



Welcome to the May edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

This issue considers the key responsibilities of the Employer and the Consultant in the Professional Services Contract.



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NEC3: Key Responsibilities

This 35th issue of *Insight* is the second of a three-part series on NEC3.

The first part dealt with the problems that are commonly encountered in NEC3 and possible solutions (see http://www.fenwickelliott.com/files/insight_issue_32.pdf). This second part will examine the key responsibilities of the Employer and Consultant in the Professional Services Contract and provide practical pointers on how to navigate them.

Key responsibilities of the Employer

The key responsibilities of the Employer are as follows:

Clause 20

Clause 20: The Employer's obligations

- 20.1 The Employer provides information and things which this contract requires him to provide in accordance with the Accepted Programme.
- 20.2 The Employer may give an instruction to the Consultant which changes the Scope or a Key Date. After Completion, an instruction is given only if it is necessary to Provide the Services.

Practice points

Clause 20.1

Clause 20.1 requires the Employer to provide "information and things" that are required in relation to the Scope or the Accepted Programme (either by reference to the Accepted Programme that is identified in the Contract Data, or to the latest programme accepted by the Employer).

In practical terms, the information and documents referred to in clause 20.1 will usually relate to the design process. Consultants should therefore ensure

that any BIM-related information, design documents (including the required format of each document), dates appearing in the Accepted Programme, access requirements, and personnel to whom the Employer will need to provide the Consultant access for the purposes of the design process are either set out in the Scope, or are incorporated into the contract by reference to the Accepted Programme.

It is not sufficient simply to include the required information and documentation. Consultants should also ensure that the dates for the provision of all information and documentation, exactly who is to provide all information and documentation, and any other relevant logistics (for example, who will be responsible for managing the information collection process, and the format in which information will be communicated) are clearly set out.

If the Employer's obligations are not set out in sufficient detail in the Accepted Programme, then Consultants may not, if delays occur, be entitled to any additional time or cost relating to any "information and things". Conversely, if the Employer does not provide the "information and things" in accordance with the Accepted Programme, then provided Consultants comply with the relevant notification procedures, a compensation event will be triggered pursuant to clause 60.1(2) or clause 60.1(3).



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Clause 20.2

Clause 20.2 entitles the Employer to instruct a change to the Scope or a Key Date. Any such instruction will give rise to a compensation event under clause 60.1(1).

If the change appears to be one that will be impossible to comply with, Consultants should either invoke the early warning clause (clause 15) or the illegal and impossible requirements clause (clause 17) to bring the impossibility to the Employer's attention. If either of these clauses is invoked, and the Employer does not take heed of the Consultant's warning, then another compensation event may be triggered in respect of the Employer's failure to deal with the matter in a spirit of cooperation under clause 10.1.

Key responsibilities of the Consultant

The key responsibilities on the part of the Consultant appear in clause 21 (obligations to provide the Services in accordance with the Scope and to use care and skill in the performance of those Services), clause 22 (key named person(s) or a replacement accepted by the Employer to carry out the work stated in the Contract Data, and removal of that person as might be instructed by the Employer), clause 23 (working with the Employer and Others), clause 24 (subconsulting) and clause 25 (other responsibilities). The more important of these in practical terms are clauses 21, 24 and 25, on which this issue of *Insight* will focus.

Clause 21

Clause 21: The Consultant's obligations

21.1 The Consultant Provides the Services in accordance with the Scope.

21.2 The Consultant's obligation is to use the skill and care normally used by professionals providing services similar to the services."

Practice points

In order to fulfil their contractual obligations under clause 21, Consultants must (i) comply fully with the Scope (clause 21.1) and (ii) (under English law) exercise reasonable care and skill in the performance of their Services required by the Scope (clause 21.2).

Clause 21.1

On a first reading, clause 21.1 appears to be self-explanatory, but Consultants must be careful not to take an overly simplistic view of clause 21.1. Not only must Consultants comply with the Scope, they must also provide the Services and this means that they must do everything necessary to provide the Services. They should, for example, attend all necessary site meetings and obtain all necessary consents and permissions, even though the Scope may not expressly require them to do so.

Clause 21.2

Clause 21.2 qualifies clause 21.1 by requiring Consultants to act in accordance with the standard that would usually be expected of (under English law, a reasonably) competent consultant who was carrying out the same task. A Consultant carrying out Structural Engineering work would therefore be measured against the standard of Structural Engineering work carried out by a qualified Structural Engineer, regardless of any structural engineering qualifications the Consultant might hold. There can be no excuses therefore for sloppy or substandard work carried out by junior staff.

However, there is no requirement for perfection. A simple failure on the part of a Consultant (for example, arriving on site half an hour late one day with no ill effects) would probably not render him in breach of clause 21.2.

