



NEC4: Practical Solutions

Second edition



Robert Alan Gerrard and Patrick Waterhouse

NEC4: Practical Solutions

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Second Edition

Robert Alan Gerrard

BSC(HONS) LL.M FRICS FCINSTCES NECREG

and

Patrick Waterhouse

CENG FICE FCIARB FCINSTCES MRICS

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Preface

Following the resounding success of *NEC3: Practical Solutions*, the book *NEC4: Practical Solutions* was published to coincide with the launch of the NEC4 suite of contracts (June 2017). There has been a series of amendments made to the NEC4 suite of contracts since then, and this book has been revised to reflect amendments made in 2019, 2020 and 2023.

As well written as the NEC3 contracts were, there was a real appetite from users to obtain a better understanding of these contracts than others before, and therefore numerous questions as to their practical application prevailed. When analysed, it was evident that similar questions tended to be repeated – highlighting a potential gap in users’ knowledge that might benefit from better guidance or more training.

NEC4: Practical Solutions provides a comprehensive set of responses to the questions that are most likely to be raised regarding the NEC4 suite of contracts. It is not, therefore, a clause-by-clause analysis, but addresses the issues, problems and queries that are expected to arise in use.

We have mainly based this book on real questions posed to the NEC Users’ Group helpline over the past few years. We noticed that there were certain questions that occurred quite frequently, particularly concerning defined terms, the programme, payment, compensation events and Defined Cost. It is these recurring questions that have formed the basis for the book. Where necessary, we reworded NEC3 questions for the NEC4 contracts. *NEC4: Practical Solutions* provides detailed contractual responses to more than 280 common queries faced by practitioners during the design and implementation stages of a project, as well as the risks associated with running a project. As it mirrors the typical questions posed, there is a natural focus on the NEC4 Engineering and Construction Contract (ECC). However, the book also covers other contracts within the NEC4 suite.

The book is structured in the same chronological order as the ECC, which we hope will enable readers to use the book as a quick look-up tool to provide answers to common questions and problems that occur in practice. We have also included tips on better drafting of contract documents and made reference to further guidance to enhance its usefulness.

We wanted to write the book because, as NEC4 consultants, we recognise that the same repeat problems tend to emerge on projects. We are both passionate about providing concise and practical solutions to these common problems in a format that can be readily sourced. In turn, this should help project teams resolve differences in contract interpretation quickly.

It is our hope that *NEC4: Practical Solutions* will be an invaluable reference guide for engineers, surveyors, architects, project managers, supervisors, consultants, contractors, subcontractors and anyone else working with or interested in working successfully with the NEC4 suite of contracts.

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About the authors

Robert Alan Gerrard BSc(Hons) LLM FRICS FCInstCES NECREg

Robert is a chartered quantity surveyor with 40 years' experience of setting up and managing contracts, mainly in the construction industry, in the UK and internationally. He is also an accredited mediator.

Robert has been the NEC Users' Group Secretary since 2005 and was part of the NEC4 drafting team. He is also an NEC consultant, and has run numerous NEC training courses, working with NEC contracts since 1996.

Patrick Waterhouse CEng FICE FCIArb FCInstCES MRICS

Patrick is a construction adjudicator, accredited mediator, expert determiner and contracts consultant. He is a renowned expert in NEC contracts, having worked with them since their first publication in the 1990s. He was part of the team that produced the NEC4 contracts. He has adjudicated and mediated many NEC disputes over the years. He is a member of ten adjudication panels.

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Abbreviations

ALC	NEC4 Alliance Contract (June 2017, with amendments January 2023)
DBO	NEC4 Design Build and Operate Contract (June 2017, with amendments January 2023)
DRSC	NEC4 Dispute Resolution Service Contract (June 2017, with amendments January 2023)
ECC	NEC4 Engineering and Construction Contract (June 2017, with amendments January 2023)
ECS	NEC4 Engineering and Construction Subcontract (June 2017, with amendments January 2023)
ECSC	NEC4 Engineering and Construction Short Contract (June 2017, with amendments January 2023)
ECSS	NEC4 Engineering and Construction Short Subcontract (June 2017, with amendments January 2023)
FC	NEC4 Framework Contract (June 2017, with amendments January 2023)
FMC	NEC4 Facilities Management Contract (June 2021)
FMSC	NEC4 Facilities Management Short Contract (June 2021)
FMS	NEC4 Facilities Management Subcontract (June 2021)
FMSS	NEC4 Facilities Management Short Subcontract (June 2021)
PSC	NEC4 Professional Service Contract (June 2017, with amendments January 2023)
PSS	NEC4 Professional Service Subcontract (June 2017, with amendments January 2023)
PSSC	NEC4 Professional Service Short Contract (June 2017, with amendments January 2023)
SC	NEC4 Supply Contract (June 2017, with amendments January 2023)
SCC	Schedule of Cost Components
SSC	NEC4 Supply Short Contract (June 2017, with amendments January 2023)
SSCC	Short Schedule of Cost Components
TSC	NEC4 Term Service Contract (June 2017, with amendments January 2023)
TSS	NEC4 Term Service Subcontract (June 2017, with amendments January 2023)
TSSC	NEC4 Term Service Short Contract (June 2017, with amendments January 2023)

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Chapter 1

General

1. Dealing with head office overheads in the Term Service Contract (TSC) (clauses 11.2(22) and 11.2(23))

QUESTION

How do we deal with head office overheads when using the TSC? Are these covered in the Fee?

