

NEC Webinar

Using X22 the Early Contractor Involvement (ECI) Clause

Q&A - Unanswered Questions



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Q. When using this secondary Option, would you recommend a collaborative cost assurance style visit to the *Contractor's* regional or head offices in Stage One e.g. visit estimating and cost recording systems and accounting procedures and collate evidence to provide added assurance and support Stage One selection process?

A. The *Client* has to decide what assurance is required, when and how it is done. Your thoughts seem sensible.

Q. In Stage One the *Contractor* is paid its Defined Cost on a cost reimbursable basis. Do these costs keep running until the Notice to Proceed is issued or the instruction that no notice will be given? Can the *Client* refuse to pay if there is a delay between the design proposal being issued and the Notice to Proceed?

A. The forecasting controls in X22.2 should control this, in particular X22.2(4) where there is provision for disallowed cost outside of the accepted forecast. The period after the proposals are submitted needs to be properly considered in the Scope. There may be iterations, discussions, negotiations or simply a lull period waiting for the *Client's* confirmation. Decide what you want the *Contractor's* resources to do here and state this in the Scope. The *Contractor* can price accordingly.

Q. During ECI Stage One, there is no total of the Prices (only a Budget) and there may not be a Completion Date either; both are subject to agreement and fixed at notice to proceed to stage Two. I appreciate that if the *Project Manager* issues an instruction to change the Scope during ECI Stage One the parties must agree changes to the Budget. However, the secondary optional clauses are meant to work alongside the core clauses. So, this suggests that when such an instruction is issued this would result in a change to the Budget but also a compensation event occurs, which then means the procedure to implement a compensation event would run in parallel at the same time. Is that correct? Or are compensation events under core clause 6 not supposed to be administered during ECI stage One? If they are to be administered, I would find it completely pointless as there is no total of the Prices that an implemented compensation event would change and really the focus instead should be on working on the design proposals effect on the Project Cost and Accepted Programme?

A. Lots of questions here! There may or may not be a Completion Date, depending on how the Contract Data was completed. There is a Prices (in Option C, but not for Option E) at award, but this is for Stage One only. There may be compensation events which affect the Stage One services and that will affect the Prices for Stage One. Anything that changes Stage Two Defined Cost will be a part of the X22.3(9) revisions to the Activity Schedule. The programme will be revised and accepted as normal and it will develop during Stage One. X22.3(7) deals with Scope provided by the Contractor in Stage One. Not every change to the Scope in Stage One will change the Budget, only those caught by X22.6(1).

Q. We are looking to appoint the contractor at the end of RIBA Stage 2 and looking to evaluate supply chain transparency as part of the tender evaluation. Any comments?

A. Sounds sensible. This is a part of the expectations for the Pricing Information.

Q. The contract does not prescribe a method for how the parties should agree Budget changes, unlike for compensation events. What do you suggest is the best method? And is there a mutual obligation on both parties to provide quotations?

A. Clause 10.2 mutual trust and co-operation will help here. Sit down and discuss these things, it may help to fully understand changes having a joint approach. There are no quotations, it is a case of agreeing, or if they cannot agree, the *Project Manager* assesses. Information provided at tender (Pricing Information) and during the contract will help in the discussions.

Q. When a client engages multiple contractors during ECI stage and awards a contract but wants to award to a different contractor due to cost reasons after Stage On, can the client take all the good ideas from the ECI contractor?

A. This could be done, providing the contract is written to permit this and design ownership issues are dealt with correctly. However, X22 would not apply as separate contracts are awarded for stages one and two. The client may find an unwillingness from future tenderers for other projects on the basis of trust. Or lack of.

Q. The contract is 'locked down' on the Contract Date. How do we include additional *Client's* liabilities/ compensation events etc which may become visible in Stage One and which need to be added for Stage Two?

A. There is no mechanism other than through clause 12.3 or writing Contract Data part one in a way to agreeing this during Stage One.

Q. Is there an ECI equivalent for suppliers or subcontractors, either for back-to-back involvement in the ECC Stage One, or for the main contractor to use independently during Stage Two?

A. There is no reason why you could not adapt a suitable clause from X22, but provisions for things like Budget may not be appropriate.

