A Practical Guide to the NEC4 Engineering and Construction Contract
A Practical Guide to the NEC4 Engineering and Construction Contract

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WILEY Blackwell
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Chapter 1

Introduction

1.1 General

In writing this guide I have set out to provide a view, much of it personal, as to how to get the most out of the 4th Edition of the New Engineering Contract Engineering and Construction Contract (ECC). It is no secret that I am a fan of this suite of contracts and, as a result, may be willing to overlook what many perceive as its faults or weaknesses. In this guide I have tried to identify and suggest ways in which the procedures and aims of the contract can be simplified so that users do not become unnecessarily bogged down in procedure, but instead concentrate on achieving the goals of the ECC. This guide therefore goes through the procedure in detail as intended by the relevant clauses, but concentrates on practical issues to provide suggestions which the parties can use to achieve the overall intent and spirit of ECC and to reach the common goal.

With this guide, you get what it says on the cover: A Practical Guide to the NEC4 ECC Form of Contract. It is a guide to provide users of the ECC, both novice and experienced, with a view of all its various philosophies, principles, mechanisms and vagaries. The reader will be guided through the contract in a manner that will enable him or her to use this guide for reference without necessarily having to read it all: in other words, a practical guide rather than a stuffy textbook. That said, there will be an amount of cross-referencing between sections in order to avoid repetition, so users will need to follow these references to find more detailed supporting guidance to particular issues. One area that is not cross-referenced is the term ‘spirit of mutual trust and cooperation’ as found in clause 10.1 of the ECC, although used extensively throughout the guide. If users are uncertain of the meaning of this phrase, then they need to re-read Chapter 4.

This version of the Guide follows on from the two editions of the same title but for the NEC3 edition of the suite of contracts. Many of the clauses remain the same in NEC4 as they were in NEC3, so both the processes and the practical guidance remain the same from one edition to the next. Nonetheless the publication of NEC4 introduced a significant amount of change to the ECC, all of which is considered and included in this version of the Guide. What this Guide does not do is identify or consider the changes from NEC3 to NEC4. It is written purely about NEC4.

To assist the reader in finding where any particular clause, related legal case or UK statute is referred to in the text, a comprehensive index of such references is included in Tables A1.1–A1.3 in Appendix 1.
The more I have worked with this suite of contracts over the years, the more I have come to think of it not as a contract but as a Project Management Procedures Manual. This should not be a surprise, as the original contract was drafted by project managers for construction professionals (and not by lawyers for other lawyers and judges).

Nevertheless, we must not lose sight of the fact that the ECC is a contract and, as such, legally binds those parties that enter into a contract incorporating these standard terms. What I have also included in this Guide is advice and practical issues with regard to the NEC4 Engineering and Construction Subcontract. Except for some of the time periods being different and the absence of one main option, the Subcontract is truly back to back with the Contract. The differences are identified and additional practical issues are identified which apply to the Subcontractor/Contractor relationship. What users of the Guide will need to do in order to apply the majority of the text to the Subcontract is substitute the names of the parties and agents in the Contract with the equivalent names in the Subcontract. So ‘Client’, ‘Project Manager’ and ‘Supervisor’ in the Contract become ‘Contractor’ in the Subcontract. Similarly ‘Contractor’ in the Contract becomes ‘Subcontractor’ in the Subcontract, and ‘Subcontractor’ in the Contract becomes ‘Subsubcontractor’ in the Subcontract.

### 1.2 Mechanics not law

Being a practical guide, this book considers the mechanics of the contract and not the law. As a practicing construction professional, I am interested in the successful outcome of the project for all parties involved. From my point of view, the employing organisation should get what it wants in terms of a project finished on time, to the required quality and within budget (providing, of course, that the budget was reasonable in the first place). The consultants should be recognised for their contribution, whether it be design, management or commercially orientated, and be paid a reasonable fee for the service they provide. The contractors and subcontractors who carry out the work should be allowed to work efficiently, be recognised as having contributed to the project and make a profit.

