FM Webinar Questions, 26 January 2021

Please note that responses to the majority of these questions were provided in the webinar and we advise users to watch the recording available to gain a fuller appreciation of the answers provided.

Question	Response
1. How is environment and local legislation integrated into the contract?	Any contract will need to reflect the legislative requirements of the region in which the contract is made (the law of the contract) and the location of the service. In many cases these are the same, but not necessarily. If there are other legal requirements that need consideration, they need to be brought into the contract through the Scope or, if necessary, Z clauses. Requirements for GDPR legislation, the CDM regulations, anti-slavery legislation and freedom of information requirements are examples which affect different clients in different ways. A Client needs to consider the requirement for any entries in the Scope or extra clauses specific to their particular contract.
2. Can the thorough inspections be contracted by Client or Service provider? Is there that choice?	If by this, the questioner is asking whether the quality or performance can be judged and assessed by the Client (in practice the Service Manager) or the Service Provider, the answer is either. This would be written into the Service Order Requirements (i.e. tell me when it is complete) and the Performance Table (this is how KPI's are measured). The related but different issue is how work is then paid for – does it have to be inspected before payment or not. Again, because this can be different for differing clients, it would be clearly specified in the contract, for example probably in the Service Order Requirements for Service Orders, and in a description of what complete means for a payment in an Option A contract
3. What are the options for payment? Do the NEC options carry over such as Option E?	The FMC has the same three options for payment as the Term Service Contract (TSC); ie Options A (price based), E (cost reimbursable) and C (target price, cost reimbursable).
4. What will the recommended value thresholds be for the shorter contract?	The criterion for choosing the short contract (FMSC) is risk rather than value. Complex contracts need the procedures of the FMC; simple, low risk contracts can be managed with the less detailed procedures of the FMSC. The FMSC is a price based contract only, the FMC has three payment options. That said, the FMSC will tend to apply to lower value contracts just because their risk is generally lower.

Question	Response
5. How does the contract deal with TUPE?	The contract does not include any specific clauses to deal with TUPE for three reasons. Firstly, TUPE is a UK provision which cannot be therefore written into an international contract form. Secondly, even in the UK there are a number of different options for TUPE clauses, for example depending on where the Client wishes the risk of TUPE to lie (with the Client or the Service Provider). So a "standard" TUPE clause is not practical. Thirdly, it is inevitable that whatever clauses were offered, many legal advisers would wish to adapt or change them – TUPE clauses can range from 2 to 10 pages easily. Clients will have to include in their contracts whatever TUPE clauses they believe are necessary. However, to support users in this area, it is proposed that guidance on TUPE will be provided by IWFM in due course.
6. Surely TUPE needs to be a Y(UK) clause?	The NEC principle is that regional specific secondary Options - Y clauses - are only written where the absence of them means that clauses in the contract would not comply with or conflict with the law of that region. For example, without Y(UK)2 on the payment procedures of a contract captured by the "Construction Act", the payment provisions of clause 50 and 51 would be held invalid and superseded by an external process. TUPE does not have this effect. It is a process that applies and needs managing, but does not affect the procedures of the contract itself in any way.
7. Do you expect NHS trusts to use these after handback of PFI contracts?	The NHS could use these contracts in the future, and we would recommend their use, since they provide a structured and well-balanced standard form of contract.
8. What market engagement has been undertaken with the supply chain to understand acceptability? [has this included small and medium size firms?}	The IWFM steering group had access to the supply chain and tested out various points of drafting during the development of the contract. In its very early development, sessions were held with various stakeholder groups to understand the concerns of the FM sector and what it believed was required. Over the next few months we welcome further responses and feedback from the market on how it feels this contract will support them – and of course areas the market feels it can be improved or needs to address further.

