



OGC fair payment practices for use with NEC Contracts

The Office of Government Commerce (OGC) has published a guide to best fair payment practices, which include recommendations for implementing these practices.

The NEC Panel has prepared this document to allow users to implement the OGC fair payment practices in NEC Contracts.

June 2008

NEC is a division of Thomas Telford Ltd, which is a wholly owned subsidiary of the Institution of Civil Engineers (ICE), the owner and developer of the NEC.

The NEC is a family of standard contracts, each of which has these characteristics:

- Its use stimulates good management of the relationship between the two parties to the contract and, hence, of the work included in the contract.
- It can be used in a wide variety of commercial situations, for a wide variety of types of work and in any location.
- It is a clear and simple document – using language and a structure which are straightforward and easily understood.

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OGC Model Fair Payment Charter

Model 'Fair Payment Charter'¹

Fair and transparent payment practices are an essential underpinning to achieving successful integrated working on construction projects. In working with each other in good faith and in a spirit of mutual trust and respect, we agree that by 1st January 2008² we will meet the 'Fair Payment' commitments set out below:

- Companies have the right to receive correct full payment as and when due. Deliberate late payment or unjustifiable withholding of payment is ethically not acceptable.
- 'Fair Payment' will apply equally between the client and lead contractor and throughout the supply chain³.
- The process will be transparent in order that members of the supply chain have certainty of how much and when they will be paid.
- Companies will consider, where appropriate, operating relevant contracts on an open book basis.
- The correct payment will represent the work properly carried out, or products supplied, in accordance with the contract. Any client arrangements for retention will be replicated on the same contract terms throughout the supply chain. Any withholding of payment due to defects or non-delivery will be proportionate and demonstrably justified in line with arrangements made at the time of contract.
- To ensure effective and equitable cash flow for all those involved, all contracts will provide for regular payments and have payment periods not exceeding 30 days.
- In order to avoid payment delays, the client and all supply chain members will agree payment procedures at the outset of their contracts. Payment will be through electronic BACS transfer and will apply throughout the supply chain.
- Monitoring and auditing and problem resolution procedures will be agreed between the parties.

We the undersigned agree that this Charter is not intended to be a legally binding document and not used in construing any contractual commitment.

¹ The Charter sets out the values and arrangements relating to payment practices with integrated working. The Model Charter is flexible to allow for adaptation and can be either a standalone document or part of a wider partnership charter. In either case it is not intended to be legally binding.

² An introduction period is to allow time for clients and contractor to modify their business systems and procedures.

³ The client would sign the Charter at the outset. Contractors and suppliers subsequently engaged would be expected to sign the Charter before appointment.

Acknowledgement

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Z3: Project Bank Account

Defined terms	Z3.1	<p>(1) The Authorisation is a document authorising the <i>project bank</i> to make payments to the <i>Contractor</i> and Named Suppliers.</p> <p>(2) Named Suppliers are <i>named suppliers</i> unless later changed in accordance with this contract.</p> <p>(3) Project Bank Account is the account used to receive payments from the <i>Employer</i> and make payments to the <i>Contractor</i> and Named Suppliers.</p> <p>(4) A Supplier is a person or organisation who has a contract to</p> <ul style="list-style-type: none"> • construct or install part of the <i>works</i>, • provide a service necessary to Provide the Works or • supply Plant and Materials for the <i>works</i>. <p>(5) Trust Deed is an agreement between the <i>Employer</i>, the <i>Contractor</i> and Named Suppliers which contains provisions for administering the Project Bank Account.</p>
Project Bank Account	Z3.2	The <i>Contractor</i> establishes the Project Bank Account with the <i>project bank</i> within one week of the Contract Date.
	Z3.3	Unless stated otherwise in the Contract Data, the <i>Contractor</i> pays any charges and is paid any interest made by the <i>project bank</i> .
	Z3.4	The <i>Contractor</i> submits to the <i>Project Manager</i> for acceptance details of the banking arrangements for the Project Bank Account. A reason for not accepting the banking arrangements is that they do not provide for payments to be made in accordance with this contract. The <i>Contractor</i> provides to the <i>Project Manager</i> copies of communications with the <i>project bank</i> in connection with the Project Bank Account.
Named Suppliers	Z3.5	The <i>Contractor</i> includes in his contracts with Named Suppliers the arrangements in this contract for the operation of the Project Bank Account and Trust Deed. The <i>Contractor</i> notifies the Named Suppliers of the details of the Project Bank Account and the arrangements for payment of amounts due under their contracts.
	Z3.6	The <i>Contractor</i> submits proposals for adding a Supplier to the Named Suppliers to the <i>Project Manager</i> for acceptance. A reason for not accepting is that the addition of the Supplier does not comply with the Works Information.
Payments	Z3.7	On or before each assessment date, the <i>Contractor</i> submits to the <i>Project Manager</i> an application for payment, and shows in the application the amounts due to Named Suppliers in accordance with their contracts.
	Z3.8	No later than one week before the final date for payment, the <i>Employer</i> makes payment to the Project Bank Account of the amount which is due to be paid to the <i>Contractor</i> .
	Z3.9	The <i>Contractor</i> makes payment to the Project Bank Account of
		<ul style="list-style-type: none"> • any amount not paid by the <i>Employer</i> and • any amount required to make payment in full to Named Suppliers.