Only those projects that satisfy all of the above criteria should be considered as being successful. Every organisation, whether it be a company, partnership or individual who is involved in a project, has its own needs and goals from that project. A good project will recognise this simple fact of business. It is when all the parties involved recognise each other's business goals (see Section 4.4.3) from the project, and work to align these goals, that success is achieved for all. As soon as one of the organisations involved feels dissatisfied, then the seeds of a dispute have been sown. As the industry knows, such seeds germinate easily and freely; once they appear on a project they can spread faster than any invasive weed.

Following on from the earlier editions, the ECC is drafted to impose the best practices within project management on the parties with the goal of avoiding disputes. It is the mechanics of these procedures and how to make them work effectively that is the focus of this guide.

As a consequence, the guide does not consider the law in relation to the ECC, except where reference is needed to explain why something is included or to confirm that, in
relation to the law in the United Kingdom, those requirements have been complied with by the ECC (or not as the case may be).

1.3 *A simple formula for understanding a contract*

Let’s face it: all contracts are confusing when you first try to work out what it all means. I picked up a simple formula for considering contracts many years ago from an experienced Chief Quantity Surveyor of a contracting organisation, who came to my then local centre of The Chartered Institute of Building to give an evening talk on Joint Contracts Tribunal (JCT) Contracts. It didn’t matter that he was talking about JCT Contracts. What I took away from that talk was a formula that I still use today in relation to any contract or procedural document that I encounter; this formula holds good in all such situations. I still have the piece of paper on which I noted the few words I needed to remind me of what to do. I rarely look at that piece of paper now, as the formula has become second nature to me in relation to every contract or set of procedures I read.

The formula is in two parts. The first part can be remembered by four words: WHO, WHAT, WHEN and HOW.

To expand, a contract is a document that sets out the rights and obligations of the parties to that contract, no matter what the contract is for. In the construction and related industries such contracts cover (usually by necessity) a range of extensive rights and obligations for both parties, how such rights and obligations are to be administered, and the involvement of agents to carry out specified duties for one or both of the parties. WHO, the first of our four key words, relates to the administration of these rights and obligations. The WHO in the ECC will be one of the eight named persons including the Employer, the Project Manager, the Supervisor, the Contractor, the Senior Representatives, the Adjudicator, the Dispute Avoidance Board or the Tribunal. The specific roles of these individuals are covered in detail in Sections 5.2–5.9.

By its processes and procedures, the ECC sets out WHAT must or may be done in the event that a certain circumstance arises. The WHAT will involve the WHO doing something as set out in the contract.

WHEN that something is to be done is also set out by the contract. In the case of ECC, the timetable for WHEN these things shall be done is clear and forms a key part of the processes and procedures under the contract. Failure to comply with these processes and procedures in accordance with the requirements specified by WHEN can result in a right being forfeited because of this failure.

Finally, ECC sets out HOW the process or procedure shall be carried out. Again ECC is prescriptive as to the HOW, although much of the HOW is set out in general terms that apply across all of the subsequent detailed processes and procedures.

To summarise, the first part of the formula (which holds good for all contracts and not just the ECC) is to consider WHO does WHAT, WHEN they do it and HOW it is to be done. Understanding these things is important as ECC creates what are known in legal circles as conditions precedent. Although the English Courts do not like such provisions, they can be effective if drafted in certain terms (for further comment on conditions precedent see Section 1.5).
When dealing with specific processes and procedures in this guide, the WHO, WHAT, WHEN and HOW will be summarised as appropriate in each case.

These four key words were included by Rudyard Kipling in his short story ‘The Elephant’s Child’, part of the Just So Stories, (1902) when he wrote:

“I keep six honest serving-men
(They taught me all I knew);
Their names are What and Why and When
And How and Where and Who.”

1.4 Mandatory or discretionary

The second part of the formula I learnt that evening was to consider whether an obligation, requirement or procedure is mandatory or discretionary. The distinction is quite clear: if something is mandatory, then it must be done in order to create a right for you and/or an obligation on someone else. If something is discretionary, then the party concerned can do it if the party feels it is appropriate but loses nothing otherwise.

The key to whether something is mandatory or discretionary is in the little words. If a provision says that a party ‘shall’, ‘must’ or ‘will’ do something, then the requirement to do that something is mandatory; that key little word leaves that party with no other option.