However, if the Consultant failed to attend an important site meeting, provided incorrect advice, gave an incorrect recommendation which was then acted upon, failed to give advice that should have been given, took action that was inappropriate, or failed to warn of risks in relation to action he proposed, then he will not be acting with the requisite reasonable care and skill.

The dividing line can be a slim one and the question of whether a Consultant acted with reasonable care and skill is often the subject of expert evidence. To be on the safe side, Consultants should always follow generally accepted practice in their area of specialism, or if there is no such generally accepted practice, Consultants should act in the way that a reasonable body of like professionals would act in order to avoid falling foul of clause 21.2.

Clause 24

Clause 24: Subconsulting

24.1 If the Consultant subcontracts work, he is responsible for Providing the Services as if he had not subcontracted. This contract applies as if a Subconsultant's employees were the Consultant's.

24.2 The Consultant submits the name of each proposed Subconsultant to the Employer for acceptance. A reason for not accepting the Subconsultant is that his appointment will not allow the Consultant to Provide the Services. The Consultant does not appoint a proposed Subconsultant until the Employer has accepted him.

24.3 The Consultant submits the proposed conditions of contract for each subcontract to the Employer for acceptance unless

- *an NEC contract is proposed or*
- *the Employer has agreed that no submission is required.*

The Consultant does not appoint a Subconsultant on the proposed subcontract conditions submitted until the Employer has accepted them.



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A reason for not accepting them is that

- *they will not allow the Consultant to Provide the Services or*
- *they do not include a statement that the parties to the subcontract shall act in a spirit of mutual trust and co-operation."*

Practice points

Clause 24.1

Under Clause 24.1, the Consultant can subcontract aspects of his work if he so wishes, but if he does subcontract, he will be responsible for providing the Services as if he had not subcontracted.

Consultants who subcontract should therefore take care over the drafting of their subcontract. The subcontract should also be NEC3, be drafted back-to-back with the main contract, and should contain sufficient warranties and indemnities to protect the Consultant's position in the event of negligence on the part of the subconsultant for which the Consultant will be liable under clause 24. So acting will also cover clause 24.3 in part.

Clause 24.2

Clause 24.2 requires the Employer's approval for the subconsultant proposed by the Consultant, which approval should be granted unless the appointment will not allow the Consultant to Provide the Services. Because the parties are required to act in a spirit of mutual cooperation under clause 10.1, it may be difficult for the Consultant to decline to provide information to the Employer in relation to the proposed subconsultant if the Employer so requests. It is likely that it will be difficult for the Employer to withhold approval unreasonably, as to do so may render him in breach of clause 10.1. This would be particularly the case if, for example, the Consultant needed to use a subconsultant with a specific area

of expertise without which he would not be able to provide the Services. If a subconsultant is likely to be required, Consultants should obtain the Employer's approval as early as possible if delays on site are to be avoided.

This is because clause 24.2 prevents the actual appointment of a subconsultant until such time as the Employer's prior approval has been obtained.

Clause 25

Clause 25: Other responsibilities

25.1 The Consultant obtains approval from Others where necessary to Provide the Services.

...

25.3 The Consultant obeys an instruction which is in accordance with this contract and is given to him by the Employer."

Practice points

Clause 25.1

Clause 25.1 has wide-ranging consequences for the Consultant as it requires him to obtain all necessary consents from third parties for the provision of the Services (other than those which appear in the Scope that have already been obtained by the Employer).

These consents may include, for example, planning permission, any party wall act consents that might be required, and any access permissions. Some of these consents, such as party wall act consents, could conceivably also be the responsibility of the lead designer, and Consultants should therefore double-check that all necessary permits and approvals, precisely who is to obtain them and by when, are set out very clearly in the Scope.

Clause 25.3

On the face of it, clause 25.3 provides the Employer with carte blanche to require the Consultant to do anything he wishes,

but this is not how the clause operates in practice, as instructions should relate back to one of the other express clauses of the contract.

If Consultants do not consider the instruction to be in accordance with the contract, they should reserve their position and comply with the instruction without prejudice to their contention it is invalid. They should then invoke the dispute resolution procedures to seek to recover any money they have expended in relation to the instruction by way of a compensation event under clause 60.1(10).

Conclusion

As can be seen from the above, the Employer's key obligation is to provide information, and the Consultant's key obligation is to provide the Services in accordance with the Scope.

It is essential that both the Employer and Consultant properly understand all their respective obligations under the Professional Services Contract (particularly as regards the Scope and Services), so that they are in the strongest possible position to proactively address any issues that might arise. Not all contracts are alike, and it is essential to read, understand and follow each individual contract.

The third and final part of the three-part series on NEC3 will come later in the year.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston. lkington@fenwickelliott.com. Tel +44 (0) 207 421 1986

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