- Z3.10 The *Contractor* prepares the Authorisation, setting out the sums due to Named Suppliers as assessed by the *Contractor* and to the *Contractor* for the balance of the certified payment. After signing the Authorisation, the *Contractor* submits it to the *Project Manager* for signature by the *Employer* and submission to the *project bank*.
- Z3.11 The *Contractor* and Named Suppliers receive payment from the Project Bank Account of the sums set out in the Authorisation as soon as practicable after the Project Bank Account receives payment.
- Z3.12 A payment which is due from the *Contractor* to the *Employer* is not made through the Project Bank Account.
- Effect of payment** Z3.13 Payments made from the Project Bank Account are treated as payments from the *Employer* to the *Contractor* in accordance with this contract or from the *Contractor* or *Subcontractor* to Named Suppliers in accordance with their contracts as applicable.
- Trust Deed** Z3.14 The *Employer*, the *Contractor* and *named suppliers* sign the Trust Deed before the first assessment date.
- Termination** Z3.15 If the *Project Manager* issues a termination certificate, no further payment are made into the Project Bank Account.

ADDITIONAL CONTRACT DATA ENTRIES

Contract Data part one – Data provided by the *Employer*

If the *Employer* is to pay any charges and is paid interest made by the *project bank*, add the following to the Contract Data part one.

- The *Employer* is to pay any charges and is paid interest made by the *project bank*.

Contract Data part two – Data provided by the *Contractor*

Add the following to the Contract Data part two

- The *project bank* is
- *named suppliers* are

TRUST DEED

This agreement is made between the *Employer*, the *Contractor* and the Named Suppliers.

Terms in this deed have the meanings given to them in the contract between and for (the works).

Background

The *Employer* and the *Contractor* have entered into a contract for the works.

The Named Suppliers have entered into contracts with the *Contractor* or a Subcontractor in connection with the works.

The *Employer* and the *Contractor* have established a Project Bank Account to make provision for payment to the *Contractor* and the Named Suppliers.

Agreement

The parties to this deed agree that

- sums due to the *Contractor* and Named Suppliers and set out in the Authorisation are held in trust in the Project Bank Account for distribution to the Named Suppliers in accordance with the banking arrangements applicable to the Project Bank Account,
- further Named Suppliers may be added as parties to this deed with the agreement of the *Employer* and *Contractor*. The agreement of the *Employer* and *Contractor* is treated as agreement by the Named Suppliers,
- this deed is subject to the law of the contract for the works,
- the benefits under this deed may not be assigned.

Executed as a deed on

by

..... (*Employer*)

..... (*Contractor*)

.....

.....

.....

.....

(Named Suppliers)

JOINING DEED

This agreement is made between the *Employer*, the *Contractor* and
(the *Additional Supplier*).

Terms in this deed have the meanings given to them in the contract between
..... and for (the *works*).

Background

The *Employer* and the *Contractor* have entered into a contract for the *works*.

The *Named Suppliers* have entered into contracts with the *Contractor* or a
Subcontractor in connection with the *works*.

