
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 as 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.