On the other hand, if the provision in question says that the party ‘may’ or ‘can’ do something, then that requirement is left to the discretion of that party, i.e. the action is discretionary.

Appreciating whether a requirement or a provision is mandatory or discretionary is key to making sure that you, as a party or agent to the contract, do what is required of you at the right time and in the right way.

In the ECC, and indeed every other contract in the NEC4 family together with all the previous editions, there is little to doubt or question as to whether things are mandatory or discretionary. The first clause in the ECC, clause 10.1, clearly states that the Employer, the Project Manager, the Supervisor and the Contractor shall act as stated in the contract. The meaning is plain and clear: they are all required to carry out the procedures set out in the contract at all times and in the way stated. There is no discretion about it, unless such discretion is given expressly in a particular clause (there are a small number of such instances which will be pointed out as they arise).

1.5 Conditions precedent

Put simply as possible, a condition precedent is a condition that acts to prevent either a right or an obligation from coming about until such time as the event prescribed as the condition precedent occurs. If a time limit is attached to the occurrence of the event (which is a condition precedent to a right or an obligation) and the event has not occurred within the time limit stated, the right or obligation can never come about.
It is important for users of the ECC to understand this principle; part of a mechanism that is commonly used includes such a condition precedent with a time limit. This actual condition will be highlighted when it is commented on.

While the courts in the United Kingdom do not traditionally like or support such clauses, they have enforced numerous examples where the wording has been clear. The first and second editions of the ECC were both said to include conditions precedent but it is generally felt that those conditions were not clearly enough worded to be effective. However, it was generally considered that the wording in the third edition was almost certainly clear enough to be considered as an effective condition precedent. That being the case, the fourth edition also contains the same standard of wording.

1.6 Note on use of uppercase in key words and phrases

Capital initial letters are used to identify terms that are defined as a feature of the ECC as set out in clause 11.1. Whenever I have referred to any such term, I have maintained consistency with the ECC and followed that principle of using upper case for the first letter of defined terms throughout the text of this guide. The reader will, however, come across instances where the same terms are referred to in a general sense, when lowercase is used. I have adopted this approach in order to distinguish between specific references to procedures, rights, obligations and other such matters that are directly linked to the ECC, and more general comments about good practice, the construction industry and other non-contract specific items.

For example, ‘Contractor’ refers to a specific issue that concerns the Contractor under the ECC and ‘contractor’ refers to the contractor in general terms.
Chapter 2

Background to the NECECC

2.1 The background: First edition

The timescale that we are looking at starts with a consultative document published in 1991, which was followed by the first edition in 1993, the second edition in 1995, the third edition in July 2005, the reprinted third edition in April 2013 and then the fourth edition in June 2017 (NEC Panel 2017a).

Many people believe the first edition was published in response to Sir Michael Latham’s (1994) report, *Constructing the Team*. This report was, however, predated by both the consultative document and First Edition.

In his report, Sir Michael identified the New Engineering Contract (NEC) (as it was then called) as being the contract, which, more than any other in general circulation at the time, contained many of the provisions, which he considered should be adopted in Construction Contracts. Out of the thirteen key issues that Latham thought should be adopted, the NEC contained eight. The full list of key issues from *Constructing the Team* is as follows:

1. A specific duty for all parties to deal fairly with each other, and with their subcontractors, specialists and suppliers, in an atmosphere of mutual cooperation.
2. Firm duties of teamwork, with shared financial motivation to pursue those objectives. These should involve a general presumption to achieve ‘win-win’ solutions to problems which may arise during the course of the project.
3. A wholly interrelated package of documents which clearly defines the roles and duties of all involved, and which is suitable for all types of project and for any procurement route.
4. Easily comprehensive language and with Guidance Notes attached.
5. Separation of the roles of contract administrator, project or lead manager and adjudicator. The Project or lead Manager should be clearly defined as the client’s representative.
6. A choice of allocation of risks, to be decided as appropriate to each project but then allocated to the party best able to manage, estimate and carry the risk.
7. Taking all reasonable steps to avoid changes to pre-planned works information. But, where variations do occur, they should be priced in advance, with provision for independent adjudication if agreement cannot be reached.
8. Express provision for assessing interim payments by methods other than monthly valuation i.e. milestones, activity schedules or payment schedules. Such arrangements must also be reflected in the related subcontract documentation. The eventual aim should be to phase out the traditional system of monthly measurement or remeasurement but meanwhile provision should still be made for it.