The *Employer* and the *Contractor* have established a Project Bank Account to
make provision for payment to the *Contractor* and the *Named Suppliers*.

The *Employer*, the *Contractor* and the *Named Suppliers* have entered into a
deed as set out in Annex 1 (the *Trust Deed*), and have agreed that the
Additional Supplier may join that deed.

Agreement

The Parties to this deed agree that

- the *Additional Supplier* becomes a party to the *Trust Deed* from the date
set out below,
- this deed is subject to the law of the contract for the *works*,
- the benefits under this deed may not be assigned.

Executed as a deed on

by

..... (*Employer*)

..... (*Contractor*)

..... (*Additional Supplier*)

GUIDANCE NOTES

The implementation of the OGC fair payment practice into the NEC contracts is achieved through signing the fair payment charter, inserting additional conditions of contract, and signing a separate Trust Deed.

Fair Payment Charter

As the charter is stated as not legally binding and not used in construing the contract, it should not be included as a contract document. A copy of the charter should be provided to Tenderers, and they should be advised that signing the charter is a precondition of an award of a contract.

Project Bank Account (PBA)

A “Z clause” and associated Contract Data entries is provided for use with the NEC3 Engineering and Construction Contract; it can be altered as appropriate for use with other NEC3 contracts where a Project Bank Account is required. The clause deals with payments into and out of the account, and its effect on other contract obligations.

Subcontractors at any level, known as “Named Suppliers”, can be included in the PBA arrangements. The *Contractor* will initially identify those to be included at tender (*named suppliers*), but subject to the acceptance of the *Project Manager*, the *Contractor* can add further Suppliers during the contract.

The *Employer* should set out in the Works Information any stipulations or restrictions on establishing the list of suppliers who can participate in payments from the PBA.

If Option Y(UK)3 is used, the rights of Named Suppliers needs to be listed in the Contract Data.

The PBA is established and maintained by the *Contractor*, who pays any bank charges and retains any interest earned on the account. At tender, the *Contractor* must identify a suitable bank able to offer arrangements which comply with the requirements for payment in this option.

The *Contractor* is required to submit an application for payment, showing the amounts due to each Named Supplier, following which the *Project Manager* issues a certificate as normal. The *Employer* pays to the PBA the amount certified, subject to any withheld sums notified to the *Contractor*. The *Contractor* completes the Authorisation, confirming the payments to Named Suppliers, and forwards it to the *Project Manager* for the *Employer*’s countersignature. This is then forwarded to the bank – it is envisaged that electronic means of authorisation will be used to simplify this process.

The *project bank* makes payment to the *Contractor* and Named Suppliers from the sums deposited. In the event the Project Bank Account has insufficient funds to make all payments, the *Contractor* is required to add funds to the account to make up the shortfall.

The payment arrangements, and how these fit with other contract provisions, is shown in the following chart.

Note: Y(UK)2 seven day periods could be longer than clause 51 week periods, as former excludes Christmas Day, Good Friday and bank holidays from count of days.

Trust Deed

This is intended to allow payment to Named Suppliers to continue in the event of the insolvency of the *Contractor*. The deed is executed by the *Employer*, *Contractor* and initial *named suppliers*.

Where an Additional Supplier is to be joined into the deed, a Joining Deed needs to be executed by the *Employer*, *Contractor* and the Additional Supplier. A copy of the initial Trust Deed should be annexed to each Joining Deed.

