Working with the Term Service Contract
Promoting best practice in Facilities Management

Neil Earnshaw, Constructing Solutions and
Ross Hayes, Anthony Collins Solicitors

Workshop Agenda

- Introductions and agenda
- Overview of Term Service Contract (TSC)
- Key observations
- TSC strengths
- Common issues and themes
- Making it work – issues and solutions
- Conclusions

Introductions

- NEC trainers & consultants
- Ross involved in development of NEC3 contracts
- Used TSC since it was published in 2005
- Extensive experience of drafting TSC contracts

Introductions

- More importantly, who are you?
- Are you clients, contractors or consultants?
- What is your experience of TSC and / or TSSC (the short contract)?

Overview of TSC

- History
  - first published in 2005
  - originally considered as Option G of ECC
  - still on first edition of TSC, unlike ECC and PSC
  - has its use exceeded expectations?
  - few alternative forms - ICC Term Version, JCT Measured Term Contract (2011), GC/Works/7, Term Partnering Contract (TPC)
  - endorsed by BIFM in 2013

Overview of TSC

- Current use
  - public sector: central and local government, education, health, housing associations
  - regulated industries: aviation, nuclear, water
  - charities
  - private sector?
- Value
  - from £100k (usually TSSC) to £50m+ per annum
  - over £2bn in London housing maintenance contracts

Overview of TSC

- Duration
  - up to 4 years when used as a framework
  - up to 15 years when set up as main FM contracts
  - commonly between 5 and 10 years
- Range of use
  - building, engineering and grounds maintenance
  - highways maintenance
  - property management
  - total facilities management

Overview of TSC

- Range of use
  - British Museum
  - DfT Highways Maintenance Efficiency Programme
  - Department of Finance and Personnel NI
  - Lincolnshire County Council
  - Liverpool John Moores University
  - Magnox
  - Mersey Care NHS Trust
  - Ministry of Defence, Defence Infrastructure Organisation
  - Ministry of Justice
  - National Library of Scotland
  - Sellafield
  - Springfields Fuels

Key observations

- use heavily weighted towards public sector
- Service Manager usually part of the client organisation
- do see inappropriate use of TSSC and TSC
- cost model in Option A or C is frequently amended: why is this?
- low levels of contract management
- annualised budget regimes for many Employers
- multitudes of monthly invoices
- 10% mark-up: the accepted norm?

TSC strengths

- Arise from normal NEC strengths
  - programming and planning – but rarely adopted fully
  - concentration on making decisions in a timely manner
  - sorting issues and problems proactively rather than reactively
  - a clear definition of roles
  - flexible: encourages wide use across the whole spectrum of hard and soft FM services
  - driving improvement in industry!

Common issues and themes

- The differences between the TSC and ECC not widely understood by industry
- Its very flexibility means that it is a generic contract – and considerable attention is needed to operational detail
- A lack of engagement in advance with the way it works financially
- Impact on operational delivery not fully appreciated prior to procurement

Common issues and themes

- Contract training often comes late in the day
- Confusion on the order process
  - instructions vs Tasks
  - the lack of any order process
- Similar issues with change management
  - compensation events vs variations
- Mix and match of prices and costs
- Use / misuse of performance specifications
- Plethora of Z clauses!

Making it work – issues and solutions

Making it work – issues and solutions

- Contract strategy – Options A, C and E
- Practical issues with Secondary Options
- Communication
- Instructing work
- Assessing amounts due
- Managing variations rather than compensation events – or are they the same?
- Assessing the cost of change
- Terminating for poor performance

Option A

- How it works will often depend on specification
- Output performance specification leads towards lump sum, fixed price view
- Input specification, with call off orders, leads to remeasurement approach, with no guaranteed total of the Prices
- How can you evidence good value with the quantity of work undefined?