9. Clearly setting out the period within which interim payments must be made to all participants in the process, failing which they will have an automatic right to compensation, involving payment of interest at a sufficiently heavy rate to deter slow payment.

10. Providing for secure trust fund routes of payment.

11. While taking all possible steps to avoid conflict on site, providing for speedy dispute resolution if any conflict arises by a pre-determined impartial adjudicator/referee/expert.


13. Making provision where appropriate for advance mobilisation payments (if necessary, bonded) to contractors and subcontractors, including in respect of off-site prefabricated materials provided by part of the construction team.

By comparison with the other major standard forms available at the time, the NEC’s score of eight was three to four times better than any of its competitors. Encouraged by this praise, the NEC Panel set about revising the contract to incorporate the balance of the ideals and to take account of other comments that had been made.

### 2.2 The second edition

The job of revising the first edition was completed in 1995 and, in November of that year, the second edition was published. This edition not only incorporated revisions to the provisions of the Contract but also heralded a change in name to the ‘New Engineering Contract Engineering and Construction Contract’, shortened in use to NECECC.

The change in name was prompted by Sir Michael’s report. He had commented that the name NEC, coupled with it being published by the commercial arm of the Institution of Civil Engineers (Thomas Telford), served to suggest that it was a civil engineering contract. This impression was already restricting and would continue to restrict the use of this otherwise versatile contract to the civil and related engineering sectors; Sir Michael believed, however, that it was suitable for all types of construction, including not least building.

The change of name had the desired effect as, over the next 10 years, the use of the NECECC by employers in the building industry steadily increased.

The principle aim of the revisions that brought about the second edition was to incorporate all thirteen of the ideals (see Section 2.1) set out in Constructing the Team. Provision was made in the second edition to cater for the five that had not been included in the first edition. It is interesting to note, however, that the third edition only catered for twelve of the thirteen ideals. The provision for trust funds found at Secondary Option V of the second edition was dropped in the third edition for the simple reason that it was never used.
2.3 The third edition

Throughout the life of the second edition, the NEC User’s Group sought and collected feedback from its members on the aspects of the contract, where it was felt that revision was required. Taking this feedback into account, the NEC Panel not only revised the NECECC but worked to consolidate the other contracts that they had drafted using the same principles and to bring them together into one unified family.

While the revision of the NECECC had at one time been expected in late 2002/early 2003, the work to the whole family delayed the publication until 14 July 2005. (Those readers with a keen eye will have noted that the NEC3 family of documents printed at that time all bear the date June 2005 on the front cover. This had been the intended month of publication; however production problems delayed the actual launch until July.)

2.4 The third edition (reprinted)

The third edition was initially reprinted in June 2006 to correct a very small number of typographical errors in the June 2005 publication. Apart from these changes no others were made.

Separate Amendments were issued in September 2011 to alter dispute resolution Option W2 and secondary Option Y(UK)2 to cater for the changes required by the amendments to the Housing Grants, Construction and Regeneration Act 1996 contained within the Local Democracy, Economic Development and Construction Act 2009, which came into effect for any new contract entered into from 1 October 2011.

In April 2013 the whole family of documents was reprinted with further amendments. These amendments made some minor changes to the compensation event clauses (core clause 6) for the sake of clarity rather than to change the meaning or application, together with a minor amendment to clause 40.1 and some more significant alterations to dispute resolution Option W2. These were accompanied by the introduction of a new UK specific secondary Option, labelled Y(UK)1 and titled ‘Project Bank Account’. Detailed comment on this new secondary Option is provided at Section 13.10.4.

