

## Insights

# NEC4: 2020 AMENDMENTS

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## SUMMARY

NEC4 was published in 2017. The first set of amendments were published in January 2019 and now, in the space of three years, we have the second set, published in October. Most standard forms do not publish updates so prolifically and (certainly for this year with all its changes) you could argue more's the pity.

Standard form updates to reflect legal developments are almost always welcome – it saves the parties from having to wield the red pen, helps standardise market approach to certain issues and reduces the likelihood of dispute.

But as for other types of update – well, it depends. NEC say that the 2020 update is based on feedback from users and industry experts that “have provided many constructive suggestions as to how the contracts could be further enhanced...”. The problem with this of course is that whether you think the changes suggested are a good idea or indeed of any relevance to how you use the forms, will depend on who you are in the contractual equation and what type of project you use the NEC form for.

Below we take a closer look at some of the key changes.

## Jumping the gun on Triple Point? Option X7

We said at the start that legal updates to standard forms were almost always welcome as they make everyone's life easier. Such is the case with Option X7 (Delay Damages).

Prior to the 2020 updates, Option X7 provided that delay damages would be recoverable until the earlier of “Completion” or the date on which the client takes over the works. The 2020 update clarifies Option X7 to provide that delay damages end on the date on which the project manager issues a termination certificate. After termination, further delay costs will be considered as part of the general costs/damages due as a result of the termination of the contract.

It seems likely that the reason for this change is to address the issue considered by the Court of Appeal in *Triple Point Technology Inc v PTT Public Co Ltd*, namely whether delay damages (LDs) are payable if the contractor fails to complete the works and the contract is terminated. Ultimately, it depends on the terms of the contract in question. By amending Option X7 in this way, NEC have put beyond doubt what the position is under the NEC standard forms.

Some have observed that it is surprising that NEC chose to address this issue before the Supreme Court judgment is handed down which (we hope) will settle the question once and for all. Others have said that this amendment introduces yet another layer of complexity by requiring the parties to determine when the termination certificate has been validly issued.

However, perhaps NEC is right to act now. While the clause at issue in *Triple Point* does not precisely extrapolate across to Option X7, it is clear that the 2017 drafting does raise questions as to precisely what damages may be payable in the *Triple Point* scenario; questions that could lead to disputes and all the time and cost that this entails.

Sensible amendments that introduce clarity and avoid dispute are no bad thing. Why wait for the Supreme Court ruling if the NEC knows what position it wishes to take?

The key, as always when using standard forms, is for the parties to address this issue in negotiations, understand the implications and ensure the contract expressly reflects their agreement.

### **Jumping the gun (again?) – Rochford v Kilhan – Option Y(UK)2**

The amendments to Option Y(UK)2 (The Housing Grants, Construction and Regeneration Act 1996) are arguably another instance of jumping the gun. But, unlike Option X7, perhaps not strictly necessary.

The 2020 update amends Option Y(UK)2 to reflect the recent obiter comments of Mrs Justice Cockerill in the first instance case of *Rochford Construction Ltd v Kilhan Construction Ltd*.

In this case, the judge said “with some diffidence” that the final date for payment should be linked to the due date by a fixed period of time. It should not be linked to the occurrence of an event after the due date such as the issue of a VAT invoice.

Prior to the 2020 update, a number of NEC4 contracts linked the final date for payment to the submission of an invoice. In what appears to be a direct response to concern generated by this case, the NEC has amended Option Y(UK)2 in the offending contracts to ensure that the final dates for payment are linked to a set period from the due date and not to an event. It is worth noting that these amendments do not affect the existing timescales for payment that run under NEC4 contracts. Parties should note that while the “[Detailed list of amendments](#)” indicates that the

Option Y(UK)2 is deleted in its entirety and replaced with revised wording, it is only Y(UK)2.2, in each case, that has been amended.

Given that the comments in Rochford were obiter and the case is only first instance, was this amendment necessary? The better course may have been to leave the drafting undisturbed and await a final decision on the matter. Parties could then, in the meantime, address the obiter comments as they saw fit by amending their contracts accordingly. After all, other far more permanent changes have happened this year (see below) which have not been picked up by the 2020 update and mean that contracts are likely to be amended to address them.

## **More flexibility – Option X22 – Early Contractor Involvement (ECI)**

Option X22 (ECI) enables the parties to contract on a two-stage basis. During Stage One (the pre-construction phase), the parties develop the scope, design and agree a price for the works. Stage Two is the construction phase of the project and deals with delivery of the development, and finalisation of the design by the contractor.

