

CONTRACTING ON NEC 3 ENGINEERING CONSTRUCTION CONTRACT OPTION A - AN INTRODUCTION

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Course Content

- Introduction and overview of ECC Standard Forms
- Summary of the Core Clauses
- Main Option Clauses to Option A
- Secondary Option Clauses - Employer's Particular Requirements
- Contract Data Parts 1 and 2
- Shorter Schedule of Cost Components
- Main Principles underlying Option A
- Main Procedures required in Option A with emphasis on early warnings/Accepted Programme/Activity Schedule
- Compensation Event Procedures/Notices/Defined Cost
- Assessment of Compensation Events
- Risk Register

ECC Contracts – Introduction

- Third Edition published July 2005 by Thomas Telford Ltd a wholly owned subsidiary of the Institution of Civil Engineers, London
- **Partnering philosophy** very different to traditional contracts FIDIC, GC/WORKS/1 and ICE
 - ◆ “10.1 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**.”
 - ◆ 16.3 At a risk reduction meeting, those who attend cooperate in:
 - seeking solutions that will bring advantage to all those who will be affected,....”

ECC Contracts – Introduction

- 6 Main Options
 - ◆ A - Priced Contract with *Activity Schedule*
 - ◆ B - Priced Contract with Bill of Quantities
 - ◆ C - Target Contract with *Activity Schedule*
 - ◆ D - Target Contract with Bill of Quantities
 - ◆ E - Cost reimbursable Contract
 - ◆ F - Management Contract

ECC Contracts – Introduction

- Further contracts within the ECC family:
 - ◆ Engineering and construction subcontract
 - ◆ Engineering and construction short subcontract
 - ◆ Professional services contract
 - ◆ Engineering and construction short contract
 - ◆ Adjudicator's contract
 - ◆ Term service contract
 - ◆ Framework contract

ECC Contracts – Introduction

- NEC has published 'Amendments September 2011' bringing all the ECC contracts in line with the recent amendments to the Housing Grants, Construction and Regeneration Act 1996 made by the Local Democracy, Economic Development and Construction Act 2009, which came into effect on 1 October 2011.

ECC Contracts – Introduction

Core Clauses

- All Options have the same core clauses:
 - ◆ General
 - ◆ *Contractor's* main responsibilities
 - ◆ Time
 - ◆ Testing and Defects
 - ◆ Payment
 - ◆ Compensation Events
 - ◆ Title
 - ◆ Risk and insurance
 - ◆ Termination

ECC Contracts - Introduction

- Main Option Clauses
 - ◆ Dispute resolution is a Main Option
 - Option W2 is used when the Housing Grants Construction and Regeneration Act, as amended by the Local Democracy, Economic Development and Construction Act 2009, (“the Acts”) apply.
 - Option W1 is used unless the Acts apply.

ECC Contracts - Introduction

- **Main Option Clauses**

The provisions of W2 have recently (September 2011) been amended to bring them in line with the new legislation. The amendments are as follows:

- ◆ Subclause W2.3(7) has a new sentence added at the end:

"If the Adjudicator's decision changes an amount notified as due, payment of the sum decided by the Adjudicator is due not later than seven days from the date of the decision or the final date for payment of the notified amount, whichever is the later."

ECC Contracts - Introduction

- **Main Option Clauses**

The provisions of W2 have recently (September 2011) been amended to bring them in line with the new legislation. The amendments are as follows:

- ◆ Subclause W2.3(8) has a new sentence added at the end:

"The *Adjudicator* may in his decision allocate his fees and expenses between the Parties."

ECC Contracts - Introduction

- **Main Option Clauses**

The provisions of W2 have recently (September 2011) been amended to bring them in line with the new legislation. The amendments are as follows:

- ◆ Subclause W2.3(12) has been replaced with:

"The *Adjudicator* may, within five days of giving his decision to the Parties, correct the decision to remove a clerical or typographical error arising by accident or omission."

ECC Contracts - Introduction

- Secondary Option Clauses
 - ◆ The payment provisions of the Acts are a Secondary Option
 - Y(UK)2 is used only when the Acts apply.

ECC Contracts - Introduction

- **Secondary Option Clauses**

The provisions of Y(UK)2 have recently (September 2011) been amended to bring them in line with the new legislation. The amendments are as follows:

- ◆ Option Y(UK)2: Y2.1(1) is replaced with:

"The Act is the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009."

ECC Contracts - Introduction

- **Secondary Option Clauses**

The provisions of Y(UK)2 have recently (September 2011) been amended to bring them in line with the new legislation. The amendments are as follows:

- ◆ Option Y(UK)2: Y2.2 third paragraph is replaced with:

"The Project Manager's certificate is the notice of payment to the Contractor specifying the amount due at the payment due date (the notified sum) and stating the basis on which the amount was calculated."

