

NEC4 Contract Changes webinar - questions

Question	Response
Is this the reasonable skill and care of a contractor or designer?	The skill and care will be that of the <i>Contractor</i> or <i>Consultant</i> who is the party to the contract with the <i>Client</i> . The level of skill required is that of a professional carrying out that type of design.
Has the reasonable skill and care of ECSC been added to FMSC and TSSC?	No – these contracts do not provide for <i>Contractor / Service Provider</i> design as it is not possible to “design” a service and there are no provisions for “project” work under these contracts.
Are there any changes in train or that were considered to deal with key dates and X clause sectional completion in relation to X22 - i.e. do the authors feel the X clause and core clauses around key dates and sectional completion align well?	No further changes to X22 to deal with these issues is planned. X22 provides for changes to the Completion Date for <i>sections</i> of the <i>works</i> as well as the whole of the <i>works</i> to be made. The <i>Project Manager</i> has the power to change Key Dates under clause 14.3.
Should CEs in Stage One just be assessed on a time-only basis if main option E is used?	The assessment of compensation events under Option E requires an assessment of the effect of the event on the Prices which is used for budgetary control.
Please give examples of what stage one and two can be for early Contractor involvement.	This will be determined by the <i>Client</i> and specific to the project. Stage One will often include preconstruction service such as advice on logistics, construction techniques, costing and timing of the works, Stage Two will involve the construction.
Has there been any feedback from Contractors on the ECI payment for Stage One on termination as only stage one. Do they feel they have lost potential income or re-tasking cost as a result?	No feedback has been received but the approach of assessing the payment on termination in Stage One based on the forecast cost of Stage One is in keeping with the principal of the Option which is that if the <i>works</i> do not proceed to Stage Two both Parties can walk away with limited consequence.
The SCC for wfh say if the 'PM agrees', but agrees with who and on what basis?	Either the <i>Contractor</i> or the <i>Project Manager</i> could propose that additional people are added to the list of people in the Contract Data who can be recovered as part of Defined Cost when based outside the Working Areas / Service Areas and working outside of these areas. This

	would require the agreement of the <i>Project Manager</i> and not acceptance so the <i>Project Manager</i> could not agree for any reason
People working outside of Working area - Can a contractor put forward additional people who are working from home that they may have forgotten to add to their original target cost and not as part of a CE? This would be for the PM to agree.	Yes, this would require the agreement of the <i>Project Manager</i> and not acceptance so the <i>Project Manager</i> could not agree for any reason. However, it is expected that an agreement would be reached where it is economically and practically sensible to do so.
Why is Delivery now required to be certified under the SC form but not the SSC form?	Certifying Delivery has been introduced to the Supply Contract to bring it in line with the other main forms. As part of the process of producing a “short” contract, certification of Completion or Delivery is not included in the short forms.
If the PM refuses to allow People working outside of the working area to be included as Defined Cost how would this cost be recovered in any Compensation Events, would this be disallowable?	Any costs that do not fall within the definition of Defined Cost are deemed to be included in the Fee (clause 52.1)
Can a project decide to incorporate an amendment in its contract already in place, and what is the way to do that?	The Parties are free to agree to amend the contract – the process for this is stated in clause 12 – but they need to consider how any amendments would affect already completed work.
Does an incentive payment under X29 form part of the target cost under an Option C and how would it be treated when assessing gainshare	No it does not, it would fall under other amounts to be paid to the <i>Contractor</i> as part of the amount due and so be outside the assessment of the <i>Contractor’s</i> share.
My client is using Main Option C but would like a number of packages (appr. 20%) to be lump sum packages to which the pain/gain mechanism does not apply. Do you think an ECC with a combination of Option C and Option A would work?	The intent of the contract is for a single main Option to be selected.
X22 is now incredibly wordy and complex. Why not just have a re-set button at the end of Stage One so just about everything can be proposed/agreed etc before moving on to Stage Two? If your answer is EU type procurement restrictions, EU is a small part of the world!	X22 allows the Prices, Completion Date, Scope, etc. to be revised during Stage One and so in effect reset for Stage Two. If the parties wish to operate in this manner than they can agree to extend the time frames in the compensation event process to enable these to be dealt with in the notice to proceed to Stage Two. However, the compensation event process remains available for those parties that need to manage all or certain compensation events in Stage One.
Is there any intention to republish the NEC4 contracts incorporating these and the previous Oct 2020 and Jan 2019 amendments?	The contract had been republished to incorporate all amendments to date.

<p>If the Contract Data does not stipulate that the liability limitation is to be unlimited and no amount or % limit is stated - what is the default position of the NEC or would it depend on the jurisdiction in which the contract is being used?</p>	<p>This is a matter of legal interpretation as to whether a blank entry means zero or no limit. The contract requires a limit to be stated, so leaving it blank means that the Contract Data has not been completed correctly.</p>
<p>In relation to the revised X22, the role of the Project Manager is obviously central. However, is it appropriate for the PM to be the decision-maker in relation to the acceptance or otherwise of the Stage Two proposals? Should the Client not be entitled to reject the Stage Two proposal, even if the Prices have been correctly calculated, simply because the Stage Two proposals are too expensive for the Client?</p>	<p>The <i>Project Manager</i> manages the contract on behalf of the <i>Client</i> and when giving instructions such as the notice to proceed to Stage Two they will do this in consultation with the <i>Client</i>.</p>
<p>Will X22 be an option in ECS and PSC form of contract?</p>	<p>There is currently no intention to include X22 in the ECS or PSC as there is no perceived need to do so. However, we welcome feedback on this from users.</p>
<p>The philosophy behind NEC seems to be that unless a person is in the working areas (i.e. 'on site') their cost must be in the fee. Some of the recent changes have sought to address this, but the drafting still relies on the link to working areas. Why is the philosophy for allowable people costs not simply 'working on the project'?</p>	<p>The intention under those contracts that contain a Working Area / Service Area is provide a limit on the people that can be recovered as part of Defined Cost. This is to provide a division between those people that form part of Defined Cost and those people who are covered by the Fee. If the distinction was removed another process would need to be introduced to distinguish between the cost of people directly involved in the Providing the Works / Service and those that were performing an overhead function and whose cost the supplier would distribute across multiple contracts, so as to provide a consistent basis for the pricing of the <i>works</i> and the definition of Defined Cost.</p>
<p>Practically, do you have example of a defect that arises where reasonable skill and care has been used? How would this be proven? The new CE seems to create a loophole for the Contractor to dispute every defect and frustrate the Client... If the PM then disagrees and assesses the CE at £0, then each and every defect would have to go to adjudication for it to be determined whose problem the defect is? Snagging will take ages on this basis</p>	<p>The issue is whether or not the supplier can recover the cost of correcting the Defect, not whether or not the Defect needs to be corrected. If there is a notified Defect, it must be corrected and a dispute over payment would not cause a delay. If the parties disagree over whether reasonable skill and care has been exercised, then unless they are prepared to compromise their dispute it would have to resolved under the dispute process in the contract.</p>