

Insights

NEED TO KNOW: OCTOBER 2020 NEC4 AMENDMENTS

Mar 02, 2021

SUMMARY

Recent amendments made to the NEC4 suite serve to clarify delay damages provision, payment schedules and ensure collaboration between client and contractor.

The **NEC4 contract suite** was published for use in June 2017. It had evolved from the NEC3 suite to provide simplified processes, reduce disputes and make contract provisions simpler to understand. The first set of amendments to the NEC4 suite were published in January 2019. A second set followed in October 2020 in the light of feedback from users and industry experts, and this article describes some of the key changes made.

Secondary option X7: delay damages

Before the October 2020 updates, option X7 provided that damages owing to delay would be recoverable until completion or the date on which the client took over the works, whichever was the earlier.

The recent amendment clarifies that all delay damages under option X7 end on the date the project manager issues a termination certificate. After termination, further delay costs will be considered part of the general costs or damages due as a direct result of the termination of the contract.

It is likely that this change is designed to address the issue considered by the Court of Appeal in **Triple Point Technology Inc v PTT Public Co Ltd [2019] EWCA Civ 230**, namely whether delay damages 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, the position under the NEC4 standard forms is beyond doubt.

This amendment applies to all NEC4 Contracts.

Secondary option Y(UK)2: "final date for payment"

The update amends option Y(UK)2 to reflect the judgment in **Rochford Construction Ltd v Kilhan Construction Ltd [2020] EWHC 941 (TCC)**. In this case, it was held that the "final date" for payment should be linked to the "due date" by a fixed period of time, rather than being linked to the occurrence of an event after the "due date", such as the issue of a VAT invoice.

Before the update, a number of NEC4 contracts linked the "final date" for payment to the submission of an invoice. The NEC has thus amended option Y(UK)2 in these contracts to ensure that the "final dates" for payment are linked to a set period from the "due date" and not to an event. The amendment changes the due date to the later of the date of receipt of an invoice by the party which is making payment and 14 days from the assessment date.

Parties should note that, while the detailed list of amendments to NEC4 indicates that option Y(UK)2 is deleted in its entirety and replaced with revised wording, it is only Y(UK)2.2 that has been amended in each case.

This amendment applies to:

- Design Build and Operate Contract
- Professional Services Subcontract
- Term Service Contract
- Term Service Short Contract.

Secondary Option X22: early contractor involvement

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

The amendments to option X22 allow for greater flexibility in stage one, and a more structured process for submitting the contractor's proposals for stage two to the project manager for acceptance and notice to proceed to stage two. The revisions require:

- the contractor to consult with the project manager to agree changes to "access dates", "key dates", "completion date" and any changes to the total of the prices resulting from the contractor's proposals for stage two
- a more detailed process for the contractor to submit its proposals for stage two to the project manager for acceptance.

ECI is well established as an effective way to promote collaboration, speed of work and optimised designs, and is one of the key policies identified in the government's recently published **Construction Playbook**. The use of this option is therefore likely to increase.

This amendment applies to:

- Alliance Contract
- Engineering and Construction Contract.

Secondary option Y(UK)1: project bank accounts

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 and the prevalence of electronic banking, and also to endorse best practice.

The key changes include the following.

- **Wider choice of account holder**

The client is now able to decide whether the contractor will establish and hold the PBA on an individual basis or whether it is held jointly by the client and the contractor.

- **Use of electronic banking**

Electronic banking methods have now been accounted for, to acknowledge their growing use.

- **Introduction of a payment schedule**

A payment schedule has been introduced that replaces the existing authorisation document. The payment schedule is prepared and maintained by the contractor, and identifies the payments from the PBA to be made to the contractor and named suppliers.

- **Introduction of a PBA tracker**

Also prepared and updated by the contractor, this PBA tracker is a register of all payments made into and out of the PBA, logging the dates on which they were made.

The **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 do so.

This amendment applies to:

- Alliance Contract
- Engineering and Construction Contract

- Engineering and Construction Subcontract
- Professional Services Contract
- Professional Services Subcontract
- Supply Contract
- Term Service Contract
- Term Service Short Contract.

Contractor liabilities and use of equipment, plant and materials

Amendments make it clear that the contractor is liable for loss of or damage to any equipment provided by the client. Provisions detailing the rights to use equipment, plant and materials and other materials provided by the client have also been simplified. The right to use other materials provided by the client has been expressly included in the provisions of clause 71.1, together with an ability for the contractor to make these rights available to a subcontractor; making it clear to the parties how such matters are to be dealt with.

This amendment applies to:

- Design Build and Operate Contract
- Term Service Contract
- Term Service Short Contract.

It is important to be aware of the latest amendments when using the latest NEC forms of contract; by using earlier versions, or staying with NEC3, parties will not have the benefit of the increased clarity offered by the new amendments.

A **full schedule** of the NEC4 amendments is available for each contract on the NEC4 website, while updated versions of **User Guides** have been produced to reflect amendments and support users.

This article was first published by [RICS Construction Journal](#) on 26 February 2021.

RELATED CAPABILITIES

- Commercial Construction & Engineering
- Real Estate
- Commercial Real Estate

MEET THE TEAM



Kimberly Roberts

London

kimberly.roberts@bclplaw.com

+44 (0) 20 3400 4627

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.