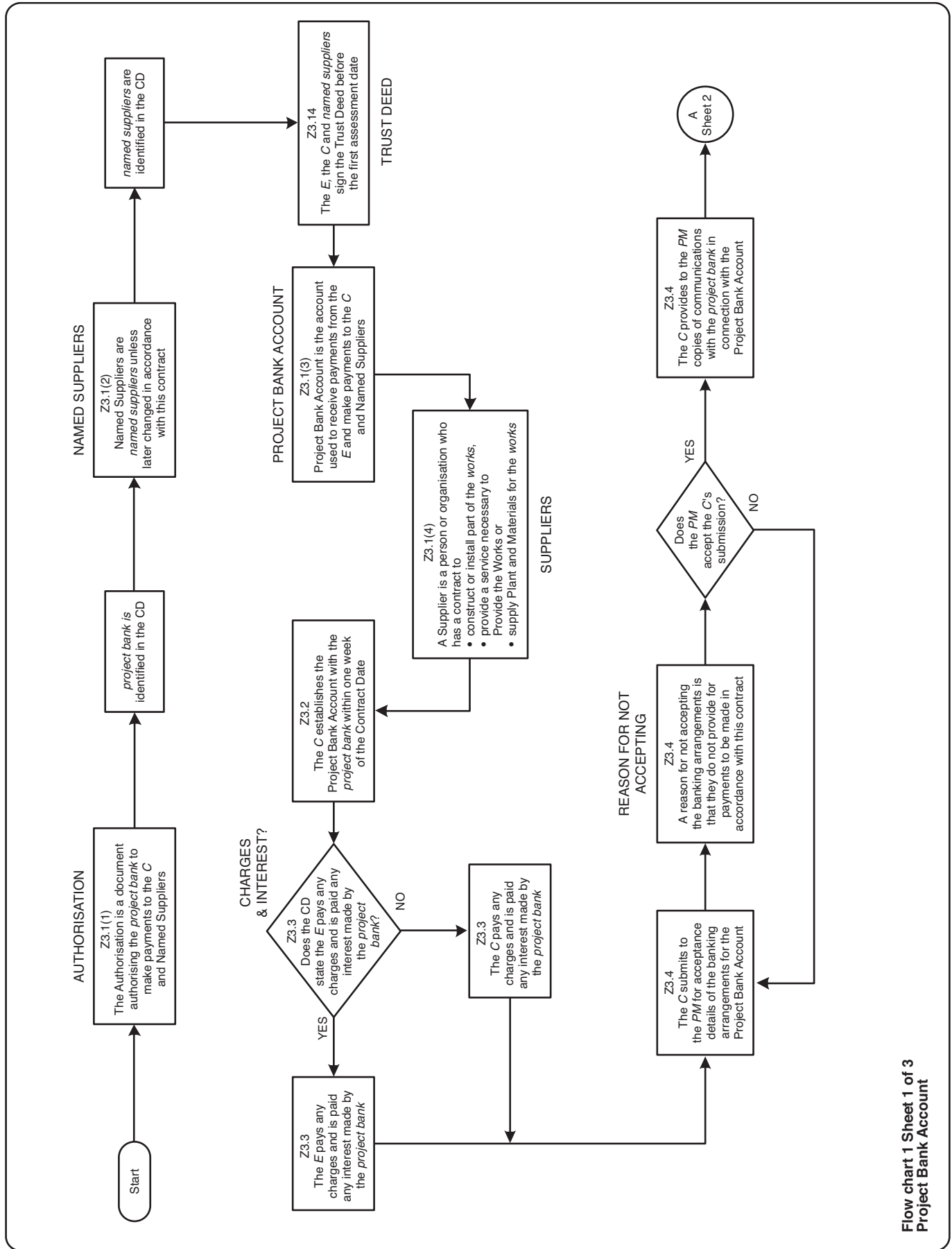
Timescales for assessment and payment under Project Bank Account arrangements

Clause 51 dates	Clause 51 actions	Project Bank Account actions	Y(UK)2 actions	Y(UK)2 dates
assessment date	<i>Contractor</i> may submit application for payment	<i>Contractor</i> submits application for payment showing amounts due to Named Suppliers		
assessment date + 1 week	<i>Project Manager</i> assesses amount due and certifies payment		date on which payment becomes due	assessment date + 7 days
assessment date + 2 weeks		<i>Employer</i> makes payment to Project Bank Account	Latest date for withholding notice	assessment date + 14 days
		<i>Contractor</i> prepares and signs Authorisation, forwards to <i>Project Manager</i> for <i>Employer</i> signature and issue to project bank		
assessment date + 3 weeks	<i>Employer</i> or <i>Contractor</i> makes certified payment	Payment made to <i>Contractor</i> and Named Suppliers	Final date for payment	assessment date + 21 days

