

# NEC3: The Engineering and Construction Contract 'An overview'



**Delivering Professional Solutions to the Property Industry**

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# The New Engineering Contract (NEC)

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The NEC is a division of Thomas Telford Ltd which is a wholly owned subsidiary of the Institution of Civil Engineers the owner and developer of the NEC

Development/publication of NEC

- Consultative edition 1991
- First Edition 1993
- Second Edition 1995 (ie NEC 2) – name change
- **Third edition June 2005 (ie NEC 3)**

Amendments issued in

- June 2006
- **September 2011 - to comply with the HGCR Act 1996 as amended**

# NEC 3 : Suite of Contracts

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## NEC 3 documents

- **The Engineering and Construction Contract**
- The Engineering and Construction Subcontract
- The Engineering and Construction Short Contract
- The Engineering and Construction Short Sub-Contract
- **The Professional Services Contract**
- The Adjudicator's Contract
- Term Services Contract
- Framework Contract
- Supply contract
- Detailed guidance notes and flow charts

# NEC3 : Characteristics

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Its use stimulates good management of relationships 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

- engineering/building/**contractor design/international projects**

Clear and simple document – using language and a structure which are straight forward and easily understood

- present tense/lack of mandatory language/short sentences

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## Approach to drafting

- defined terms – capitalised eg “Works Information” (cl.11.2.19)
- *specified Terms* – are in italics (eg *works*) and identified within the Contract Data
- clause 10.1
  - The *Employer*, the *Contractor*, the *Project Manager* and the *Supervisor* **shall** act as stated in the contract **and** in a spirit of mutual trust and co-operation [emphasis added]

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‘Pick & mix’ approach to creating a project specific contract

- core clauses
- main options clauses
- secondary option clauses
  - general
  - UK specific
- dispute resolution option clauses

Contract Data – Part 1 and Part 2

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## Core clauses (structure of contract)

- Core clause 1 - General
- Core clause 2 - The *Contractor's* main responsibilities
- Core clause 3 - Time
- Core clause 4 - Testing and Defects
- Core clause 5 - Payment
- Core clause 6 - Compensation events
- Core clause 7 - Title
- Core clause 8 - Risks and insurance
- Core clause 9 - Termination

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## Main options

- **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

A main option must be selected



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## Secondary Options (17 Nr)

- Option X1 : Price adjustment for inflation
- Option X2 : Changes in the law
- Option X3 : Multiple currencies
- Option X4 : Parent company guarantee
- Option X5 : Sectional Completion
- Option X6 : Bonus for early Completion
- Option X7 : Delay damages
- Option X12 : Partnering

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## Secondary Options (17 Nr) (cont'd)

- Option X13 : Performance bond
- Option X14 : Advanced payment to Contractor
- Option X15 : Limitation of Contractor's liability for his design to reasonable skill and care
- Option X16 : Retention
- Option X17 : Low performance damages
- Option X18 : Limitation of liability
- Option X20 : Key Performance Indicators

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## Secondary Options (17 Nr) (cont'd)

- **Option Y (UK)2 : Housing Grants Construction and Regeneration Act 1996**
- **Option Y (UK)3 : Contracts (Rights of Third Parties) Act 1999**
- **Option Z : Additional conditions of contract**
- **Dispute Resolution**
  - **Option W1 : Dispute Resolution Procedure (Non HGCR Act 96)**
  - **Option W2 : Dispute Resolution Procedure (HGCR Act 96 applies)**
- **Note: references X8 to X11, X19 and Y(UK)1 are not used**
  - **X8 to X11 in PSC / X19 in TSC / Y(UK) 1?**

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## Contract Documents?

- Form of agreement (see Guidance Notes Appendix 3)
  - Letter of acceptance (?)
  - Contact data : part one – **completed by the Employer**
    - Main option / Secondary options etc stated
  - Contact data : part two – **completed by the Contractor**
  - The Contractor's pricing document
  - \* Works Information \*
  - Site Information
  - Form of tender (see Guidance Notes Appendix 2)(?)