The April 2013 reprint also involved a change in image, in that the front covers were redesigned and the introduction of seven ‘How To’ guides covering the writing of the Works Information (NEC Panel 2013b), Scope (PSC) (NEC Panel 2013c) and Service Information (TSC) (NEC Panel 2013d), together with Communication Forms for each of the ECC, PSC and TSC (NEC Panel 2013e–g), with the seventh dealing with the incorporation of Building Information Modelling (BIM) (NEC Panel 2013h) into NEC3 Contracts. The total number of documents in the box set increased to thirty-nine.

2.5 The fourth edition

The fourth edition was published in June 2017 with the strap line ‘evolution, not revolution’. The intent was to incorporate changing patterns in procurement and project management. The preface to the documents says that the drafting panel had three key objectives, these being:
• provide greater stimulus to good management (see Section 2.11);
• support new approaches to procurement which improve contract management; and
• inspire increased use of NEC in new markets and sectors.

Some of this was achieved by adding new contracts to the suite of contracts, in the form of a new design, build and operate form, a forthcoming alliance contract and subcontracts to support some of the other contracts which did not already have such a document to support them.

Other enhancements have included new or expanded provisions to cover finalising elements of cost as contracts proceed, providing for final assessments, expanding the available dispute resolution provisions, creating more standardisation across the suite and reworking the guidance into what is seen by the drafters as a more user friendly format.

This last element has been created by replacing the previous guidance documents with a four-volume set, which is intended to assist users through the use of the contract from conception to completion. The four volumes provided are:

• Volume 1 – Establishing a Procurement and Contract Strategy (NEC Panel 2017b)
• Volume 2 – Preparing an Engineering and Construction Contract (NEC Panel 2017c)
• Volume 3 – Selecting a Supplier (NEC Panel 2017d)
• Volume 4 – Managing an Engineering and Construction Contract (NEC Panel 2017e)

These documents are referred to at various places within this Guide.

What users familiar with the second and third editions will immediately realise is that there are no flow charts in these User Guides. There are, however, books of flowcharts available for each contract for an additional charge for each volume required.

It is not the purpose of this guide to describe the changes from the third to fourth editions.1 This guide concentrates on administering projects using the fourth edition of the ECC. That said, the principles of the third edition are very similar; it is my belief that if you are familiar with only the second or third or fourth edition, then you should easily understand the others. Equally, anyone who can properly understand the ECC should be able, with a little thought and application, to use any of the other contracts in the NEC4 family.

2.6 Endorsement of NEC3 by the Office of Government Commerce

When the third edition of the NEC family of contracts was published in 2005, all of the 23 documents in the box set carried an endorsement from the UK’s Office of Government Commerce (OGC) on their title pages and back covers: the use of the family was recommended to all public sector construction procurers. By the time of the 2013 reprint,

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1 For those interested in the revisions from the third to fourth editions, the author wrote a series of articles that were published in *Civil Engineering Surveyor* in 2017/2018 (Rowlinson 2017a–d, 2018a,b). All are available on the author’s website (www.michael-rowlinson.co.uk).
the government body endorsing the contracts had changed its name to the Construction Clients’ Board and although the wording of the endorsement has changed, the meaning and intent remained the same. The recommendation was linked to a statement that such procurers must satisfy the objectives of the government’s Achieving Excellence in Construction (AEC) principles. These principles had been launched in March 1999 with the aim of improving the performance of central government departments, executive agencies and nondepartmental public bodies as clients in the construction industry. In the United Kingdom, depending on the state of the economy, these procurers account for between 35% and 40% of all new build, refurbishment and maintenance work carried out by the construction industry.

It is difficult to find any literature that lists the principles to which the OGC refer. What is published is a list of key factors, which in summary are:

- the establishment of integrated project teams;
- the use of short and effective lines of communication;
- the consideration of design, construction, operation and maintenance as a whole;
- effective risk management;
- effective value management;
- the use of sound project management techniques; and
- creating partnering and long-term relationships.

