Course Notes

These notes form a brief overview of elements of ECC to assist delegates in dealing with the case studies
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SESSION 1

BACKGROUND AND UNDERLYING PRINCIPLES - THE CONCEPT

In September 1985 the Council of the Institution of Civil Engineers (ICE) approved a recommendation from its Legal Affairs Committee “to lead a fundamental review of alternative contract strategies for civil engineering design and construction with the objective of identifying the needs for good practice”. From this initiative emerged, in 1993, the New Engineering Contract (NEC), which was a contract between an Employer and a Contractor specifically designed for works on an engineering or construction project.

In July 1994 Sir Michael Latham in his report “Constructing the Team” recommended that the NEC should be adopted by clients in both the private and public sectors and suggested that it should become a national standard contract across the whole of engineering and construction work generally. Following that recommendation use of the NEC increased as did demand for contracts to cover other contractual relationships. This lead to new contracts being issued, including ones covering professional services and subcontracting. Therefore the name “NEC” became that used by this family of contracts, and the original NEC contract was renamed the Engineering and Construction Contract (ECC).

By 2004 use of the NEC forms of contract had grown considerably, with employers from both the private and public sectors reporting that it gave them better control of time, cost and quality issues, as well as greatly improving the working relationship between the parties. Use in the UK had grown to the extent that it had become the most popular form of contract for use in the civil engineering sector and was beginning to make inroads into other sectors. In addition it was being used in many other areas around the world.

In July 2005, NEC3 was launched as a complete review and update of the whole NEC family, including the introduction of two new contracts, the Term Service Contract and the Framework Contract.

The objectives of the NEC contracts, and more specifically the Engineering and Construction Contract (ECC), which we are considering were to make improvements under three headings:

1. **Flexibility**

   The Engineering and Construction Contract is intended, and is used:

   - for engineering and construction work containing any or all of the traditional disciplines such as civil, building, electrical and mechanical work, and process engineering.

   - whether the Contractor has full, some or no design responsibility.

   - to provide a wide variety of options for types of payment mechanisms such as priced, target, cost reimbursable and management contracts.

   - to allocate risks to suit the particular project.

   - in the United Kingdom and abroad.

   This flexibility enables the Employer to choose a variety of options that best suits their specific project and priorities.

2. **Clarity and Simplicity**

   Although a legal document the ECC is written in ordinary language and in the present tense. As far as possible it only uses words which are in common use so that it is easily understood, particularly where the user’s first language is not English. It has few sentences that contain more than 40 words and uses bullet points to subdivide longer clauses. The number of clauses and the amount of text are also less than in most other standard forms of contract and there is an avoidance of cross referencing found in more traditional standard forms.
It is also arranged in a format, which allows the user to gain familiarity with its contents, with a separate numbered section of the contract to cover each of the main processes and the clause numbering reflecting those sections. This format is then retained for all of the contracts in the NEC family.

Clarity is further enhanced because the required actions for each process, who is to take them and within what timescale, are all defined precisely thereby reducing the likelihood of disputes. This enables the processes to be further defined by the use of flow charts, which act as a logistical check during the drafting process.

Finally, subjective words like “fair”, “reasonable” and “opinion” have been used as little as possible when dealing with decisions. Instead reasons for all decisions have to be stated.

3. Stimulus to Good Management

This is the most important objective of the ECC in that every procedure has been designed so that its implementation should contribute to, rather than detract from, the effective management of the work.

This is founded on two simple but effective management principles:

- Foresight applied collaboratively mitigates problems and shrinks risk
- Clear division of function and responsibility helps accountability and motivates people to play their part

Thus the processes in the NEC concentrates on encouraging the parties to share their knowledge to prevent problems occurring in the first place, unlike more traditional contracts, which tend to concentrate on allocating blame once they have gone wrong.

An example of foresight within the ECC is the early warning procedure and the management of compensation events. Under the early warnings provision, the Project Manager and Contractor notify each other upon becoming aware of any matter which could have an impact on cost, time or quality. The compensation event procedure requires the Contractor within 3 weeks to submit a quotation(s) showing the time and cost effect of the event. The Project Manager then responds to the quotation within 2 weeks enabling the matter to be properly resolved close to the time of the event rather than many months or even years later.

The programme is also an important management document, and is much more than just the traditional bar chart. It must also be regularly updated as work progresses and when changes are made.

In total the ECC is designed to provide a modern method for Employers, Designers, Contractors and Project Managers to work collaboratively and to achieve their objectives more consistently than has been possible using other traditional forms of contract. People will be motivated to play their part in collaborative management if it is in their commercial and professional interest to do so.

Uncertainty about what is to be done and the inherent risks can often lead to disputes and confrontation but the ECC clearly allocates risks and the collaborative approach will reduce those risks for all the parties so that uncertainty will not arise.

The NEC family of contracts

NEC is a family of contracts covering most of the contractual arrangements normally found in engineering and construction works. Each of them has the same basic layout and modular form, as described in more detail in the next session.
The NEC3 family consists of the following contracts:

**Engineering and Construction Contract (ECC)**  
This is a contract between an Employer and a Contractor for physical engineering or construction works on a project, and was originally called the NEC.

**Engineering and Construction Short Contracts (ECSC)**  
This is similar to the ECC, but is for low risk, straightforward works. It is shorter because many of the management techniques and options in the ECC have been removed.

**Term Service Contract (TSC)**  
As its title implies it is designed for providing a service of some kind (not necessarily professional in nature) over a fixed period of time. The TSC is not a contract to provide a project. The principle of the TSC is based on providing a service ie. maintaining an existing condition for a period of time to permit the Employer’s continuing use of a facility. It does not normally include the improvement of an existing condition of an asset – that would comprise a project. However a modest amount of improving the condition of an asset - sometimes called “betterment” - may sometimes be sensibly included in a TSC. For the purposes of the TSC, maintenance includes renewal and replacement of things which have become worn out or otherwise reached the end of their useful lives.

**Term Service Short Contract (TSSC)**  
This is an alternative to the TSC, but is for low risk, straightforward services. It is shorter because many of the management techniques and options in the TSC have been removed.

**Framework Contract (FC)**  
This is a fixed period contract used to engage suppliers (contractors or consultants) to carry out future project works and/or services. This contract defines how a quotation for each of the projects is calculated and agreed between the parties. The project works themselves are carried out under one of the other NEC forms of contract, e.g. the ECC or PSC, as defined in the FC.

**Engineering and Construction Subcontract (ECS)**  
This is a contract between a Contract and Subcontractor for physical engineering or construction works on a project where the ECC is being used as the main contract. It is, as far as is possible, back to back with the ECC main contract.

**Engineering and Construction Short Subcontract (ECSS)**  
This is similar to the ECC, but is for low risk straightforward subcontract works. It is shorter because many of the management techniques and options in the ECS have been removed. It can also be used where the ECSC is used for the main contract.

**Professional Service Contract (PSC)**  
This is a contract for the provision of intellectual works, such as professional services, by a consultant or other professionals.

**Professional Service Short Contract (PSSC)**  
This is similar to the PSC, but is for low risk straightforward professional services. It is shorter because many of the management techniques and options in the PSC have been removed.

**Supply Contract (SC)**  
This contract should be used for local and international procurement of high-value goods and related services including design.

**Supply Short Contract (SSC)**  
This contract should be used for local and international procurement of goods under a single order or on a batch order basis and is for use with contracts which do not require sophisticated management techniques and impose only low risks on both client and a supplier.
Adjudicator’s Contract (AC)
This is used by both parties to engage the Adjudicator who is named in one of the other NEC contracts. The Adjudicator decides any disputes between the parties.
SESSION 2

THE ECC SYSTEM AND CONTRACT STRATEGY

The ECC System

The ECC conditions of contract are modular in form with 5 main modules as follows

- The core clauses and Schedules of Cost Components
- The main Options (A to F)
- The secondary Options these are numbered and prefixed with either X or Y.
- The dispute resolution Options (W1 or W2)
- Any other additional clauses (prefixed Z)

The Employer usually chooses which of the various modules to use, as follows

- The core clauses and Schedule of Cost Components (appropriate to the main Option chosen) are always used. These are not changed by any of the other NEC standard options chosen.
- One main Option is chosen, which determines the mechanism for payment of the Contractor.
- Any secondary Options may be added as required in order to suit the project or the Employer’s objectives. Clauses prefixed with an X can be used in any legal jurisdiction whereas those prefixed with a Y are for use in specific (stated) legal jurisdiction.
- One dispute resolution Option is chosen
- Any number of Z clauses may be added. However great care must be taken to ensure that these are not inconsistent with any of the other clauses in the contract. In addition clauses that attempt to remove other standard NEC clauses should be very carefully drafted to ensure that they do not have unintended affects on the contract.

In addition to these modules the contract will also require the preparation and inclusion of certain other documents, including the Works Information and Site Information. The extent of these documents will depend upon the main and secondary Options chosen.

The core clauses

The core clauses are set out in the following numbered sections

1. General
2. The Contractor’s main responsibilities
3. Time
4. Testing and Defects
5. Payment
6. Compensation events
7. Title
8. Risks and insurance
9. Termination

The clause numbers follow the section numbers. Thus the clauses in Section 1 are numbered from 10 to 19, Section 2 from 20 to 29 and so on. This means that there are gaps in the clause numbering, the most obvious of which is that there are no Clause numbers 1 to 9.