ECC Contracts - Introduction

- **Secondary Option Clauses**

The provisions of Y(UK)2 have recently (September 2011) been amended to bring them in line with the new legislation. The amendments are as follows:

- ◆ Option Y(UK)2: Y2.3 is replaced with:

"IF either Party intends to pay less than the notified sum, he notifies the other Party not later than seven days (the prescribed period) before the final date for payment by stating the amount considered to be due and the basis on which that sum is calculated. A Party does not withhold payment of an amount due under this contract unless he has notified his intention to pay less than the notified sum as required by this contract."

ECC Contracts – Introduction

Secondary Option Clauses

- For use where there are special requirements:

- ◆ Price adjustment for inflation X1
- ◆ Changes in the law X2
- ◆ Parent company guarantee X4
- ◆ Sectional Completion X5
- ◆ Bonus for early Completion X6
- ◆ Delay Damages X7
- ◆ Partnering X12

ECC Contracts – Introduction

Secondary Option Clauses

- For use where there are special requirements:
 - ◆ Performance Bond X13
 - ◆ Advanced payment to the Contractor X14
 - ◆ Limitation of the *Contractor's* liability for his design to reasonable skill and care X15
 - ◆ Retention X16
 - ◆ Low performance damages X17
 - ◆ Limitation of liability X18
 - ◆ Key Performance Indicators X20

ECC Contracts – Introduction

- 'Z' Clauses
 - ◆ bespoke additions and amendments
 - special attention required!

Option A – Additional Clauses

- Identified in **bold type** in the respective options
- Option A the **additional clauses** include:
 - ◆ Definitions (11.2)
 - Activity Schedule
 - Defined Cost
 - Price for Work Done to Date
 - Prices

Option A – Additional Clauses

- Option A the additional clauses include:
 - ◆ relationship between programme and *Activity Schedule* (31.4)
 - ◆ Use, by agreement, of rates and lump sums to assess compensation events in instead of Defined Cost (63.14)
 - ◆ In the event of termination, the amount due is assessed without taking grouping of activities into account (93.3)

Option A – Contract Data

- Part One
 - ◆ completed *by the Employer* at tender

- Part Two
 - ◆ completed *by the Contractor* when submitting his tender

Option A – Contract Data

- **Part One** includes:
 - ◆ Names of the *Employer, Project Manager* and *Supervisor*
 - ◆ Documents containing the Works Information
 - ◆ Key dates and Completion/Completion Date
 - ◆ Site Information
 - ◆ The *boundaries* of the Site
 - ◆ The *starting date*
 - ◆ The *access dates*
 - ◆ *assessment intervals*

Option A – Contract Data

- **Part One** includes:
 - ◆ Matters to be included in the Risk Register
 - ◆ Optional statements, for example:
 - *Completion Date*
 - *Conditions to be met by Key Dates*
 - Parent Company guarantee (X4)
 - Sectional Completion (X5)
 - Delay Damages (X7)
 - Additional *Employers* risks

Option A – Contract Data

Part Two includes:

- ◆ Name of *Contractor*
- ◆ *Contractor's* key people
- ◆ *Direct fee percentage*
- ◆ *Sub-Contracted fee percentage*
- ◆ Programme identity
- ◆ *Activity Schedule* identity
- ◆ Tendered total of the Prices i.e. the target
- ◆ Matters to be included in the Risk Register

Option A – Contract Data

- **Part Two** includes:
 - ◆ Works Information for *Contractor* design
 - ◆ *Completion Date*
 - ◆ Published list of Equipment
 - ◆ Percentage adjustment to published list
 - ◆ Rates for other Equipment

Option A – Contract Data

- **Part Two** includes:
 - ◆ Hourly rates for Defined Cost of design outside the Working Areas
 - ◆ Percentages to cover:
 - Design overheads
 - People overheads

Option A – Schedules of Cost Components

Only Shorter SoCC used in Option A

- ◆ used only for the **assessment of compensation events**
- ◆ **Rates and lump sums can be used instead, by agreement between the *Project Manager* and the *Contractor* (63.14)**

Option A – Shorter Schedules of Cost Components

- Shorter SoCC lists the **reimbursable cost elements**
 - ◆ People
 - ◆ Equipment
 - ◆ Plant and Materials
 - ◆ Charges
 - ◆ Manufacture and fabrication
 - ◆ Design
 - ◆ Insurance

Option A – Main Principles

- No bill of quantities or schedule of rates
- **No re-measurement**
- *Contractor* tenders on Works Information
- *Contractor* provides programme and *Activity Schedule* with tender
 - ◆ if no programme identified in Contract Data – **25 per cent retention** pending submission of programme to Project Manager (50.3)
- Each activity on the *Activity Schedule* has a price which are **the Contractor's lump sum prices for each of the activities on the Activity Schedule**

