

AN NEC DOCUMENT
OPTION X29
MARCH 2022

Guide to the consultative edition of secondary Option X29 reducing the impact of the *works* on climate change

BACKGROUND

Secondary Option X29 reducing the impact of the *works* on climate change has been published in a consultative draft form to allow potential users to identify any matters they would prefer to be dealt with in a different way and to suggest any additional material which should be included in the secondary Option when published. This guidance document gives the background to the development of the secondary Option and explains how the clause is intended to operate. It also explains how responses to the consultation should be submitted.

This consultative draft of secondary Option X29 is not intended for use and will only be finalised and ready for adoption once any changes that result from the consultation have been made.

The convention of using italics for terms which are identified in the Contract Data and capital initials for terms defined has been used in this guide.

The consultative version of secondary Option X29 has been drafted for use with the NEC4 Engineering and Construction Contract, however it is intended that following the consultation process that relevant versions of the secondary Option will be developed for each of the main and subcontracts in the NEC4 suite.

NEC APPROACH

Achieving net zero emissions of carbon dioxide and other climate-warming gases will dramatically increase the sustainability of creating and operating built assets. This is a key part of the UK government's strategy for construction (HM Government, 2020) and, as highlighted by the recent Cop26 climate change conference, is of increasing importance for public and private-sector organisations worldwide.

Achieving net-zero emissions and sustainable outcomes is principally a technical issue that can be addressed in the Scope. However, there is now a growing view that standard contract conditions can be used to further support the reduction in the climate change impact of built assets. This has led NEC to develop a new secondary Option to specifically to address the issue.

SECONDARY OPTION X29

Identified and Defined Terms

Differing terminology and focuses are being applied in the drive to reduce the impact of climate change, with terms such as climate change, net zero, sustainable development, biodiversity, etc being used interchangeably. Secondary Option X29 has been drafted using generic terminology to provide the greatest flexibility in its application. However, any

comments on the terminology used including the title of the secondary Option would be welcomed.

Climate Change Requirements

Climate Change Requirements are stated in the Scope and are therefore things the *Contractor* has to provide or comply with in order to Provide the Works in accordance with the Scope. A failure to do so will be a Defect which the *Contractor* will be required to correct. Careful consideration has to be given as to the content of the Climate Change Requirements to make sure they are achievable and do not place undue risk upon the *Contractor*. If the Climate Change Requirements are unduly onerous this may lead to bidders refusing to bid for the work or including substantial risk allowances within their bids. Climate Change Requirements could include things such as levels of recycling, use of renewable power on-site or electric vehicles, reducing waste generation, designing out waste, designs that reduces carbon emission etc. It may also cover issues such as any requirements to be included in the Climate Change Execution Plan or details over what information relating to climate change that the Parties may use, disclose and publicise.

The Climate Change Requirements are likely to be set by the *Client* in the Scope but could be requested from the bidder or they may be developed between bidders and the *Client* depending on the procurement process used.

The Performance Table

Whilst it is expected that a Performance Table will commonly be used with secondary Option X29 it is not mandatory and the secondary Option can be used with just the Climate Change Requirements. Where a Performance Table is used the *Client* has the flexibility to include within this any targets related to climate change, net zero, sustainable development etc. it wants the *Contractor* to achieve. Secondary Option X29 is in some ways a combination of secondary Options X17 low performance damages and X20 Key Performance Indicators and we do not recommend it is used with these options.

The Climate Change Requirements can be contrasted with any targets for performance stated in the Performance Table. These are targets which the *Contractor* may be incentivised to achieve through positive and/or negative financial incentives. If the *Contractor* fails to achieve these targets this will not result in a Defect that has to be corrected, as the targets the Performance Table will not be stated in the Scope, but will instead be addressed through the Performance Table itself. The Performance Table may contain positive incentives, negative incentives, a combination of the two or even no financial incentive at all and instead be used only to measure and record the performance achieved. Where there are financial incentives in the Performance Table, and in particular negative incentives, careful consideration needs to be given as to the values included and the potential risk this may impose on the *Contractor*. The Performance Table should also include any limits on the amounts to be paid by or retained from the *Contractor* both overall and in relation to each target. The payments under the Performance Table are an excluded matter under X18 limitation of liability (clause X29.13).

Targets in the Performance Table may be in the form of key performance indicators, or specific values or requirements to be achieved. They may be stretch targets beyond the levels that must be achieved as stated in the Climate Change Requirements. However they are expressed, if there is any impact on the *Contractor*, positive or negative, they must be clearly stated, unambiguous, and demonstrably and accurately measurable.

The targets in the Performance Table will likely be set by the *Client*. If a bidder is required to offer targets, it may be appropriate to include those targets in bid evaluation.

An example of a Performance Table is provided in Appendix A.

Collaboration

Clause X29.2 requires the *Contractor* to collaborate with other Climate Change Partners identified in the Climate Change Requirements. These can be identified as specific companies

or by work type or activity they will undertake. The *Project Manager* has the power to change the Scope and so can revise the list of Climate Change Partners as necessary, for example when particular subcontractors and suppliers are engaged by the *Contractor* or other contractors or consultants are engaged by the *Client*. Where there are multiple parties involved in the delivery of the project consideration may also be given to using X12 multiparty collaboration. However, the interface between the Key Performance Indicators and Schedule of Partners in X12 and the content of the Performance Table would need to be carefully considered.

Early Warnings

Early warnings are to be notified for events which may impact the achievement of the Climate Change Requirements. Where an event may impact the achievement of targets in the Performance Table these will be reported and addressed through clause X29.12 performance measurement.

