

Insights

NEC4: JANUARY 2023 AMENDMENTS

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SUMMARY

In this Insight, Lucy Hawley and Sarah Platts consider the key changes made to the NEC4 suite by the January 2023 amendments.

At the start of this year NEC published the third set of amendments to the NEC4 suite of contracts. In this Insight, we look at some of the key changes.

CLIMATE CHANGE: SECONDARY OPTION X29 (ALL NEC4 CONTRACTS)

Option X29 (Climate Change), originally published as a standalone clause in July 2022, has now been incorporated into all main NEC4 contracts. This change reflects the direction of travel in market as parties more frequently look to include teeth in their climate change contractual provisions.

EARLY CONTRACTOR INVOLVEMENT (ECI): SECONDARY OPTION X22 (ECC)

Originally introduced in 2015 as part of the NEC3 suite and updated in October 2020, Option X22 (ECI) enables parties to contract on a two-stage basis (Stage One (pre-construction phase): scope and design development and agreement of price and Stage Two (Construction phase): design finalisation and development delivery).

Over the years, X22 has established itself in market as a straightforward framework for parties wishing to use this mechanism. Key changes this time focus on improving collaboration and introducing flexibility into project development during Stage One while clarifying what happens if the project does not proceed to Stage Two.

The changes are welcome, although as ever, for ECI to be a success the Client needs to proactively manage Stage One to ensure the benefits of better design, collaboration and faster delivery times

result and both parties need to actively engage with the process. Unfortunately, no drafting can make this happen; it is all to do with the parties having the right mind set from the outset.

ADJUDICATION: DISPUTE RESOLUTION OPTION W2 (ALL CONTRACTS WHICH INCLUDE Y(UK)2)

Option W2 is used where statutory adjudication applies under the Housing Grants Construction and Regeneration Act 1996. Minor changes have been made to this Option to ensure it aligns with the Act.

Changes include express provision that the adjudicator will decide the procedure and timetable for adjudication. In addition, the requirement for all adjudicator submissions to be made within 14 days (unless the parties agree otherwise) has been removed. This is a sensible change as the mutual consent for extension of the submission deadline, while straightforward in theory, was rarely workable in practice.

WORKING FROM HOME AND OTHER LOCATIONS OUTSIDE OF THE WORKING AREAS (ALC, DEBOC, ECC, ESC, FMC, FMS, TSC, TSS)

Changes have been made to the Schedule of Cost Components and the Short Schedule of Cost Components to address remote working (both home working and working from other locations).

An option has been included in the Contract Data for users to identify whose costs will be recoverable as part of the Defined Cost where people are working outside of the Working Areas/Service Areas. This is a sensible change driven, we assume, by changes in working culture following Covid-19.

LIMITATION OF CONTRACTOR'S LIABILITY FOR DESIGN (ECSC AND ECSS)

The Engineering and Construction Short Contract (ECSC) and Engineering and Construction Short Sub-contract (ECSS) have been amended to provide the Client with the option of altering the Contractor's liability for design from the higher liability for any failure in such design to a standard of reasonable skill and care used by professionals designing similar works. This Option is similar to Option X15 (Contractor's Design) in the NEC4 ECC.

Clients should be aware that if this Option is selected, and the Contractor corrects any defect for which it is not responsible (as it exercised reasonable skill and care), this will constitute a compensation event.

SUPPLIER'S DESIGN (ALC, DEBOC, ECC, ESC, FMC, FMS AND SC)

The principles of clause 22.1 (which relate to use and copying of design) have been extended so the Client can now also use and copy the Supplier's design and any documents prepared for design. This change has also been made to the relevant subcontracts.

DAMAGE TO THE CLIENT'S PROPERTY (FMSC AND FMSS)

Changes have been made to both the Facilities Management Short Contract (FMSC) and Facilities Management Short Sub-contract (FMSS) to provide that the Service Provider is liable for loss or damage to the Client's property resulting from the Services Provider Providing the Service. However, the Client can limit such liability, should it wish to do so, in the Contract Data.

MINOR CONSISTENCY CHANGES

Limitation of liability (ECSC, ECSS, FMSC, FMSS, SSC, TSSC and TSSS): To ensure consistency between the shorter form contracts and the main contracts, an optional provision to limit liability has been added to the Contract/Sub-contract Data.

Payment on termination (SSC): A change concerning payment due to the Supplier as a result of termination due to Purchaser default/Purchaser's convenience has been added to the Short Supply Contract (SSC) to ensure consistency with the other NEC4 contracts.

FINAL THOUGHTS

Overall, these latest amendments further improve the NEC4 suite of contracts addressing feedback from industry users. Aiming to reflect best and common practice in the industry, users should consider including them in new contracts although, ultimately, as always, such inclusion will depend upon the particular parties and the project.

This article was authored by Lucy Hawley, Associate and Sarah Platts, Trainee

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