



# early contractor involvement

January 2016



## Early Contractor Involvement (ECI)

This additional clause should be used along with the NEC3 Engineering and Construction Contract where early contractor involvement is required

An NEC document

January 2016

### Construction Clients' Board endorsement of NEC3

The Construction Clients' Board recommends that public sector organisations use the NEC3 contracts when procuring construction. Standardising use of this comprehensive suite of contracts should help to deliver efficiencies across the public sector and promote behaviours in line with the principles of *Achieving Excellence in Construction*.

**Cabinet Office UK**



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- Its use stimulates good management of the relationship between the two parties to the contract and, hence, of the work included in the contract.
- It can be used in a wide variety of commercial situations, for a wide variety of types of work and in any location.
- It is a clear and simple document - using language and a structure which are straightforward and easily understood.

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## Contents

1. Additional clause for use with the NEC3 Engineering and Construction Contract (ECC) Options C and E .....	5
2. Additional ECC Contract Data entries.....	10
3. Guidance on this additional clause .....	12



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## Additional clause for use with the NEC3 Engineering and Construction Contract (ECC) Options C and E

- |                                |            |   |
|--------------------------------|------------|---|
| <b>Definitions</b>             | <b>1.1</b> | <p>(1) Budget is the items and amounts stated in the Contract Data unless the amounts are later changed in accordance with this contract.</p> <p>(2) Project Cost is the total paid by the <i>Employer</i> to the <i>Contractor</i> and Others for the items included in the Budget.</p> <p>(3) Stage One and Stage Two have the meanings given to them in the Works Information.</p> <p>(4) Pricing Information is information which specifies how the <i>Contractor</i> prepares his assessment of the Prices for Stage Two, and is in the document which the Contract Data states it is in.</p>  |
| <b>Forecasts</b>               | <b>2.1</b> | <p>The <i>Contractor</i> provides detailed forecasts of the total Defined Cost of the work to be done in Stage One for acceptance by the <i>Project Manager</i>. Forecasts are prepared at the intervals stated in the Contract Data from the <i>starting date</i> until the issue of a notice to proceed to Stage Two.</p> <p>Within one week of the <i>Contractor</i> submitting a forecast for acceptance, the <i>Project Manager</i> either accepts the forecast or notifies the <i>Contractor</i> of his reasons for not accepting it. A reason for not accepting the forecast is that</p> <ul style="list-style-type: none"> <li>• it does not comply with the Works Information or</li> <li>• it includes work which is not necessary for Stage One.</li> </ul> <p>The <i>Contractor</i> makes a revised submission taking account of the <i>Project Manager's</i> reasons.</p> <p>Any cost that is not included in the accepted forecast is treated as a Disallowed Cost.</p> |
|                                | <b>2.2</b> | <p>The <i>Contractor</i> prepares forecasts of the Project Cost in consultation with the <i>Project Manager</i> and submits them to the <i>Project Manager</i>. Forecasts are prepared at the intervals stated in the Contract Data from the <i>starting date</i> until Completion of the whole of the <i>works</i>. An explanation of the changes made since the previous forecast is submitted with each forecast.</p>  |
| <b>Proposals for Stage Two</b> | <b>3.1</b> | <p>The <i>Contractor</i> submits his design proposals for Stage Two to the <i>Project Manager</i> for acceptance in accordance with the submission procedure stated in the Works Information.</p>   |
|                                | <b>3.2</b> | <p>The submission includes the <i>Contractor's</i> forecast of the effect of the design proposal on the Project Cost and the Accepted Programme.</p>  |
|                                | <b>3.3</b> | <p>If the <i>Project Manager</i> does not accept a submission he gives his reasons. A reason for not accepting a <i>Contractor's</i> submission is that</p> <ul style="list-style-type: none"> <li>• it does not comply with the Works Information,</li> <li>• it will cause the <i>Employer</i> to incur unnecessary costs to Others or</li> <li>• the <i>Project Manager</i> is not satisfied that the Prices or any changes to the Prices have been properly assessed.</li> </ul> <p>The <i>Contractor</i> makes a revised submission taking account of the <i>Project Manager's</i> reasons.</p>  |

