

# INSIDER INSIGHTS

No.2

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## NEC4 AMENDMENTS

JANUARY 2023



**A BRIEF SYNOPSIS**

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# A BRIEF **SYNOPSIS**

**Having first been published almost six years ago (see prior article), the NEC4 suite of contracts have been amended on a couple of occasions already (2019 and 2020) but the recently announced set of amendments (dated January 2023) appear to be far more comprehensive.**

Consequently, I thought I'd delve into the detail, starting with the salient commercial amendments!



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# PART 1

# PAYMENT



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# PART 1 **PAYMENT**

## **Payment for people working elsewhere**

The drafters have clearly recognised that post pandemic, a seismic shift in working patterns has taken place. Consequently, the Schedule of Cost Components (SCC) and the Short Schedule of Cost Components (SSCC) now make admissible as a Defined Cost those people working from home or elsewhere, even if their normal place of work is not within the Working Areas. Whilst such working practices and the acceptance of costs have been common practice for a while now (particularly since the onset of COVID-19), the amendments make a lot of sense and will aid in removing the potential for debate on the issue.

Under the NEC4 ECC for example, the Contractor simply needs to identify those people to be captured as an admissible cost (even if outwith the Working Areas) in Contract Data Part Two when using the SCC (main options C, D and E). This reflects good practice in my opinion. We have regularly recommended collation and agreement of a project organogram (with a subtle amendment to the SCC) to clarify people, roles, and responsibilities prior to contract award. Doing so helps to ensure greater transparency, collaboration, and cost management.

## **Payment on termination**

(Supply Short Contract)

The Supply Short Contract (SSC) has been amended to ensure alignment with the other contracts in the suite and provide for payment to the Supplier in instances when the agreement is terminated due to a Purchaser's default, or for their convenience.

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# PART 2 SHORT CONTRACTS



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# PART 2

# SHORT CONTRACTS

## **Limit of liability** under short contracts

All short form contracts now provide an optional entry in the Contract / Subcontract Data to enter a total limit of liability. This should be carefully considered by all contracting entities to reduce the risk of financial loss through damages. For example, the exposure could be limited to a percentage of the original prices (as at the contract date) or a maximum commercial value.

## **Design obligation** under short contracts

Most, if not all, Professional Indemnity policies (in the UK) are unable to provide cover for 'fitness for purpose' obligations. Consequently, this change to the NEC4 Engineering and Construction Short Contract (ECSC) and NEC4 Engineering and Construction Short Subcontract (ECSS) which affords the Client the opportunity to limit the design obligation to 'reasonable skill and care' is a sensible move. All contracting entities are well advised to ensure this option is included (as X15 should be under the 'full' contracts) in Contract Data Part One to ensure alignment to the typical negligence cover provided by insurers.

Additionally, a compensation event has been introduced to deal with the situation whereby the Contractor corrects a notified Defect for which it is subsequently found not liable (since it used reasonable skill and care in delivery of the design).