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## Administration

- **Project Manager** – delegation cl 14.2
- **Supervisor** (eg clause 4 Testing & Defects and clause 7 Title)
- **no** quantity surveyor or architect identified
- Certificates e.g.
  - **Completion certificate** (cl 30.20) / **Defects Certificate** (cl 43) / **Payment certificates** (cl 51)

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## Communications

- each instruction, certificate, etc, to be communicated in a form which can be read, copied and recorded (cl.13.1)
- take effect when received by recipient at notified address (cl 13.2)
- Contractor and PM to act within timescales set out in contract (cl.13.3)
  - might be a specific period set out in the clause (eg cl 31.3) or reply within the *period for reply*
- if PM not accept then state reasons (cl 13.4 &13.8)
- Certificates to Employer and Contractor (cl.13.6)
- a notification to be a separate communications (cl.13.7)

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Early warning by Contractor or PM (cl.16) as soon as become aware that a matter could

- cause an increase in the total of Prices / cause a delay in Completion / cause a delay in meeting a Key Date / impair performance of *works* in use

Contractor may give an early warning of any matter which could increase his total cost

Risk Register is a register of risks listed in the Contract Data (cl 11 (14))

- PM to enter early warning matters on Risk Register (cl 16.1)
- Risk reduction meeting (cl.16.3) / PM to review Risk Register following decisions at meeting / issue to Contractor

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## Programme

- programme identified in Contract Data part one
  - Contractor submits a programme to PM for acceptance (cl.31.1)
- Accepted Programme (cl.11.2.1)
- PM has 2 weeks to accept or notify of reason for not accepting (cl.31.3)
- Cl.31.2 sets out what the Contractor is to show on each programme



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## Programme

- revised programme (cl.32)
  - content /submission procedure
- assessment of compensation events
- relationship between 'programme' and 'activity schedule'
  - Contractor to provide information showing how each activity relates to the programme submitted for acceptance (cl 31.4)
- Contractor changes method of working
  - programme and activity schedule to relate to each other

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## Defects

- terminology
  - Defect - a defined term (cl. 11.2(5))
  - *defects date*
  - *defect correction period* (weeks – one period)
  - **Defects Certificate** (cl. 11.2.(6))
- until *defects date* the **Supervisor** can instruct the Contractor to search for Defects (cl.42.1)
  - Contractor to correct Defects whether notified or not (cl. 43.1)
- the **Supervisor** may notify a Defect at any time before *defects date* (cl.42.2)

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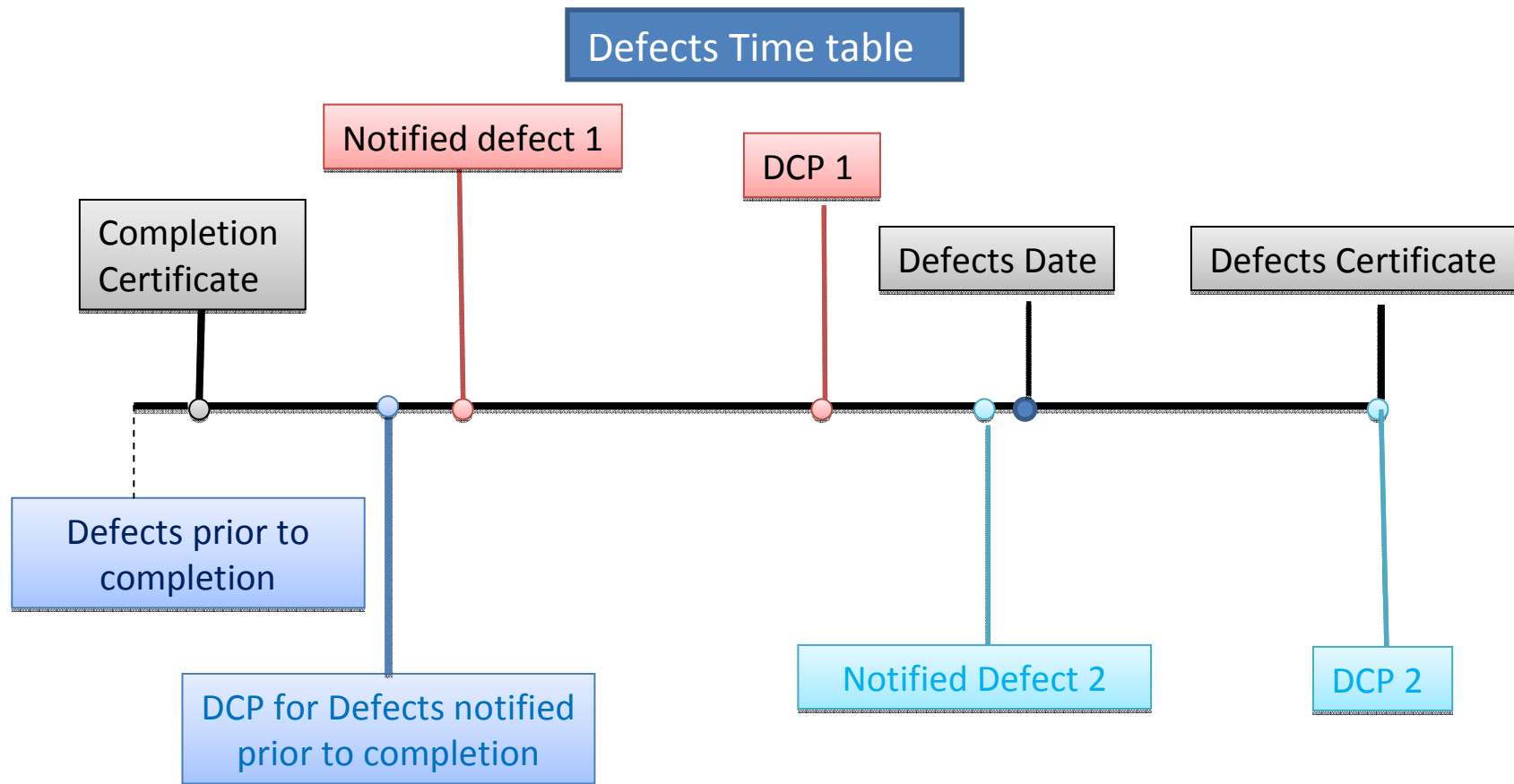
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## Defects