In addition there is also Schedules of Cost Components as follows

- the Schedule of Cost Components, which is used only in main Options C to F, and
- the Shorter Schedule of Cost Components, which is used in main Options A and B, but which may, in certain circumstances, be used in Options C to F.

The main Options

The six main Options enable Employers to select a contract strategy and payment mechanism most appropriate to the project and the various risks involved.
Whilst many traditional contracts are based on bills of quantities, there has been a movement away from the use of traditional bills and towards payment mechanisms such as milestone payments and activity schedules, with payment based on progress achieved, rather than quantity of work done. There is also an increasing use of target cost contracts which has been encouraged by the increasing use of partnering arrangements, and the better sharing of risk.

There is also an increasing tendency for greater Contractor involvement in design, with the increasing use of various design and build contracts, performance specifications and design, build, finance and operate projects.

Factors to take into account in deciding which of the main options to use from within the Engineering and Construction Contract system include the following:

- Which party is to be responsible for design and/or which party has the necessary design expertise?
- How important is early commencement and/or rapid completion?
- How important to the Employer is certainty of price?
- How clearly defined are the Employer’s requirements, the Works Information and Site Information?
- What is the likelihood of change to those defined requirements?
- What views prevail on the allocation of risk and where can risk be best managed?

Once the contract strategy has been decided, the main and secondary options can be selected to suit that strategy.

**Contractor Design**

There are a number of reasons for allocating some or most of the design to the Contractor: 

- the design and construction periods can overlap, leading to faster delivery of the project
- the Contractor can utilise his particular experience and preferred methods of construction to minimise costs and price
- the temporary works/permanent works interface and influence of design is rationalised and the permanent works should be more “buildable”
- the traditional design/construction interface and the risks associated with it are transferred to the Contractor.
- the management of the design risk by the Contractor can result in greater certainty of the time, cost and performance and project objectives being met.

Within the ECC, the Works Information provides a statement of any part(s) of the work to be designed by the Contractor.

This can include:

- Size or space limitations
- Design standards and procedures
- Loading and capacity requirements
- Performance specifications

**The main Options**

<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option A</td>
<td>Priced contract with activity schedule</td>
</tr>
<tr>
<td>Option B</td>
<td>Priced contract with bill of quantities</td>
</tr>
<tr>
<td>Option C</td>
<td>Target contract with activity schedule</td>
</tr>
<tr>
<td>Option D</td>
<td>Target contract with bill of quantities</td>
</tr>
<tr>
<td>Option E</td>
<td>Cost reimbursable contract</td>
</tr>
<tr>
<td>Option F</td>
<td>Management contract</td>
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</tbody>
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- Options A and B are priced contracts in which most of the risks of being able to carry out the work at the agreed prices are borne by the Contractor.
• Options C and D are target contracts in which the Employer and Contractor share most of the financial risks in an agreed proportion.

• Options E and F are two types of cost reimbursable contract in which the financial risk is largely borne by the Employer.

**Option A – Priced contract with activity schedule**

Option A is normally used where the Employer is able to define accurately what he requires. This will normally be in the form of drawings and specifications, but can alternatively be a performance specification, where the Contractor is to design the works to meet specific performance objectives.

An activity schedule is a list of activities, usually prepared by the Contractor, which he expects to carry out in Providing the Works. When the Contractor has priced it, the lump sum for each activity is the Price to be paid by the Employer in the assessment following completion of that activity.

It is important to note that the Contractor gets paid nothing for each activity until it is complete. Therefore the choice of activities to be listed will influence the Contractor’s cash flow. It is for this reason that normally the Contractor, rather than the Employer, chooses the activities.

Establishing and taking off the quantities of work involved to achieve the completion of each activity is the responsibility of the tendering Contractors. The price for each activity is in effect a lump sum for that activity and must include for everything necessary to complete the activity. The sum of the tendered lump sums for each of the activities is the tendered price (the total of the Prices) for the whole of the Works.

Option A is ideally suited to Contractor’s design but can be used for Employer’s design or divided design responsibility.

The contract requires that the activity schedule should relate to the operations on the programme.

**Option B – Priced contract with bill of quantities**

This is the ECC equivalent to a traditional remeasurement contract. A bill of quantities comprises a list of work items and quantities prepared by the Employer and priced by the Contractor. Standard methods of measurement are published (e.g. SMM7 & CESMM3) which state the items to be included and how the quantities are calculated. However, unlike other contracts, the bills of quantities are not used to value changes to the contract (compensation events) unless both parties agree to use them.

Where there is a significant amount of Contractor’s design, Option A should be used rather than Option B, as it allows the Contractor to price the work and include the various design stages within his activity schedule rather than the Employer measuring the work which would not be practical.

Most standard methods of measurement assume the work is fully detailed with no provision for payment for the design activity. The tender bills of quantities require the design to be finalised at tender enquiry.

When selecting Option B one should consider the merits of preparing and using bills of quantities against other procurement methods. Do not select Option B just because in the past, with other forms of contract one has always begun the procurement process by measuring the work!
Option C – Target contract with activity schedule
Option D – Target contract with bill of quantities

Target contracts are a development of cost reimbursable contracts and are used where the extent of work to be done may not be fully defined (although the target is to be based on assumed work), where anticipated risks are greater or where the Employer sees a direct and significant benefit in encouraging collaboration through the target mechanism itself. Most financial risks are shared, proportionally through the Contractor’s share percentages, between the Employer and the Contractor.

The Contractor tenders a “target” price, called in the contract the total of the Prices, using either an activity schedule (Option C) which he prepares, or a bill of quantities (Option D) normally prepared by the Employer. The Contractor also tenders his Fee in terms of percentages to be applied to Defined Cost. This Fee should include all other costs and overheads not covered by the Defined Cost plus profit.

During the course of the contract, the activity schedule or bill of quantities is not used to pay the Contractor. Instead the Contractor is paid his Defined Cost plus the Fee, which is called the Price for Work Done to Date (PWDD).

Under Option C the target is adjusted for compensation events, whilst under Option D, the target is adjusted for compensation events and remeasurement.

At the end of the contract, the adjusted “target” is compared with the PWDD, and the Contractor is paid (or pays) his share of the difference between the two according to a formula stated in the Contract Data. If the final PWDD is less than the final target, the Contractor is paid a share, if it is greater he has to pay. This mechanism ensures that both parties share most financial risks and motivates them both to reduce costs.

Option E – Cost reimbursable contract

A cost reimbursable contract should be used where the definition of the work to be done is inadequate even as a basis for a target price and yet an early start is required. In such circumstances the Contractor cannot be expected to take risks. He carries minimum risk and is reimbursed his Defined Cost plus tendered Fee (basically covering his off site overheads and profit), subject only to a number of constraints designed to motivate efficient working.

It therefore gives little incentive for the Contractor to minimise costs during construction, but this particular strategy may be appropriate where time or quality are overriding priorities or where the scope is not known. For instance:-

- where scope of work is uncertain e.g. refurbishment
- where extreme flexibility is required e.g. for enabling work
- where a high level of Employer involvement is envisaged
- in emergency work (time driven)
- where trials or work of an experimental nature is carried out

The Option allows development of the design as the works proceed and permits maximum flexibility in allocation of design responsibility.

Option F – Management contract

Under a management contract the Contractor’s responsibilities for the construction work are the same as those under the other main Options although most works will be carried out by trade subcontractors working for the Contractor. If the Contractor intends to carry out any works himself he can also provide a lump sum price for that work.

The Contractor tenders his Fee and his lump sum price for the work he will carry out himself.
The Contractor is then paid his tendered lump sum price for the work that he has stated he will carry out himself plus the amounts paid to Subcontractors for all other work, plus his Fee.

The Contractor is responsible for supplying management services and completing or advising on design if required. If the Contractor is responsible for design he will be appointed on a design and manage basis.

Management based contracts are generally suitable:

- where there is a need to co-ordinate a number of works contractors and suppliers
- when the Employer does not have sufficient capability to manage the project
- when the time scale of the project is tight requiring an early start of construction.

At this point the scope of the project is not fully developed. As the scope is developed and construction progresses, successive works contracts can be awarded, but the interfaces between these successive packages must be managed.

**Secondary Options**

**Option X1: Price adjustment for inflation (used only with Options A, B, C and D)**

Where Option X1 is not used then with Options A & B the Contractor carries the risk of inflation, whereas in Options C & D it is shared through the share mechanism. In either case the Contractor should price for the risk within their tender. If Option X1 is used the Employer carries the risk, and the Contractor is not required to price for it.

Option X1 uses the formula method to allow for inflation. The indices to be used and the ratios in which they are to be used are defined by the Employer and included in the Contract Data Part 1. With Options A & B these indices are applied to the amount that the Contractor is paid, whereas with Options C & D they are applied to the “target” for the works.

**Option X2: Changes in the law**

This clause removes from the Contractor the risk of changes in the law that occur after the Contract Date. If Option X2 is selected, these changes are dealt with as compensation events, which can lead to the Prices being reduced as well as increased.

**Option X3: Multiple currencies (used only with Options A and B)**

This is used for priced contracts where the Contractor is to be paid in more than one currency. Cost reimbursable and management contracts have their own specific arrangements to deal with this matter.

