

Selecting a suitable NEC3 form of contract



Dr Ron Watermeyer
2011 Chairman ICE-SA
watermeyer@ssinc.co.za

BACKGROUND

ISO 6707-2 defines conditions of contract as “terms that collectively describe the rights and obligations of contracting parties and the agreed procedures for the administration of their contract; or document containing conditions of contract”.

A standard form of contract, or standard contract, is a contract between two parties that is published by an authoritative industry body with fixed terms and conditions which are deemed to be agreed and are not subject to further negotiation or amendment.

The NEC is a family of contracts that facilitates the implementation of sound project management principles and practices, as well as defining legal relationships. It is suitable for procuring a diverse range of engineering and construction works, services and goods, spanning major framework projects through to minor works and purchasing of goods. NEC is a division of Thomas Telford Ltd, which is a wholly-owned subsidiary of the Institution of Civil Engineers (ICE), the owner and developer of the NEC.

The NEC was originally known as the ‘New Engineering Contract’ when it was launched in 1993. The second edition, which added several new documents to the family, including a professional services and adjudicator’s contract, was launched in 1995. The NEC3, which incorporated the learning and industry feedback in using the second edition, was published in 2005. The NEC3 Term Service Short Contract (TSSC), NEC3 Supply Contract (SC) and NEC3 Supply Short Contract (SSC) were launched in 2009.

The NEC3 is drafted around three main objectives:

1. Stimulus to good project management
2. Clarity
3. Flexibility

It is drafted on a relational contracting basis, based on the belief that collaborative working across the entire supply chain optimises the likely project outcomes when compared with a typically fragmented and non-integrated approach to designing and constructing projects. The NEC3 contracts are accordingly designed to encourage collaboration and teamwork, rather than a confrontational approach to the management of a contract. The first clause in every contract requires the parties to the contract, and any project / services / supply manager appointed in accordance with the contract, to “act as stated in the contract and in a spirit of mutual trust and cooperation”.

The NEC3 contracts provide effective control of change, speedy agreement of time, quality and cost impacts of change, improved early forecasting of end costs, greater accuracy of end date forecasts, early warning of risks and potential change, and quick dispute resolution mechanisms. They also contain clear procedures with clear time limits for actions to be taken, which:

- are designed to reduce financial and decision-making chains, and
- make use of risk and value management tools.

NEC3 DOCUMENTS

The NEC3 set of contracts contains a whole family of interlocking documents covering engineering and construction works, professional services, term services, supply, framework and adjudicator’s contracts (see Table 1). This promotes a ‘best fit’ procurement route for a particular project. These standard forms of contracts are accompanied by guidance notes and flow charts which depict the procedures followed when using the NEC3 contracts (see Table 2). The flow charts are intended to assist users to see how the various

clauses of an NEC3 contract are applied, and as such depict the sequences of actions that take place in terms of the contract.

STRUCTURE OF THE NEC3 CONTRACTS

Each contract in the family:

- uses a similar structure and terminology to promote ease of learning and back to back provisions for process integration and contractual cover, and
- is drafted around a modular structure so that a rapid assembly of ‘best fit’ procurement arrangements can be made for each transaction.

All contracts have Core clauses, while some have Main Option clauses, which enable different pricing mechanisms to be called up, and Secondary Option Clauses which provide for a range of optional conditions of contract to be called up if need be. Some of the contract types have short options which do not require sophisticated management techniques and impose only low risks on both the parties. These short contracts as such provide the drafter with very few options when compiling a contract and make no provision for a Project / Supply / Service Manager appointed by the Employer.

All the NEC3 contracts, with the exception of the Framework Contract (FC) and the Adjudicator’s Contract (AC), contain core clauses which are arranged in the following nine sections:

- 1 General
- 2 The Contractor’s (ECC, ECSC, TSC and TSSC) / Subcontractor’s (ECS and ECSS) / Parties’ (PSC) / Supplier’s (SC and SSC) main responsibilities
- 3 Time
- 4 Testing and defects (ECC, ECS, SC, SSC, TSC and TSSC) / Defects (ECSC and ECSS) / Quality (PSC)
- 5 Payment
- 6 Compensation events
- 7 Title (ECC, ECSC, ECS, ECSS, PSC, SC and SCC) / Use of equipment

