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Using the NEC Facilities Management Contract (FMC) in a national, international or cross-border context

OVERVIEW

The NEC Facilities Management Contract (FMC) is written, like all NEC contracts, to be used in any country, including the United Kingdom. This practice note is written to explain how the FMC is designed for this, and what those wanting to use the contract have to include in their contracts.

Apart from the context where the *Client*, the *Service Provider* and the facilities management (FM) *service* are all based in the same country, whether this is England or Scotland or any other country with its own legal framework, there are a variety of different international, cross border arrangements possible. In these situations, the FMC as a standard contract can still be appropriate.

The more obvious examples of these are where:

- the *service* is being provided in two or more countries;
- the *Service Provider* is from and in the country where the *service* is being provided rather than the country of the *Client*;
- the *service* is being provided in a different country from that of the *Client* or *Service Provider*.

There will be a number of other variations on these arrangements, leading to considerable complexity in the legal, contractual and administrative arrangements. As it is published, the FMC is based on a fairly simple relationship between *Client*, *Service Provider* and the country where the *service* is provided, but it has been designed with the flexibility to allow it to be used for more complex arrangements. This practice note explains the basic principles of the contract and then identifies areas which any *Client* wishing to use this contract in an international context should address.

Where terms used refer directly to the terminology in the FMC, the NEC approach to the use of capitals and italicisation is adopted. It should also be noted that while this practice note describes the requirements in relation to the FMC, the principles in this note also apply to other NEC contracts, particularly the Term Service Contract.

LEGAL CONSIDERATIONS FOR THE NEC AS AN INTERNATIONAL CONTRACT

The FMC, as all NEC contracts, is written as a legally independent contract – that is, it is written with no particular legal framework to dictate its terms. The issue of which legal framework is imposed on the contract, or on which the contract sits depending on your point of view, therefore has to be made clear within the contract or extra information contained within the contract.

NEC contracts, and in this context the FMC, approach this situation in four ways.

The law of the contract

The contract states the *"law of the contract"* in its Contract Data. This will be the jurisdiction under which the contract is formed. It gives no more details about this law.

The inclusion of a legal framework in the contract

As stated above, the FMC is a legally independent contract. It is written with the intention that the core clauses do not require a particular legal approach before they can work. The structure of the contract does however recognise that there may be legal requirements that may be imposed onto a contract, for example because of the nature of the work or the country in which the work is being undertaken. These can be introduced through the Option clauses or additional conditions of contract.

The "Y" secondary option clauses allow the adoption of certain country specific legal requirements where the contract would not work, or would be rendered ambiguous, without them. An example of this in the UK is the option of Option Y(UK)2 which brings the payment process in the contract in line with the requirements of the UK Housing Grants, Construction and Regeneration Act 1996 – the "Construction Act". The NEC has produced "Y" clauses for a number of different countries, not just the UK, where the contracts are commonly used, and continues to develop these to meet users' requirements.

The "Z" secondary option clauses enable the *Client* to include contract specific clauses which allow the inclusion of legal clauses required by the *Client* and the countries concerned (be that of the *Client*, the *Service Provider* or where the *service* is provided). These clauses are not required by the FMC to make it work, but are required by the *Client* to make their specific contract work. An example of this in the UK would be the inclusion of clauses managing the requirements of the Transfer of Undertakings (Protection of Employment) regulations – the TUPE requirements.

The law of the country in which the Affected Property is located

In one particular Option, Option X2 changes in the law, the FMC acknowledges that the *service* may be provided in a country that is not necessarily the same as that of the *law of the contract*. Option X2 allows for the risk of changes in the law of the country where the Affected Property is located to be transferred from the *Service Provider* to the *Client*. The Affected Property is the term used to describe the type and location of the assets which form the subject of the contract[1]. Examples might be all the property owned, occupied or managed by the *Client*, or all the banks in the *Client's* portfolio. This Option allows for these to be in a different country from, say, the *Client*, recognising that the law of that country will impact on the service delivery of the *Service Provider*.

The law of dispute - and location of arbitration

The FMC has a dispute escalation process which follows a model of internal alternative dispute resolution, to adjudication, to a *tribunal*. Generally, the *tribunal* is either the courts of the country of the law of the contract or arbitration, and it is selected by the *Client* in the original tender documentation, in the Contract Data. If arbitration is chosen, the *Client* states the arbitration procedures and seat of arbitration, again in the Contract Data. It would be possible to state a seat and procedure of arbitration that was an internationally recognised one, not necessarily directly linked to the *law of the contract*.

SPECIFYING THE *SERVICE* FOR INTERNATIONAL CONTRACTS

The FMC requires that the service to be provided by the *Service Provider* is fully detailed and set out in the Scope. The Scope provides the full specification for the work, and describes

[1] Affected Property is defined in the FMC as "property of the *Client* or Others which is affected by the work of the *Service Provider* or used by the *Service Provider* in Providing the Service"

what is required behind each element of the Price List. It also gives all the constraints that apply to the *Service Provider*; for example the *Client's* employment policies, procurement procedures to be followed, access requirements, and the like.

