

Webinar - The Project Manager in the NEC4 ECC: What's new and different?

17th May 2017

Q&A session

This document provides answers to the questions submitted during the webinar.

The webinar can be viewed at <https://www.youtube.com/watch?v=hfjI5gDVJDE>

General queries

Q: Any bridging course for NEC3 accredited PMs?

A: For the currently accredited NEC3 professionals, there will be an extension course. This will allow you to receive their NEC4 accreditation without the need of doing the full NEC4 accreditation course. There will also be an extension course to allow accredited NEC4 to extend their knowledge to include NEC3.

Q: Can you clarify what the ECC and TSC Accreditation updates will involve please?

A: Full details will be released at the NEC User Group seminar on 22 June 2017.

Q: Does the phrase Site Information still exist?

A: Site Information is unchanged from NEC3 ECC to NEC4 ECC.

Q: For new contracts, should we be using NEC4 straight away? i.e when will it become live?

A: The NEC4 will be available when launched in June 2017 at the NEC Users' Group Annual Seminar. NEC3 will remain available and NEC will continue to support its use.

It will be up to the users to decide how quickly to upgrade to NEC4.

NEC4 is an improvement on NEC3, reflecting user feedback, industry developments and user best practice. Check all the NEC4 benefits here: <https://www.neccontract.com/About-NEC/NEC4-suite-of-contracts>

Q: When will NEC3 RIP?

A: Support to NEC3 will continue indefinitely. This will reflect our users' needs and requirements to deliver projects.

Some projects currently being undertaken under NEC3, such as HS2, have a significant duration for delivery. Therefore NEC will continue to support NEC3 while it is in use.

Q: Is there a prompt in preparing Scope that it has to include all the Client's works?

A: This prompt is in the definition of Scope, which is unchanged from the definition of the ECC3's 'Works Information'.

Q: So it's now *Client, Employer, Contractor*?

A: In ECC, PSC, TSC and the short contracts (other than the supply short contract, the 'Employer' (NEC3) is now (in NEC4) the 'Client'. The *Contractor* is still the *Contractor*.

Q: What *percentage* of Employers do you think will use Z-clauses to effectively nullify the changes in NEC4? e.g. most already amend deemed acceptance of CEs.

A: We can only guess at what some *Clients* may do with their Z clauses to NEC4. We consider a *Client* choosing to use NEC, which requires active management, is misguided in deleting clauses specifically designed to encourage all players to carry out their actions in the allowable timescales.

Q: When there is a time restricted action by the *PM* (to review & accept or reject with reasons) or a time restricted action by the *Contractor* (to provide programme, quotes or supplementary information or design information), then in these cases how is the 2 week Christmas shutdown dealt with fairly? And what is in place to stop the parties deliberately taking advantage of the approaching shut-down at Christmas or Easter?

A: NEC has no specific provisions to deal with notices at any particular time of year. The sort of 'ambush' provisions you mention might be against the general 10.2 obligation to act in the 'spirit of mutual trust and co-operation'. (10.1 in ECC3).

Q: Will there be Guidance Notes published at the same time as NEC4?

A: Yes. In producing the NEC4 contracts, a comprehensive review and re-structuring of all guidance documents was completed.

Read this article for further info: <https://www.neccontract.com/About-NEC/News-Media/NEC4-guidance-notes>

Q: Will changes from NEC3 to NEC4 be untouchable by Z clause amendment?

A: This is not possible. NEC can't prevent any client from making any Z clause.

Q: Would you advise existing live projects let under NEC3 contracts to upgrade to NEC4 and if so how would you do it?

A: A change from NEC3 ECC to NEC4 ECC would be possible. This would have to be by a significant negotiated addendum.

Q: Would you say the NEC4 changes favors the Contractor?

A: NEC considers all the changes improve the NEC for both the *Client*, his *Project Manager* and the *Contractor*.

Part 1 - General

Q: I have heard that under NEC4 clause 10.1 has been amended to delete the express obligation for the parties to act in a spirit of mutual trust and co-operation? Is this the case?

A: This is not true. The only change is to separate ECC3's 10.1 into ECC4's 10.1 and 10.2.