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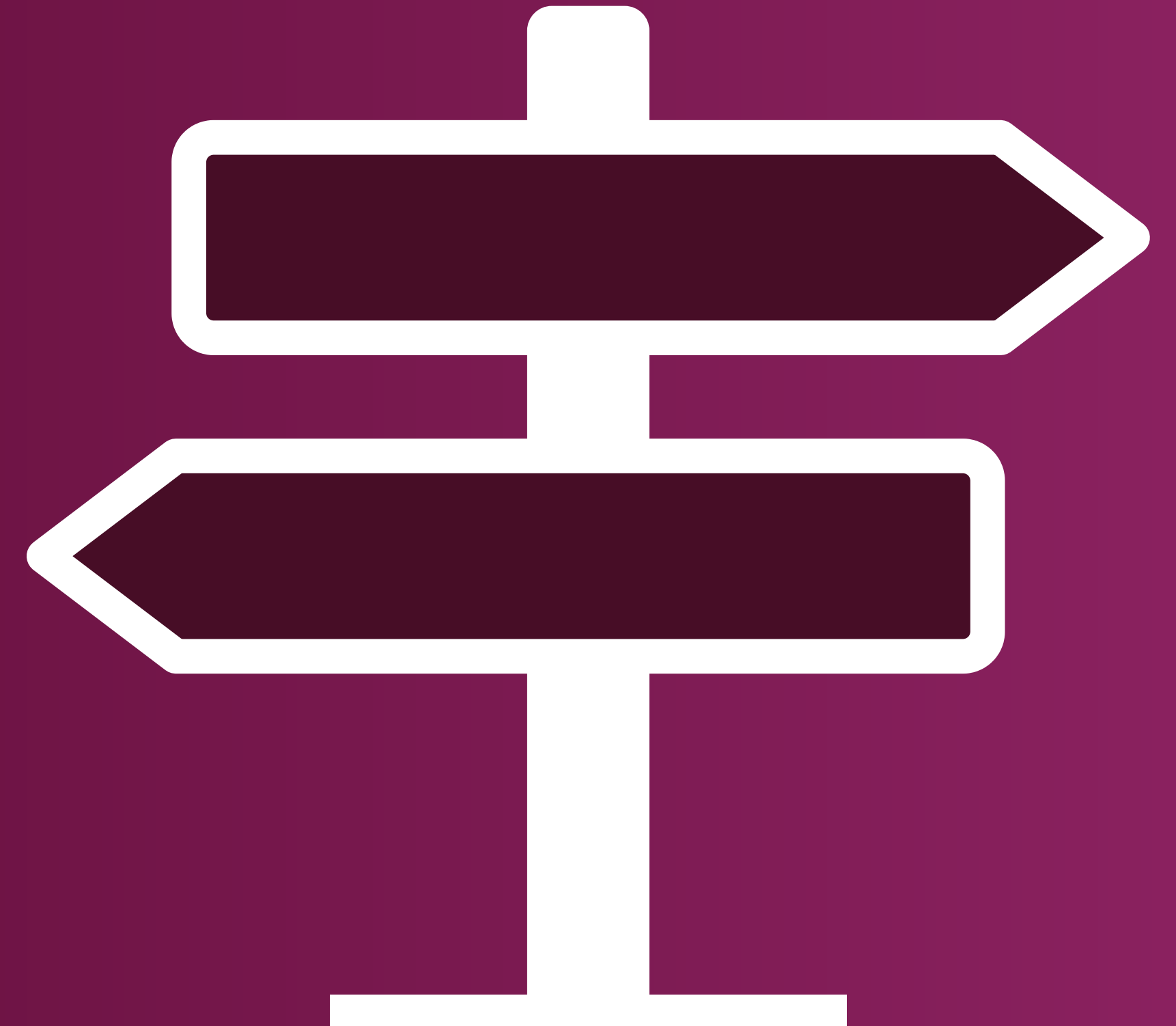
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# PART 3

# OPTIONS



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# PART 3 OPTIONS

## **Adjudication (Option W2)**

In line with the Housing Grants, Construction and Regeneration Act (1996), dispute resolution Option W2 has been amended to afford the Adjudicator the right to decide on the procedure and timetable (with the removal of the previously stipulated 14-day period for submissions). Prior experience informs me that this is typically what happened in any case but being explicit can't be of any harm!

## **Secondary Option X22**

### Early contractor involvement

Introduced in 2015, the 'early contractor involvement' clauses (Option X22) for the Engineering and Construction Contract (ECC) were introduced to facilitate the involvement of the contractor in early stages of design and planning of the project under one agreement (as opposed to separate appointments). Split into two stages, Stage One involves the Contractor in assisting in development of the design until such time that there is sufficient maturity to price the construction stage as well as any outstanding design aspects (delivered under Stage Two).

Secondary Option X22 has now been amended to facilitate assessment of compensation events using information gathered in Stage One. Whilst the information gathered will inform Stage Two proposals (updated Site Information for example), the date of the notice to proceed to Stage Two shall also become the 'baseline' for assessment of compensation events as opposed to the Contract Date.

Additionally, all compensation events notified in Stage One are to be agreed (implemented) prior to, or whilst issuing the notice to proceed to Stage Two; thus, providing greater cost certainty for both Parties.

If the works do not proceed to Stage Two, then a notice is to be issued to clarify this position (effectively removing the Stage Two works from Scope). In the same notice, the Project Manager shall change the Completion Date and the Prices to match those at the end of Stage One; effectively removing any threat of delay damages and ensuring that no pain or gain situation transpires. Incentive payments are also ruled out as a consequence of this amendment.



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Finally, the slightly prickly issue following termination (for Client convenience) of the amount due including the fee percentage applied to any excess of the total of the Prices at the Contract Date over the Price for Work Done to Date (clause 93.2, A4) has also been remedied so that it only applies to the total of the Prices for Stage One if they do not proceed to Stage Two. Another pragmatic amendment.

**Secondary Option X29**

Climate change

First published as a standalone option in 2022; secondary option X29, which is focused on climate change, will now be incorporated into each relevant main contract (ECC and ECS for example) with the aim of supporting efforts to decarbonise construction projects.

X29 allows contracting parties to identify climate change targets in the Scope or performance table to drive behaviours and offer financial incentives to attain or better the targets. Clearly there is still a lot more work and focus required from the wider industry to tackle climate change, but the availability of this optional provision in the standard forms will at least prompt discussion at

contract formation stage. Perhaps future amendments to NEC4 (or NEC5) as well as other standard forms of contract (JCT, IChemE, FIDIC for example) may, or should consider incorporating this as a core clause?!

