

Construction Law Update

The Second Set of NEC4 Amendments – What Do You Need to Know?

Following publication of the NEC4 suite of contracts in June 2017, there has been substantial feedback from users and industry experts suggesting how the contracts could be further enhanced. In light of this feedback, NEC has recently published the second set of amendments to its NEC4 suite of contracts. This bulletin explains what the main changes include and the effects they have on the NEC4 suite of contracts.

Delay damages

Amendments have been made in every NEC4 contract that contains an option for delay damages to clarify that any delay damages cease at termination. Any further delay costs that occur after termination will form part of the general costs/damages due as a result of the termination of the Contractor/Supplier's obligation to provide the goods, works or services.

This new wording has been included to address the impact of the recent Court of Appeal decision in *Triple Point Technology Inc v PTT Public Company Ltd*. In this case, a clause that was very similar to the original NEC4 delay damages clause was held to be inapplicable on termination. This meant that delay damages that had accrued up until the point of termination could not be claimed and the client could only claim general unliquidated damages.

Contractor's liabilities and use of equipment, Plant and Materials

Clause 8.1 has been amended in the Term Service Contract, Term Service Subcontract and Design Build Operate Contract to clarify that the Contractor is liable for loss of or damage to any equipment provided to it by the Client.

NEC has also simplified the provisions in clause 7 of those contracts which set out the Contractor's rights to use equipment, Plant and Materials and other materials provided by the Client.

Early Contractor involvement

Amendments have been made to Secondary Option X22, which applies to the Engineering and Construction Contract and the Alliance Contract. These amendments provide greater flexibility in the development of a project in stage one and also provide a more structured process for the Contractor's submissions and the notice to proceed to stage two.

As part of the amendments, any changes to the Access Dates, Key Dates and the Completion Date as well as any necessary changes to the total of the Prices are to be agreed between the Project Manager and the Contractor.

Secondary Option Y(UK)1 – Project Bank Account

A number of amendments have been made to Option Y(UK)1 (Project Bank Account) in order to incorporate user feedback and reflect best practice. These include:

- The Client now has the option to decide whether the account is held by the Contractor or jointly by the Contractor and the Client. This enables the Client to decide how much day-to-day involvement in administering the Project Bank Account it would like.
- The procedures have been updated to reflect electronic banking methods.
- The Authorisation document has been replaced with a Payment Schedule to be prepared by the Contractor. The Payment Schedule should contain a list of the payments that are to be made from the Project Bank Account to the Contractor and Named Suppliers.
- The Contractor is also now required to prepare and continually update a Project Bank Account Tracker, which contains a register of all payments made to and from the Project Bank

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Account, stating the date each payment was made.

not be relied upon in any specific situation without appropriate legal advice. If you require legal advice on any of the issues raised in this article, please contact one of our specialist construction lawyers.

These amendments apply to all of the contracts in the NEC4 suite except the Design Build Operate Contract and Professional Services Short Contract.

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Secondary Option Y(UK)2 – The Housing Grants, Construction and Regeneration Act 1996

In order to reflect recent developments in UK case law which confirmed that the final date for payment must be a fixed period of time from the due date, and cannot be linked to the provision of invoices, Secondary Option Y(UK)2 has been amended. This amendment applies to those NEC4 contracts that link the “final date for payment” with the submission of an invoice from the payee (i.e. the Professional Service Contract, Professional Service Short Contract, Term Service Contract, Term Service Subcontract and Design Build Operate Contract).

The amendments mean that the final date for payment is now a fixed period of time from the “due date” and no longer runs from the date of receipt of an invoice by the payer. The “due date” is now the later of:

- i. the date of receipt of an invoice by the paying party; or
- ii. fourteen days from the assessment date.

It is important to note that these amendments do not change the overall timescales for payments.

Summary

NEC has published a full schedule of amendments for each contract which can be found on the NEC contract website.

NEC has also confirmed that it will no longer provide updates for the NEC3 suite of contracts, so anyone still using NEC3 standard forms should consider incorporating similar amendments to these NEC4 ones (as appropriate).

This article contains information of general interest about current legal issues, but does not provide legal advice. It is prepared for the general information of our clients and other interested parties. This article should