**Option X4: Parent Company Guarantee**

Option X4 is used if a parent company guarantee is required from the Contractor, often as an alternative to a performance bond. If the Employer requires this guarantee to be in any particular form they must include that information in the Works Information. The guarantee must be provided no later than 4 weeks after the Contract Date. Core Clause 91.2 enables the Employer to terminate the Contractor’s obligation to Provide the Works if the guarantee is not provided.

**Option X5: Sectional Completion**

Option X5 should be included when the Employer requires parts of the works (sections) to be completed before the whole of the works. The Employer then sets out in the Contract Data Part 1 what work is to be completed in each section and the date by which completion is required to be achieved.
**Option X6: Bonus for early Completion**

Where an early Completion would benefit the Employer, this Option allows him to motivate and reward the Contractor for achieving the early Completion.

**Option X7: Delay damages**

Delay damages are liquidated and ascertained damages paid by the Contractor in the event that he breaches the contract by failing to complete the works by the Completion Date. In the UK these damages must be no more than a genuine pre-estimate of the Employer’s likely losses, otherwise they may be voidable as a penalty clause.

In the ECC these damages are referred to as delay damages, rather than liquidated and ascertained damages as there are other damages applicable with respect to low performance (Option X17) and interest on late payments (clause 51.2).

**Options X8 to X11 and X19**

These Options are for secondary Options in other contracts in the NEC family that are not relevant to the ECC and are therefore not used.

**Option X12: Partnering**

The ECC contract is a bi-party partnering based contract at its core and therefore Option X12 is not needed in order to set up a partnership between the two Parties to the contract. Instead Option X12 enables a multi-party partnering arrangement to be implemented. In that case Option X12 is used as a secondary Option common to the contract which each party has with the body which is paying for the work. The parties together make up the Partners and each Partner works with the other Partners to achieve the Client’s objective stated in the Contract Data and the objectives of every other Partner stated in the Schedule of Partners.

The content of Option X12 is derived from the “Guide to Project Team Partnering” published by the Construction Industry Council (CIC).

**Option X13: Performance bond**

Option X13 is used if the Employer requires a performance bond from the Contractor. The Contractor must provide this bond no later than 4 weeks after the Contract Date. Core clause 91.2 enables the Employer to terminate the contract if the guarantee is not provided.

The amount of the bond must be stated in the Contract Data Part 1. In addition, if the Employer requires this bond to be in a particular form they should include that in the Works Information.

**Option X14: Advanced payment to the Contractor**

This is appropriate when the Contractor will incur significant “up front” costs before the start of income generating work for example in pre ordering specialist materials, plant or equipment.

The amount of the payments is stated in the Contract Data Part 1 together with any requirements for a bond or security. The form of that bond or security is set out in the Works Information.

**Option X15: Limitation of the Contractor’s liability for his design to reasonable skill and care**

Without this clause, the standard of liability for Contractor’s design in the UK is generally “fitness for purpose”. Option X15 reduces the liability to that of using “reasonable skill and care” which is the standard required of a consultant designing direct for an Employer under the NEC PSC contract. If a Defect in the Contractor’s design occurs the onus is on him to show
that he used reasonable skill and care in that design, rather than the Employer to show that he
did not.

If this clause is used and the Contractor corrects a Defect, which he is subsequently found not
to be liable for because he used reasonable skill and care that becomes a compensation
event.

**Option X16: Retention (used only with Options A, B, C, D and E)**

Option X 16 allows the Employer to retain a proportion of the Price for Work Done to Date as
retention. . Half of this retention is released at Completion with the other half being released
upon the issue of the Defects Certificate.

If this Option is used, the retention percentage and any retention free amount must be stated in

**Option X17: Low performance damages**

Option X17 is another form of liquidated and ascertained damages that can be pre-estimated
for a particular breach of the contract. In this case the breach is that the works do not perform
in the way specified in the Works Information.

With X17 in the event that the Contractor produces defective work, the Employer has three
options:

(i) The Contractor corrects the Defect (Clause 43.1).

(ii) If the Contractor does not correct the Defect, the Project Manager assesses the
cost to the Employer of having the Defect corrected by Others and the Contractor
pays this amount (Clause 45.1).

(iii) The Employer can accept the Defect and a quotation from the Contractor for
reduced Prices and/or an earlier Completion Date (Clause 44).

Where the performance in use fails to reach the specified level within the contract, the
Employer can take action against the Contractor to recover any damages suffered as a result
of the breach, but as an alternative can recover liquidated damages under Option X17 if it has
been selected.

**Option X18: Limitation of liability**

This Option can be used to place financial and/or time limits on the various liabilities the
Contractor has to the Employer. The limits in the various clauses can be used in any
combination and the amounts or times to be limited are set out in the Contract Data Part 1.

**Option X20: Key Performance Indicators**

Performance of the Contractor can be monitored and measured against Key Performance
Indicators (KPIs) using this Option. This Option is not used if X12 is chosen, because that
already includes KPIs.

**Option Y(UK)1: Project Bank Account**

This Option applies in the UK only where the parties wish to create a project bank account.
The clause deals with payments into and out of the account, and its effect on other contract
obligations.

**Option Y(UK)2: The Housing Grants, Construction and Regeneration Act 1996**
This Option applies in the UK only where the Act, as subsequently amended by the Local Democracy, Economic Development and Construction Act 2009, applies and deals only with payment aspects. Adjudication under the Act is covered by Option W2.

**Option Y(UK)3: Contracts (Rights of Third Parties) Act 1999**

This Option should be used only in the UK. If used it limits third parties rights under the Contracts (Rights of Third Parties) Act 1999 to only those parties and rights stated in the Contract Data Part 1.

**Option Z: Additional conditions of contract**

This allows additional conditions to be added to further tailor the contract strategy. This may include adding or deleting compensation events. The flexibility inherent in the NEC system is designed so that amendments to the contract are kept to a minimum.

Should it be necessary to amend standard clauses, all the changes should be shown under Option Z. This ensures that all the changes are collated and highlighted in one area of the contract. Any amendments or additions should be carefully drafted to avoid inconsistencies with standard clauses. Use of the flow charts for this purpose is recommended.
PREPARING THE TENDER DOCUMENTS

When preparing tender documents, the first action is for the Employer to decide the contract strategy (see above notes); this will then enable the correct main and secondary Options to be chosen to suit the Employer’s requirements.

As a minimum the Employer should provide the following tender documents:

- The Contract Data Part 1 completed with the information necessary for the various options chosen
- An uncompleted Contract Data Part 2 for the Contractor to complete as part of their tender.
- Works Information, which specifies and describes the work that the Contractor has to carry out and any constraints upon him doing so.
- Site information, which describes the Site and its surroundings.
- The bill of quantities for the Contractor to price if Options B or D are chosen.
- Any other information required by any of the Options chosen, for example
  - the Partnering Information is Option X12 if chosen, or
  - the incentive schedule if Option X20 is chosen.

In addition other documents can also be included such as:

- Instructions to tenderers (which are not usually incorporated into the contract). This will include any additional requirements that the Contractor is to produce with their tender, such as details of specific key people, programme, etc.
- Form of tender to be completed by the Contractor.
- Pre tender Health & Safety Plan (for UK work to which the CDM Regulations apply).

The Contractor completes the information set out in the Contract Data Part 2, including the pricing information, details of which will depend upon the main and secondary Options included by the Employer. In addition the Contractor will also provide other information such as:

- Works Information for any of the design he is to be responsible for
- Priced activity schedule if Options A or C are used
- Priced bill of quantities if Options B or D are used
- A programme

ASSESSING TENDERS

It is critical that tenders are properly assessed prior to appointing the Contractor, not only with respect to the Contractor’s ability to carry out the works, but also the price he offers.

The method of financial evaluation of the tender will depend upon the main Option chosen. It should concentrate on likely out-turn costs rather than the initial price in the tender. For Options A and B this may include an assessment of the costs of any compensation events and the impact of the percentages and rates the Contractor has tendered for Fee, Working Area overheads, manufacturing and fabrication, and design.

For Options C & D, the financial assessment becomes more complicated. The price quoted by the Contractor in their tender is only the “target” for the works. The Contractor will be paid their Defined Cost plus Fee to carry out the works and therefore the rates and percentages tendered become much more critical. Usually it will be necessary to set up a sensitivity model of the possible Defined Cost out-turn and apply these various rates and percentages to that model, along with the “target”, to find the most financially advantageous tender.

Once a tender has been chosen the contract can be made by various means, either by way of a formal Deed or by way of a simple letter accepting the Contractor’s tender. In either event care must be taken to ensure that only those documents the parties want to be bound by are included in the contract. In addition great care must be taken to properly record any agreed changes made between the Parties in the post tender period.
SESSION 3

GENERAL PROVISIONS AND CONTRACTOR'S MAIN RESPONSIBILITIES

Clause 10.1 – Mutual trust and co-operation

The Employer, the Contractor, the Project Manager and the Supervisor have an obligation, not only to comply with the contract but to act in a spirit of mutual trust and co-operation.

Identified and defined terms

Defined terms have capital initials and are defined in alphabetical order under Clause 11. Terms identified in the Contract Data are in italics.

Some of the more important identified and defined terms are considered below:

Clause 11.2(7) and (12) – Equipment and Plant and Materials

The ECC defines Plant differently to some other contracts. Any temporary works provided by the Contractor to carry out the works, including items of contractor’s plant such as dumpers, excavators etc, as well as accommodation, scaffolding, etc is called Equipment.

