



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

This issue considers some of the key areas of difficulty with the NEC form and makes suggestions as to how NEC3 might be amended to overcome them from the contractor's perspective.

Why amend NEC3?

NEC3's focus is on effective management procedures, collaborative working and good working relationships, and it is therefore more of a project-based contract than a legal contract in the sense that what the parties are signing up to is an ethos.

Compared with JCT, it is relatively brief in terms of the parties' obligations, and as a general rule, it is not as comprehensively written as other standard forms. The JCT Design & Build 2011, for example, contains comprehensive detail in relation to insurance at Clause 6 and Schedule 3, but the insurance arrangements at Clause 84 of NEC3 are very brief. NEC3 is also silent on existing buildings insurance and adjacent property insurance.

NEC3 is written completely in the present tense, and, with the exception of Clause 10.1 (which provides that "*the Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and co-operation*"), the usual series of obligations upon the parties is absent. The absence of obligations other than to act in good faith has the potential to create difficulties, as any breaches of contract will be more difficult to establish in the absence of a positive obligation from which a breach can give rise, and there is no case law on the meaning of Clause 10.1. Even if such case law did exist, the court would inevitably focus on what NEC actually says, rather than take into account the collaborative mindset that is inherent in the operation of NEC3.

That said, the draughtsmen of NEC3 contemplated that amendments may be necessary, and provided a secondary Option Z that allows parties to incorporate bespoke provisions into the contract. The resulting additional clauses are commonly referred to as "Z clauses".

Suggested Z clauses for NEC3

Priority of documents clause

NEC3 usually comprises the Contract Agreement; Contract Data; Conditions of Contract; Schedule of Cost Components and Shorter Schedule of Cost Components; Works Information; Site Information; and an Activity Schedule, or bill of quantities. On

occasion, the inclusion of these documents can introduce inconsistencies, in which case a priority of documents clause can be useful.

NEC3 does not include a core clause that deals with the priority of contract documents, as a result of which there is a risk that a provision in another contract document could take precedence over the Conditions of Contract. Clause 17.1 provides some comfort by obliging the contractor and project manager to notify the other if they become aware that there is an ambiguity or inconsistency in any of the contract documents, in which case the Project Manager gives an instruction resolving the ambiguity or inconsistency. However, this falls far short of a priority of documents clause which would deal with such a problem before it arises.

The Court of Appeal emphasised recently in *RWE Npower Renewables Limited v JN Bentley Limited* [2014] EWCA Civ 150 (19 February 2014) (see http://www.fenwickelliott.com/files/dispatch_issue_165.pdf for full details) that contract documents should be read as complementing each other as far as possible, and only in the case of a clear and irreconcilable discrepancy would it be necessary to resort to the contractual order of precedence, in which case the order of precedence would only apply to the particular discrepancy and would not operate as a mechanism to choose an entire clause over another.

This decision casts some doubt over the efficacy of any priority of documents clause, as it would be unnecessary to refer to it if the documents can be read together as expressing the parties' intentions in a clear and sensible way. However, there is nothing to lose by having a priority of documents clause which should be included by parties as a belt and braces measure in the interests of certainty.

Statutory requirements in relation to materials and workmanship

NEC3 also omits the contractual obligation that is commonly seen in other standard forms to comply with applicable statutory requirements, and there is no clear guidance as to

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NEC3: some areas of difficulty and suggested amendments

This is the third of a three-part series on NEC3.

Part one dealt with problems that are commonly encountered in NEC3 and possible solutions (http://www.fenwickelliott.com/files/insight_issue_32.pdf), and Part two examined the principal responsibilities of the Employer and Consultant respectively (http://www.fenwickelliott.com/files/insight_issue_35.pdf).

This final part considers some of the key areas of difficulty with the NEC form and makes suggestions as to how NEC3 might be amended to overcome them from the contractor's perspective.



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the minimum standards that should apply in relation to materials and workmanship.

Pursuant to NEC3 Clause 20.1, "The Contractor Provides the Works in accordance with the Works Information". This means that the Works must comply with any purposes specified in the Works Information. In other standard forms, such as the JCT Standard Building Contract 2011, the contractor is obliged at Clause 2.19.1 to use reasonable skill, care and diligence in carrying out design work.

Under NEC3, if no duty to comply with the relevant statutory requirements appears within the Works Information, it is likely that there would be an implied condition that the materials supplied under the contract are of satisfactory quality (unless, for example, the goods were inspected as a sample prior to the contract being entered into). This would make the contractor liable for any latent defects under the Supply of Goods and Services Act 1982.

A term may also be implied into NEC3 under the Supply of Goods and Services Act 1982 that, where an employer makes known to the contractor (whether expressly, or by implication) the purpose for which materials will be used, there will be an implied condition that the materials are reasonably fit for that purpose. Even if no such obligation exists (which can be the case where the employer has prepared the Works Information and the employer has not relied upon the contractor's assessment of the materials), there may be a duty on the contractor to warn if the materials are unsuitable.