Many of these matters have their roots in Sir Michael Latham’s 1994 report Constructing the Team and Sir John Egan’s report Rethinking Construction (The Construction Task Force 1998). It is fair to say that both of these reports, and especially the former, influenced the development of the NEC family of contracts. The result was the endorsement by the OGC. Later contracts in the family published in December 2009 also carried the endorsement; the only difference is that by then it was given by the Construction Client’s Board (formerly known as the Public Sector Construction Clients’ Forum). The AEC principles can now only be accessed in the National Archives at the link http://webarchive.nationalarchives.gov.uk/20110622151127/www.ogc.gov.uk/ppm_documents_construction.asp.

The fourth edition carries a similar endorsement, now given by the Government Construction Board, from within the Cabinet Office UK. This endorsement is similar but now talks about efficiencies across the public sector and the promotion of behaviours in line with the principles of the Government Construction Strategy. This strategy has several faces, and rather than a single link giving access to relevant documents a general internet search on the phrase Government Construction Strategy will reveal numerous links to government information and scholarly articles about this latest initiative.

2.7 Endorsement by the Development Bureau, HKSAR Government

NEC4 also carries an endorsement from the Development Bureau of the Government of the Hong Kong Special Administrative Region (HKSAR) of the People’s Republic of China. This endorsement recommends a progressive transition from NEC3 to NEC4 for
the management of public works projects in Hong Kong. Whilst recognising the need for suitable amendments to cater for the Hong Kong environment, which term could include legislative, economic, social and market requirements, the endorsement foresees that the use of NEC4 should enhance collaborative partnering, unlock innovations and achieve better cost management and value for money in public works contracts.

An internet search on Development Bureau Hong Kong immediately reveals several statements and blogs concerning the use of NEC contracts in the HKSAR. These include a proud reference to the Development Bureau having won the NEC Client of the Year 2017 category and having been Highly Commended in the ‘Contract Innovation Through Additional Clauses’ category of the NEC Awards 2017. The endorsement and the awards, when taken together, show a government body that is not only making the right statements but being recognised for its achievements by the promoting organisation, for which they should be congratulated.

### 2.8 General philosophy: Aims and objectives

The brief leading to the preparation of the initial consultative document of the ECC was to prepare a radical new style of contract form. The ECC certainly achieved that aim in that it is intentionally different from other forms of construction contracts available at that time.

In order to comply with this desire for a contract that would be seen as radical, the drafting committee developed a number of aims and objectives that they sought to introduce into the form. These are summarised in Sections 2.9–2.12.

#### 2.9 Flexibility

One of the principle aims was to make the ECC as flexible as possible, thereby allowing the provisions:

- to be used for engineering and construction work containing any or all of the traditional disciplines such as civil, electrical, mechanical and building work;
- to be used whether the Contractor has some design responsibility, full design responsibility or no design responsibility;
- to provide all the normal current options for types of contract such as competitive tender (where the Contractor is committed to its offered prices), target contracts, cost reimbursable contracts or management contracts; and
- to be used in any country in the world.

As this guide develops, readers will appreciate how this flexibility is provided and how numerous combinations can be used to create contracts with different risk profiles to suit the needs of an individual project or series of projects.

The objective that the contract could be used anywhere in the world is being fulfilled. The NEC3 family was adopted by governments other than that of the UK; for example,
both the Australian and New Zealand authorities endorsed the contract. It is known to be used on all of the five major land masses and in the Antarctic (by the UK government on the survey stations built in that region). At the time of writing, there is no indication that these positions will change following publication of NEC4.

That said, NEC3 has been widely used in Framework agreements in the United Kingdom. That these contracts have been entered into for varying periods, typically 3 to 5 years but in some instances for 10 years or longer, will mean that NEC3 remains in use for some time to come.

2.10 Clarity and simplicity

One of the more radical aims was to produce a contract that was clear and simple in its format and readily understandable by ordinary construction professionals, as opposed to being a contract that required a degree of legal ability in order to be able to understand the rights and obligations of the parties. This aim for clarity and simplicity has been incorporated in several ways, including:

- the use of ordinary language rather than legal jargon;
- the use of short sentences at all times and by using subclauses to break up large bodies of text;
- the use of a logical structure that keeps like matters grouped together;
- the provision of flow charts for each procedure in the contract;
- a consistent approach to the management and allocation of risk across the different procurement routes;
- by limiting the extent of the text and clauses in order to provide a framework rather than by being prescriptive.