Option A – Main Principles

- Contractor tenders his **Fee** (*direct fee percentage and subcontracted fee percentage*) for inclusion in assessment of compensation events
 - ◆ deemed to include for everything not included elsewhere
- The Prices are **adjusted only by compensation events (or acceleration agreement)**
- Payment of the Prices (as adjusted by any compensation events) is made for each group of completed activities or each completed activity which is not in a group
- Important to structure the Activity Schedule to provided an adequate cash flow

Option A – Main Procedures

- Communications
 - ◆ All communications are required to be in a form which can be read copied and recorded
 - ◆ Includes:
 - Instructions, certificates, submissions, proposals, records, acceptances, replies and importantly, notifications (i.e. notices)
 - ◆ It should be noted that notifications must be communicated separately from other communications

Option A – Main Procedures

- Early Warnings
 - ◆ Both the *Contractor* and the *Project Manager* are each under an obligation to give the other **early warning** notifications (16.1)
 - ◆ Early warning as to:
 - increase the total of the Prices;
 - delay Completion,
 - delay meeting a Key Date or
 - impair the performance of the *works* in use

Option A – Main Procedures

- Such early warnings may relate to matters which qualify as compensation events under clause 60.1
- There are 19 such events listed under clause 60.1. The list includes such matters as:
 - ◆ Instructions changing the Works Information
 - ◆ Failure to allow access to and use of the Site
 - ◆ Failure to reply to a communication in time
 - ◆ Encountering adverse physical conditions
 - ◆ Weather conditions
 - ◆ Breach of Contract

Option A – Main Procedures

- Administration **complex and expensive**:
 - ◆ follow the required procedures
 - ◆ take **required actions** at the **required times**
 - *Contractor* to notify of compensation event **within 8 weeks** otherwise **no entitlement** to change in the Prices or Completion Date (61.3). (The exception being in circumstances when the *Project Manager* should have notified the event to the *Contractor* but did not).
 - significant **time bars** against the *Employer* (61.4, 62.6 and 64.4)

Option A – Main Procedures

- Clause 61.4 has been extended to provide:-
 - ◆ If the *Project Manager* does not notify his decision (in relation to a compensation event) to the *Contractor* within either
 - One week of the *Contractor's* notification or
 - A longer period to which the *Contractor* has agreed

The *Contractor* may notify the *Project Manager* to this effect. A failure by the *Project Manager* to reply within two weeks of this notification is treated as acceptance by the *Project Manager* that the event is a compensation event and instruction to submit quotations.

Option A – Main Procedures

- Quotations for compensation events (62)
 - ◆ A new provision, 62.6 has been included as follows:-
 - If the *Project Manager* does not reply to a quotation within the time allowed, the *Contractor* may notify the *Project Manager* to this effect. If the *Contractor* submitted more than one quotation for the compensation event, he states in his notification which quotation he proposes is to be accepted. If the *Project Manager* does not reply to the notification within two weeks, and unless the quotation is for a proposed instruction or a proposed changed decision, the *Contractor's* notification is treated as acceptance of the quotation by the *Project Manager*.

Option A – Main Procedures

- *The Project Manager's assessments (64)*
 - ◆ A new clause 64.4 has been included as follows:
 - “If the *Project Manager* does not assess a compensation event within the time allowed, the *Contractor* may notify the *Project Manager* to this effect. If the *Contractor* submitted more than one quotation for the compensation event he states in his notification which quotation he proposes to be accepted. If the *Project Manager* does not reply within two weeks of this notification the notification is treated as acceptance of the *Contractor's* quotation by the *Project Manager*.”

Option A – Main Procedures

- **Vital elements in the administration:**
 - ◆ *Activity Schedule*
 - ◆ Accepted Programme
- *Activity Schedule* and Accepted Programme **adjusted only by:**
 - ◆ compensation events (60.1)
 - ◆ acceleration agreements (36)
- Compensation events
 - ◆ effects on the Prices and the Completion Date should be assessed **as they arise**

Option A – Main Procedures

- 19 compensation events (60.1(1) to (19))
- Procedures are a **two-way** affair:
 - ◆ **early warning** of any event that may effect the Prices and/or the programme activities (16.1)
 - ◆ each party has an obligation to warn
 - ◆ meetings convened to discuss and decide on best actions
 - ◆ If an event will or has effected the Prices or the Accepted Programme and falls within the list of events in clause 60.1 **either party** notifies a **compensation event** (61.1 and 61.3)

Option A – Main Procedures

- If the *Project Manager* agrees the compensation event he instructs the *Contractor* to submit a **quotation** (61.1):
 - ◆ quotation will be the *Contractor's estimate* of Defined Cost of the compensation event plus the *Fee*
 - ◆ if programme activities, Key Dates or the Completion Date have been or are likely to be affected the quotation must include a **revised programme** (62.2)

