

CONSTRUCT

NEC ECC CONTRACT

EDT. 1

THE STRUCTURE AND READING OF THE
NEC ECC CONTRACT



Construction & Technology Attorneys

In 2025 the MDA Attorneys Construct Journal will dissect and discuss certain key features of the NEC3 and NEC4 engineering and construction contract (NEC ECC) across six separate editions. The NEC suite of documents consists of various contracts, which share common features. Although the Construct Journal will focus on the NEC ECC, several of the features discussed will apply across the other various NEC contracts.

In this first edition, MDA Attorneys explains the structure of the NEC ECC and provides a high-level discussion on certain key detail that informs the NEC ECC.

Structure of NEC ECC

The structure of the NEC ECC and how the final contract should be read, is often a source of confusion given the multiple options available to contracting parties when entering into the contract.

The starting point, is the Contract Data which should provide the following details:

- Which NEC3 or NEC4 contract, including details of which reprint, will be the applicable standard form;
- Which payment option has been selected by the employer;
- Which secondary options are applicable;
- Which dispute resolution option has been chosen;
- Where the reader will find the Works Information/Scope and Site Information; and
- What changes have been made to the standard form via the Z-clauses

The Contract Data also gives detail of the identified terms (that is the italicised words used in the contract).

Core clause 1 sets out the definitions which are used in the contract. These are capitalised words and should be distinguished from italicised words which are identified terms. Please note that the payment option selected has additional definitions which must be read as part of the contract.

NEC3 or NEC4 standard form

Although the NEC3 ECC was released in 2005, various clauses were corrected and/or tweaked resulting in reprinted editions in June 2006, and April 2013.

The NEC4 ECC was released in June 2017.

The Contract Data should specify exactly which NEC contract is being used with details of the reprinted edition, if applicable.

The NEC ECC has nine core clauses which always apply, regardless of which payment option, secondary option or dispute resolution option are chosen.

Payment Options

The NEC ECC provides for six different payment options (A to F). Each of these payment options have specific clauses which are read with the core clauses.

These payment specific clauses *talk* to the payment option selected. For example, option B is a remeasurable contract and the payment specific clauses in this option reflect the use of a bill of quantities as the key document for determining regular payments due to the contractor.

The selection of the payment option also determines whether the shorter schedule of cost components (options A and B) or the schedule of cost components (options C to F) apply, a topic which will be considered more closely in later editions.

Secondary Options

The NEC ECC provides for several secondary options which can be used in the final contract to adjust the risk profile. The intention behind these secondary options is to provide standard amendments so as to avoid the unnecessary inclusion of Z-clauses. The selected secondary options are read as forming part of the contract.

Some of the more common secondary options include:

- X1 – price adjustment for inflation

This provides for the inclusion of a formula to be applied to amounts due so as to address the risk of price inflation. Specific details of the formula and indices are provided by the employer in the Contract Data.

A dilemma which often arises where X1 is not used, is whether the prices remain fixed in the event that there are excessive extensions to the completion date. Compensation events, which are required to extend the completion date, permit for the assessment of cost associated with the relevant event. Thus, at least in part, the parties are able to include for the effect of inflation on the extended duration of the contract.

- X7 – delay damages

This secondary option provides for delay damages to be applied for late completion. Of interest, the NEC provides no limitation on the maximum delay damages which may be payable for late completion and, if X18 applies, these damages are excluded from any overall limitation of liability.

The effect of this is that in cases of severe late completion, an employer has the option to continue to seek payment for delay damages or terminate the contract and appoint a replacement contractor.

However, in most South African NEC contracts, a limitation of liability for delay damages is included in the Contract Data.

- X13 – performance bond

The performance bond is to be provided by a bank or an insurer acceptable by the employer within 4 weeks of the contract date. The form of the bond is to be set out in the Works Information/Scope.

The employer has the right to terminate where the contractor fails to provide a performance bond required by the contract.

The provisions of this secondary option do not describe when the performance bond is to be returned to the contractor and this can lead to controversy, particularly when it is the project manager who is empowered to change the Works Information. For example, the wording of the bond at the contract date may provide that it is returned on completion, however, this could be changed by the project manager so that the bond is returned on the issuing of the defects certificate. Although, in this example, the contractor can pursue a compensation event, this change would represent a fundamental alteration to the risk profile.

- X16 – retention

The NEC4 has introduced the option for the contractor to submit a retention bond in lieu of retention monies.

The wording of this option is similar to that found in X13.

- X18 – limitation of liability

X18 provides a comprehensive limitation of liability clause which limits the liability of the contractor. There is no limitation of liability in favour of the employer.

- X11 – termination by the client – only applicable to the NEC4

This is a termination for convenience provision which formalises what was previously referred to as a termination “for any other reason”.

If X11 is not selected, the employer is not permitted to terminate for convenience. Therefore, a termination without reason would constitute a repudiation of the contract, introducing a common law claim for damages – a remedy which was expressly excluded under the NEC3.

Further, there is uncertainty as to whether clauses 90.1 to 90.3 still apply to a termination under X11.

Dispute resolution option

The options under the NEC3 address adjudication within the United Kingdom (W2) and in other jurisdictions (W1).

The NEC4 introduces a first tier of negotiations between senior representatives to options W1 and W2, and in addition, introduces a dispute avoidance board which can be implemented for contracts outside the United Kingdom (W3).

The procedures which now need to be followed to include the senior representatives have added additional complexity and an additional possible time bar to the dispute process. Moreover, the dispute table has been amended to include a new category of dispute in relation to compensation events and programmes which have been treated as accepted.

Works Information/Scope and Site information

The Contract Data identifies where the reader will find the Works Information/Scope (a description of what the contractor is required to construct) and the Site Information (a description of the site and its conditions). These two documents are similarly read together with (and form part of) the contract

Z-clauses

These are the amendments and additions to the core clauses, payment option clauses, secondary option clauses and/or dispute resolution clauses. As with any standard form contract, when extensive amendments are made, the full impact of these amendments is not always properly appreciated and such impact only comes to the fore during the execution of the contract, typically in the form of disputes. Therefore, extensive amendments should be avoided.

In the next edition, MDA Attorneys will take a closer look at clause 10.1, the roles of the project manager and supervisor, the importance of record keeping, and how to give effective early warning notices.