Plant and Materials are what other contracts call the permanent works, i.e. that which is specified in the Works Information to be included in the works, for example permanent mechanical and electrical installations.

Clause 11.2(9) – Key Dates

Key Dates are used for example to manage the interface between different contractors on a project where the Employer has let more than one contract to different contractors. A Key Date is a date by which work has to reach a stated condition such that another contractor, or the Employer themselves, can start work.

Care should be taken to only use Key Dates for this reason. If the Employer requires that a geographical section of the works should be completed (as opposed to having reached state short of Completion) and handed over early then it is better to use Option X5.

If the Project Manager decides that the works have not met the stated condition for a Key Date by that Key date, and as a result the Employer incurs additional cost on the project, that cost is assessed by the Project Manager and paid by the Contractor (Clause 25.3).

Key Dates are managed through the contract. They may be extended if they are affected by compensation events. In addition, the Project Manager may instruct a change to a Key Date, and in which case it is a compensation event (Clause 60.1(4).

Clause 11.2(16) – Site Information

The documents in which the Site Information is contained are identified in Part 1 of the Contract Data.

Site Information may include:

(i) Subsoil investigations, borehole records and test results.
(ii) Reports obtained by the Employer concerning the physical conditions within the Site or its surroundings. This may include mapping, hydrographical and hydrological information.
(iii) References to publicly available information.
(iv) Information about plant and services below the surface of the site.
(v) Information about piped or other services.
(vi) Information about existing buildings, structures and plant on or adjacent to the Site.
The Contractor is assumed to have taken the Site Information (amongst other things) into account when judging what physical conditions he may encounter on the Site – see Clause 60.2. Therefore the more comprehensive and accurate the Site Information is the less likely it will be that a compensation event under Clause 60.1(12) will occur.

**Clause 11.2(19) – Works Information**

Works Information specifies and describes the works the Contractor is to carry out and states any constraints the Employer wishes to impose on him when doing so. The Employer identifies in the Contract Data Part 1 where the Works Information they provide is to be found. If the Contractor provides Works Information e.g. for his design, he specifies in the Contract Data Part 2 where it can be found.

The Works Information should include the following information (Ref. Guidance Notes – Page 21 for more details):

(i) **Description of the works**
- a general description of the works including general arrangement and location drawings
- detailed working and/or production drawings, specifications, models, etc.
- a statement of any constraints on how the Contractor Provides the Works e.g. restrictions on access, construction sequence, security issues.

(ii) **Plant and Materials**
- materials and workmanship specifications
- requirements for delivery and storage, provision of spares, etc.

(iii) **Health and safety**
The particular health and safety requirements for the site. Any health and safety plan for the project should also be included.

(iv) **Contractor’s design**
A statement of those parts of the works which the Contractor is to design. On design and build contracts the Employer may have designed part of the works; the Contractor will then be responsible for designing the remainder. Design criteria should also be included.

(v) **Completion**
The work required to be done by the Completion Date for the whole of the works and if Option X5 is used for each of the sections.

(vi) **Working with the Employer and Others**
Details of other Others who will be occupying the Working Areas during the contract period. Details of services an other things the Employer and the Contractor provide to each other.

(vii) **Subcontracting**
- Lists of acceptable subcontractors for specific tasks
- Statement of any work which should not be subcontracted
- Statement of any work which is required to be subcontracted

(viii) **Programme**
Any information which the Contractor is required to include in the programme in addition to the information shown in Clause 31.2.

(ix) **Tests**
- Description of tests to be carried out by the Contractor, the Supervisor and others including those which must be done before Completion.
- Specification of materials, facilities and samples to be provided by the Contractor and the Employer for tests.
• Specification of Plant and Materials which are to be inspected or tested before
delivery to the Working Areas.
• Definition of tests of Plant and Materials outside the Working Areas which have to
be passed before marking by the Supervisor.

(x)  Title
Statement of any materials arising from excavation and demolition to which the
Contractor will have title. (Clause 73.2)

(xi) Others
There are also certain specific requirements for statements to be made in the Works
Information from certain main and secondary Options in the conditions of contract.

Clause 13 – Communications

Under Clause 13.1, each instruction, certificate, submission, etc which the contract requires, is
communicated in a form which can be read, copied and recorded i.e. non verbal. The contract
does not have provision for verbal instructions, or confirmation of verbal instructions by the
Contractor. The Project Manager must ensure that instructions are given in the correct form.

Clause 14 – The Project Manager and the Supervisor

The Project Manager is appointed by the Employer, either from his own staff, or from an
outside body. His role is to manage the contract for the Employer to achieve the Employer’s
objectives for the completed project. The Project Manager is often appointed at the feasibility
stage of the project, his duties then including advising on design, procurement, cost planning
and programme matters.

The ECC places a great deal of authority in the hands of the Project Manager and assumes
that he has the full authority to carry out his actions on the Employer’s behalf. If the Employer
has set limits upon his level of authority, for instance agreeing the value of compensation
events, he must ensure that there is an efficient and speedy authorisation procedure to allow
the Project Manager to respond to the Contractor within the time scales set by the contract.

The Project Manager is not independent but he has to administer the contract in accordance
with its provisions. He has to give reasons for any decision the contract requires him to make.
This acts as a constraint, because if the reasons are not listed in the contract then the
Contractor is compensated for the additional time and costs he incurs in complying with that
decision.

The Supervisor is also appointed by the Employer. He can be either from the Employer’s own
staff, or from an outside body. Essentially, his role is to check that the works are carried out in
accordance with the contract. This role is similar to that of a Clerk of Works or Resident
Engineer in other contracts but the Supervisor holds his own authorities which are not
delegated to him by others e.g. the right to instruct a search for a Defect, and the responsibility
to issue the Defects Certificate.

Under Clause 14.1, the Project Manager’s or the Supervisor’s acceptance of a communication
from the Contractor or of his work does not change the Contractor’s responsibility to Provide
the Works or his liability for design.

It is important that whoever carries out the role of Project Manager and Supervisor is close to
the works. The contract imposes time limits on them for their actions and failure to meet those
time limits can have serious consequences. Under Clause 14.2, the Project Manager and the
Supervisor may delegate any of their actions, but must inform the Contractor (in a form which
can be read, copied and recorded) before doing so. This delegation will be essential on larger
projects.
Clause 16 – Early Warning

Early warnings are a very important part of the NEC contracts. They are about identifying potential problems before they occur, so that they can either be avoided or their affects mitigated, rather than waiting until after they have occurred and seeking who is to blame. No entitlement to additional monies or time attaches to the early warning mechanism, and they should not be considered to be “claims”. However if they are not given, or if they are given but ignored, money and time may be expended by either or both parties that could have been avoided.

Under Clause 16.1 “the Contractor and Project Manager each give an early warning by notifying the other as soon as either becomes aware of any matter which could:

• increase the total of the Prices,
• delay Completion,
• delay meeting a Key Date or
• impair the performance of the works in use.

In addition the Contractor may, if he chooses, give an early warning for any other matter that could increase his total cost for carrying out the works.

There are considerable financial consequences if the Contractor does not give an early warning when he should have. For example:

• Any resulting compensation event may be assessed as if the Contractor had given early warning (Clause 61.5 & 63.5).
• For Options C to F any cost that was incurred solely as a result of the failure may be treated a Disallowed Cost and deducted from the amount due to the Contractor.

Clause 16.2 gives the Project Manager or the Contractor the right to instruct the other to attend a risk reduction meeting. Others may attend if their presence is likely to assist.

At the risk reduction meeting those who attend co-operate in:

• making and considering proposals on how to avoid or reduce the effect of the registered risks,
• seeking solutions that will bring advantage to all those who will be affected,
• deciding upon actions and who, in accordance with the terms of the contract, will take them and
• deciding which risks have now been avoided or have passed and can be removed from the Risk Register

When an early warning is given the Project Manager must update the Risk Register to include the matter referred to and must also record on it any actions that are agreed to be taken in the subsequent risk reduction meeting.

The early warning procedure forces people into being proactive, rather than reactive, encourages the early identification of problems by both parties and puts emphasis on joint solution finding. It is the starting point for the development of mutual trust and co-operation.

Clause 17 - Ambiguities and Inconsistencies

Under Clause 17.1, the Project Manager or Contractor notifies the other as soon as either becomes aware of an ambiguity or inconsistency. The Project Manager gives an instruction resolving the ambiguity or inconsistency.

Under Clause 63.8, a compensation event which is an instruction to change the Works Information in order to resolve an ambiguity or inconsistency is assessed as if the Prices, the Completion Date and the Key Dates were for the interpretation most favorable to the Party which did not provide the Works Information.
Clause 19 – Prevention

This deals with an event that

• stops the Contractor completing the works, or
• stops him completing the works by the date shown on the Accepted Programme,
and which

• neither Party could prevent, and
• an experienced Contractor would have judged at tender stage had such a small chance of occurring that it would have been unreasonable for him to have allowed for it.

It should be noted that the requirement for “stopping” is absolute. It only covers situations where it is impossible to complete the works at all, or by the date on the Accepted Programme, no matter what actions the Contractor takes.

Clause 60.1(19) now makes such an event a compensation event, thus making it an Employer’s risk. For this reason Clause 19 enables the Project Manager to take over the management of the consequences of the event from the Contractor. In addition if this event is forecast to lead to a delay of more than 13 weeks the Employer is able to terminate the contract without having to pay the Contractor compensation for the works not yet carried out, in the form of the Fee for those works (Reason 21 in Clause 91.7).