- prior to Completion Contractor to correct notified defects if it would prevent Employer/others doing their works (cl.11.2(2))
- after Completion Contractor to correct notified defects **before** end of *defects correction period* (cl. 43.2)
- **Supervisor** issues **Defects Certificate** at the later of the *defects date* or last *defects correction period* (cl. 43.3)
  - for the last notified defect
- accepting defects / uncorrected defects(45)
  - **PM assessment**

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## Payment (cl.50)

- PM assesses amount due at each assessment date and certifies amount within **1 week of assessment date**
  - first assessment date **decided by PM**
  - thereafter assessment interval as stated in Contract Data until 4 weeks after issue of the Defects Certificate and at Completion of the whole of the works
  - Y (UK)2 HGCR Act 96 and September 2011 amendments

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## Payment (cl.50)

- Amount due (50.2)
  - the Price of Work Done to Date
  - plus other amounts to be paid to the Contractor
  - less amounts to be paid by or retained from the Contractor
    - e.g. delay damages

including any tax e.g. VAT

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## Payment (cl.50)

- the amount due at the Assessment Date (50.1) - different terminology e.g. Price for Work Done to Date
  - Option A ( 11.2(22))
    - each group of completed activities
    - each completed activity not in a group
  - Option C (11.2(23))
    - amount of payments due to subcontractor
    - cost of components in Schedule of Cost Components
    - less **Disallowable Costs** (cl 11.2(25))

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## Payment (cl.50)

- Option C
  - total which PM forecasts will have been paid by the Contractor before the next assessment date (11.2(29))
  - Contractor to keep records and allows PM to inspect (52.2)
  - Contractor's share (53)
    - 'pain/gain' mechanism
    - two assessments – Completion / final payment
- Contractor
  - prepares forecast of total Define Cost (cl 20.4)



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## Compensation events

- **no** separate 'extension of time' or 'loss and/or expense' provisions
- both 'time' and 'money' addressed under 'compensation events' cl 60
- there are 19 compensation events (listed at cl.60.1) which if occur not the fault of the Contractor e.g.
  - change in Works Information (cl. 60.1(1)) - Employer act
  - weather (cl.60.1(13)) - neutral!
- Employer could add to the list at tender stage - set out in Contract Data

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## Compensation events

- notification of event by PM or Contractor (cl 61)
  - has happened or is expected to happen
  - event changes Prices/Completion Date/Key Dates
- procedure premised upon submission of Contractor's quotations
  - process prospective not retrospective?
- quotations (cl 62)
  - includes changes to Prices/Completion Date(s)/Key Dates – details to be included
  - alterations to Accepted Programme