Option A – Main Procedures

- Defined Cost is:
 - ◆ the cost of the components in the Shorter Schedule of Cost Components whether work is subcontracted or not excluding the cost of preparing quotations for compensation events (11.2 (22))

Option A – Main Procedures

- *Project Manager* can notify the *Contractor* that he accepts the quotation and revised programme, or, after discussion with the *Contractor* as to ways in which the compensation event could be dealt with,
 - ◆ require the *Contractor* to submit a **revised** quotation and programme, or
 - ◆ make his **own assessment**

Option A – Main Procedures

- Critical path network programme is **essential** for effective management
 - ◆ **programme updated** at intervals stated in the Contract Data (commonly one month) (32.2)
 - ◆ revised programme submitted to *Project Manager* for acceptance (32.2)
 - ◆ *Project Manager* can require updates at any time (32.2)
 - ◆ *Contractor* can submit when he chooses to
 - ◆ revisions should be provided with each quotation/assessment of a compensation event (62.2)

Option A – Main Procedures

- Accepted Programme
 - ◆ only way to extend time
 - ◆ should be reviewed and revised at **4 week** intervals and as and when compensation events arise
 - ◆ **no provisions** for retrospective extensions of time
 - ◆ revised Accepted Programmes record planned Completion current at the time the programme was accepted
 - ◆ planner/programmer involvement essential
 - ◆ promote good site management and financial control

Option A – Main Procedures

- Defined Cost, in terms of the effect of a compensation event, is calculated in accordance with **Shorter Schedule of Cost Components**, and comprises the cost of:
 - ◆ People
 - ◆ Equipment used to Provide the Works
 - ◆ Plant and Materials
 - ◆ Charges
 - ◆ Manufacture and fabrication
 - ◆ Design

Option A – Main Procedures

- Costs not qualifying for inclusion in Defined Cost, i.e., not a cost component in the Shorter SoCC, are **deemed included in the Fee**
- *Contractor's Fee* must include:
 - ◆ **all costs** – not included in SSoCC
 - ◆ general **overheads and profit**
- **No mechanism** for adjustment of direct *fee percentage* or subcontracted *fee percentage*

Option A – Main Procedures

- **Subcontracts** can be let on the NEC Subcontract:
 - ◆ Subcontractor bound by the **same core clauses** as the *Contractor*
 - ◆ Subcontractor may **not necessarily** be bound by the same option clauses and secondary option clauses

Option A – Main Procedures

- Varied Works:
 - ◆ qualify as compensation events (60.1(1))
 - ◆ assessed by way of:
 - an **accepted quotations** (62.3), based on
 - assessments of Defined Cost and forecast Defined Cost (63.1)
 - accepted quotations or *PM*'s assessments result in changes to the Prices in the Activity Schedule

Option A – Main Procedures

- System for the notification of **early warnings** and **compensation events** should be set up:
 - ◆ use standard forms
 - ◆ set up before work commences
 - ◆ share with the *Employer/Project Manager*

Option A – Shorter Schedule of Cost Components (“SSoCC”)

- Only one use:
 - ◆ defines the cost components which are included in an **assessment of changes to the Prices** arising from a compensation event
- Compensation events are assessed by their effect on:
 - ◆ **forecast** Defined Cost
 - ◆ **recorded** Defined Cost

Option A – Shorter Schedule of Cost Components (“SSoCC”)

- People: **three categories** can be included in Defined Cost:
 - ◆ **First** - People directly employed by the *Contractor* and whose normal place of working is **within the Working Areas**
 - ◆ which **excludes** staff working at Head Office

Option C – Shorter Schedule of Cost Components (“SSoCC”)

- People: **three categories** can be included in Defined Cost:
 - ◆ **Second** - People directly employed by the *Contractor* whose normal place of working is not within the Working Areas, but who are working in the Working Areas

Option A – Shorter Schedule of Cost Components (“SSoCC”)

- People: **three categories** can be included in Defined Cost:
 - ◆ **Third** - People who are not directly employed by the *Contractor* but are paid by the *Contractor* according to the time worked while they are within the Working Areas
 - e.g. specialist consultants who may be required as a result of a compensation event

Option A – Shorter Schedule of Cost Components (“SSoCC”)

- Equipment: Defined Cost of Equipment used **within the Working Areas**:
 - ◆ excludes Equipment cost covered by the percentage for people overheads
- Equipment Defined Cost includes:
 - ◆ Amounts in the published list stated in the Contract Data calculated by applying the percentage adjustment stated in the Contract Data
 - ◆ Amounts at rates stated in the Contract Data for Equipment not listed in the published list
 - Each multiplied by the time it is required

Option A – Shorter Schedule of Cost Components (“SSoCC”)