Q: If this is the case then in the light of judicial comment that clause 10.1 makes a difference was that omission appropriate?

A: There has been no change to the substance of the ECC3's clause 10.1.

Q: How is conflict of interest dealt with in the ECI contract?

A: There are no specific clauses relating to conflict of interest in the ECI Option X22.

Q: If there is no longer a Risk Register how are the identified risks captured in the contract ie not EWNs?

A: There is no change other than to the language. Contract Data parts one and two have entries for 'The following matters will be included in the Early Warning Register.'

Part 3 - Time

Q: Any sanction for not submitting programmes beyond first accepted?

A: No. 50.5 (was 50.3 in ECC3) and 64.1 are unchanged in ECC4. 50.5 applies only to the first programme. 64.1 applies to any programme.

Q: Are the reasons for "not acceptance of programme" by PM still the same 4 or there is more clarity for the reasons for which it can be rejected?

A: The reasons for not accepting the programme in 31.3 are unchanged from ECC3. This leaves 'does not represent the *Contractor's* plans realistically' and 'not practicable' as reasons for non-acceptance.

Q: Does the introduction of a deeming provision in respect of the submitted programme not unduly place the *Project Manager* and *Client* at risk? What was the rationale in introducing this deeming provision?

A: The reason for the provision - called for by many in the industry - was to reduce the incidence of non-accepted programmes. The NEC and the compensation event process relies on an up to date programme. It is hoped that the deeming provision will increase the pressure on both *Contractor* and *Project Manager* to collaborate to agree changes to the programme promptly. Having a programme 'treated as accepted' should be seen as a failure of that collaboration.

Q: If the *Contractor* prompts after two weeks instead of 1 then does the *PM* get another week?

A: The *Contractor* may only prompt after the *PM* has failed to respond in the two week period. The *PM* gets another week after the prompt to respond to avoid the update being 'treated as accepted'.

Q: In section 3 "Time" you stated that if the *PM* does not response to a programme after 2 weeks then the *Contractor* MAY prompt. If there is still no response after a further week then the programme is deemed accepted. If the *Contractor* does not prompt, does this then mean that if there is no response or prompt then the programme is accepted after 3 weeks?

A: If there is no prompt from the *Contractor* there is no 'treated as accepted'. A compensation event arises for the late response and the *PM* will have to assess CEs (64).

Q: Is the *PM* still entitled to conduct its own assessment in terms of 64.2 - is the programme for the remaining works defined?

A: As in ECC3, if there is not an Accepted Programme, 64.1 requires the *PM* to assess the compensation event and 64.2 requires the *PM* to make their assessment of the programme.

Q: Is treated accepted programme considered same as Accepted Programme in case of delays/extension of time (EoT) evaluation? Can it be rejected by PM as not officially accepted?

A: If the programme is 'treated as acceptance' it becomes the Accepted Programme and has exactly the same status as if it had been accepted positively by the PM.

Q: Project Manager not replying the Contractor's submission of a programme for acceptance - How does ECC4 deal with this?

A: If the PM does not reply within 2 weeks under 31.3, the Contractor may prompt. If the PM does not respond within a further week of the prompt, the programme is 'treated as accepted'.

Q: Why not state which type of programme you require?

A: ECC4 has a reference to Scope to prompt the Client to specify any requirements re the format of the programme submissions.

Q: Will the Contractor HAVE to accelerate under ECC4?

A: No, as under ECC3, acceleration requires the agreement of a 'deal'.

Part 4 - Quality Management

Q: Any period for acceptance of quality plan?

A: There is not a stated period so the 'period for reply' will apply.

Q: Are the QMS requirements applicable when there is no Contractor design?

A: Yes, the clauses re quality management system, quality policy statement and quality plan are standard irrespective of the amount of design by the Contractor. The QMS has to comply with the requirements stated in the Scope.

Q: Are there key changes to the Supervisor's role that the PM needs to be aware of?

A: There are no changes to the role of the Supervisor in ECC4.

Q: An NEC Supervisor it sounds like the role has been reduced. Is this correct?