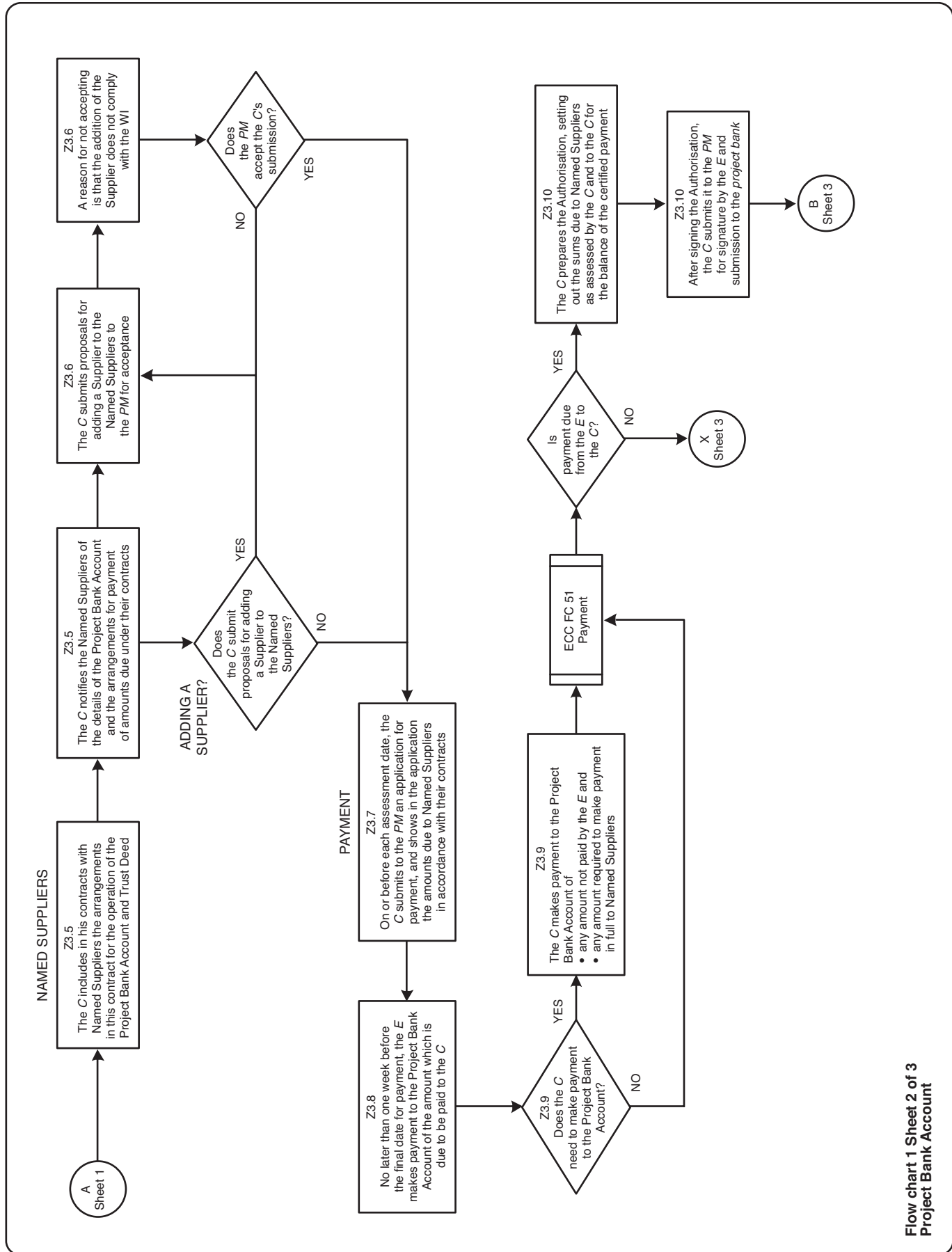


ABBREVIATIONS USED IN THE FLOW CHART BOXES

FC 1.9	Flow chart for clause 1.9
CD	Contract Data
C	<i>Contractor</i>
E	<i>Employer</i>
PM	<i>Project Manager</i>
WI	Works Information



Flow chart 1 Sheet 1 of 3 Project Bank Account



Flow chart 1 Sheet 2 of 3
Project Bank Account