- ◆ Unless included in the published list and the rate includes the cost component, payments for:
 - **transporting** Equipment to and from the Working Areas other than for repair and maintenance
 - **erecting** and **dismantling** Equipment
 - **constructing, fabricating** or **modifying** Equipment as a result of a compensation event (including purchase of **materials**)
- Cost of **operatives** is included in “People” unless included in the rate in the published list
- If not in published list or stated in Contract Data – at competitively tendered or open market rates

Option A – Shorter Schedule of Cost Components (“SSoCC”)

- Defined Cost of **Plant and Materials** intended to be included in the *works* includes:
 - ◆ purchasing Plant and Materials
 - ◆ delivery to and removal from the **Working Areas**
 - ◆ providing and removing packaging
 - ◆ samples and tests

Option A – Shorter Schedule of Cost Components (“SSoCC”)

- Defined Cost of **Charges** (calculated by applying the percentage for people overheads stated in the Contract Data to people item 11) to cover the cost of items including:
 - ◆ payments to utilities for provision and use in the **Working Areas** of:
 - Water
 - Gas
 - electricity

Option A – Shorter Schedule of Cost Components (“SSoCC”)

- Defined cost of charges includes:
 - ◆ buying/leasing land
 - ◆ compensation for loss of crops
 - ◆ Royalties
 - ◆ inspection certificates
 - ◆ charges for access to the **Working Areas**
 - ◆ Equipment, supplies and services for offices, workshops, stores and compounds etc.

Option A – Shorter Schedule of Cost Components (“SSoCC”)

- Charges include:
- Payments for
 - ◆ Cancellation charges arising from a compensation event
 - ◆ Payments to public authorities which they are authorised to make in respect of the *works*
 - ◆ Consumables and equipment provided for the *Project Manager’s* and *Supervisor’s* office
 - ◆ Specialist services

Option A – Shorter Schedule of Cost Components (“SSoCC”)

- Defined Cost of **Manufacture and Fabrication** is amounts paid by the **Contractor** for:
 - ◆ Manufacture and Fabrication of Plant and Materials:
 - wholly or partly designed specifically for the *works* and
 - manufactured or fabricated **outside** the **Working Areas**

Option A – Shorter Schedule of Cost Components (“SSoCC”)

- Defined Cost of **Design** is:
 - ◆ cost of design of the *works* and Equipment done outside the **Working Areas**
 - ◆ total hours worked by employees multiplied by rates listed in **Contract Data Part 2**
 - ◆ an amount for **overheads** calculated by applying the percentage stated in the Contract Data Part Two for design overheads
 - ◆ cost of travel to and from the **Working Areas** for the categories of employees listed in the Contract Data Part Two

Option A – Shorter Schedule of Cost Components (“SSoCC”)

- Insurance: the following are deducted from Defined Cost:
 - ◆ cost of events against which the *Contractor* is required to insure
 - ◆ other costs paid to the *Contractor* by insurers

Option A – Contract Data Part 2

- **Part Two** includes:
 - ◆ *Fee percentages* to be applied to the amount of Defined Cost
 - ◆ Definition of the **Working Areas**
 - extremely important for the *Contractor* to ensure that the Working Areas are properly and fully defined
 - implications on Defined Cost can be significant
 - *Contractor* can **propose additions** to the Working Areas (15.1)

Option A – Contract Data Part 2

- **Part Two** includes:
 - ◆ Published list of Equipment
 - Last edition of a published list
 - Percentage for adjustment
 - ◆ Rates for:
 - Listed **special items** of Equipment not included in published list

Option A – Contract Data Part 2

- **Part Two** includes:
 - ◆ **People overheads** percentage:
 - To be applied to the total Defined Cost of People – item 11 in the SSoCC
 - ◆ **Design overheads** percentage
 - to be applied to the total Defined Cost of design employees – item 61 in the SSoCC

Option A – Defined Cost

- Costs not falling within the SSoCC are **deemed** to have been allowed in the Fee (52.1) including e.g.:
 - ◆ Head office charges and overheads
 - ◆ Profit
 - ◆ Insurance premiums, including employers liability
 - ◆ Corporation tax
 - ◆ Bonds, sureties and guarantees

Option A – Assessing Compensation Events

- Works Information includes work [A] which is to be replaced by work [B]
 - ◆ Compensation event is assessed as the difference between the **forecast Defined Cost of [B]** and the **forecast Defined Cost of [A]**
 - **the Fee** is then added
- Changes to the Prices are assessed as the effect of the compensation event upon (63.1):
 - ◆ Defined Cost of the **work already done**
 - ◆ Forecast Defined Cost of the **work not yet done**
 - ◆ resulting **Fee**

Option A – Assessing Compensation Events

- Certainty is added to clause 63.1 by the inclusion of the words
 - ◆ “The date when the *Project Manager* instructed **or should have instructed** the *Contractor* to submit quotations divides the work already done from the work not yet done.”