A: This is not true. The role of the Supervisor is unchanged. The only changes are - the renaming of part 4 to 'Quality Management'

- the obligation to operate a quality management system
- the obligation to submit a quality policy statement and a quality plan for the acceptance of the *Project Manager*.

Given that the quality management system will typically cover testing and defects, it is anticipated that the *Supervisor* will also be interested in these documents.

Q: What is the scope of a quality plan?

A: There are no explicit requirements for the content of a quality plan in the contract. Most formal quality management systems will set out minimum requirements for the quality plan. The only reason stated for non-acceptance by the *PM* is that it will 'not allow the *Contractor* to Provide the Works.

Q: Why not call it a quality certificate, rather than Defects Certificate?

A: The Defects Certificate is appropriately named as, through it, the *Supervisor* certifies the remaining Defects or the lack of any Defects.

Q: With quality management and those changes, does this make the *Supervisor* role a little defunct?

A: No, the *Supervisor* role is still important. However, the level of effort required by the *Supervisor* (as in ECC3) will depend on the amount of testing required by the Scope and how much of that testing is required to be carried out or witnessed by the *Supervisor*.

Part 5 - Payment

Q: Any range of fee *percentage* guidelines?

A: No. It is not appropriate for NEC to offer 'guidelines' for the fee *percentage*. It will be up to bidders to determine what *percentage* of 'Defined Cost' under the contract is required to cover their other 'costs'.

Q: Defined Costs - Does the *PM* have the same option as the *Contractor* to seek submission of a chunk of Defined Cost for agreement?

A: Good question. No, it is the *Contractor* who 'notifies the *PM* when a part of Defined Cost has been finalised'. In the spirit of mutual trust and co-operation (10.2) it will be logical for the *PM* and *Contractor* to collaborate to agree sensible 'parts' of Defined Cost.

Q: How does the requirement for the *Contractor* to submit an application fit with statute and regular payment dates?

A: The known assessment dates are stated in the contract. We do not believe the requirement to submit an application for payment contradicts UK statute.

Q: If the *Client* doesn't get a share of value engineering then why would they agree

A: It is up to the *Client* to set the 'value engineering *percentage*' in the Contract Data. If a compensation event is a change to the Scope provided by the *Client* proposed by the *Contractor* and accepted by the *Project Manager*, then the Prices are reduced by an amount calculated by multiplying the assessed effect of the compensation event by the 'value engineering *percentage*'.

So a higher value engineering percentage gives the *Client* more benefit in the value engineering.

Q: Is these costs, not covered in hourly rate? (helmet, pen, calculator etc)

A: In Options C, D, E these costs will be under 'Equipment' in the SCC.

In Options A and B they will also be Equipment. The People Rates in the SSCC cover only the direct cost of the people. [Rob - I think that's right].

Q: On final assessment, is it 4 weeks to state you want to go to *tribunal* after the *Adjudicator's* decision (as in W1/W2) or 4 weeks when you must take it to the *tribunal* and shut the dispute down?

A: The Party may refer to the *tribunal* its dissatisfaction of the decision of the *Adjudicator* within 4 weeks of the decision being made. If neither Party acts within that period the *Adjudicator's* decision becomes the 'conclusive evidence' of the final amount due.

Q: What can be requested in terms of proof of SubContractor's costs?

A: The *Contractor* will present the Subcontractor's actual or forecast application for payment or compensation assessment as part of its Defined Cost. As with any element of Defined Cost, 52.1 (still) requires that cost to be 'at open market or competitively tendered costs'. One of the records to be kept (in C,D,E,F (but not in A,B)) is '(52.2) communications about and assessment of compensation events for Subcontractors'.

Q: What remedy is there if the *PM* doesn't respond in 13 weeks to the audit of the accounts?

A: If the *PM* does not respond within the 13 weeks the statement of Defined Cost is 'treated as correct'. If the *PM* asks for more details, the *Contractor* has four weeks to provide them and the *PM* has 4 weeks to accept or correct the statement of Defined Cost. If the *PM* does not respond within the 4 weeks the statement is 'treated as correct'.

Q: Why would the Contractor not get 100% of the saving (reduction in cost and no target change) if it was their idea?