Option A – Incentivisation

- How do you incentivise the Contractor under an Option A contract?
- Do we need to?
- Are KPIs the answer?
- Remember, no penalties

Option C & E – the Cost

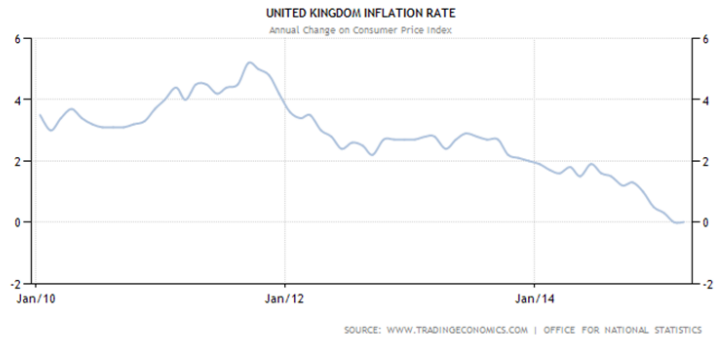
- Is the definition of Defined Cost adequate for multi-million contracts?
- Is there a place for a TSC “Schedule of Cost Components”?
- Difference between ECC and TSC assessment, and therefore cashflow, catches Contractors out

Option C – the Price

- Defining target can be very difficult, especially with input specification approach
- Setting the pain/gain share is even more of a "dark art" than with ECC
- Many Employers require annualisation of accounts
  - they can accept minor year end adjustments but
  - cannot accept continuous annual target adjustments

Option X1 - Inflation

- Standard NEC approach – adjust prices at time of payment
- This is not the industry standard
- Most favour shared risk with prices on the Price List adjusted annually
- Real difficulty in determining the inflation index to use on long contracts



Option X2 – Changes in the Law

- For long term contracts it is always wanted by the Contractors
- Sometimes offered
- Is there a middle approach?

Option X18 – Limiting liability

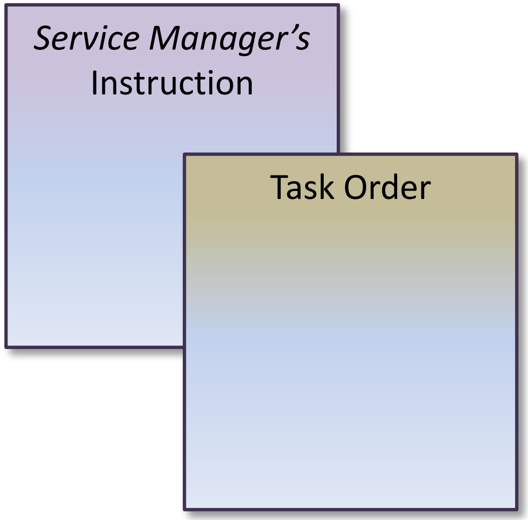
- Limitation of liability almost universally requested on large contracts
- How is it set? Who determines value? What is omitted?
- Remember to link to inflation

Clause 13 – Communication – the heart of the contract

- "Service Manager" authority may be delegated to dozens of people – if only to order work
- Need for control, documentation and clear understanding of authority
- Decision making often constrained by financial limits – who can authorise what
- How do we manage diffused decision making

Clause 27 and X19 – Instructing work

- Different ways under the contract
- May not be needed – performance specification
- Service Manager’s instruction – clause 27?
- Call centre call-off?
- Task Order – X19
- So, how is it done?
- What is needed?
- What defines the difference?



Clause 50 – Assessing the amount due

- It is the Service Manager’s responsibility but must have information from Contractor
- The Service Manager may be assessing hundreds of “instructions”
- What should be the application for payment needed from the Contractor?
- How often? In what form?

Clause 60 – Compensation events

- Instructing change – can we add / omit work?
- Is the change
  - a variation to an existing instruction or
  - a compensation event or
  - both
- How is the difference defined?
- What goes wrong if it isn't?
- Usually an issue of budgetary control

Clause 63 – Assessing compensation events

- Is Defined Cost ever used?
- Does a schedule of rates circumvent the use of Defined Cost?
- How do you assess an event if **most** of the work has a rate?

Clause 91 – Termination reasons

- How can you terminate for “substantially failing to Provide the Service”?
- Use of KPIs?
- Ensuring performance is both specified and measured
- Other termination reasons seem particularly vulnerable to poor drafting

Conclusions

- Its use is more advanced in some sectors of industry – can this be widened?
- There is positive feedback from industry that the TSC is an improvement
- The wide range of use presents some challenges for us to overcome
- The nature of FM work means there is always work to do – there can be no off-the-shelf product

Thank you

- Neil Earnshaw
- Constructing Solutions
- neil@constructingsolutions.co.uk
- 01422 230149

- Ross Hayes
- Anthony Collins Solicitors
- ross.hayes@anthonycollins.com
- 0121 212 7449