Question	Response
9. Is there an exclusivity clause within the NEC4 contract	If by "exclusivity" it is meant a clause that states that the Service Provider will be given all the service to the exclusion of any other service provider, no. However, the service as defined in the Scope would normally be exclusive to the Service Provider unless the contract says otherwise. This can be added to the contact; in which case it would be a Z clause.
10. How much international influence/ engagement exists in the main contract?	The NEC FM contract (as with all NEC contracts) has been developed to be flexible to adapt to different regions and geographies. This adaptation comes from the client / project specific drafting of parts of the contract, such as the Contract Data and Scope, that will be needed for a contract that includes FM services to be delivered overseas. Areas such as Scope (regional legislation / standards compliance, and requirements on language) Performance (different performance measures for each region or the same for all..?) Service Order Requirements (how work is instructed) and Payment (currencies, payment terms) all need careful consideration, but the NEC form of contract allows for this.
11. With all the variants in options, terminology and contract forms, are you not in danger of overcomplicating and losing the simplicity and collaboration message?	This and the next question go together, and the variants and terminology points are answered in the next question. The contract is designed to be modular in its approach, enabling the contract to be as complex as needed. The main core clauses provide procedures common to any FM contract. For a simple, single workstream, single location contract the Scope will be clear and straightforward, and the performance requirements similarly simple. For a multi region, total FM contract this inevitably is more complex, but the main complexity is in the development of the Scope (specification). The collaborative approach of the NEC is built into its structure, its culture and its risk sharing and is no different in the FMC than in any other contract.
12. What I meant was there are now so many different NEC contracts each with slightly different terminology	There are a number of contracts in the NEC suite of contracts. Generally, they are addressing different types of work. So ECC is for projects, PSC is for consultancy type services, and the TSC is for services provided to the client's asset for a period of time. The FMC is a sector directed contract, as its name suggests, and directed at a type of work which may in time differentiate itself from that used for the TSC. Any small differences in terminology reflect the type of work for which the contracts are intended. This is more fully explained in volume 1 of the User Guides.

Question	Response
13. Is there a structured and clear method to evaluate the KPI or does it still depend on human self-evaluation?	That is entirely dependent on the Performance Table, which will detail what KPIs are, how they are measured, who measures them, how often, etc. The methodology should be clear and unambiguous, even if the evaluation is subjective. Some KPIs can be "measured" from information on data collection, others need subjective assessment (like "customer satisfaction").
14. You said that training is being developed. NEC seems to have abandoned its NEC4 Term Service Manager accreditation- it hasn't run for a year. Is it NEC's intention to introduce an FM service manager accreditation in the medium term?	The NEC has not abandoned the TSC Service Manager Accreditation course – the problem is that the industry has not considered it needs accredited Service Managers to run their contracts and so there has been little demand for the courses. There will be an NEC4 TSC Service Management Accreditation course running in June 2021 – that is definitely taking place and has spare places available. The NEC is looking to see how this course can be adapted for the FMC, or whether it would be possible to have a dual accredited course. The NEC is working with the IWFM to identify training needs.
15. Slide16-Performance guarantees- what's the Alliance Contract approach? How are these guarantees are set in accordance with the FM contracts? When can these applied on services?	The Alliance Contract is a relatively new NEC contract whereby all the parties to a project contract (client, contractor, consultants, designers, etc) are locked into the same contract, with mutually agreed objectives to work together for the benefit of all participants. Unlike the FMC, which is a strict bi-lateral, two party contract between the Client and the Service Provider. This was the first contract where the drafters decided to merge the two separate guarantee Options, the performance guarantee and the ultimate holding company guarantee (normally, parent company guarantees in more common language) into one Option, where the Client chooses the guarantee it requires. In both cases they are guarantees to deal with a Service Provider who for some reason cannot provide the service it has contracted to supply and the Client needs a means to protect themselves. It is still relevant to a FM contract, though much more significant for a project contract where a half built asset is useless until completed.

Question	Response
16. In option C - when is the share calculated and if over a period is it clear that the share is based only on PWDD and Prices over that period.	The calculation of share in the FMC follows the process brought into the TSC4. The share **by default** is calculated and paid on an interim basis at intervals stated in the Contract Data, but rolled on through the contract and ultimately assessed on a total cumulative basis. Many clients do not want that, so there is an Option (X24) to finalise the share and make interim but final share payments at specified intervals – usually years, and often tied into the Client's financial year. In both cases the share is a comparison between the cost of work done (Defined Cost plus Fee) and the target – the total of the Prices for the part of the service complete at that date. Whether this applies over the whole duration of the contract (the default) or a specified period depends on whether or not the Option allowing that is chosen. This is explained in the User Guides.
17. Are SLA's & KPI's ~~will be~~ covered as part of the contract templates?	No – not directly. Every client will have different KPIs that are important to it. Each will incentivise them differently. Most clients have already got performance requirements they deem necessary – since many FM contracts are a continuation or replacement for a previous one. It is the Performance Table that will define these. The User Guide 2 does give some guidance on what should be in this; other Practice Notes will be provided by IWFM to help in this as well. Service Level Agreements mean different things to different people. Is the SLA just an in-house alternative for a contract? If so, it is not relevant in this instance. Is it another word for the performance standards which the Client wishes the Service Provider to achieve? If so, then in the FMC this is the Performance Table, which will be different for every contract.