- 3.4** The total of the Prices for Stage Two is assessed by the *Contractor* using the Pricing Information stated in the Contract Data.
- [Option C only]** The *Contractor* submits the total of the Prices for Stage Two to the *Project Manager* in the form of revisions to the Activity Schedule. The Activity Schedule includes the Price for Work Done to Date in Stage One.
- 3.5** The *Contractor* obtains approvals and consents from Others as stated in the Works Information.
- 3.6** Any additional Works Information provided by the *Contractor* for his design in Stage One becomes Works Information for the *Contractor's* design.
- 3.7** The *Contractor* completes any outstanding design during Stage Two.
- Key people** **4.1** The *Contractor* does not replace any *key person* during Stage One unless
- he is instructed by the *Project Manager* to do so or
  - the person is unable to continue to act in connection with this contract.
- Notice to proceed to Stage Two** **5.1** The *Project Manager* issues a notice to proceed to Stage Two when
- the *Contractor* has obtained approvals and consents from Others as stated in the Works Information,
  - changes to the Budget have been agreed or assessed by the *Project Manager*,
  - the *Project Manager* and the *Contractor* have agreed the total of the Prices for Stage Two and
  - the *Employer* has confirmed the *works* are to proceed.
- 5.2** If the *Project Manager* does not issue a notice to proceed to Stage Two for any reason, he issues an instruction that the work required in Stage Two is removed from the Works Information. This instruction is not a compensation event.
- 5.3** If the *Project Manager* does not issue a notice to proceed to Stage Two because
- the *Project Manager* and the *Contractor* have not agreed the total of the Prices for Stage Two or
  - the *Contractor* has failed to achieve the performance requirements stated in the Works Information
- the *Employer* may appoint another contractor to complete the Stage Two *works*.
- Changes to the Budget** **6.1** If one of the following events happens, the *Project Manager* and the *Contractor* discuss different ways of dealing with changes to the Budget which are practicable.
- The *Project Manager* gives an instruction changing the *Employer's* requirements stated in the Works Information.
  - Additional events stated in the Contract Data.
- 6.2** The *Project Manager* and the *Contractor* agree changes to the Budget within four weeks of the event arising which changes the Budget. If the *Project Manager* and the *Contractor* cannot agree the changes to the Budget the *Project Manager* assesses the change and notifies the *Contractor* of his assessment.
- The Parties' use of material** **7.1** The *Employer* has the right to use the material provided by the *Contractor* for the purpose stated in the Works Information. The *Contractor* obtains from a Subcontractor equivalent rights for the *Employer* to use material prepared by the Subcontractor.



- 7.2** The *Contractor* has the right to use material provided by the *Employer* only to Provide the Works. The *Contractor* may make this right available to a Subcontractor. On Completion of the whole of the *works*, the *Contractor* returns the material provided by the *Employer* to him.
- 7.3** The *Contractor* may use the material provided by him under this contract for other work unless stated otherwise in the Works Information.

- Incentive payment**
- 8.1** The *Project Manager* assesses the *Contractor's* share of the difference between the Budget and the final Project Cost. If the final Project Cost is less than the Budget, the *Contractor* is paid his share of the saving as stated in the Contract Data.
  - 8.2** The *Project Manager* makes a preliminary assessment of the forecast *Contractor's* share at Completion of the whole of the *works*. This share is included in the amount due following Completion of the whole of the *works*.
  - 8.3** The *Project Manager* makes a final assessment of the *Contractor's* share and includes this in the final amount due.

**Additional ECC Contract Data entries**

**Add the following to the Contract Data part one**

- The Budget is

Item	Description	Amount
1	.....	.....
2	.....	.....
3	.....	.....
Total		.....