The decision to use clear and simple language with short sentences and subclauses provides the user with a contract that can be read in bite-sized pieces. The downside is that, for an industry that has been used to prescriptive rules in contracts, the lack of detail and direction regarding the next step in every resulting scenario is a concern to many. In order to overcome this concern, users must learn to appreciate the goal of a clause or subclause and adopt their working practices to achieve that goal. Practical examples of such steps are considered throughout the following chapters of this guide.

The language itself is written using the present tense, a style that has been criticised by The Hon. Mr. Justice Edwards-Stuart who, in the judgement he made in the case of Anglian Water Services Ltd v Laing O’Rourke Utilities Ltd [2010] EWHC 1529 (TCC), said:

I have to confess that the task of construing the provisions in this form of contract is not made any easier by the widespread use of the present tense in its operative provisions. No doubt this approach to drafting has its adherents within the industry but, speaking for myself and from the point of view of a lawyer, it seems to me to represent a triumph of form over substance.
Notwithstanding the above statement, the good judge was still able to interpret the issues before him and give meaning to them all.

2.11 Stimulus to good management

Providing a contract that acted as a stimulus to the use of good project and commercial management techniques was central to the philosophy behind the drafting of the original contract and has been improved through the revisions. These procedures are designed to contribute to the forward-looking management philosophy, which is designed to manage problems rather than to simply allow them to degenerate into disputes.

This philosophy can be described by two basic principles, both of which impact on the objective of stimulating good management:

• foresight that is applied collaboratively serves to mitigate problems and, this, in turn, reduces risk for all those involved; and
• the clear division of function and responsibility helps accountability and motivates people to play their part in the successful management of the project.

In order for this philosophy to be successful, users of the form must adopt a cultural transition that is best described by quoting the opening paragraph of Section 1.2 in Volume 1 (establishing a procurement and contract strategy (NEC Panel 2017b) that forms part of the NEC4 family. This says:

NEC (New Engineering Contract) is a modern day family of contracts that facilitates the implementation of sound project management principles and practices as well as defining legal relationships. Key to the successful use of NEC is users adopting the desired cultural transition. The main aspect of this transition is moving away from a reactive and hindsight-based decision-making and management approach to one that is foresight based, encouraging a creative environment with pro-active and collaborative relationships.

The philosophy and cultural transition are contributed to and achieved by several matters including but not limited to:

• the provision of express requirements requiring collaboration between the parties and other personalities involved (see clause 10.2 and Section 4.2);
• providing provisions and procedures which encourage and reward foresight (including provisions that penalise a failure to use such foresight);
• by clearly allocating risks between the parties, with differing levels of risk depending on the main option chosen but with a consistent approach to risk across those main options;
• by a clear and consistent approach to the definition and administration of compensation events;
• by providing the Project Manager with options from which the solution to suit the particular problem can selected;
• by providing procedures to obtain quotations from the Contractor in relation to problem situations or in advance of proposed change; and
• by the use of up-to-date, accurate and binding programmes which are regularly monitored and revised, thereby acting as a dynamic management tool.

2.12 Other characteristics

The family provides for different methods of exerting financial control through the selection of the preferred Main Option. The principle two methods used are by bills of quantities or an activity schedule, the latter being provided by the tenderer before the Contract is formed. In both cases the primary use of the document is only for assessing payments although, by agreement, the use of a bills of quantities can be extended.

The drafters of the NEC family have avoided the use of any cross-referencing from one clause to another. This serves to remove the need or temptation to divert from the clause the user is reading to other related clauses. Instead, the user is encouraged to simply follow the particular procedure covered by the clause they are reading. As a result, the contract seems uncluttered and comes across as very easy to read.

However, this principle has more than one downside. The lack of cross-referencing can lead users who are experienced in other contractual arrangements to become puzzled as to why the contract does not provide provisions that they would expect to see in relation to a matter they are following in a core clause. In all likelihood, such a provision is provided but in another core clause. The lack of cross-referencing in this respect means that users have to understand how the contract is laid out and learn where to go to look for the conditions they expect to find in a contract of this nature.