Table 1 Contracts in the NEC family

NEC3 Document	Code	Recommended Usage
Engineering and Construction Contracts		
NEC3 Engineering and Construction Contract *	ECC	Engineering and construction works, including any level of design responsibility
NEC3 Engineering and Construction Short Contract	ECSC	Engineering and construction works which do not require sophisticated management techniques, comprise straightforward work and impose only low risks on both the employer and contractor
NEC3 Engineering and Construction Subcontract	ECS	Engineering and construction works where the contractor has been appointed under the ECC and is written as a back-to-back set of terms and conditions
NEC3 Engineering and Construction Short Subcontract	ECSS	Engineering and construction works where the contractor has been appointed under the ECC or ECSC where sophisticated management techniques are not required and the works comprise straightforward work and impose only low risks on both the contractor and subcontractor
Professional Services Contracts		
NEC3 Professional Services Contract	PSC	Professional services, such as engineering, design or consultancy advice
Term Service Contracts		
NEC3 Term Service Contract	TSC	Manage and provide a service over a period of time
NEC3 Term Service Short Contract	TSSC	Manage and provide a service over a period of time or provide a service, which does not require sophisticated management techniques, comprises straightforward work and imposes only low risks on both the employer and contractor
Supply Contracts		
NEC3 Supply Contract	SC	Local and international procurement of high-value goods and related services, including design
NEC3 Supply Short Contract	SSC	Local and international procurement of goods under a single order or on a batch order basis and is suitable for use with contracts which do not require sophisticated management techniques and impose only low risks on both the Purchaser and the Supplier
Adjudicator's Contract		
NEC3 Adjudicator's Contract	AC	Adjudication services to decide disputes under the NEC3 family of contracts
Framework Contract		
NEC3 Framework Contract	FC	Construction works or design or advisory services on an 'as instructed' basis over a set term
*Also available separately as six separate documents – options A, B, C, D, E and F		

Table 2 NEC3 supporting documentation

Category	Title
Guidance on Contract Strategy	NEC3 Procurement and Contract Strategies
Engineering and Construction Contracts	NEC3 Engineering and Construction Contract Guidance Notes
	NEC3 Engineering and Construction Contract Flow Charts
	NEC3 Engineering and Construction Short Contract Guidance Notes and Flow Charts
Professional Services Contracts	NEC3 Professional Services Contract Guidance Notes and Flowcharts
Term Service Contracts	NEC3 Term Service Contract Guidance Notes
	NEC3 Term Service Contract Flow Charts
	NEC3 Term Service Short Contract Guidance Notes and Flow Chart
Supply Contracts	NEC3 Supply Contract Guidance Notes
	NEC3 Supply Contract Flow Charts
	NEC3 Supply Short Contract Guidance Notes
Adjudicator's Contract	NEC3 Adjudicator's Contract
	NEC3 Adjudicator's Contract Guidance Notes
Framework Contract	NEC3 Framework Contract Guidance Notes and Flow Charts

	Plant and Materials (TSC) / Use of equipment and things (TSSC)	Indemnity, insurance and liability (ECSC, PSC, ECSS and TSSC)	Those contracts which have clause 9 as 'Termination' only contain a core clause
8	Risks and insurance (ECC, ECS and TSC) / Risks, indemnities, insurance and liability (SC, SSC) /	9 Termination (ECC, ECS, PSC and TSC) / Termination and dispute resolution (ECSC, ECS, SSC, SSC, TSSC)	W (Option W/2) Dispute Resolution, which allows the compiler of the contract data to select one of two options for the

Table 3 Main Options

Main Option	ECC	ESC	PSC	TSC
A	Priced contract with Activity Schedule	Priced contract with Activity Schedule	Priced contract with Activity Schedule	Priced contract with Price List
B	Priced contract with Bill of Quantities	Priced contract with Bill of Quantities	-	-
C	Target contract with Activity Schedule	Target contract with Activity Schedule	Target contract	Target contract with Price List
D	Target contract with Bill of Quantities	Target contract with Bill of Quantities	-	-
E	Cost reimbursable contract	Cost reimbursable contract	Time-based contract	Cost reimbursable contract
F	Management contract	-	-	-
G	-	-	Term contract	-

Table 4 Payment due in the ECC, ECS, PSC and TS at each assessment day

Main Option	What is included in the amount due	
Price-based		
A	Priced contract with Activity Schedule	<ul style="list-style-type: none"> The total of the Prices for each of the activities which have been completed (PSC) The total of Prices for each group of completed activities and each completed activity which is not in a group (ECC and ECS)
	Priced contract with Price List	The total of (TSC): <ul style="list-style-type: none"> The Price for each lump sum item in the Price List which the Contractor has completed, and where a quantity is stated in the Price List, an amount calculated by multiplying the quantity which the Contractor has completed by the rate
B	Priced contract with Bill of Quantities	The total of (ECC and ESC): <ul style="list-style-type: none"> The quantity of the work which the Contractor has completed for each item in the Bill of Quantities multiplied by the rate, and a proportion of each lump sum which is the proportion of the work covered by the item which the Contractor has completed
Cost-based		
C	Target contract with Activity Schedule	The total Defined Cost which the Project Manager forecasts would have been paid by the Contractor before the next assessment date plus the Fee (ECC and ECS)
	Target contract	The Time Charge for the work which has been completed (PSC)
D	Target contract with Price List	The Defined Cost which the Contractor has paid plus the Fee (TSC)
	Target contract with Bill of Quantities	The total Defined Cost which the Project Manager forecasts would have been paid by the Contractor before the next assessment date plus the Fee (ECC and ECS)
E	Cost reimbursable contract	<ul style="list-style-type: none"> The total Defined Cost which the Project Manager forecasts would have been paid by the Contractor before the next assessment date plus the Fee (ECC and ECS) The Defined Cost which the Contractor has paid plus the Fee (TSC)
	Time-based contract	The Time Charge for the work which has been completed (PSC)
F	Management contract	The total Defined Cost which the Project Manager forecasts would have been paid by the Contractor before the next assessment date plus the Fee (ECC)
Combined (price- and cost-based)		
G	Term contract	The total of (PSC) <ul style="list-style-type: none"> The Time Charge for work done which has been completed on time-based items in the Task Schedule, and a proportion of the lump sum price for each other item on the Task Schedule which is the proportion of the work completed on that item

