



Technical

## 3 Key Amendments to NEC4 – Delay Damages, Early Contractor Involvement, Payment

Date: 4 March 2021

### Introduction

NEC Contracts are designed for global use on Construction and Engineering projects and are the Contract of choice for Public Sector Works in the UK. The latest version is the NEC4 and was first published in June 2017. It was updated at the beginning of 2019 and then again in October 2020, after feedback from users and due to changes in the Law. Three of the main changes that were made in October 2020 are:

1. Delay Damages ceasing to apply at Termination.
2. Changes to “*Secondary Option X22 – Early Contractor Involvement*” to improve flexibility on Two-Stage Tenders.
3. Amendments to Secondary Option Y(UK)2 to ensure compliance with The Housing Grants, Construction and Regeneration Act 1996.

These are considered in more detail later in this Article.

### Delay Damages

Prior to October 2020, the NEC3 Contract stated that Delay Damages applied until Completion or until the Works were taken over by the Employer.

A clause with similar wording was considered by the Court of Appeal in *Triple Point Technology Inc v PTT Public Company Limited* [2019] EWCA Civ 230. In this case, the Contractor (PTT) failed to complete the Works and the Employer appointed a second Contractor to complete the Works. The Contract had a daily rate of Liquidated Damages up to “the date [PTT] accepts such work”. The original Contractor had no control over how long it would take the second Contractor to complete the Works. It would create unfairness for the Employer to continue being able to deduct damages. The Court of Appeal applied one of the usual principles in Contract Law; that the obligations of the Parties under the Contract ends when the Contract is terminated. The Contractor remains liable for delays that occurred before termination (the case has been appealed in the Supreme Court (UKSC 2019/0074) and Judgment is pending).

The updated NEC Contract states that Delay Damages in the Contract cease to apply at termination. This means that, after termination, Delay Damages are part of the General Damages.

## Secondary Option X22 – Early Contractor Involvement

Clause X22, which is an optional clause (mainly used in Options C and E), aims to provide incentives to Contractors involved in Two-Stage Tenders. On projects with Two-Stage Tenders, there is not typically any price competition after the first stage; usually there is only one Contractor left. Clause X22 introduces the definitions “*Project Cost*” (which includes the final price for carrying out the Works and other costs to the Employer) and “*Budget*” (which works as a target for all the Employer’s costs – not just construction costs). At the end of the project, if the cost is less than the Budget, a proportion of the saving is shared with the Contractor. The intention of Clause X22 is to encourage the Contractor, through design and innovation, to help the Employer achieve a better cost than the Budget.

This clause has been amended so that the Contract Dates (Access Dates, Key Dates and Completion Date) can be adjusted with agreement by the Project Manager and Contractor. Before October 2020, they could only be modified by a Compensation Event. Allowing these dates to be moved by agreement increases flexibility at Stage One.

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

The Housing Grants, Construction and Regeneration Act 1996 (“*the Construction Act*”) is an Act of Parliament that sets out minimum requirements for Construction Contracts. Section 110 of the Construction Act deals with “*Dates for Payment*”. Payment becomes due on the Due Date but does not need to be paid until the Final Date for Payment.

Paragraph 1(a) states that Construction Contracts must contain an “*adequate mechanism*” for determining the Due Date. Sub-Paragraph (1)(b) refers to a “*period...between the date on which a sum becomes due and a final date for payment*”.

In *Rochford Construction Limited v Kilhan Construction Limited* [2020] EWHC 941, the legal positions in relation to Due Dates and Final Dates for Payment was discussed by Mrs Justice Cockerill. The interpretation was that Due Dates can be fixed by reference to invoices or notices. The Final Date for Payment must be calculated from the Due Date, based on a set period of time, rather than being based on the occurrence of an event.

One practical reason for this interpretation is to enable the Payer to be certain how much time there is to serve a Pay Less Notice – the timing is calculated from the Final Date for Payment. Pay Less Notices are issued when the Payer intends to pay a lower amount than the Payee was expecting, and so the Notices give a warning (this is obviously a simplification).

The Secondary Option Y(UK)2, a clause which is used to ensure compliance with the Construction Act, has been amended in the NEC4 Contract that links the “*Final Date for Payment*” with the submission of an invoice from the Party to which payment is due. In these Contracts, the Due Date has been changed to the later of the date of receipt of an invoice by the Party which is making payment and fourteen days from the assessment date. The Final Date for Payment is then a fixed period from the Due Date.

The interpretation in *Rochford v Kilhan* was not a binding part of the Judgment, but Contracts have been amended to reflect the developments in Case Law.

## Conclusions

The NEC Contract is used on major projects. NEC4 Contracts will continue to be updated as the Law develops (note that NEC3 Standard Form Contracts are no longer being kept up-to-date and there will be a progressive increase in the use of NEC4 on live projects). It is crucial to have an understanding of mechanisms in the Contract you are using.