Clause 20 – Providing the Works

Clause 20 is one of the shortest and yet most important clauses in the contract. It requires the Contractor to Provide the Works (a defined term) in accordance with the Works Information. It is therefore clear that the Works Information is an important document (or series of documents) that has to be carefully put together.

Clause 21 – The Contractor’s design

The Contractor is required by this clause to design any part of the works which the Works Information states he is to design. The fall back position, if the Works Information is silent about design, is therefore that the Employer is responsible for the design of all of the works. Under Clause 21.2, particulars of the design as stated in the Works Information have to be submitted to the Project Manager for acceptance, and the Contractor cannot proceed with the relevant part of the works until the design has been accepted.

The Contractor remains responsible for the work or any design and is liable for any failure, despite it having been accepted by either the Project Manager or Supervisor (Clause 14.1).

Clause 24 - People

The Contractor is required to employ those key persons he lists in the Contract Data Part 2. If he cannot do so he must provide details of alternatives to the Project Manager for acceptance. The Project Manager must give reasons for not accepting. This will be a compensation event unless the reason given is that the relevant qualifications and experience of the new person are not as good as those of the person he is replacing.

Clause 26 – Subcontracting

Under Clause 26.2, the Contractor submits the name of each proposed Subcontractor to the Project Manager for acceptance. In addition he should also submit the proposed conditions of contract for each subcontract he intends to use unless

• an NEC contract is proposed, or
• the Project Manager has agreed that no submission is necessary.
As usual the Project Manager must give reasons for rejecting a subcontractor or the subcontract conditions. One of the reasons stated in the contract is that they will not allow the Contractor to Provide the Works (in accordance with the contract). Therefore any constraints on how or to whom the Contractor is to subcontract that the Employer wishes to apply should be included in the Works Information, in which case if they are not met a refusal to accept will not be a compensation event.

In any event the Contractor is responsible for Providing the Work as if he had not subcontracted (Clause 26.1).
SESSION 4

TIME, TESTING AND DEFECTS

Time Issues

Clause 30 – Starting, Completion and Key Dates

In contrast with most forms of contract, the period of time within which the Contractor is required to Provide the Works is not stated. Instead, the starting date is decided and set down by the Employer in the Contract Data together with the completion date. This has the advantage that tenderers know exactly when the works are required to commence. The starting date and the access dates are stated in the Contract Data. The Contractor carries risks from the starting date and so has to provide stated insurances prior to that date. The Contractor cannot physically start on Site before the first access date.

The Contractor's obligation is to complete the works on or before the Completion Date as stated in the Contract Data or as may be revised in accordance with the contract. Failure to complete on time constitutes a breach of the Contractor's obligation. If the secondary Option X7 (Delay damages) is included, the Employer is then entitled to pre-defined damages for that delay. If it is not then unliquidated damages may apply but will need to be pursued separately as a breach of contract.

The Project Manager is responsible for certifying Completion, as defined in Clause 11.2(2), within one week of Completion. Normally, the Contractor will request the certificate as soon as he considers he is entitled to it, but such a request is not essential.

In addition Key Dates may be used to manage the interface between different contractors on a project where the Employer has let more than one contract to different contractors. A Key Date is a date by which work has to reach a stated condition such that another contractor, or the Employer themselves, can start work.

Care should be taken to only use Key Dates for this reason. If the Employer requires that a geographical section of the works should be completed (as opposed to having reached state short of Completion) and handed over early then it is better to use Option X5.

If the Project Manager decides that the works have not met the stated condition for a Key Date by that Key Date, and as a result the Employer incurs additional cost on the project, that cost is assessed by the Project Manager and paid by the Contractor (Clause 25.3).

Key Dates are managed through the contract. They may be extended if they are affected by compensation events. In addition if the Project Manager may instruct a change to a Key Date, in which case it is a compensation event (Clause 60.1(4).

Clause 31 – The programme

In the ECC the programme is an important document for administering the contract. It enables progress to be monitored and the time effects of compensation events to be assessed properly including changes to the Completion Date.

Provision is made for a programme either to be identified in the Contract Data Part 2 at the Contract Date or to be submitted by the Contractor within a period stated in the Contract Data Part 1. In certain types of project, Employers may wish to have programmes submitted with tenders and to take account of them in the tender assessment. Reasons for this include the wish of the Employer to judge whether a tenderer has fully understood his obligations and whether he is likely to be able to carry out the work within the stated times.
Any programme submitted for acceptance is required to include, amongst other things (see Clause 31.2):-

- dates which are stated in the Contract Data or the Works Information
- dates decided by the Contractor
- dates when the Contractor requires information, facilities, access, etc. which are to be provided to him by the Employer
- order and timing
- float and, separately, time risk allowances
- health and safety requirements
- for each operation a statement of how the Contractor plans to do the work identifying the principal Equipment and other resources which he plans to use
- other information required in the Works Information.

It is therefore likely that a programme will be much more than just a simple bar chart. It will be a collection of documents that may include method statements, histograms, and network diagrams. If the Employer requires the programme to be presented in a particular way, or to show information that is additional to that listed in Clause 31.2 then those requirements should be included in the Works Information.

Within two weeks of the Contractor submitting a programme, or a revised programme, the Project Manager either accepts it or notifies the Contractor of his reasons for not accepting it. The reasons why the Project Manager may not accept a programme may include subjective judgement as to what is practicable or realistic. The reasons listed in the contract for not accepting a programme are that:-

- the Contractor’s plans are not practicable
- it does not show the information which the contract requires
- it does not represent the Contractor’s plans realistically or
- it does not comply with the Works Information.

The Project Manager can give reasons other than these, but that will lead to a compensation event (Clause 60.1(9))

The Project Manager should be prepared to accept a programme with earlier dates if this is acceptable to the Employer. After acceptance, any subsequent failure by the Employer to meet these earlier dates is a compensation event.

**Clause 32 – Revising the programme**

The ECC requires that the programme is a management tool that is updated at regular intervals. Revisions should record the actual progress achieved on each operation and the reprogramming of future operations. They should also show the effects of implemented compensation events.

Revised programmes should be submitted

- when instructed by the Project Manager
- when the Contractor chooses,
- with the quotation for any compensation event that has affect upon the programme, and in any case
- no longer than the intervals stated in the Contract Data.

**Clause 33 – Access to and use of the Site**

The Employer allows the Contractor access to and use of the Site from the relevant access dates shown in the Contract Data. This is not sole possession and others may work on the Site. However this may lead to a compensation event.

The Contractor may not require access on the dates stated in the Contract Data, in which case he should show on his programme the later dates. These then supersede those in the Contract Data and become obligatory on the Employer.
Clause 34 – Instructions to stop or not to start work

The Project Manager has the authority to stop or restart work for any reason, for example where there is a risk of injury or damage to property. The instruction would constitute a compensation event except if it was due to a fault of the Contractor.

Clause 35 – Take over

If the Contract Data is silent on this, the Employer is required to take over the works within two weeks of Completion. Any particular requirement should be stated in the Contract Data. The Employer may take over any part of the Site at any time before Completion is achieved. This would constitute a compensation event unless it occurred after the Completion Date.

Clause 36 – Acceleration

Acceleration means bringing the Completion Date forward which differs from usage in many contracts where “acceleration” means speeding up the work to ensure that the Completion Date is achieved.

The Project Manager can instruct the Contractor to submit a quotation for acceleration. There is no remedy, however, if it is not produced, or if the Contractor's quotation is unacceptable. Acceleration can only be undertaken by agreement between the Project Manager and the Contractor and cannot be imposed on the Contractor without his agreement.

If a compensation event would normally lead to the Completion Date being extended the Project Manager may ask the Contractor to provide an alternative quotation assuming that he takes measures to complete within the original period. That is not “acceleration” as defined by this clause.

Testing and Defects

Clause 40 – Tests and inspections

Clause 40.1 states "this clause only applies to tests and inspections required by the Works Information or the applicable law.”

It is imperative that the Works Information, produced at tender stage and referred to in Contract Data Part 1, defines the full extent and timing of tests required.

Clauses 42 & 43 – Searching for, notifying and correcting Defects

The term Defect is a defined term of the contract – see Clause 11.2(5)

The Contractor’s obligation to deal with Defects is governed by two periods, which are identified in the Contract Data Part 1. These are

- The defects date. This is the date up until which the Contractor is required to correct any Defects found and the Employer is required to allow him to do so and to provide access. This date is expressed as a number of weeks after Completion (normally 52 weeks)

- The defect correction period. This is the period that the Contractor has to correct each Defect. Different defect correction periods may be specified in the Contract Data for different types of Defect. For Defects found or notified before Completion this period starts at Completion. For the period between Completion and the defects date it starts on the later of
  - when the Contractor either finds or is notified by the Supervisor of the Defect and
  - when the Employer provides access to any parts of the works that is necessary to correct the Defect.
Up until the defects date the Supervisor (not the Project Manager) has the authority to instruct the Contractor to search for a Defect. This action is normally defined as “uncovering” or “opening up” in other contracts. It is normally required to investigate the cause of a defect. If following the search no Defect is found, a compensation event arises under Clause 60.1 (10), unless the search is needed only because the Contractor gave insufficient notice of carrying out work that obstructed a test or inspection required by the contract.