Question	Response
18. Is there anything explicit re information about the standard of the existing asset? 'Site Information'? Asset Register?	There is no specific reference to an asset register. This in part is because there is no clear definition of an asset register – which unfortunately ISO41011:2017 doesn't clarify. Is the asset the building which the FM Service Provider is looking after, or the boiler which is in the building which is being maintained? This is why the FMC maintains the language of Affected Property, which in the example above would be the building, not the boiler. The boiler would be listed on a register of assets, provided by the Client in the Scope. What state it is in, whether it really exists, what risk the Service Provider takes in accepting that asset list, whether there is a "honeymoon period" where the register can be checked, adjusted and the Prices adjusted is all within the Client's control and specified within the contract documentation.
19. Under option C - disallowed costs - how are these managed? Linking this to poor workmanship, recalls, material failures etc	The approach adopted for Disallowed Cost in the FMC is the same as that in the TSC and ECC. Disallowed Cost is a cost, which may have been incurred by the Service Provider, legitimately allowed under a heading in the Schedule of Cost Components but which the Service Manager does NOT pay because of specific reasons. Poor workmanship, recalls, and Service Failures caused by material failures are not generally one of those reasons – so the contract would need to manage the impact of these through the Performance Table.
20. How do you see the contracts working with the Collaborative Working Standard?	There are some clear synergies between the two, (assuming this refers to ISO 44001) with both focusing on the need for parties to work together to achieve specific goals. Whilst the FM contract does not state sector specific standards in its core clauses, a client's need for adherence to any standard such as this would be stated in the Scope, and any requirements on the service provider would be clearly detailed in this part of the contract. We envisage a mapping exercise between the parties would help here – to be drafted by the parties and included in the contract put together that states the need to comply (as agreed) with ISO44001; using the existing flow charts for the NEC contracts, and those that show the relationships noted in the ISO. Because of the collaborative nature promoted by NEC, we see these two working well together, promoting best practice and appropriate behaviours by both parties.

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<tr><th>Question</th><th>Response</th></tr>
<tr><td>21. Have you had much interest from Pharmaceutical clients?</td><td>Not directly to date, but we believe this contract would work well with the demanding environments that clients in that sector need to manage, and we would welcome any feedback from such clients as and when they decide to use the FM contracts.</td></tr>
<tr><td>22. Does the contract allow flexibility to enable the client/service provider to deliver services to third party 'client's'?</td><td>In principle “yes”. The issue here would be whether or not that third party was
a true client to the Service Provider (in which case we have a contract with two clients, or better, two contracts) or
a beneficiary of the service as defined in the contract, in which case the third party has a service level agreement with the Client and the third party is allowed to instruct work in accordance with the permissions in the Scope.</td></tr>
<tr><td>23. To what extent are topics of continuous improvement and/or innovation as task of the service provider integrated in the contract?</td><td>To the extent they are written into the Scope, and possibly Performance Table.

There are clauses encouraging value engineering (reducing the cost to achieve adequate performance) and life cycle costing (increasing the cost of the service to generate greater savings (however that is considered – not necessarily financial) in the life cycle of the asset.</td></tr>
<tr><td>24. Where does this leave the TSC?</td><td>For the present the two contracts run in parallel. Current users of the TSC can continue to use the contract and it remains a valid approach.

There may well be a natural differentiation of users – those considering they do have a FM contract, with requirements for call-off orders for (say) reactive maintenance will tend towards the FMC. Those who prefer the terminology of construction, and those clients who use the TSC as a form of framework contract to order small but regular elements of project work may tend towards the TSC.

Those who like the TSC, but see elements of drafting in the FMC they like, may well incorporate them into their TSC contracts. It may be that current TSC users will adopt the FMC next time around. And finally it may be that in time the FMC becomes the contract of choice.</td></tr>
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Question	Response
25. Is there any consideration for critical facilities requirements, like healthcare ??	There can be no specific elements in the standard FMC for a specific part of the FM sector because this contract is a general one for any FM service, anywhere in the world. If there are specific requirements for the service, that must be defined and detailed in the Scope (specification of work). The benefit of the FMC, like any standard contract, is that the procedures such as payment, variation, plans, administration etc are consistent across the whole use of this contract, in all types of work, for all clients, for all service providers. Clients can then concentrate on the client specific information; the Scope (what it wants), the Service Order Requirements (how it instructs work and what are the criteria for that); the Performance Table (what is the performance it wants and how does it encourage all the parties to achieve that performance