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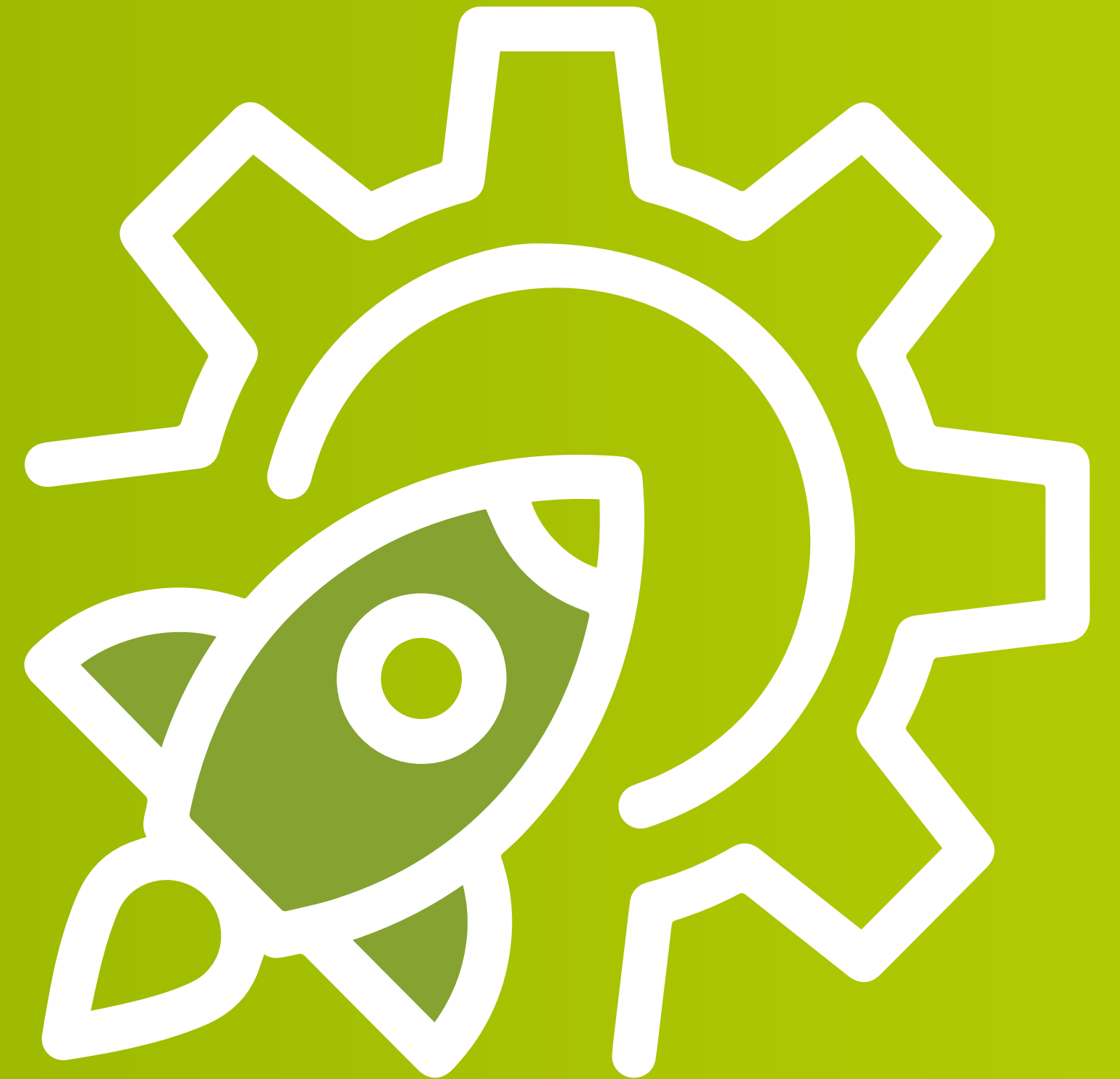
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# PART 4 GOING FORWARD



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# PART 4 **GOING FORWARD**

To incorporate these changes into future agreements, the entry in Contract Data (Part One) just needs to read (as an example)

“The conditions of contract are the core clauses, the clauses for main Option A, the following Option for resolving and avoiding disputes and secondary Options of the NEC4 Engineering and Construction Contract June 2017 (with amendments October 2020, and January 2023)”.



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Clearly contingent on feedback from practitioners; exactly how it should be, the amendments appear to be clear, justified and therefore they should be welcomed by those engaged under such agreements, and those looking to award future contracts under NEC4.

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