Option A – Assessing Compensation Events

- If the effect of a compensation event would be to reduce the total Defined Cost, the Prices are **not reduced unless** the compensation event is:
 - ◆ A **change to the Works Information**, or
 - ◆ A **correction of an assumption** made by the *Project Manager* in assessing an earlier compensation event
- Delay to the Completion Date is assessed as the length of time **planned Completion** is later than planned Completion shown on the **Accepted Programme**

Option A – Assessing Compensation Events

- *Contractor* is required to show on **each** programme submitted for acceptance (31.2):
 - ◆ Planned Completion
 - ◆ **time risk** allowances
 - ◆ float

Option A – Assessing Compensation Events

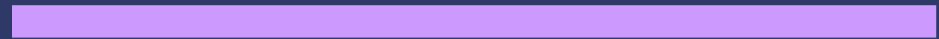
- *Contractor's time risk* allowances:
 - ◆ allowances within the duration of each activity or the duration of groups of activities (parts of the *works*)
 - ◆ *owned by the Contractor* as part of his realistic planning to cover his risks
 - ◆ *should be preserved* in the assessment of any delay to planned Completion

Option A – Assessing Compensation Events

- **Float** is any spare time within the programme
 - ◆ float in the programme **before planned Completion** is available to either party to mitigate or avoid any consequential delay to planned Completion
 - ◆ Float **between planned Completion and the Completion Date** is not available to the *Employer* – it is **owned** by the *Contractor*
- Delay to **planned** Completion due to a compensation event will result in the same delay to the Completion Date (63.3)
- Assessment of Compensation Event **will not be revised** if the forecast upon which the assessment is based proves to be wrong (65.2)

Option A – Time Allowances, Float and Completion

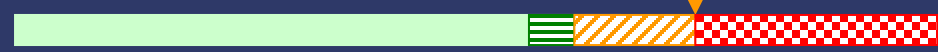
Contract



95 weeks

planned Completion

Accepted



Programme

2 weeks time risk allowance owned by Contractor

3 weeks float owned by Contractor and Employer

5 weeks float owned by Contractor

Option A – Assessing Compensation Events

- First stage in assessing whether planned Completion will be delayed is to adjust the Accepted Programme **leaving intact the time risk allowances** (63.5)
 - ◆ If **planned** Completion is not delayed the Completion Date remains unchanged

Option A – Assessing Compensation Events

- Assessment of the effect of a compensation event includes:
 - ◆ cost and time risk allowances for matters which have a **significant chance** of occurring and are at the *Contractor's* risk (63.6)
 - ◆ time risk allowance will be greater when the work is uncertain and there is a **high chance** of a *Contractor's* risk happening

Option A – Assessing Compensation Events

- Assessments are based upon the following **assumptions** (63.7):
 - ◆ *Contractor* reacts **competently** and **promptly** to the compensation event
 - ◆ additional Defined Cost and time due to the event are **reasonably incurred**
 - ◆ Accepted Programme can be changed
- Important when assessing compensation events to get forecasts of Defined Cost and time implications as accurate as possible
 - ◆ if later recorded information proves a forecast to have been wrong, there will be **no revision** to the assessment (65.2) (Other than by an Adjudicator or by the *tribunal*)

Option A – Contractor's Responsibility

- Option A (core clauses) do not deal with design liability
 - ◆ where a design and build contract is silent on the point the design and build *Contractor* will have a **fitness for purpose obligation**
 - ◆ in circumstances where the *Contractor* has design responsibility, either in full or in part, the *Contractor* should take particular care to **ensure that Secondary Option X15 forms part of the contract**

Option A – Contractor's Responsibility

- No provision for liquidated damages in the core clauses:
 - ◆ **Option X7** must be incorporated if delay damages are to be liquidated
 - ◆ **Option X17** must be incorporated if low performance damages are to be liquidated
- Absent options X7 and X17 the *Contractor* will be exposed to the risk of **un-liquidated damages**

Option A – Risks and Insurance

- 80 and 81 identify the risks which lie with each party respectively
- 80 sets out the *Employer's* risks
 - ◆ all risks not carried by the *Employer* (i.e. those in 80.1 and any additional *Employer's* risks stated in the Contract Data) are carried by the Contractor (80.1)
- 84 contains a table identifying the risks which are to be insured by the *Contractor*

Option A – Main Procedures

- Accepted Programme
 - ◆ Should be reviewed and revised regularly (normally at monthly intervals) and as and when compensation events arise
- Compensation events
 - ◆ their effects on the Prices and Key Dates/Completion Date should be assessed as they arise

Option A – Main Procedures

- Non-compliance by the *Contractor* with the actions and timetables:
 - ◆ can have disastrous effects in terms of the *Contractor* obtaining his entitlement to relief, particularly failure to give timely notices
- Non-compliance by the *Project Manager* with the actions and timetables:
 - ◆ will render the *Employer* in breach of contract and breach of contract is a compensation event (60.1(18))

GOOD TENDERING PRACTICE UNDER THE NEC

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Contract Data Part 2

Fee Percentages

- The fee percentages are to cover for all costs for which there are no cost components in the schedule of cost components.