- The *Contractor* prepares forecasts of the total Defined Cost of the work to be done in Stage One at intervals no longer than .....weeks.
- The *Contractor* prepares forecasts of the total Project Cost at intervals no longer than .....weeks.

**If there are additional reasons to change the Budget**

- These are additional reasons to change the Budget

1	.....
2	.....
3	.....

- The *Contractor* provides these additional insurances
  1. Insurance against liability of the *Contractor* for claims made against him arising out of his failure to use the skill and care normally used by professionals providing services similar to those required in the Works Information.
  2. The minimum amount of cover is ..... in respect of each claim, without limit to the number of claims and to be maintained for the period of ..... following Completion of the whole of the *works* or earlier termination.
- If the final Project Cost is less than the Budget, the *Contractor's* share is .....% of the saving.

**Add the following to the Contract Data part two**

- The Stage One *key people* are

(1) Name .....

Job .....

Responsibilities .....

Qualifications .....

Experience .....

(2) Name .....

Job .....

Responsibilities .....

Qualifications .....

Experience .....

- The Pricing Information is in .....

## Guidance on this additional clause

The purpose of this guidance is to assist users understand the additional provisions needed to enable the NEC3 Engineering and Construction Contract (ECC) to be used in an early contractor involvement (ECI) approach. This allows the *Contractor* to be appointed before details of what is to be constructed have been fully developed and priced.

Two options are covered by these clauses.

1. The *Employer* appoints a consultant to carry out design, and the *Contractor* assists the consultant in designing the project. The *Contractor* may or may not be required to carry out specific elements of the design in addition to assisting the designer. The *Contractor* is instructed to proceed with the *works*, including any outstanding design, under a standard main Option C arrangement following agreement of the Prices for Stage Two.
2. The *Employer* appoints a *Contractor* to carry out the design, and the *Employer's* consultant works with the *Contractor* in completing the design. This can use main Option C or E. If using main Option E, the *Contractor* is incentivised to provide a cost-effective solution by sharing in the savings on the *Employer's* Budget – including other costs incurred by the *Employer*.

### Definitions

The Budget represents the maximum amount of money that the *Employer* wishes to spend on the project. It should be stated by the *Employer* within the Contract Data, with provision made for a breakdown between different heads of cost. The details of what is included in the Budget – *Contractor* costs (total of the Prices), other costs (for example consultants, land purchase, *Employer* own cost etc) and *Employer's* risk allowance – are set out in the Works Information.

Pricing Information is provided by the *Contractor* as part of his submission for the contract, and will be used during the contract for preparing the prices for Stage Two. The *Employer* sets out in his invitation to tender what form this Pricing Information is to take, and the Works Information sets out how the information is to be used. The Pricing Information will be a document possibly containing unit rates, resource costs, overheads and profit, preliminaries costs, Fee percentages and the like, but will also specify how the *Contractor* will prepare his assessment of the Prices for Stage Two, the 'rules'.

### Forecasts

During Stage One of the contract, the *Project Manager* operates control of the *Contractor's* costs by requiring regular forecasts of work to be done during that Stage. This is to ensure there is constant dialogue and understanding between the *Contractor* and *Project Manager*, and that the *Contractor* does not commit the *Employer* to cost that is unnecessary as decided by the *Project Manager*. The *Project Manager* must review each submission and, within one week, decide whether the proposed work is required by the Works Information and is necessary to complete Stage One. If not, the *Project Manager* does not accept the submission and the *Contractor* must resubmit. The *Contractor* is not paid for work unless it has been included in an accepted submission.

The *Contractor* must also provide regular forecasts of total anticipated expenditure against the Budget – the Project Cost. This is prepared in consultation with *Project Manager*, as the *Project Manager* must advise the *Contractor* of current expenditure and forecast future expenditure against other heads of cost in the Budget.

