

Webinar - NEC4 Service Contracts: how have they changed?

15 November 2017

Q&A session

You can find the full recording here: www.neccontract.com/NEC4servicewebinar

Q: At what point is the saving of a value engineered change amount agreed?

A: The amount is agreed when the compensation event that flows from the agreement to the Contractor's proposal is implemented (clause 63.12 Option A, clause 63.13 Option C)

Q: 'Call off against Scope' mentioned - is that in the conditions or needing to be in Scope (the latter, I think)

A: See the answer below. The call off procedure should be properly explained and set out in the Scope.

Q: Can the client's contract manager then be considered the client's agent

A: That depends on who the contract manager is. If they are just a member of the client team, then they don't need to be set up as an "agent" because they are the Client. All the Consultant needs to know is who can instruct them and who has what authority.

In a TSC/PSC the Service Manager acts as the Client in nearly all matters - there's no place for another "agent". In the TSSC the Client can nominate an agent.

Q: Can you please explain the price for services provided to date under PSC Option C and E

A: This was answered during the webinar. PSPD for Option A is the total of completed activities on the Activity Schedule. PSPD for Options C and E is the total of the forecast Defined Cost to the next assessment date, plus the Fee (11.2(21))

Q: Does it mean that PSC has become more transparent?

A: On an Option C/E contract, since Defined Cost is now actual, auditable, open book costs, in principle the answer must be "Yes"

Q: Does the removal of Option G mean there is now no Task based option at all under NEC4 PSC?

A: See response to a similar question below.

Q: Does the X18 limit of liability act as a sub cap within the overall liability or is it an additional liability?

A: This depends on the contract. Under the PSC X18 does provide a means of capping specific liabilities under any overall cap on liability provided under core clause 87.1. Under the TSC there are no core clauses that provide a cap on liability and all liabilities caps will be covered under X18.

Q: How does "Contractor states assumptions" affect the contract? EG.

Contractor stating assumptions in tender makes no difference to the contract

A: Assumptions made in a tender submission would be a variant bid if they changed the Scope and should either not be accepted or, if accepted, the Client should change the Scope accordingly. Assumptions stated as part of the compensation event assessment process mean that the risk is transferred to the Client as, if these assumptions prove incorrect, another compensation event can be raised for the difference, either positive or negative.

Q: How are comprehensive limits for reactive works dealt with?

A: In your Scope. The TSC does not have an ordering, reactive, call off process built in. Partly because it may not be necessary, partly because no two clients do it the same way. So the Scope states that the Contractor is to provide a reactive repairs service to the housing stock, at the prices in the Price List, as called off by the Service Manager or its delegates (for example the call centre). If there are limits to the Contractor's authority, an ability to self-certify work, definition of what is in, and not in, comprehensive price per property Prices, etc., this all needs clearly stating in the procedures in the Scope.

Q: If Consultant does not submit application for payment is the Client responsible for making an assessment.

A: Yes. The assessment will be zero or lower, but the assessment must still be made and the certificate issued. Otherwise, in the UK under the Construction Act, the Consultant may be able to submit later and push things through. It is always good practice to follow the procedures, even if you are issuing a payment certificate for Zero.

Q: If PSC now based on actual cost approach, how is the Consultant making a profit? Is it a fee %?

A: Yes. For an Option C/E PSC the profit is included in the fee percentage (see question below).

Q: I'm interested to know whether there are also any significant changes to the PSSC?

A: This was a question early in the webinar. The webinar did I think cover this. The PSSC already required quotations with notifications of CEs (unlike the TSSC) so this is not a change. The language has changed to suit NEC4 and the payment process has changed to require the Consultant to provide the invoice or it does not get paid (effectively).

Q: Is contractor's Profit affected by the savings achieved via value engineering?

A: Since the value engineering proposal is assessed as a compensation event then yes profit will be recovered as part of the Fee.

Q: Is it mandatory for the Contractor to use the subcontracts for their subcontractors?

A: The NEC does not insist that subcontracts must be on NEC forms. This it would like more used because it means that the principles of good management, mutual trust, etc get passed down the supply chain. The Service Manager (on a PSC, TSC) has to accept Subcontractors and subcontracts (eg PSC cl 23), and there are some reductions of requirements if a NEC subcontract is used.