For Example:

- ◆ Profit
- ◆ Overheads
- ◆ Insurance
- ◆ Bonds
- ◆ Guarantees
- ◆ Corporation Tax
- ◆ Other

Contract Data Part 2

Fee Percentages

- NEC 2 provides for only one fee percentage.
- NEC 3 provides for two fee percentages.
 - ◆ Direct fee percentage.
 - ◆ Subcontracted fee percentage

Contract Data Part 2

Fee Percentages

- The direct fee percentage is applied to the Defined Cost of the Contractor's direct (i.e. in-house) resources.
- The subcontracted fee percentage is applied to the Defined Cost of subcontracted work.

Contract Data Part 2

Fee Percentages

- The reason for the inclusion of a separate subcontracted fee percentage is to remove an anomaly (or at least go some way to removing an anomaly) relating to NEC 2 Option A where Defined Cost is the cost of the components in the Shorter Schedule of Cost Components **whether work is subcontracted or not**. The anomaly was that for compensation events the cost of which was subcontract cost, the Contractor was often faced with paying a higher subcontract fee to the subcontractor than his own fee percentage which he could recover from the Employer. The Contractor can now include a higher fee percentage to help off set this potential short fall.

NB: This is only relevant to Options A and B. Under Options C, D and E Defined Cost includes subcontractor

Contract Data Part 2

The Working Areas

- It is important that the Contractor fully describes the Working Areas to include not just the Site (the boundaries of which are defined by the Employer in Contract Data Part 1) but **all** areas where work connected with the contract is to be performed.

Contract Data Part 2

The Working Areas

- With the exception of manufacture, fabrication and design work, which maybe performed outside the working areas and paid as such, only the cost of resources working **within** the Working Areas qualify as Defined Cost for payment purposes. Hence the importance of fully describing the Working Areas in Contract Data Part 2.

Contract Data Part 2

The Risk Register

- There is a provision for the Contractor to include matters to be included in the Risk Register.
- The Risk Register, unless expressly incorporated in some way, is not a Contract Document.
- The listing of risks on the Risk Register does not have the effect of fixing either of the parties with any particular risk

Contract Data Part 2

The Risk Register

- Clause 80 lists all the risks which are Employer's risks. The last bullet point refers to "Additional *Employer's* risks stated in the Contract Data".
- Clause 81 provides:
 - ◆ "81.1 *From the starting date until the Defects Certificate has been issued, the risks which are not carried by the Employer are carried by the Contractor.*"

Contract Data Part 2

The Risk Register

- Unless there are additional Employer's risks listed in Contract Data Part 1, the effect of clause 81 is to fix the Contractor with all risks other than those listed in clause 80, regardless of any purported risk allocation on the Risk Register.

Contract Data Part 2

The Risk Register

- If the Risk Register allocates certain risks to the Employer, the Contractor should seek to have a statement included in the appropriate part of Contract Data Part 1 as follows:-
 - ◆ *“The risks allocated as Employer’s risks on the Risk Register reference...”*

Contract Data Part 2

The Risk Register

- If the Risk Register allocates certain risks to the Employer, the Contractor should seek to have a statement included in the appropriate part of Contract Data Part 1 as follows:-
 - ◆ *“The risks allocated as Employer’s risks on the Risk Register reference...”*

Contract Data Part 2

The Works Information

- Where the Contractor has design responsibility, the Contractor must identify the documents in which the Works Information for his design is to be found.
- Care should be taken to provide as full and comprehensive Works Information as is possible.

Contract Data Part 2

The Works Information

- If the Works Information is deficient or incomplete, any addition necessary will not qualify as a compensation event.

Contract Data Part 2

The Works Information

- Clause 60.1 (1) provides:

“60.1 The following are compensation events.

(1) The Project Manager gives an instruction changing the Works Information except

- *a change made in order to accept a Defect or*
- *a change to the Works Information provided by the Contractor for his design which is made either at his request or to comply with other Works Information provided by the Employer.”*

Contract Data Part 2

The Programme

- The Contractor should provide a programme with its tender and identify the programme by reference number and date.
- Clause 31.4 provides:
 - ◆ *“31.4 The Contractor provides information which shows how each activity on the Activity Schedule relates to the operations on each programme which he submits for acceptance.”*

Contract Data Part 2

The Programme

- The relationship can be shown by adding a column to the activity schedule listing the programme activity/activities identification numbers which relate to each activity on the activity schedule.
- The Prices on the activity schedule should relate to the estimated cost of performing the related programme activity/activities.