The difficulty with a fitness for purpose obligation is that, unlike a reasonable care and skill obligation, it will not usually fall within the confines of a professional indemnity policy, and contractors should resist the inclusion of an express fitness for purpose provision for that reason.

Design requirements and liability

Clause 21.1 of NEC3 provides that the contractor designs the part of the Works which the Works Information states he is to design. It is the Works Information therefore that dictates the extent of the contractor's design obligations, and, depending on the drafting of the Works Information, it might be that there would be an absolute obligation that the design is fit for purpose. In the absence of an absolute obligation, in a design and build contract, it leaves an implied term that the completed work will be reasonably suitable for the purpose for which the contractor knows it is required.

If they can, contractors should insist on secondary option X15, which provides for the lower standard of reasonable care and skill, which will not include the implied obligation of fitness for purpose. This is because a reasonable care and skill obligation will be covered by professional indemnity insurance.

Contractors should also resist any attempt by employers to widen the scope of Clause 21.1 by providing, for example, that the contractor has to provide the Works in a consistent and diligent manner, as such provisions would also not be covered by professional indemnity insurance.

Building Information Modelling (BIM)

If the works are BIM-enabled, parties to NEC3 should take into account the NEC3 guidance on using Building Information Modelling ("BIM") with NEC3 contracts ("the Guidance") that

accompanies the NEC3 April 2013 suite of contracts.¹

The Guidance suggests wording for a Z clause that is compatible with the Construction Industry Council (CIC) BIM protocol ("the Protocol"). The Protocol was commissioned by the Commercial Workstream of the government's BIM Implementation Task Group, and is representative of best practice of working on a BIM level 2 project.

The wording proposed by the Guidance makes express provision for the consequences of breaching a requirement of the Protocol by identifying such a breach as a compensation event. As such, it is particularly advantageous for contractors who should ensure it is included as a Z clause.

In addition to including the Guidance, the Works Information or Scope should be amended to include the BIM Working Party Strategy Paper draft protocol document ("the Protocol Document"). The Protocol Document was expressly drafted for inclusion into the Works Information section of an NEC3-style contract. Lastly, the parties' rights and liabilities in relation to the Protocol would need to feature in the conditions of contract, as well as the role of the Information Manager who will co ordinate the BIM.

Risk allocation

Finally, the allocation of risk under the unamended NEC3 is absolute and is firmly swayed in favour of the Employer. Clause 80.1 sets out a relatively short list of employer risks, and under Clause 81.1, as a general rule, the contractor is responsible for all other risks from the commencement of the works until the issue of the defects certificate. Under Clause 83.1, the Contractor must provide an indemnity to the employer in respect of its risks.



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The contractor's risks are covered by the provision of joint names insurance under Clauses 84—87 by the contractor, but there is nothing requiring the employer to take out insurance in respect of its risks unless express provision is made for those risks in the Contract Data.

This blanket allocation of risk and the largely uninsured risks that are to be covered by the employer are very onerous to contractors, and contractors should therefore consider what risks should rightly be borne by the employer, having regard to the nature of the works. Any non-standard Employer risks that can be agreed, such as any loss or damage caused by civil war, should be included in the Contract Data, with provision for the employer to insure against them.

Practical tips when amending NEC3

- Make sure that any Z clauses or other amendments you introduce are drafted in the same style and language as NEC3 and any other contract documents you might have, to avoid creating any discrepancies or contradictions in relation to the remainder of the contract. As a belt and braces measure, ensure that your Z clauses fit into the logic flow charts that accompany NEC3.
- Check to see whether any Z clause or other amendments you draft have an effect on any other provisions of the contract, or require any further information to be added to the Contract Data or Works Information. If you do not do so, your amendments may create unintended consequences or may not work properly due to the

operation of another core clause of the contract.

- Consider whether your Z clauses impose any additional obligations on the other party, or on the project manager. If so, the other party or project manager should be made aware of what is required.
- Any amendments you make should be made back to back with any other NEC3 contracts or subcontracts up or down the contractual chain if they are to be effective.
- Consider whether your Z clauses have any insurance implications. If you can, try not to include a Z clause that cannot be covered by insurance.

Conclusion

Whilst NEC3 invites the parties to prepare their own contract conditions through secondary option Z, extensive use of Z clauses tends to undermine the NEC3 partnering ethos, which requires the parties to act collaboratively and in the spirit of mutual trust and cooperation.

Any amendments to NEC3 should be made in a manner that is consistent with and takes account of the other clauses in NEC3, as in the event of a dispute, the contract will be interpreted as a whole, and unless the contract provides otherwise (and an unamended NEC3 does not), then greater weight will be given to any Z clauses than to the standard form clauses. Unless Z clauses are drafted with great care, they have the potential to create more problems than they solve.

Footnotes

¹ See <http://codebim.com/wp-content/uploads/2013/06/BIMwithNEC3guide.pdf>.

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

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