Whilst elements of the Scope may be common to different geographies, local variance is likely even in relatively close and similar countries. The applicable Scope in relation to each country where the *service* is to be provided should therefore be clearly set out. Accuracy, appropriate detail, and consistency are the essential ingredients of the Scope, and this is even more important where international contracts are concerned. The use of standard management approaches will assist in this. This is further developed in Appendix A, recommending the use of the recent ISO 41001.

PRACTICAL APPLICATION IN AN INTERNATIONAL CONTEXT

The practical application of the FMC to Affected Property in two or more countries entails consideration of factors which will often not be an issue when a contract applies to a single geography, even if that includes multiple sites. Issues which may need to be considered and agreed upon by both *Client* and *Service Provider* include (but are not necessarily limited to):

- Contract law: Even within trading blocs supposedly sharing a common or aligned legal framework, such as the EU, individual nations will often have their own nation-specific laws covering trading and contract law. The contract covering an international facilities management services agreement should ensure that the requirements of local law are met at national level. For significant issues relating to the contract as a whole, a system of law could be designated as the default legislation under which any contractual issue should be resolved. Unless stated otherwise within the contract when signed, this would typically be the legal system under which the customer HQ operates.

  Note the section above which indicates how the FMC can accommodate this in its structure, stating the *law of the contract*. Further careful consideration will be needed where different national law impacts on the *service* in different countries.

- Currency: In some situations, the contract may provide for all invoices relating to the contract to be submitted to and paid by a single customer entity, typically the corporate headquarters. This may simplify payments through standardising the currency in which transactions take place. However, in many international contracts, it is likely that at least some transactions will need to allow for different currencies being used in different geographies. Even in contracts within a trading bloc with a common currency (for example, the EU,) differences in tax regime may require some transactions to take place within the relevant country rather than centrally in the HQ domicile.

  Organisations implementing the contract in an international context should consider stipulating in the contract a mechanism which will determine the applicable exchange rate for any cross-border or cross-currency transactions. While the simple answer may be to use the publicly quoted rate of exchange at the time of the issue of an invoice or transaction taking place, this will often be impractical, as the value of the same item of work or product will vary day by day or hour by hour. A more workable and stable solution may be to set periodic (for instance quarterly) dates and a specific time at which the exchange rate between currencies in question is set at the market rate, to be applied until the next set review date.

  An alternative mechanism could be to set an exchange rate for the term of the contract, or for a longer period of time, for instance a year. However, the variances in customer cost and supplier revenues that could entail from such a longer-term arrangement may be onerous to any adversely affected party. If long term certainty of exchange rates is required, it is therefore recommended that a percentage or cash movement limit be set, so that any variance outside this tolerable limit of change prompts a renegotiation of the exchange rate.

The FMC already manages this in part in the core and option clauses, where it stipulates that payments are made in the *currency of the contract*[2]. This *currency of the contract* is stated in the Contract Data by the *Client* in its contract formation.

The FMC also provides a framework for multiple currencies in its Option X3. It is designed to manage currency fluctuations, the risk of currency exchange and the payment for the *service* in different currencies. It provides for exchange rates to be declared in advance. This is not an easy issue as the paragraphs above indicate, and the framework provided may well need some adaption for contracts in a number of countries.

- Language: Similar to the issues above, differences in language may be an issue that participants in an FM contract with international reach will need to consider. Even in markets nominally sharing the same language, for instance the UK and USA or Canada, certain terms will be understood differently in different countries. Local input should be sought to ensure that the interpretation placed upon terms when translated is the same as that when drafted in the language of the original contract agreement. The latter should generally be defined in the contract documentation as the definitive version and meaning, so that any local dispute which may be brought about or exacerbated through linguistic interpretation is resolved in accordance with the original intent of the contract and contracted parties.

  At the date of writing this practice note there are no accepted, accredited translations of the FMC from English.

- Taxes: Organisations deploying the contract in an international context must ensure that they and any local entities which may be party to the contract in different geographies comply with tax laws in each state within which activities covered by the contract take place. This may require a mechanism to be agreed which ensures that neither party is disadvantaged to the advantage of the other in the treatment of tax, especially sales taxes. In particular, any trans-border transactions should avoid charging additional taxes on tax already paid in another jurisdiction.

- Employment Law: For a facilities management contract applicable to more than one nation, at least two different legal frameworks for employment law are likely to apply. Even if the countries concerned are within a trading bloc within which the legal regime is supposedly homogeneous, such as the EU, organisations will find that the same "rules" are often interpreted differently by sovereign governments (as is the case with TUPE legislation in the EU). Both parties to the contract should ensure that they are compliant with local law at a national operations level. If local employment law within a country to which the contract applies differs significantly from that agreed as the "host" or "HQ" location, a clause may need to be agreed and added to the contract to define the legislative framework and any financial implications it may involve for that country.