Contract Data Part 2

The Programme

- Clause 50.3 provides:
*“50.3 If no programme is identified in the Contract Data, **one quarter of the Price for Work Done to Date is retained in assessments of the amount due** until the Contractor has submitted a first programme to the Project Manager for acceptance showing the information which this contract requires.”*
- Hence the importance of providing and identifying a programme in Contract Data Part 2

Contract Data Part 2

The Activity Schedule

- Under Option A, the Activity Schedule goes to payment. The Contractor is paid the lump sum price for each activity or group of activities upon **completion** of the activity or group of activities.
- For cash flow purposes, it is therefore desirable to have a comprehensive list of activities. The more activities listed with a price, the more often activities will be completed and therefore paid.

Contract Data Part 2

The Activity Schedule

- Contractors should be careful not to fall into the trap of having a single activity for Site establishment, Site management and other preliminaries items. On a strict interpretation of the Contract, payment for those items would only be received at the end of the Contract.
- The Activity Schedule does not go to payment under Option C, therefore it need not be as comprehensive a list of activities.

Contract Data Part 2

Data for Schedule of Cost Components

- Where Equipment is to be purchased specifically for the Contract, the Contractor must identify the items of Equipment and insert a time related charge e.g. £100 per day, for the purposes of the 'change in value' calculation under item 23 of the Schedule of Cost Components.

Contract Data Part 2

Data for Schedule of Cost Components

- Assume purchase price of €50,000, notional sale price of €40,000, time-related on cost of €50 per day and a requirement period of 50 days, mid March to mid May

Example 1:

- ◆ first interim assessment at end March

Change in value = £10,000 + time related on cost for 10 days at £50 per day = £500. Total payment £10,500

- ◆ second interim assessment at end April

Change in value = £10,000 + time related on cost for 40 days at £50 per day = £2,000. Total payment £12,000 (less previously paid)

Contract Data Part 2

Data for Schedule of Cost Components

- Item 23 of the SCC provides:
 - ◆ “Payments for equipment purchased for the work included in the Contract and listed with a time-related on cost charge in the Contract Data Part 2, of
 - the change in value over the period for which the equipment is required and
 - the time-related on cost charge stated in the Contract Data Part 2 multiplied by the period for which the equipment is required
 - The change in value is the difference between the purchase price of the Equipment and the sale price or open market sale price of the Equipment at the end of the period for which it was required

Contract Data Part 2

Data for Schedule of Cost Components

- Example 1 continued:
 - ◆ final assessment at end May (when actual sale price determined)
 - ◆ Determined change in value = £10,000 + time related on cost for 50 days at £50 per day = £2,500. Total payment £12,500 (less previously paid)

Contract Data Part 2

Data for Schedule of Cost Components

- Example 2:
 - ◆ final assessment at end May (when actual sale price determined)
 - ◆ Determined change in value = £6,000 + time related on cost for 50 days at £50 per day = £2,500. Total payment £8,500 (less previously paid)

- If the *Project Manager* agrees these items of equipment may be assessed as if listed in Contract Data Part 2

Contract Data Part 2

Data for Schedule of Cost Components

- Percentage for Working Areas overheads
 - ◆ This percentage is to cover the cost of items attendant upon employing People. The items are listed under item 44 of the SCC. The percentage is applied to the Defined Cost of People.
 - ◆ Under NEC 2, accommodation was included in the list of items to be covered by the percentage.
 - ◆ Under NEC 3, accommodation is not included as part of the percentage but is paid as Equipment.

Contract Data Part 2

Data for Schedule of Cost Components

- Percentage for Working Areas overheads
 - ◆ The Contractor can arrive at the appropriate percentage by calculating the cost of providing the items listed at item 44 of the SCC, calculating the total cost of People and expressing the former as a percentage of the latter.

Contract Data Part 2

Data for Schedule of Cost Components

- Percentage for People overheads
 - ◆ This has the same purpose as the percentage for Working Area overheads but is for use only when the Shorter Schedule of Cost Components is used.
 - ◆ The Shorter Schedule is used with Options A and B for the purposes of assessing compensation events and, by agreement only for assessing compensation events under Options C, D and E.
 - ◆ The Shorter Schedule is not used for assessing payments under Options C, D and E.

Contract Data Part 2

Data for Schedule of Cost Components

- Percentage for People overheads
 - ◆ Under NEC 2 the list of items to be covered by the People overhead percentage is far greater than under NEC 3.
 - ◆ This is because under NEC 3 certain items have been separated out to be paid as Defined Cost rather than as part of a percentage.

Contract Data Part 2

Data for Schedule of Cost Components

- The Contractor can include percentages to cover the overhead costs in relation to.
 - ◆ Manufacture and fabrication outside the Working Areas.
 - ◆ Design outside the Working Areas.

ECC Contracts – Introduction

- Further questions?
- Delegates may be interested in other courses provided by Kerrigans, in particular, in relation to the NEC contracts, our course entitled:

"A Practical Guide to Compensation Events"