Whether or not a search is instructed up until the defects date the Supervisor and Contractor each have a duty to notify the other as soon as they find any Defect. Following notification the Contractor must correct the Defect within the defect correction period. It is not necessary for either the Project Manager or Supervisor to instruct him to correct the Defect.

After the Employer has taken over any part of the works he is required to provide the Contractor access to enable him to correct any Defect. As stated above the defect correction period for that Defect does not start until he does so.

In any event it should be noted that Defects that prevent the Employer from using the work must be corrected before a Completion Certificate can be issued (Clause 11.2(2)).

Clause 44 – Accepting Defects

Under Clause 44.1 the Contractor and Project Manager may each propose to the other that the Works Information should be changed so that a Defect does not have to be corrected.

If the Contractor and Project Manager consider this change, the Contractor submits a quotation for reduced Prices or an earlier Completion Date, or both. If the Project Manager accepts the quotation he gives an instruction to change the Works Information, the Prices and the Completion Date.

Clause 45 – Uncorrected Defects

These are dealt with as follows.

- If the Contractor does not correct a Defect within its defect correction period the Project Manager assesses the cost to the Employer of having it corrected by others and the Contractor pays that amount.

- If the Employer does not provide access to the works to correct a notified Defect before the defects date the Project Manager assesses the costs to the Contractor of correcting it and the Contractor pays that amount.

In either event the Works Information is treated as having been changed to accept the Defect
SESSION 5

PAYMENT

Payment

The payment mechanisms for the six main Options are distinguished mainly by the use of three key terms:

- The Prices
- The Price for Work Done to Date (PWDD) – this is what the Contractor is paid for each assessment
- Defined Cost

These terms, as defined in Clause 11.2 of each main Option, are used to generate the payment mechanisms, which are summarised below.

For contracts which are subject to the provisions of Housing Grants, Construction and Regeneration Act 1996, as subsequently amended by the Local Democracy, Economic Development and Construction Act 2009, (“the Act”) the requirements set down in Section 5 are extended by Option Y(UK)2.

Option A – Priced contract with activity schedule

The Price for Work Done to Date (PWDD) is the total of the activities completed at the lump sum Prices for each of the activities in the activity schedule. The Contractor is paid for only those activities or groups of activities which have been completed. There is no provision for payment of partly completed activities. It is important that the Contractor, when compiling the activity schedule, defines activities completion of which can be clearly recognised.

The activity schedule is only a payment document used to determine payments to the Contractor for what he designs and builds. However it is important that it should relate directly to the programme and be compatible with it.

Option B – Priced contract with bill of quantities

The bill of quantities is only a payment document used to determine payments to the Contractor for what he designs and/or builds.

The Price for Work Done to Date (PWDD) is calculated using the bill of quantities rates and lump sums and the total quantity of the work completed.

Options C and D – Target contracts

The Price for Work Done to Date (PWDD) is the Defined Cost which the Project Manager forecasts will have been paid by the Contractor before the next assessment date plus the Fee, calculated from the two fee percentages.

Defined Cost is:

- the sums paid to Subcontractors for work which is subcontracted plus
- the cost of components in the Schedule of Cost Components for all other work, less
- Disallowed Cost.

The total of the Prices from the activity schedule or bill of quantities (adjusted for compensation events) is the “target” and is compared with the PWDD to determine the Contractor's share in accordance with the share percentages set down in the Contract Data. Defined Cost is also used in the assessment of compensation events.

The Contractor is then paid, or has to pay, a share of the difference between the “target” and the PWDD. If the “target” is greater than the PWDD the Employer pays the Contractor the share. If it is smaller the Contractor pays the Employer the share.
A preliminary assessment of the share is made and paid following Completion, using forecasts of the final PWDD and “target”. A final assessment is made and paid as soon as the final assessment of the PWDD and “target” has been made.

The Contractor is required to keep the following accounts and records (Clause 52.2) to calculate Defined Cost:-

• accounts of his payments of Defined Cost  
• records which show that the payments have been made  
• communications about and assessments of compensation events for Subcontractors and  
• other records as stated in the Works Information.

In assessing the amount due the Contractor is paid Defined Cost in the same currency as the payments made by him. The Fee and the Contractor's share are paid in the currency of the contract based on the exchange rate identified in the Contract Data Part 1.

Option E – Cost reimbursable contract

The Price for Work Done to Date (PWDD) and the Defined Cost is the same as in Options C & D, as is:

• the requirement to keep records, and  
• the payment mechanisms for payments made in different currencies.

Unlike Options C & D, there is no target and therefore no share mechanism.

Option F – Management contract

The Price for Work Done to Date (PWDD) is the same as Options C to E. However Defined Cost is different, being:

• the sums paid to Subcontractors for work which is subcontracted plus  
• the (lump sum) prices tendered by the Contractor for work the Contractor does less  
• Disallowed Costs

The requirements to keep records and the payment mechanism for payments made in different currencies are the same as Options C to E.

Core Clauses

Clause 50 – Assessing the amount due

This clause defines the “assessment date” for each payment, from which the dates of both certification and payment are calculated. The first assessment date is determined by the Project Manager, preferably after discussion with both Employer and Contractor., with a view to satisfying the accounting procedure of both Parties. Thereafter, further assessment dates occur:

• at the end of each assessment interval until four weeks after the Supervisor issues the Defects Certificate, and  
• at Completion of the whole of the works

The amount due to the Contractor is:

• the Price for Work Done to Date (PWDD),  
• plus other amounts to be paid to the Contractor,  
• less amounts to be paid by or retained from the Contractor.

Such is the importance of the programme in the administration of the contract, that failure by the Contractor to submit a first programme in accordance with the contract entitles the Project Manager to withhold from the Contractor one quarter of the Price for Work Done to Date (Clause 50.3) until he has submitted a programme showing the information which the contract requires.
Clause 51 – Payment

The Project Manager certifies payment within one week of each assessment date (see also Option Y(UK)2). Each certified payment is made within three weeks of each assessment date or, if a different period is stated in the Contract Data, within the period stated.

Interest is paid if a payment is not made within the stated period.

Interest is also paid on later corrections:
- to certified amounts by the Project Manager in relation to correcting mistakes or
- because of a decision by the Adjudicator.

The interest rate is stated in Part 1 of the Contract Data.

Clause 52 – Defined Cost

The term Defined Cost is used for two different activities in the contract

- **For all Options** – to assess the value of compensation events.
- **For Options C to F only** – to calculate the PWDD (see above on main options)

The definition of Defined Cost varies according to each main option. The definitions for Options C to E are set out in the previous explanations of those Options. For Options A and B – Clause 11.2(22) Defined Cost is the cost of the components in the Shorter Schedule of Cost Components, whether work is subcontracted or not, excluding the cost of preparing quotations for compensation events. Therefore the ECC contract defines what and how the Contractor is to be paid by way of Defined Cost. With the exception of Option F it does this by using the Schedule of Cost Components (SCC) or Shorter Schedule of Cost Components (SSCC).

However the contract does not specify what is not included in Defined Cost. Any other costs the Contractor incurs or any profits or overheads he wishes to recover is deemed to be included in the Fee that the Contractor quotes in his tender. In addition, costs are only allowed to the extent that they are at open market or competitively tendered prices. They are also paid net of all and all deductions, discounts, rebates and taxes that the Contractor can recover.

The Schedule of Cost Components (SCC) is used in Options C to E to:
- define what the Contractor gets paid (see previous notes on the main Options), and
- value compensation events.

The SCC is not used in Options A, B or F.

The Shorter Schedule of Cost Components (SSCC) is used in Options A and B only to value compensation events. It may also be used for this purpose in Options C to E, but only if the Project Manager and Contractor both agree. The SSCC is not used in Option F.

Working Areas

People and Equipment are only included in the SCC and SSCC if they are working or used within the Working Areas. The only exceptions to this is for people employed elsewhere on:
- manufacturing or fabricating Plant and Materials which is wholly or partly designed specifically for the works, or
- designing the works or Equipment.

The Working Areas are:
- the Site, access and use of which is arranged by the Employer plus
- any other areas that the Contractor defines as part of his tender in the Contract Data Part 2, but only if those areas are
  - necessary for Providing the Works and
  - used only for work on the contract.
Disallowed Costs

The inclusion of a cost element in the SCC or SSCC does not necessarily entitle the Contractor to payment of all costs incurred. The Disallowed Costs clauses for Options C, D, E and F identify the circumstances in which costs will be excluded from Defined Cost.

Under Options C, D, & E Disallowed Cost is cost which the Project Manager decides:
  - is not justified by the Contractor’s accounts and records
  - should not have been paid to a Subcontractor or supplier in accordance with his contract
  - was incurred only because the Contractor did not
    - follow an acceptance or procurement procedure stated in the Works Information or
    - give an early warning which the contract required him to give

and the cost of:
  - correcting Defects after Completion,
  - correcting Defects caused by the Contractor not complying with a constraint on how he is to Provide the Works stated in the Works Information,
  - Plant and Materials not used to Provide the Works (after allowing for reasonable wastage) unless resulting from a change to the Works Information
  - resources not used to Provide the Works (after allowing for reasonable availability and utilisation) or not taking away from the Working Areas when the Project Manager requested and
  - preparation for and conduct of an adjudication or proceedings of the tribunal.