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## Compensation events

- Price adjustments - valuation based on Defined Costs (cl 63.1)
  - assessment date - instruction or should have instructed
- delay - effect on planned completion (63.3)
- procedural timescales placed upon
  - Contractor to submit quotations
  - PM to respond - consequences for PM !
- PM can undertake his own assessment (cl.64) if
  - Contractor fails to submit a quotation
  - Contractor's assessment is not correct

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## Compensation events

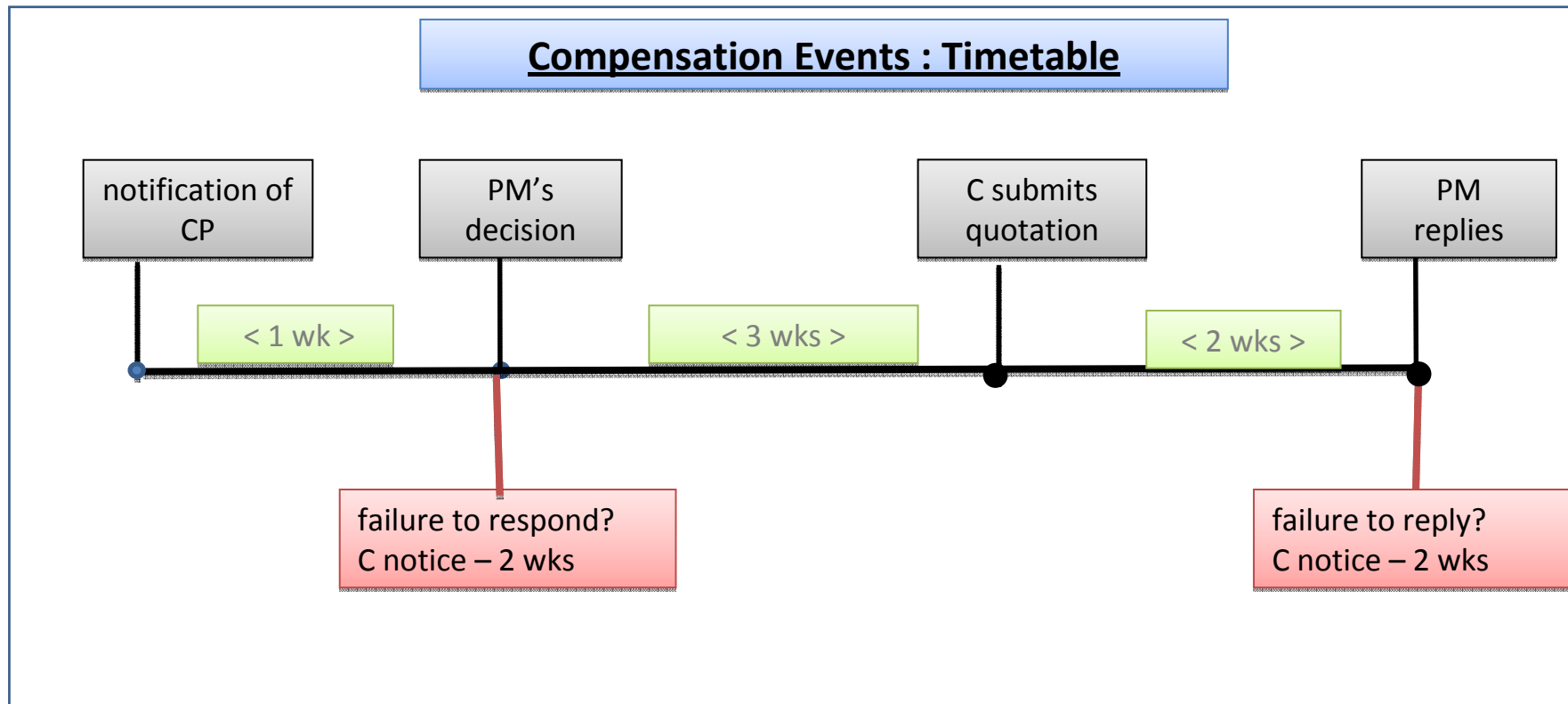
- changes to the Prices - valuation based on Defined Costs (cl 63)
  - actual Defined Cost on work done
  - forecast Defined Cost on work not yet done
  - Fee

## Schedule of Cost Components or Shorter Schedule of Cost Components

People  
Equipment  
Plant & Materials  
Charges

Manufacture & fabrication  
Design  
Insurance

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# *Questions*

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