The lack of cross-referencing also creates situations where what could be a very severe penalty for the failure to do something is not referred to at the point where the requirement to do that something is actually set out. Instead, the penalty is set out in another core clause. It is therefore not unknown for a user not to do something that they consider is simply procedural and without any consequences should the procedure not be followed; a penalty as severe as termination of the contract could, however, lurk elsewhere in the document.
3.1 *General arrangement of the ECC*

The principle way in which the flexibility referred to in Section 2.9 is provided by the ECC is in the arrangement of the conditions. The drafting body developed a system whereby users of the contract could select from a menu of options to produce a version of the conditions which was suitable for the project that was being considered.

That said, the arrangement of the ECC is based around nine core clauses that must in used in every contract:

1. General
2. The Contractor’s main responsibilities
3. Time
4. Quality management
5. Payment
6. Compensation events
7. Title
8. Liabilities and insurance
9. Termination

The first part of the flexibility comes when the user, usually the Client or the Project Manager on the Client’s behalf, selects which one of the Main Options the project is going to be carried out under. The ECC offers six Main Options for the user to choose. The selection of the Main Option will determine the risk profile that the Client sets for the project subject to minor adjustments, resulting from the selection of further options, which will be discussed below.

The six Main Options that are available for selection are:

- *Option A*: Priced contract with activity schedule;
- *Option B*: Priced contract with bill of quantities;
- *Option C*: Target contract with activity schedule;
- *Option D*: Target contract with bill of quantities;
- *Option E*: Cost reimbursable contract;
- *Option F*: Management contract\(^1\).

\(^1\) The ECS does not include Option F. This procurement route is not suitable for a subcontract situation.

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It must be emphasised that the ECC requires that just one of the Main Options listed above is selected. One must be selected, otherwise the contract will not function. The Main Option chosen dictates which additional conditions are added to the core clauses. Should more than one Main Option be included, the resulting contract would immediately contain conflicts that it would not be possible to resolve.

Comments on these Main Options are given in Section 3.5. Details of the additional conditions added to the core clauses are given in the relevant chapter that refers to the conditions under consideration.

Once the Main Option has been selected, the user must select one of the three dispute resolution options:

- Option W1 for use where adjudication is the method of dispute resolution and where the UK Construction Act does not apply; or
- Option W2 where the UK Construction Act does apply; or
- Option W3 for use where a Dispute Avoidance Board is the method of dispute resolution and where the UK Construction Act does not apply.

While the ECC states that one of these options must be chosen, there would not, in the author’s view, be anything to prevent users from not selecting any one of the dispute resolution options and either inserting their own procedures in Option Z or opting to rely on the relevant law. In the United Kingdom, adjudication would be implied for all contracts that fall within the definition of a construction contract under the Housing Grants, Construction and Regeneration Act 1996. In all jurisdictions that I am aware of, reference to the courts is always available.

The next part of the selection procedure that the Client must consider is to decide which, if any, of the Secondary Options will be included within the Conditions. It must be emphasised that it is not necessary to select any of the Secondary Options; the core clauses and selected Main Option, in all six cases, will provide a perfectly workable and sound contract.

The only limit on how many Secondary Options can be selected is determined by the restrictions on the combination of choices; these restrictions are stated within the notes in brackets attached to some of the Secondary Options in the Schedule of Options.

The full list of Secondary Options available for use in the ECC is:

- **Option X1**: Price adjustment for inflation (used only with Options A, B, C and D);
- **Option X2**: Changes in the law;
- **Option X3**: Multiple currencies (used only with Options A and B);
- **Option X4**: Ultimate holding company guarantee;
- **Option X5**: Sectional Completion;
- **Option X6**: Bonus for early Completion;
- **Option X7**: Delay damages;
- **Option X8**: Undertakings to the Client or Others;
- **Option X9**: Transfer of rights;
- **Option X10**: Information modelling;
- **Option X11**: Termination by the Client;
- **Option X12**: Multiparty collaboration (not used with Option X20);
- **Option X13**: Performance bond;