A: The *Client* sets the 'value engineering percentage' in the Contract Data. If that percentage is set at 0% then the Prices reduces by the % multiplied by the value of the savings, so the *Contractor* gets all the benefit. The *Client* may choose a higher percentage so both *Client* and *Contractor* benefit from such a change.

Q: Will ECSC also see these changes?

A: Some of these changes in ECC will be present in the ECSC, as appropriate.

Q: Will the Contractor receive payment for the preparation of value engineering options if they are not accepted?

A: Unlike the preparation of a quotation for a proposed instruction, this will not be a compensation event.

So

- under Options A and B there will be no payment for the work
- under Options C, D and E, if the preparation is carried out in the Working Areas, then the cost of people will be covered as, since there is a clear invitation in the new clause to prepare such proposals, the preparation of them should be considered to be part of 'Providing the Works'. However, as this will not be a compensation event, the Prices will not be changed

Part 6 - Compensation events

Q: Is the intention of the addition of CE's in CD1 to eliminate the requirement of CE Z clauses?

A: Yes. It will also correct the anomaly in ECC3 that additional *Employer's* risks can be added in the Contract Data part one, but compensation events cannot. This will also make those preparing the Contract Data focus on the difference between 'normal' compensation events and *Employer's* risks (the latter being renamed '*Client* liabilities' in ECC4).

Parts 7 - 9

Q: Are there any key changes in 7 - 9 we should be aware of?

A: There are some detailed changes, but nothing that will affect the day to day role of the *Project Manager*.

Q: Any changes to the insurance provisions within ECC4?

A: There is a change making the insurance against 'death of or bodily injury to employees of the *Contractor*' not subject to the requirement to be in the joint names of the Parties. There is a reason to not accept certificates for insurance if 'the insurers commercial position is not strong enough to carry the insured liabilities.'

Options W

Q: At what stage do Senior Representatives have to be nominated?

A: The Senior Representatives are named by the *Client* (in Contract Data part one) and the *Contractor* (in Contract Data part two).

Q: There are provisions in NEC3 dealing with joint adjudication of related multi-contract disputes (e.g. a main contract dispute which is related to the subcontract). Have these been retained in NEC4?

A: These provisions are retained in NEC4.

Q: Free issue items supplied by *Client* - how is that managed?

A: This is not changed by ECC4. The *Client* should set out what is to be 'free issued' and when in the Scope.

Option X4 ultimate holding company guarantee

Q: What was the driver to change to an ultimate holding company guarantee?

A: The driver was to make sure that the guarantee comes from the ultimate holding company rather than a possibly intermediate 'parent' company.

Option X10 Information Modeling

Q: How do we use BIM with NEC4?

A: X10 is 'Information Modelling' and sets out appropriate provisions relating to BIM.

Q: Is there a mechanism within NEC4 for compelling the provision of information modelling data in native format when this would be contractor's IP?

A: This is not explicit, but is likely to be set out in the 'Information Model Requirements'.

Option X12 Multiparty collaboration

Q: How does X12 fit with alliancing - should it be used if alliancing?

A: Alliancing involves a multiparty contract designed to incentivize the partners and the client to collaboratively deliver project 'success'. X12 is an 'overlay' to separate bi-party contracts on the same project that allows the *Client* to include incentives on each party that relate to overall project success. X12 will not be used with alliancing.

Option X15 The *Contractor's* design

Q: We would appreciate more detailed commentary on the X15 clause with respect to the reversal in the burden of proof.

A: ECC3 has 'X15.1 The Contractor is not liable for Defects in the works due to his design so far as he proves that he used reasonable skill and care to ensure that his design complied with the Works Information.'

ECC4 does not include the explicit obligation for the *Contractor* to 'prove' this.

Option X22 Early *Contractor* Involvement

Q: Is there a mechanism for a *Contractor* to gain from their proposals through the ECI option/ clause? Under ECC3 (Options C & D), the *Contractor* is likely to hold back value engineering proposals so that they see the benefit during ECI?

A: This would be a disappointing outcome from a collaborative contract.

Answers by **Richard Patterson & Robert Gerrard**, NEC4 drafters.