decision will need to take into account client approvals and its governance on change management.

If the quotation is accepted, the service manager changes the scope and, where relevant, the prices and performance table. The service provider's revised plan submitted with the quotation becomes the latest accepted plan as defined by clause 11.2(1) and managed under core clause 3.

A change to the scope to reduce whole-life costs is not treated as a compensation event. This does not mean the service provider is not rewarded for its cost saving proposals but simply that the process for any changes to the price the client pays the service provider is not subject to the rules under the contract for assessing compensation events.

The service provider's quotation includes any proposed change to the prices; this gives flexibility in how the change is assessed and gives the service provider a commercial incentive to make such proposals.

Whole-life costing

Whole-life costs have been defined in different ways (e.g., ISO, 2011). The FMC does not define whole-life cost or provide criteria for preparing or evaluating the service provider's forecasts of cost reduction. Furthermore, the output from a model developed for forecasting whole-life costs is highly sensitive to input data and assumptions made. Service providers therefore need to be well informed to be able to make these judgements and to analyse the resulting risks to their clients. Clients should also be aware of the potential for optimism bias by service providers in their proposals.

The FMC, like all other NEC4 contracts, is drafted for use in a wide range of circumstances, and this flexibility needs to apply to whole-life costing too. For example, a whole-life cost assessment for a newly built office block would be quite different to a 60-year-old steel bridge. Further, the whole-life cost assessment may focus on just part of an asset, such as the ventilation system in an office block or the horizontal load bearings of a bridge.

An FM client wishing to use secondary option X21 may consider including criteria in the contract, either stated in the scope or in additional conditions (Z clauses). These criteria can include: baselines for repair, replacement and maintenance costs; carbon footprint; discounted cash flow; inflation; legislation changes; net present value; internal rate of return; predicted design life of components; obsolescence; operational constraints of the asset (e.g., outages); sustainability; and whole-life cost study period.

Using project orders as an alternative

Changing an asset to reduce whole-life costs can also be implemented using an FMC project order under secondary option X27. A project order is instructed by the service manager and is intended for additional work that is within the scope but for which a separate programme is required (X27.2).

The change process is similar to that for compensation events, with specified time periods for submission and acceptance. The service provider submits its quotation to the service manager for acceptance using the rates stated in the price list or otherwise, following the rules of defined cost and the schedule of cost components (X27.7).

The process for an X27 project order is client led, giving the client greater control in managing changes to cost and programme than the service-provider-led approach of X21. The latter however provides greater flexibility in how the change is managed and opportunity for the client to benefit from the service provider's knowledge and experience.

Conclusions

Whole-life costing should play a key part in the decision-making process during the construction, operation, maintenance and replacement of assets. The provisions within the NEC4 FMC offer various effective contract mechanisms to FM clients and their service providers wishing to seek reductions in whole-life costs and increase value for money.

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LEGAL

Welcome to the family: a lawyer's observations on the NEC FMC

JON HART PINSENT MASONS LLP

KEY POINTS

- NEC4 FMC offers a standard FM contract based on the well-known and beneficial features of the NEC4 contract suite.
- Key features of the FMC are payment option flexibility, the performance table, service failures, accepted plans, and service and project orders.
- Aspects needing careful consideration include staff transfers, completing contract data, drafting the performance table, and ensuring legal compliance on disputes and payments.

Facilities management (FM) contracting is a hugely complex area. Over the years there have been attempts to achieve a standard FM contract, but many services are still delivered using clients' bespoke arrangements, using service providers' standard terms, or by adapting other standard forms. The NEC3 Engineering and Construction Contract (ECC), Term Service Contract (TSC) and Professional Services Contract (PSC) are often used, but these different approaches can deliver mixed results.

It is against this background that the NEC4 Facilities Management Contract (FMC) was launched last year, though adoption seems so far to have been limited. This could be because many major long-term frameworks have yet to be renewed, but equally likely is that many clients and service providers are committed to their existing contractual arrangements. This is a missed opportunity, especially when many industry players are already familiar with the NEC contract suite.

FMC's key features

The FMC shares the hugely beneficial features and modular approach of other NEC4 contracts. It is available in short form and has its own subcontract form. For NEC users not familiar with the FMC, there are a number of features to note.

- **Payment option flexibility**: FMC incorporates lump sum, target cost and cost reimbursable models – that is options A, C and E and associated definitions. This provides flexibility to respond to different FM services.
- **Performance table**: FMC adopts a similar approach to the NEC4 Alliance Contract (but not TSC), incorporating a performance table that identifies the targets the service provider is to achieve and sets out the adjustments to payments if this is not the case. This an important part of the contract data. The performance table also appears in the quotation and assessment processes for compensation events under the FMC and performance deductions are excluded from limits on liability.
- **Service failures**: FMC follows the typical NEC drafting on defects but termed 'Service Failures.' This is relevant to defined and disallowed costs, but also how a service failure regime sits alongside the performance table.
- **Accepted plans**: FMC uses TSC terminology of 'Accepted Plans' rather than ECC and PSC programmes. The drafting here is particularly useful (and more detailed than TSC) in that it also calls up references to mobilisation and demobilisation plans, which are often a key feature of FM service delivery.
- **Service and project orders**: under NEC3 PSC, there is an intrinsic task order call-off mechanism and associated option G payment regime, which has been used for FM services. Under the NEC4 suite, this is dealt with by way of a secondary option on task orders. The FMC follows this approach, but with both service orders and project orders, which are especially useful features providing operational flexibility that is (subject to careful consideration of procurement law and tendering processes) highly desirable, given the nature of many FM services.

Where care is needed

So far, so good. There are also a few legal challenges that need to be carefully addressed from the outset, such as the following.

- **Staff transfers**: UK FM clients and services providers know that The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is often one of the biggest issues for FM projects. The FMC does not make express provision for this, so careful consideration should be given to the legal and contractual aspects of staff transfers, particularly in relation to using key persons, schedule of cost components and termination arrangements. A new NEC practice note on TUPE will soon be published.
- **Filling in the boxes**: how the NEC contract data is (or not) completed can lead to disputes. The importance of the performance table in the FMC further highlights this. The FMC expressly relies on a payment-deduction mechanism, as opposed to the more common points-based or 'traffic light' approach. Care should be taken to ensure that drafting for the performance table is objective and as administratively straightforward as possible.
- **Disputes and payment law**: FMC provides a choice for disputes and payment drafting compliant with the UK Housing Grants, Construction and Regeneration Act 1996. Application of these provisions should be considered carefully. The UK market continues to rely on 'total FM' solutions with a single supplier, and many arrangements may include services that are caught by and sit outside statutory requirements. There is a history of disputes where parties have got this wrong. Where there is uncertainty, using FMC option W2 and Y(UK2) may be a sensible default position.

Conclusions

The FMC provides a readily adaptable standard form that is potentially going to be powerful tool for procurers of FM services. As with any contract, it will require careful consideration by those concerned before it is used, but it is a welcome addition to the NEC4 suite which hopefully is going to be of benefit to clients and service providers alike.

"The FMC provides a readily adaptable standard form that is potentially going to be a powerful tool for procurers of FM services."