  As explained above, these special clauses would be included in the additional clauses, or "Z" clauses, of the FMC.

- Scope – geographic: The geographic extent across which the contract will apply may be determined by the procurement exercise from which it arises. For both the procurement specification and subsequent FM services contract/s, consideration should be given to the practicality of applying the same specification, standards and terms across different countries and regions. Management of the contract, from the point of view of both customer and provider, should also be considered. Depending upon factors such as the number and geographic spread of locations involved and alignment, or lack thereof, of the FM market norms in each, it may be deemed more practicable to split the geography involved regionally, or adopt a global approach if standardisation is a key outcome.

- Culture: Whilst not necessarily an issue to be documented in the contract itself, the parties to the international FM contract should consider the different cultures within

[2] The payment clauses reference the *currency of the contract* in the core payment clause 51.1, and for payments based on Defined Cost for Options C and D in option clauses 50.7 and 50.8.

which the contract may need to operate. While some elements may be relatively generic irrespective of culture, for example M&E maintenance, other services may be subject to much greater cultural variance which may need to be addressed through location or region-specific references in the contract documentation: for example catering.

- Dispute resolution: While no-one enters a contract hoping for disputes, it is almost inevitable that over a long term contract there are disputes and frictions which need to be resolved. The processes and procedures for this, acknowledging the requirements of the individual countries, need to be considered and incorporated into the contracts with care. This is affected by many of the points above; culture, contract law and language being three of the more obvious.

  As stated in the legal considerations section above, the FMC has procedures included to manage disputes between the Parties. However, these may need considering, particularly at the initial stages when the disputes may be very "local", to see how the points of culture, contract law and language are best served.

CONCLUSION

The FMC is not specifically written to be a contract where the *service* is provided in many countries for a *Client* in another country, or for any of the ever increasingly complex arrangements one could envisage. That does not mean it cannot be used in these contexts. It is designed to accommodate the relatively straightforward situation that the Parties to the contract may be having a *service* undertaken in a different geographical area. More complex arrangements will result in more complex contracts, with different Scope requirements in each location, and possibly different regulations for those locations.

This would be needed for any such contract, whether the FMC was used or not. What the FMC does provide is a standard contractual approach, consistent management procedures, and a coherent framework to enable this to be developed without having to develop a totally bespoke contract.

APPENDIX A

Management standards

Drawing on international best practice, the application of a recognised FM management system standard is recommended and will provide a benchmark for developing and driving an effective future strategic, tactical and operational FM regime. It will also assist in developing a supply chain which is able to demonstrate compliance with the standard to provide an assurance regarding their approach and processes.

Such a recommended standard against which future FM service providers can be assessed is the recently published management system standard ISO 41001, *Facility management – Management systems – Requirements with guidance for use*[3].

The ISO 41000[4] standards series identifies that 'FM does not mean the same thing globally, nationally or even within similar organisations. Furthermore, the capabilities of the supply side have evolved in different ways in different countries, as has the quality of service provided', and has the aim to improve this situation. The ISO 41000 series will undoubtedly

[3] ISO 41001:2018 specifies the requirements for a facility management (FM) system when an organization:
a) needs to demonstrate effective and efficient delivery of FM that supports the objectives of the demand organization;
b) aims to consistently meet the needs of interested parties and applicable requirements;
c) aims to be sustainable in a globally-competitive environment.
The requirements specified in ISO 41001:2018 are non-sector specific and intended to be applicable to all organizations, or parts thereof, whether public or private sector, and regardless of the type, size and nature of the organization or geographical location.

[4] At the time of writing, published "ISO41000 standards series" includes ISO41001 (Management Systems); 41011 (Vocabulary); 41012 (Strategic Sourcing); 41013 (Scope, key concepts and benefits); 41014 (FM strategy). Currently under development in the series are: 41015 (Influencing behaviours); 41016 (Technology); 41017 Emergency Management and Epidemic Prevention); 41018 (Development of a FM policy); 41019 (Role of FM in sustainability and resilience) and 41020 (Performance measurement and improvement)

facilitate consistency across regions, driving improved performance and strategic thinking when considering cross-border outsourcing.

Whilst most of the practices identified in the standard are already covered in some way through the typical industry wide adopted standards (ISO 18001, ISO 14001 and ISO 9001), ISO 41001 is about recognising the scope of responsibilities and creating a management structure and resource appropriate to the needs of the demand organisation.

The standard enables a continuity of language and set a benchmark in terms of the management approach, while providing emerging markets in such as the UAE and Africa with a template on which to build and develop a facilities management regime.

The application of this standard in support of the Integrator FM operating model will further increase awareness and support the development, implementation and maintenance of effective facilities management regimes across the contract footprint.

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