resolution of disputes (one of these options is aligned with the provisions of the United Kingdom's Housing Grants, Construction and Regeneration Act of 1996).

The ECC, ESC, PSC and TS contracts make provision for the Main Options listed in Table 3, which can be activated in a particular contract through reference in the Contract Data. Payment in terms of these contracts is based on the Prices for Work Done to

Date / Price for Services Provided to Date, as described in Table 4. In target contracts the 'target' is the Prices (i.e. the lump sum prices for each of the activities on the Activity Schedule (ECC, ECS and PSC), the amounts stated in the Price column of the Price List (TSC), or the lump sums and the amounts obtained by multiplying the rates by the quantities for the items in the Bill of Quantities (ECC)). The Consultant's

/ Contractor's / Subcontractor's share (gain / pain) is the difference between the total of Prices and what is paid in terms of Time Charges or Defined Cost.

There are no Main Options in the ECSC, ECSS, SC, SSC and TSSC, as these contracts contain standard payment provisions as indicated in Table 5.

The Secondary Options that are provided in the ECC, ECS, PSC, TSC and SC are listed in Table 6.

Table 5 Payment due in the ECSC, ECSS, SC, SSC and TSSC at each assessment day

Contract	What is included in the amount due
ECSC and ECSS	<ul style="list-style-type: none"> The Price for each lump sum item in the Price List which the Contractor / Subcontractor has completed, and where a quantity is stated in the Price List, an amount calculated by multiplying the quantity which the Contractor / Subcontractor has completed by the rate
SC and SSC	<ul style="list-style-type: none"> The Price for each lump sum activity in the Price Schedule which the Supplier has completed, and where a quantity is stated for an item in the Price Schedule, an amount calculated by multiplying the quantity which the Supplier has completed by the rate
TSSC	<ul style="list-style-type: none"> The Price for each lump sum item in the Price List or Task Order which the Contractor has completed, and where a quantity is stated in the Price List or Task Order, an amount calculated by multiplying the quantity which the Subcontractor has completed by the rate

Table 6 Secondary Options provided for in ECC, ECS, PSC, TS and SC

#	Clause title	ECC and ECS	PSC	TSC	SC
X1	Price adjustment for inflation	Main Options A, D, C and D only	✓	Main Options A and C only	✓
X2	Changes in law	✓	✓	✓	✓
X3	Multiple currencies	Main Options A and B only	Main Options A and G only	Main Option A only	✓
X4	Parent company guarantee	✓	✓	✓	✓
X5	Sectional completion	✓	✓	✗	✗
X6	Bonus for early completion	✓	Main Options A, C and E only	✗	✗
X7	Delay damages	✓	✓	✗	✓
X8	Collateral warrantee arrangements	✗	✓	✗	✗
X9	Transfer of rights	✗	✓	✗	✗
X10	Employer's agent	✗	✓	✗	✗
X11	Termination by Employer	✗	✓	✗	✗
X12	Partnering	✓	✓	✓	✓
X13	Performance bond	✓	✓	✓	✓
X14	Advanced payment to the Contractor	✓	✗	✗	✓
X15	Limitation of the Contractor's design liability to reasonable skill and care	✓	✗	✗	✗
X16	Retention	Main Options A, B, C, D and E only	✗	✗	✗
X17	Low performance damages	✓	✗	✓	✓
X18	Limitation of liability	✓	✓	✓	✗
X19	Task order	✗	✗	✓	✗
X20	Key Performance Indicators (not used with option X12)	✓	✓	✓	✓

SELECTING A PARTICULAR NEC3 FORM OF CONTRACT

The selection of an NEC3 form of contract for a particular contract is, in the last analysis, a matter of professional judgement and should only be considered after the scope of work has been developed and some consideration has

been given to the remuneration of the contractor. The following practical considerations inform the specific contract that is decided upon:

- 1 What is the best fit for the contract working through the flow charts presented in Figure 1?
- 2 Does the identified NEC3 contract

fit the recommended usage outlined in Table 1?

- 3 Does the identified NEC3 contract fit the payment mechanism envisaged (see Tables 3 to 5)?
- 4 Is the short form of NEC3 contract warranted, i.e. the Secondary Options (see Table 6), or not required? ■