Climate Change Execution Plan

The form and content of the Climate Change Execution Plan should be detailed in the Climate Change Requirements. The Climate Change Execution Plan should set out the strategy for achieving the Climate Change Requirements and, where relevant, Performance Targets (e.g. identifying stakeholders, roles, timescales, key milestones, tools and tasks to get there). In many cases a Climate Change Execution Plan will be submitted as part of the tender process and included in the Contract Data at the Contract Date. However, there is also the option for a first Climate Change Execution Plan to be issued, within a fixed period of time after the Contract Date. It should be noted that there is no financial sanction on the *Contractor* if they fail to submit a first Climate Change Execution Plan. This approach is similar to that taken for the submission of quality plans under clause 40.2 or an Information Execution Plan under clause X10.4.

Disclosure

A specific clause has been included to allow for information relating to climate change to be used, disclosed and publicised to Others in accordance with the Climate Change Requirements. This is to address the fact that clients and contractors are increasingly required to report and publicise their climate change credentials. This also potentially allows for good practice to be shared with the wider industry.

Acceleration, accepting Defects, compensation events

Where a Performance Table is used and linked to financial incentives there needs to be a mechanism to adjust the targets, amounts and dates stated within it as a result of compensation events or agreements made in relation to the acceptance of a Defect or acceleration and clauses to this effect have been included within the secondary Option.

Clause X29.7 is included to address the situation where a compensation event only impacts the Performance Table and so would not be covered by the compensation event process in the core clauses of the contract. Clause X29.9(2) is included to address the limitation in clause 63.6 of the core clauses in relation to the Parties' entitlements as a result of a compensation event.

It should be noted that with all periods for reply under the contract, the period for responses to notified compensation events etc, can be extended by the mutual agreement of the *Contractor* and *Project Manager* under clause 13.5.

Contractor's proposals

Clause X29.11 is included to allow the *Contractor* to propose changes to the Scope. It has been drafted deliberately widely so as to allow the *Contractor* to propose changes that may reduce the impact on climate change in both the creation of the asset and its future

operation, maintenance and demolition. In effect it combines core clause 16.1 and secondary Option X21 into a single clause specifically related to climate change impact. The process requires the agreement of both the *Contractor* and the *Project Manager* to proceed, in that the *Contractor* may propose changes but does not have to, and the *Project Manager* can choose not to accept a proposal for any reason. However, one would expect that they would want to work together to enable a viable proposal to proceed if it will deliver climate change benefits. If the proposal is accepted the Scope, the Prices, the Performance Table, the Completion Date and the Key Dates are changed to reflect the impact of the change upon them. The clause also protects the *Contractor* in that the Scope cannot be changed as proposed by the *Contractor* unless the *Contractor's* quotation is accepted.

Clause X29.13 refers specifically to changes in the Scope, which therefore includes changes to the Climate Change Requirements. If the *Contractor* can better the targets stated in the Performance Table, then they will be rewarded for this via the Performance Table itself.

Performance measurements

Clause X29.12 creates a regime for reporting on performance against the targets in the Performance Table and a process for proposing performance improvements where a failure to achieve a performance target is forecast. Careful consideration should be given to the frequency of reporting against the targets in the Performance Table so as to provide regular and early awareness of issues that may impact their achievement.

Clause X29.12 also provides the mechanism for making assessments and payments in accordance with the Performance Table. The dates when performance will be assessed is stated in the Performance Table with amounts then becoming due in the next assessment after the relevant date.

Excluded matters

Clause X29.13 is only applicable if secondary Option X18 limitation of liability has been selected to apply and extends the matters excluded from the limitation of liability to include amounts payable by the *Contractor* as determined in accordance with the Performance Table.

RESPONSES TO CONSULTATION

It would be helpful if the responses to consultation could be structured in the following way. As far as possible, brief explanations should be provided with the comments.

Overall impression of the secondary Option

- Provisions within the secondary Option which are welcomed and are considered to be best practice.
- Provisions within the secondary Option which would be difficult to implement as they stand.
- Further provisions which should be added to the secondary Option to support the global drive towards net-zero greenhouse gas emissions and sustainability.
- Other comments on the draft secondary Option.

Secondary Option X29 can be downloaded by registering your interest with the NEC group at the website neccontracts.com. Access will then be provided to a restricted copy of the secondary Option and a pro forma for your response. All responses should be made electronically using the standard form to allow collation of comments.

Any queries on the documents or the process should be referred to jane.sweetman@neccontracts.com

We look forward to hearing your views.

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- S Jackson, LLB, LLM, MSc, FCI Arb, FCIInstCES
- S Rowsell, BSc, CEng, FCIHT, MCIPS

APPENDIX A

Ref	Subject/ issue to be addressed	Target	Units	Measurement rules	Reporting frequency (weekly/ monthly/ at completion)	If performance does not meet the target stated in the Performance Table, the Contractor pays the amount stated ¹ (Sum or rate)	Limit on sum to be paid by the Contractor (if any)	If performance exceeds or meets the target stated in the Performance Table, the Contractor is paid the amount stated ² (Sum or rate)	Limit on sum to be paid to the Contractor (if any)
							<i>[For a per target limit]</i>		<i>[For a per target limit]</i>
	Total limit on sum to be paid						<i>[When an overall limit will apply]</i>		<i>[When an overall limit will apply]</i>

¹ The amount may be stated to be zero

² The amount may be stated to be zero