## Proposals for Stage Two

Design submissions for Stage Two are submitted in accordance with the procedure in the Works Information. If the *Contractor's* appointment is to assist the *Employer's* designer, there may be no, or very few design submissions. The *Employer* sets out in the Works Information what level of detail is required and at what stage submissions are to be made. These design submissions need to include anticipated effect on the Project Cost and on the Accepted Programme, to allow the *Project Manager* to assess whether or not to consider other options. The *Project Manager* is required to consider and either accept the submission or explain why not.

Regular submissions of the Accepted Programme will take into account the effect of any accepted design submissions. As Stage One progresses, the Accepted Programme will become more fully developed for Stage Two.

Once design submissions are complete, the *Contractor* is required to produce a priced Activity Schedule under an Option C arrangement, setting out the total of the prices for Stage Two. This is prepared using the Pricing Information, and is submitted to the *Project Manager* for agreement. The Activity Schedule includes the Price for Work to Date in Stage One, so that the total Defined Cost plus Fee incurred by the *Contractor* can be compared with the target using the assessment in clause 53.

The design by the *Contractor* remains the *Contractor's* responsibility, and any additional Works Information required as result of the *Contractor's* design becomes Works Information for the *Contractor's* design. Accordingly, any changes to the design later found necessary would not give rise to a compensation event. In addition, the *Contractor* is required to provide professional indemnity insurance for his design liability.

## Key people

During the early stages of design, the *Employer* is likely to have relied on proposed *key people* in identifying the most advantageous offer. As the *Employer* is relying on those people, they cannot be changed unless they are unable to continue – for example through illness, or because they have left the employment of the *Contractor*. The *Contractor* may not change the *key people* to suit the *Contractor's* own convenience.

## Notice to proceed to Stage Two

The notice to proceed to Stage Two is only issued once all necessary steps have been completed. This includes getting external approvals and consents, determining any changes to the Budget and agreement of the Stage Two Prices. The *Project Manager* is not able to fix the Prices if they are not agreed – in that event the work does not proceed and an alternative contractor would need to be found. In addition, the *Employer* has the right to decide not to proceed with the *works* for any reason.

If Stage Two is not to proceed, the *Project Manager* issues an instruction removing the Stage Two work from the Works Information. The instruction is not a compensation event; the *Contractor* is paid for all the work carried out in Stage One but receives no additional payment for not proceeding with Stage Two.

If the reason for not proceeding is because the Prices have not been agreed, or the performance of the *Contractor* is below a standard specified in the Works Information, the *Employer* is free to replace the *Contractor* with another contractor to carry out the work. If the work does not proceed for other reasons – for example consents have not been obtained – the *Employer* may proceed with the *works* at a later stage with another contractor once consents have been obtained if the appropriate entries have been made in the Works Information.

**Changes to the Budget**

The Budget may change if the *Employer's* requirements change, as instructed by the *Project Manager*. Provision is also made for inclusion in the Contract Data of other reasons for changing the Budget. This may include, for example, elements of cost where accurate forecasting could be made. The Works Information must spell out how any such Budget changes would be made.

If an event occurs which changes the Budget, the *Contractor* and *Project Manager* discuss and attempt to reach agreement on the appropriate change. If they are unable to reach agreement, the *Project Manager* must decide and notify the *Contractor* of the revision to the Budget.

**The Parties' use of material**

Provisions similar to those in the NEC3 Professional Services Contract have been included to enable the *Employer* to spell out how he intends to use the design information provided by the *Contractor*, and what use the *Contractor* may make of such information. This is to be set out in the Works Information, and will need to include, for example, the *Employer's* right to use the design and other information in the future contract if the notice to proceed is not issued, its use in maintenance or its use on other projects.

Unless otherwise stated in the Works Information, the *Contractor* may use the material provided by him on other projects, and accordingly the Works Information must set out any restrictions the *Employer* wishes to impose.

**Incentive payment**

This additional clause allows for two options for incentivising the *Contractor*. The first is through the standard use of an Option C target arrangement based on the *Contractor's* own cost. The second is for an incentive based on achieving savings on the *Employer's* Budget. This allows for the *Contractor* to be paid a share of any saving on the Budget, but does not contribute towards any overspend.





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