Q: Option C % share?

A: The Option C share percentage has not changed from the NEC3 or any other NEC Option C approach. The values are stated in the Contract Data.

Q: PSC - also important to note that in option A the cost of preparing quotation is now allowed in Defined Cost.

A: This is correct. The value of the fee percentage should reflect this of course

Q: PSC - why have we lost Option G? - and given that it has gone why not include 'Tasks' in PSC

A: The primary use of Option G of the PSC was to create a single supplier framework contract. The NEC Framework Contract provides for such a contract; it allows "tasks" to be ordered in the same way as option G provided for, and should be used where a call off arrangement is needed. The Framework Contract provides greater flexibility than was available under Option G, and allows the use of PSC or PSSC for Time Charge or Work Orders.

Q: PSC - You mention that due skill and care has changed. Can you just clarify as this sounds quite a major change? What has it changed to? (Sorry if I missed this)

A: The Consultant's obligation to use skill and care normally used by professionals providing services similar to the service has not changed. Clause 20.3 merely provides additional clarity that if the Consultant corrects a Defect for which it is not labile this is a compensation event (clause 60.1(13)), as it was under NEC3.

Q: Re quotations for Task Order, is there deemed acceptance

A: No. If anything there is the opposite. If everything goes well, the SM asks for a quote, the Contractor provides it in 3 weeks, the SM accepts within 2 weeks and the Task Order is given. If the quotation is not OK, the SM can ask for another, cancel the whole process or assess it (following the normal assessment rules). So the SM can instruct a Task and also price it, but the quotation process, like the CE quotation process, has to have run its course. If the SM does not respond to a quotation, the contract is silent.

Since the work has not been instructed the Contractor does not do the work. It may be wise for the Contractor to give a limitation on the length of time the quotation stands - you don't want the SM to dig it up 6 months later. But if the SM did, the delay in responding may be a CE.

Q: Should slide 14 state "Contractor" or "Consultant"?

A: Correct - it should. Well spotted, and many apologies.

Q: TSC seems still not to cover C's design of things in the Affected Property - this is often required for Tasks.... as it stands the C is taking 'fit for purpose liability' for any such D&B Z clauses...

A: Correct. The TSC is predicated on the default position that the Contractor does not design a service. If there is to be significant design the procedures and acceptances for this need adding into the Scope, or into the Task information for a Task as and if it arises. The Client and Contractors then also need to consider PI insurance (an extra insurance in the Contract Data) and the liability for design (adopting ECC

Option X15 if really necessary). If the Contractor is doing a significant design and build element, the new NEC DBO contract may be more appropriate.

Q: what is the timescales for when a programme is deem as accepted

A: The Service Manager should accept or reject the programme or plan within 2 weeks. If the SM does not respond, the Consultant can remind him/her after that time has elapsed. Once reminded, the SM has one week to respond otherwise the programme or plan is deemed accepted (clause 31.3 in PSC/TSC/ECC)

Q: What takes precedence for changes to the Completion Date; the "treated as accepted" Programme or that as represented in an implemented compensation event?

A: The Completion Date, or Task Completion Date can only be changed by the SM and only via a compensation event, acceptance of a Defect or under the PSC, acceleration. It cannot be changed by the Contractor / Consultant in the programme they put forward for acceptance regardless of whether the programme is accepted by the SM or accepted by default.

Q: Why isn't there a client's or service manager mentioned in the TSSC

A: In order to provide a simplified contract, the short form contracts do not have a specific Client's administrator (such as the Service Manager) named in the contract clauses themselves. The TSSC provides for a Client's Agent in the Contract Data as it was considered that such a role was more likely to be needed in a term contract. The Client needs to name the agent and define the authority that agent has.

Q: Would you expect fee to equal margin (profit) on PSC? Bearing in mind rates now based on defined cost?

A: The Fee in all NEC contracts covers all the costs that are not covered in the Defined Cost (PSC clause 52.1 for example). So it will cover profit and also head office overheads, group company requirements, costs like insurance premiums etc.. So, it should be a larger value than just profit/margin.

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