ANSWER

There is no direct reference in the TSC to ‘head office overheads’, and this term might mean different things to different people. You need to understand what cost the *Contractor* can recover through the contract – this is called Defined Cost and is defined in clause 11.2(22) in Option A and 11.2(23) in Options E and F. Clause 52.1 then confirms that all costs not included in Defined Cost are treated as included in the Fee.

So, you need to concentrate on the components in the Defined Cost definitions and understand what they mean, and cover – such as people, Plant and Materials, Subcontractors and Equipment. Most of the components need to be Providing the Service within the Service Areas, but there are some exceptions. As you work through all other costs on the same basis, you will appreciate what cost falls within the definition of Defined Cost and that everything else is treated as included in the Fee.

2. Spirit of mutual trust and co-operation (clause 10.1)

QUESTION

Clause 10.1 sets out an obligation to follow what the contract states and, from clause 10.2, work in a spirit of mutual trust and co-operation. I appreciate that several cases have defined the latter.

Why are these separated into two clauses?

ANSWER

Yes, most of the contracts within the NEC4 suite contain the same clauses 10.1 and 10.2. These are separated in order to reinforce the need to undertake both.

- Clause 10.1 contains an express requirement to ‘act as stated in the contract’.
- Clause 10.2 contains an express provision to act ‘in a spirit of mutual trust and co-operation’.

Both aspects need to be complied with – not just the former. These provisions apply to all actions and procedures in the *conditions of contract*.

3. What is Site Information? (clause 11.2(18))

QUESTION

I have a query regarding the content of Site Information in an Engineering and Construction Contract (ECC) Option A contract used for design-and-build procurement. The project involves the design and construction of an asset, but the Site is to be determined by a developer and will be surrounded by a housing development and highways, which are yet to be designed in detail. Does the source of information impact its status as Site Information? For example, if a ground investigation or similar report is procured by the design-and-build *Contractor*, does it still constitute as being Site Information? Similarly, if a ground investigation report is provided by a third-party housing developer, could that be Site Information?

ANSWER

The first thing to say is that Site Information is a defined term (clause 11.2(18)), so only information that falls within that definition will count. Part of the definition refers to ‘documents which the Contract Data states it is in’, which means it must be referenced in the relevant entry in Contract Data part one.

So, to answer your question, the source of the information in the Site Information is irrelevant. If it is in the Site Information in the contract and complies with the first bullet of clause 11.2(18), then it is Site Information. The Site Information is, however, used in the ECC for only one purpose, which is to help determine what ‘an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for them’ (clauses 60.1(12), 60.2 and 60.3). Site Information is important in that it enables the *Contractor* to make reasonable assumptions at the tender stage, rather than assuming the worst and pricing for it. Clause 60.1(12) refers to compensation events that arise due to physical conditions at the Site.

You refer to a ground investigation procured by the *Contractor*. The status of that will depend on when it is procured and what the contract says. If the ground investigation is procured at the tender stage, and if the *Contractor* bases its price on the investigation, then it is sensible to include the investigation within the Site Information in the subsequent contract entered into. That gives better certainty to both Parties. In those circumstances, however, the *Client* should satisfy itself that the ground investigation has been competently carried out, as it potentially takes the risk for any physical conditions that are worse than shown. Of course, the benefit to the *Client* is that the tender price should be lower as a result.

Unless using secondary Option X22, there is no facility in the contract to change the Site Information after the Contract Date, unlike the Scope. Once the contract is formed, any ground investigation sourced by the *Contractor* does not become Site Information. The *Contractor* is, of course, entitled to argue that the information in its later ground investigation shows that the physical conditions are such as to trigger a compensation event under clause 60.1(12), but that will be judged partly on any Site Information you put into the contract.

Finally, NEC has produced some guidance on how to write the Scope for the ECC, which also includes a section on the difference between Site Information and Scope. This is contained in volume 4 of the ECC User Guides. We strongly recommend that anybody tasked with putting together both the Scope and Site Information reads this document.

4. What is the Early Warning Register? (clause 11.2(8))

QUESTION

I'm a new adopter of the ECC and note that there is an Early Warning Register. Can you explain the rationale behind this and how risks are managed in the contract?