The 2020 amendments to Option X22 allow for greater flexibility in Stage One and a more structured process for the Contractor to proceed to Stage Two of the works. Principally the amendments allow for:

- changes to Prices, Access Dates, Key Dates and the Completion Date resulting from the Contractor's proposals for Stage Two; and
- a more detailed process for the Contractor to submit their proposals for Stage Two to the Project Manager for approval, including an obligation to consult with the Project Manager on the Project Costs and proposals.

ECI is well established in market as an effective vehicle to promote collaboration, speed of delivery and optimised designs although it does of course come with its dangers if the process is not managed carefully. The introduction of additional structure is welcome although, as we commented originally when an ECI clause for use with NEC3 ECC was issued, the client still needs to engage proactively during Stage 1, so as to monitor and drive implementation of the ECI ethos and to mitigate the risks as far as possible.

## **Project Bank Accounts – Option Y(UK)1**

The optional drafting that provides for a project bank account (PBA) to be established and used has been updated across a number of the NEC4 contracts to reflect user feedback, the prevalence of electronic banking methods and to endorse best practice.

PBAs have been described as underpinning the collaborative intent behind NEC contracts and these amendments, summarised below, clarify the scope of collaboration and give users more flexibility:

- **Wider choice of account holder:** The client is now able to decide whether it or the contractor will establish and hold the PBA on an individual basis or jointly. This gives the client greater flexibility as it can decide how involved it would like to be in administering the PBA. The allocation of responsibility is clearly captured in the Contract Data.
- **Use of electronic banking:** Electronic banking methods have now been accounted for, which reflects its growing use.
- **Introduction of a Payment Schedule:** A “Payment Schedule” has been introduced that replaces the existing “authorisation” document. This schedule is prepared and maintained by the contractor and identifies the payments from the PBA to be made to the contractor and Named Suppliers. While the contractor takes on the responsibility for this document, collaboration is essential as it is required to provide the information noted in the Payment Schedule to the project bank and a copy must be provided to the project manager.
- **Introduction of a PBA Tracker:** The amendments implement a new PBA Tracker. Also prepared by the contractor, this tracker is a register of all payments made into and out of the PBA and the dates on which they were made. This tracker must be updated and issued to the project manager every time a payment is made from the PBA.

While the amendments to the PBA procedures undoubtedly clarify matters for those projects on which they are used, as our colleague Yousef Shakah noted recently in his blog, PBAs are still not widely used in the UK market with their use being typically confined to major projects with cost, administration and sheer complexity remaining key deterrents.

The amendments to the PBA mechanisms may well be of limited relevance if the vehicle is rarely used in practice although the recently published Construction Playbook confirms that while PBAs are not always suitable, they should be used on public sector projects unless there are compelling reasons not to.

## **Contractor’s liabilities and use of equipment, Plant and Materials**

Amendments have been made to several NEC forms to make clear that the contractor is liable for loss of or damage to any equipment provided by the client to the contractor. Provisions detailing the rights to use equipment, Plant and Materials and other materials provided by the client have also been simplified. Undoubtedly, such clarification is welcome.

## **Final thoughts**

Overall the 2020 update is welcome.

But what is surprising is not what NEC has chosen to address but rather what it has chosen NOT to address. For example, no amendment has been made to take account of the Corporate Insolvency

and Governance Act (CIGA), which came into force on 26 June 2020 and, in particular, the two new insolvency and restructuring processes introduced by CIGA.

While the Part 26A restructuring plan may be covered by the current wording, making “an arrangement with its creditors” (for example R10 of NEC4 ECC), the new Part A1 moratorium is not covered. The effect of this is that the client will not be able to terminate immediately if the contractor enters into a Part A1 moratorium. The NEC may have considered that it is not appropriate for the client to terminate in these circumstances given that the Part A1 moratorium process is designed to allow financially distressed incorporated entities a breathing space from enforcement action by certain types of creditors while they organise their affairs to make their rescue viable. Ultimately, if the contractor has entered a Part A1 moratorium, it will either be rescued as a going concern or enter into a subsequent insolvency process, at which point the client may terminate. However, in the absence of guidance or relevant contract drafting, clients are likely to continue to amend the termination provisions to ensure they capture the new insolvency processes. Perhaps this will be addressed in an update for 2021!

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This [article](#) first appeared on the Practical Law Construction blog dated 16 December 2020.

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