Notes on the Schedule of Cost Components (SCC)
(Only applies to Options C, D & E)

Section 1 – People

This relates to components of cost of people who are directly employed by the Contractor or who are paid by the Contractor and includes, in addition to wages and salaries, all costs related to their employment that are listed. It specifically excludes Contractor’s staff who are working outside the Working Areas.

Section 2 – Equipment

This provides a mechanism for reimbursement of costs for Equipment hired or owned by the Contractor, including accommodation, and for the assessment of compensation events for Options C, D & E.

Section 3 – Plant and Materials

This deals with purchasing, delivery, packaging and samples and tests. Cost of disposal is credited.

Section 4 – Charges

This covers miscellaneous costs incurred by the Contractor, partly as direct cost, but partly through the application of the percentage for Working Areas overheads, which is quoted by the Contractor in the Contract Data Part 2 as part of their tender.

Section 5 – Manufacture and fabrication

This relates to the components of cost of manufacture or fabrication of Plant and Materials outside the Working Areas that has been wholly or partly designed for the works. It includes the addition of a manufacturing and fabrication overhead percentage, which is quoted by the Contractor in the Contract Data Part 2 as part of their tender.
Section 6 – Design

This deals with the cost of design outside the Working Areas in the same way as Section 5. It includes the addition of a design overhead percentage, which is quoted by the Contractor in the Contract Data Part 2 as part of their tender.

Section 7 – Insurance

Insurer’s payment of claims is deducted from cost.

The Shorter Schedule of Cost Components

The Shorter Schedule of Cost Components is used for the assessment of compensation events under Option A & B, and may also be used for this purpose in Options C to E, but only if both the Project Manager and Contractor agree. It is laid out similarly to the SCC but with a greater use of percentages instead of costs.
SESSION 6

COMPENSATION EVENTS

Core Clauses

Compensation events are events which are at the Employer’s risk. If they occur, and do not arise form the Contractor’s fault, they entitle the Contractor to be compensated for any effect the event has on the Prices the Completion Date, and any Key Dates.

The assessment of a Compensation Event therefore deals with both time and money. It may lead to the total of the Prices being increased as well as the Contractor being given additional time to carry out the works. In some cases, specified in the contract, it may result in the total of the Prices being reduced.

What affect this value of compensation events has upon payments made to the Contractor depends upon the main Option chosen:

- In Options A & B the value of the compensation event is added to the PWDD, i.e. the amount the Contractor is paid.
- In Options C & D the value of the compensation event is added to the “target” for the works and therefore only affects the Contractor’s share payment.
- In Options E & F it has no affect on what the Contractor is paid.

Compensation events are listed as follows:

- In core clause, 60.1 which includes events types (1) to (19).
- In main Options B & D
- In secondary Options X2, X12, X14, X15 and Y(UK)2
- If required in Option Z clauses added by the Employer.

The basic principles of assessing compensation events are as follows:

- Their effect on the Contractor should be, as far as is possible, entirely neutral. The Contractor should neither gain not lose from them.
- They should be dealt with individually as they occur rather than being left to be sorted out “later”. The contract therefore sets out a defined timetable for the assessment to take place. Either party has the ability to be able to force the other to comply with that timetable or suffer adverse consequences if they fail to do so.

Clause 60 – Compensation Events

The following are compensation events:-

(1) **Changing the Works Information** – The Project Manager may require variations to the works, which may comprise deletion or addition of work or alteration to work and are effected by a Project Manager’s instruction to change the Works Information. Included would be changes made in order to eliminate an illegality or impossibility (Clause 18) or to resolve an ambiguity or inconsistency (Clause 17). The contract allows that changes to the Works Information that leads to a reduction if the Defined Cost of carrying out the work may lead to a reduction in the Prices.

The effect of the second bullet of this clause is to give precedence to the Works Information provided by the Employer in Part 1 of the Contract Data over the Works Information for the Contractor’s design provided by the Contractor in Part 2 of the Contract Data.

(2) **Access to the Site** – The Employer does not allow access to a part of the Site by the later of its access date in the Contract Data and the date shown on the Accepted Programme. Thus if the Accepted Programme shows a date later than that in the Contract Data the Employer only has to provide access by that later date.
(3) **Provision by the Employer** – Something that the contract requires the Employer to provide is not provided by the date shown on the Accepted Programme.

(4) **Stopping Work** – The Project Manager gives an instruction to stop or not to start any work or to change a Key Date.

(5) **Work of the Employer or Others** – The Employer or Others
   - do not work within the times shown on the Accepted Programme,
   - do not work within the conditions stated in the Works Information, or
   - carry out work on the Site that is not stated in the Works Information.

(6) **Reply to a communication** – The Project Manager or the Supervisor do not reply to a communication within the period required by the contract.

(7) **Object of value or historical interest** – The Project Manager gives an instruction to deal with an object of value, or historical or other interest.

(8) **Change of decision** – The Project Manager changes a decision previously communicated to the Contractor.

(9) **Withholding an acceptance** – The Project Manager withholds an acceptance for a reason not stated in the contract.

(10) **Instruction to Search** – The Supervisor instructs the Contractor to search for a Defect and no Defect is found, unless the search was needed only because the Contractor gave insufficient notice of doing work obstruction a test or inspection.

(11) **Tests or inspections** – a test or inspection done by the Supervisor causes unnecessary delay.

(12) **Physical conditions** – The Contractor encounters physical conditions which :-
   - are within the Site
   - are not weather conditions
   - an experienced Contractor would have judged to have such a small chance of occurring that it would have been unreasonable for him to have allowed for them.

   Only the difference between the physical conditions encountered and those for which it would have been reasonable to have allowed is taken into account in assessing a compensation event.

   The criteria for judging the physical conditions are given in Clause 60.2. The Contractor is considered to have taken into account:-
   - the Site Information
   - publicly available information referred to in the Site Information.
   - information obtainable from a visual inspection of the Site.
   - other information which an experienced Contractor could reasonably be expected to have or to obtain.

   Clause 60.3 states the rule regarding inconsistencies in the Site Information, for which the Employer is responsible whereby the Contractor is assumed to have taken into account the physical conditions more favourable to carrying out the work.

(13) **Adverse weather** – Rather than rely on subjective generalisations about “exceptionally inclement weather” normally included in standard forms of contract, the ECC includes a more objective and measurable approach. Weather data is made available for each contract, compiled by an independent authority and agreed by both Parties beforehand, establishing the levels of selected relevant weather conditions for the Site for each calendar month, which have had an average period of return of less than once in every
ten years. If weather conditions more adverse than these levels do occur it is a compensation event.

Only the difference between the weather measurement and the weather which the weather data show to occur less frequently than once in ten years is taken into account in assessing a compensation event.

Part 1 of the Contract Data includes the place (which may be outside the Working Areas) at which four measurements (as a minimum) for which 10 year ‘return period statistics’ for each calendar month may be required. They are:-

- the cumulative rainfall (mm) (this includes the equivalent rainfall corresponding to falls of snow),
- number of days in the month with rainfall greater than 5mm (a measure of the days when outside work may be interrupted by rain),
- number of days in the month with minimum air temperature less than 0 degrees Celsius, and
- number of days in the month with snow lying at a stated time GMT (in the United Kingdom, Met Office readings are taken at 0900 hours GMT; the time may vary in other countries).

Space is left in the Contract Data for adding other measurements pertinent to the Site in question or the operations to be carried out.

(14) **Employer’s risk event occurs** – The Employer’s risks are stated in Clause 80.1 and in the Contract Data Part 1.

(15) **Employer’s take over of the works** – The Employer may use part of the works before Completion and, unless it is for the reasons stated in Clause 35.3, when he does so he takes over that part. If this take over occurs before both Completion and the Completion Date, it is a compensation event.

(16) **Materials etc. for tests** – If the Employer does not provide materials etc for tests as stated in the Works Information.

(17) **Assumptions about compensation events** – If the Project Manager later changes any stated assumption about a previous compensation event (Clause 61.6).

(18) **Employer’s breach of contract** – This is an “umbrella” clause to include breaches of contract by the Employer other than those covered elsewhere by compensation events.

(19) **Stopping the Contractor** – This deals with an event that

- stops the Contractor completing the works, or
- stops him completing the works by the date shown on the Accepted Programme, and which
  - neither Party could prevent,
  - an experienced Contractor would have judged at tender stage had such a small chance of occurring that it would have been unreasonable for him to have allowed for it, and
  - is not one of the other compensation events.

It should be noted that the requirement for “stopping” is absolute. It only covers situations where it is impossible to complete the works at all, or by the date on the Accepted Programme, no matter what actions the Contractor takes.

This is now at the Employer’s risk. For that reason the Project Manager is able to take over the management of the consequences of the event from the Contractor by the use of Clause 19. In addition if this event is forecast to lead to a delay of more than 13 weeks the Employer is able to terminate the contract without having to pay the Contractor compensation for the works not yet carried out, in the form of the Fee for those works (Reason 21 in Clause 91.7).
Under Options B & D, there are additional compensation events:

(i) Under Clause 60.4 a difference between the final total quantity of work done and the quantity for an item on the Bill of Quantities is a compensation event if it satisfies the three tests stated in the clause.

(ii) Under Clause 60.5, a difference between the final total quantity of work done and the quantity for an item on the Bill of Quantities that delays Completion or the meeting of a Condition stated for a Key Date by that Key Date.

(iii) Under Clause 60.6, correction of mistakes in the bill of quantities which are due to departures from the rules for item descriptions and for division of the work into items in the method of measurement or are due to ambiguities or inconsistencies.