Q. To date, what experience has there been of a team being changed (contractor/consultant) after Stage One of ECI, due to price, quality etc... and in such instances, how seamless has the new team been in picking up where the first one left off?

A. We have no experience or feedback of this situation.

Q. Is X22 compliant with statutory procurement requirements? Are there implications in relation to use of this secondary Option and choice of procurement and selection procedures in relation to current English or European Union statutory legislation?

A. X22 does not tell you how to procure. It gives you a set of rules that you need to be sure can be used within your chosen legal framework.

Q. At tender stage in an Option C ECI, can the *Client* ask bidders to submit Prices for Stage One so that the *Contractor* is incentivised to beat the Stage One target, or is Stage One always cost reimbursable?

A. As drafted, Stage One is always cost reimbursable. The focus isn't on using less resources during Stage One but applying those resources to delivering the proposals as best they can.

Q. X22.3(9) recognises this only applies to Option C. Why aren't the requirements with regard Pricing Information drafted to be relevant to Option C only? Surely under Option E we would only rely upon the forecast (20.4/X22.2(5)) and the Pricing Information would not be relevant?

A. Pricing Information is relevant for Option E, but there is no Activity Schedule for Option E. That's why this clause highlights the requirements for Option C only. The Pricing Information is '...how the *Contractor* prepares its assessment of the Prices for Stage Two...' (a process) whereas the forecast is of Defined Cost (a deliverable).

Q. You have kept mentioning harnessing the contractor's estimating team but conversely you have said that rates are not suitable because they are not market tested. If there is sufficient information to allow market testing – why is the project not competitively tendered? If there isn't sufficient information for market testing, then what is the benefit to the *Client*?

A. It is quite mis-leading to simply procure rates at early stages of a contract with so many variables. If you are highly confident with your information (Scope) then there's no problem with traditional procurement. During Stage One this should develop the Scope further so that there is sufficient information for market testing.

Q. Some national frameworks (SCAPE and SCF) are working on ECC Option A along with ECI. They currently use a PSC Stage One. Have you come across this and any thoughts?

A. Yes, we have experience of this. Clients can use an ECI approach with Option A but the drafting is for Option C or E only and would need careful amendment to work with Option A.

Q. What is the mechanism to change the Completion Date and total of the Prices going from Stage One to Stage Two?

A. X22 is not currently drafted to allow the Completion Date to change during Stage One. The Parties could of course change this through clause 12.3. The *Contractor* submits the total of the Prices for Stage Two as X22.3(9) which needs to be agreed by the *Project Manager* before a Notice to Proceed is given.

Q. Can you undertake Stage One under Option E and switch to Option C for Stage Two?

A. Not as current written.

Q. How do you trade off the incentive for “early gains” with ECI against the overall Budget in a Option C contract, and how would you ensure early value is added by the *Contractor* whilst not at the expense of the overall Budget? i.e. – early ‘savings’ however in Stage Two suddenly the *Contractor* has massive “windfall” in savings/gain shares?

A. Careful consideration of these possible outcomes during Stage One to assure yourself that the entire proposals for Stage Two are adequate. The Client needs to have confidence in the Budget.

Q. Contracting organisations and their legal teams are worried about design liability when Stage Two doesn’t proceed. Another contracting party (lets call the ‘take over’ contractor would pick up the Stage Two using a Contractor’s design as developed in Stage One) clouds design responsibility?

A. Whoever is the designer and whether they design or pick up a design needs to fully appraise itself of such risks.

Q. When executing the contract prior to proceeding that Stage One what should be entered into the Contract Data for the *completion date* if this is to be agreed during the implementation of the Stage Two process?

A. In Contract Data part one enter ‘The *completion date* is to be decided by the Parties during Stage One’

Q. Is X22 looking to move design risk onto the *Contractor* i.e. making it a D&B contract?

A. No, the *Client* still need to decides who is the designer when preparing the Scope before tendering using ECC and Option X22.

Q. Has the NEC given some thought to a stock form of Brexit clause?

A. Option X2 provides for such a situation, if incorporated in the contract.

Q. What are the benefits of using ECI over procuring a Contractor to provide consultancy services via a stand-alone PSC?

A. X22 offers a single contract with a break clause. PSC then ECC are two separate contracts.