ANSWER

The approach to risk management under the ECC is intended to be proactive rather than reactive. This is all contained within clause 15. The *Project Manager* is initially required to prepare a first Early Warning Register within 1 week of the *starting date*. This should be based on the identified matters from the Contract Data. The Contract Data also includes an entry to be made stating the frequency of early warning meetings in order that the matters are reviewed regularly. Many of the online communication systems available for NEC contracts include a semi-automated provision for the Early Warning Register, reducing the time commitment for the *Project Manager*.

Clause 15.1 places an obligation on both the *Project Manager* and *Contractor* to notify early warnings and potentially include others if agreed (clause 15.2). This may include the supply chain, the *Client*, stakeholders or both.

Clause 15.3 sets out how the matter should be managed (effectively forming the agenda for the meeting) and the need to co-operate and seek solutions that bring advantage to all those affected.

Clause 15.4 further requires the *Project Manager* to issue the Early Warning Register to the *Contractor* within 1 week of the early warning meeting and instruct a change to the Scope, if required at the same time.

This should ensure that the team focuses on proactive management and deals with potential problems effectively.

5. Establishing a cut-off between genuine cost in Providing the Service and what is effectively a head office cost in the TSC (clause 11.2(15))

QUESTION

I am working for a client about to procure an Option C maintenance contract over a large geographic area. There will be a lot of support work away from the Affected Property, such as the call centre, accounts and procurement.

How can we ensure that the *Contractor* does not charge for management and overhead costs that are included in the Fee?

ANSWER

Your aim should always be to ensure that the right amount is certified and paid; remember clause 10.2.

Clause 11.2(15) of the TSC defines the Service Areas, and this is relevant to assessing the amount due for some of the people used by the *Contractor*. There are five categories of people mentioned in the Schedule of Cost Components (SCC), which is relevant to main Option C.

- People who are employed by the *Contractor* and whose normal place of working is within the Service Areas. The costs of these people form part of Defined Cost wherever they are working. So, for example, if they attend a meeting somewhere else or visit a supplier then the costs would be allowable.
- People who are employed by the *Contractor* and whose normal place of working is outside the Service Areas – for example, people at head office or a regional hub. They are paid for according to the time spent in the Service Areas. Here, the management and overhead costs that concern you would not form part of Defined Cost.

- People who are employed by the *Contractor* and whose normal place of working is outside the Service Areas and who are working outside the Working Areas and who are identified in the Contract Data. For example, someone providing support on a technical helpline. These costs form part of Defined Cost and are paid at the rates stated in the Contract Data.
- People who are not employed by the *Contractor* but are paid for according to the time they work. Their costs form part of Defined Cost regardless of where they work. People in this category may be sole traders or those working through a service company but do not qualify as a Subcontractor.
- People who are employed by the *Contractor* and work outside the Service Areas in providing a *shared service* who are identified in the Contract Data as doing so. Their costs are paid at the rates stated in the Contract Data according to the time spent working.

Remember that for all costs listed in the SCC, they must be incurred in order to Provide the Service, so your scrutiny of the *Contractor's* accounts and records should always ask why the cost was needed.

Item 41 (Subcontractors) within the SCC protects against subcontracting work that is covered by the Fee 'but not including any amounts paid to or retained from the Subcontractor by the *Contractor* which would result in the *Client* paying or retaining the amount twice'.

Finally, proposals to add to the Service Areas are dealt with in clause 16.4.

6. What is a Subcontractor? (clause 11.2(19))

QUESTION

We are using the ECC, and in relation to clause 11.2(19) we are trying to understand the cut-off between labour-only operatives and Subcontractors. Where is the line drawn?

ANSWER

What you must look at is the contract between the *Contractor* and Subcontractor. If the contract falls within one of the bullets stated in clause 11.2(19), then it is a Subcontractor, otherwise it is not. So, if it has a contract to lay all the brickwork on a people-only basis, for example, and is paid an amount per square metre to do so, then it is a Subcontractor under the first bullet. In that case, it has the obligation to provide the resources to do this within the time set out in the contract. If it instead has a contract to supply bricklayers at an amount per hour (and Equipment at an amount per hour), and those bricklayers will be put to work as determined by the *Contractor*, then it is not a Subcontractor because its obligation is to provide people to work rather than the result (last bullet of clause 11.2(19)).

7. Are in-house designers Subcontractors? (clause 11.2(19))

QUESTION

We have been on a fast-track ECC Option E contract, and the design was developed as the *works* proceeded. As a result, the designer had a heavy presence on Site as well as backup in the design office. The rates within Contract Data part two are now 5 years old, and the contract has an inflation provision for the designer. The designer is ‘in house’, albeit a separate legal entity under the umbrella of the parent company. There was no formal subcontract in place.

Within Contract Data part two there is a completed table for design employees (disciplines) under the line ‘The rates for Defined Cost of design outside the Working Areas are’.

Under the ECC, should the designer be treated as a Subcontractor? If not, should the design works (done outside the Working Areas) be valued at the hourly rates in Contract Data part two plus the Fee plus inflation? Also, if not a Subcontractor, should the design works done inside the Working Areas be valued at the same hourly rates plus the Fee plus inflation?

ANSWER

This designer is not a Subcontractor because you have not got a subcontract with it (clause 11.2(19)). It is difficult to comment on the inflation provision, as no further details are provided. For design work carried out outside the Working Areas you will be paid for the designer’s rate in Contract Data part two plus the Fee.

The designer’s rates only apply for design carried out outside the Working Areas (item 7 of the SCC). If it is carrying out design in the Working Areas, your quoted rates are not used at all. Instead, you use the calculation for people set out in item 1 of the SCC, and to that you add the Fee.

8. How do we sign the contract? (clause 12)

QUESTION

We have a copy of the ECC, but there is nowhere for the Parties to sign. Is there another document that sits with this, or do we have to create our own signing provisions?

ANSWER

The omission is quite deliberate. It is for the Parties to decide how the contract is to be made, because it could well depend on the *law of the contract* (or even the law of the country that one or more of the Parties reside in). In England, it could also depend on whether you want a deed, or not.

So, you can make it as straightforward or as complicated as the applicable law requires. Offer and acceptance may be sufficient in the UK, or you can write out a more formal document (deed or not) for both Parties to sign. A suggested form of agreement is provided in Volume 2 of the ECC User Guides at chapter 6.

9. Mutual agreement to revise the Activity Schedule (clause 12.3)**QUESTION**

We have an ECC Option A project on Site where the programme has been revised. As funding is time critical, we are questioning how we can ease the release of payments. Considering clause 32.1, can the *Project Manager* and *Contractor* mutually agree to revise the Activity Schedule to co-ordinate with the accepted revised programme, including splitting original contract activities within the Activity Schedule and tasks within the revised programme into two sub-activities (i.e. ‘Delivery of materials on Site’ and ‘final complete installation’)?

ANSWER

You can change the Activity Schedule because of a compensation event (clause 63.14), if the *Contractor* changes its planned method of working (clause 55.2) or if the *Contractor* corrects the Activity Schedule so that the activities on the Activity Schedule relate to the Scope (clause 55.2). None of these applies in this case. The only way that your suggestion can be achieved is if the *Client* and *Contractor* agree to change the contract and it is confirmed in the way set out in clause 12.3.

10. Instructing an additional section of the works (clause 12.3)**QUESTION**

I am the *Project Manager* working on an ECC design-and-build contract. The *Client* has instructed me to notify the *Contractor* to accelerate a certain amount of work to ensure that it is completed on a certain date, which is before the current Completion Date.

Is the right way to do this to notify the *Contractor* of a new *sectional* Completion Date, providing the *Contractor* with a list of the work to be completed by this date and then ask the *Contractor* for a quotation for the impact of this?

ANSWER

You simply do not have the power under the contract to issue an instruction to complete *works* by a certain date or add a new *sectional* Completion Date to an existing contract. If you tried to do that, the *Contractor* could ignore your instruction with impunity, because it is only required to obey an instruction that is given in accordance with the contract (clause 27.3).

All that can happen is that the *Client* (not the *Project Manager*) and *Contractor* can agree to change the contract to accommodate the new requirements. It is likely that the *Contractor* will only agree to this for an additional sum, payment of which will form part of the agreement. Any such agreement must comply with clause 12.3. We therefore recommend that the *Client* needs to start talking to the *Contractor* about this, because the longer the agreement takes, the more expensive it is likely to be. As the *Client's* instruction applies only to a certain amount of the *works* rather than all of it, you cannot even use clause 36. And even if you could, you still need to get the *Contractor's* agreement to the quotation before proceeding.

11. Should we consolidate tender documentation? (clause 12.4)

QUESTION

We are about to start a contract using ECC Option B, which has been the subject of a prolonged period (6–10 months) of exchanges, refinements and discussions following the initial tender. We think it would be beneficial for a copy of a definitive document, which presents all the agreement after all the correspondence and negotiations, to be supplied before commencement. We consider this would make the contract management task simpler for both us and the *Project Manager*. We have asked for this but have been advised along the lines that we have all the information necessary already and, additionally, that it will be available by means of the electronic management system used for tendering. It would appear that the intention is to work with the multiple volumes of all exchanges/offers/counter-offers through the period as a package of emails rather than presenting the output in a more concise package that references the necessary changes. Is there any written requirement in the ECC for a consolidation of such documentation?