Also, under Option Y(UK)2, Clause Y2.4, if the Contractor exercises his right under the Act to suspend performance it is a compensation event.

**Clause 61 – Notifying Compensation Events**

If the compensation event arises from the Project Manager or the Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption, then the Project Manager is required to notify the Contractor of the compensation event and instruct the Contractor to provide a quotation. Therefore when, for example, the Project Manager issues a new drawing showing a change to the Works Information he should notify the Contractor of the compensation event.

It is the Contractor’s responsibility to notify all other compensation events. In addition the Contractor may notify any event that the Project Manager should have notified but failed to do so. The Contractor has to notify a compensation event within 8 weeks of becoming aware of the event otherwise he is not entitled to a change in the Prices, the Completion Date or a Key Date.

This renders the 8 week period time barring. However this limit does not apply to compensation events that the Project Manager should have notified, in which case the Contractor has as long as he wishes to notify up to the defects date. For that reason it is in the Employer’s best interests for the Project Manager to notify compensation events in order to start the procedural clock ticking.

In addition the Project Manager may, if he wishes, instruct the Contractor to provide a quotation for a proposed instruction.

The Project Manager has one week to reply to the Contractor’s notification of a compensation event. He can reject it only for one of the following reasons:

- it arises from the a fault of the Contractor
- the event has not happened and is not expected to happen
- it has no affect upon Defined Cost, Completion or meeting a Key Date or
- it is not one of the compensation events listed in the contract.

If the Project Manager believes that none of these applies he tells the Contractor and instructs him to provide a quotation.

If the Project Manager fails to reply within one week to the Contractor’s notification the Contractor may, if and when he wishes, notify the Project Manager to that affect. If the failure continues for a further two weeks after this notice then that is treated as the Project Manager having accepted the event as a compensation event and instructing a quotation. The only way that can be changed is if the Employer takes the matter to adjudication.

If the Project Manager decides that the effect of a compensation event are too uncertain to be reasonably forecast he states in his instruction assumptions about the event which the Contractor should make in his quotation. If any of these later proves to be wrong he notifies a
correction and that correction becomes another compensation event (Clause 60.1(17)). So, for example, if information or access to be provided by the Employer is late and the Project manager does no know when it will be available he should tell the Contractor how long to assume when producing his quotation.

If the Project Manager decides that the Contractor did not give an early warning of the event that an experienced contractor should have then he notifies of the Contractor of that when he instructs him to provide a quotation.

Clause 62 – Quotations for compensation events

A quotation for a compensation event deals with both time and money, as set out in more detail in the notes on Clause 63. The Contractor should include details of his calculations within any quotation as well as a revised programme for acceptance if the compensation event alters the timing or sequence of the remaining work.

If a compensation event occurs the Project Manager may, after consulting the Contractor, instruct him to submit alternative quotations based upon different ways of dealing with the event.

The Contractor has three weeks to submit a quotation from being instructed to do so. The Project Manager then has two weeks after submission to reply. Either or both of these periods may be extended with the agreement of both the Project Manager and Contractor.

The Project Manager’s reply (Clause 62.3) is:-

- an instruction to submit a revised quotation, giving reasons
- an acceptance of a quotation
- a notification that a proposed instruction or a proposed changed decision will not be given or
- a notification that he will be making his own assessment

If the Contractor does not provide a quotation within the time set out in the Contract, or agreed between the parties, the Project Manager may make his own assessment.

If the Project Manager fails to reply to a quotation within the time allowed the Contractor may, if and when he wishes, notify him to that effect. If the failure continues for a further two weeks after notification it is treated as acceptance of the quotation by the Project Manager. The only way that the Employer can change that is by taking the matter to the Adjudicator.

Clause 63 – Assessing compensation events

The changes to the Prices are assessed as the effect of the compensation event upon

- the actual Defined Cost of work already done,
- the forecast Defined Cost of the work yet to be done, and
- the resulting Fee.

The date when the switch is made between actual and forecast Defined Cost is stated in clause 63.1.

It should be noted that this quotation should include all of the costs associated with a compensation event, including any costs for prolongation of the time on Site. There is no such thing in the ECC as the separate entitlement to a “loss and expense” claim found in other, more traditional contracts.

Assessment of compensation events is therefore based on their effect on Defined Cost. This is different from most standard forms where variations are valued using the rates and prices in the contract as a basis. The reason for this policy is that no compensation event which is the subject of a quotation is due to the fault of the Contractor or relates to a matter which is at his
risk under the contract. It is, therefore, appropriate to reimburse the Contractor his forecast additional costs arising from the compensation event.

However, in all Options rates and lump sums may be used to assess a compensation event, but only if both the Project Manager and Contractor agree to do so.

If the compensation event changes the timing or sequence of subsequent work from that shown in the Accepted Programme the Contractor must submit a revised programme. Any delay to the Completion Date is assessed as the length of time that, due to the compensation event, planned Completion is later than planned Completion as shown on the Accepted Programme. A delay to a Key date is assessed as the length of time that, due to the compensation event, the planned date when the Condition stated for a Key Date will be met is later than that shown on the Accepted Programme.

No compensation event can result in a reduction in the time for carrying out the works, i.e. an earlier Completion Date. Only acceleration as agreed under Clause 36 can result in an earlier Completion Date.

Any time risk allowances which the Contractor has allowed are preserved by this clause, as assessment of the compensation event is based on entitlement rather than need. Allowances for risk must be included in forecasts of Defined Cost and Completion in the same way that the Contractor allows for risks when pricing his tender. Unlike terminal float, free float or project float within the Accepted Programme is available to mitigate or avoid any consequential delay to the Completion Date.

Clause 64 – The Project Manager’s Assessments

The Project Manager may assess a compensation event, but only for the following reasons:

- if the Contractor has not submitted a required quotation and details of his assessment within the time allowed
- if the Project Manager decides that the Contractor has not assessed the compensation event correctly in a quotation and he does not instruct the Contractor to submit a revised quotation
- if, when the Contractor submits quotations for a compensation event, the Contractor has not submitted a programme which the contract requires him to submit or
- if, when the Contractor submits quotations for a compensation event, the Project Manager has not accepted the Contractor’s latest programme for one of the reasons stated in the Contract.

These are all derived from some failure of the Contractor. The Project Manager has to use the same methods to assess the time and money implications of the compensation event as the Contractor, i.e. the rules set out in Clauses 63.1 and 63.3. He will be motivated to make a proper assessment in the knowledge that the Contractor may, if dissatisfied, refer the matter to the Adjudicator who may change the assessment.

The Project Manager has the same time to complete his assessment of a compensation event as he allowed the Contractor to complete his assessment for the same event. When his assessment is completed he gives it, including his calculations and any revised programme, to the Contractor.

If the Project Manager fails to assess a compensation event within the time allowed the Contractor may, if and when he wishes, notify him to that effect. If the failure continues for a further two weeks after notification it is treated as acceptance of the Contractor’s original quotation by the Project Manager. The only way that the Employer can change that is by taking the matter to adjudication.
Clause 65 – Implementing Compensation Events

A compensation event is implemented when the earliest of the following occurs:

- the Project Manager notifies the Contractor of his acceptance of a quotation,
- the Project Manager notifies the Contractor of his own assessment, or
- the Contractor’s quotation is treated as having been accepted by the Project Manager.

Compensation events are not reviewed or revised after they are implemented. If the records of resources on work actually carried out show that achieved Defined Cost and timing are different from the forecasts included in the accepted quotation or in the Project Manager's assessment, the assessment is not changed.
SESSION 7

OTHER ASPECTS OF THE ECC

Risks and Insurance

Various Employer’s risks are listed under Clause 80.1. These and any others added in the Contract Data will also give rise to compensation events under Clause 60.1(14)

There are six main categories of Employer’s risk:

1. Risks relating to his use of the Site, his general responsibilities and faults in his design.
2. Risks relating to items supplied to the Contractor up to the point of handover to the Contractor. This would normally be covered by the Employer’s own loss or damage policy.
3. Risks relating to loss or damage to the works, Plant and Materials, caused by matters outside the control of the Parties.
4. Risks arising once the Employer has taken over the works.
5. Risks relating to loss or damage to the works, and any Equipment, Plant and Materials retained on Site after termination of the Contractor’s obligation to Provide the Works.
6. Any other risks referred to in the Contract Data.

Any risks not carried by the Employer are carried by the Contractor from the starting date to the Defects Certificate or a termination certificate has been issued.

Whilst this section deals with risks as a whole it should be remembered that the time and money risks associated with compensation events always remain with the Employer. In addition the financial risks of events will also depend upon the main Option chosen.

- With Options A & B the remaining financial risks reside with the Contractor.
- With Options C & D they are shared between the Contractor and the Employer using the share mechanism, except for Disallowed Cost, which remain with the Contractor.
- With Option E they remain with the Employer except for Disallowed Cost, which remain with the Contractor.
- With Option F they remain with the Employer except for Disallowed Cost and any (lump sum) prices the Contractor has tendered for, which both remain with the Contractor.

The Contractor is required to take out insurances in the joint names of the Parties for events which are at his under the following four headings in the Insurance Table:

1. Loss of or damage to the works, Plant and Materials.
2. Loss of or damage to Equipment.
3. Liability for loss of or damage to property except the works, and liability for bodily injury or death to a non employee of the Contractor in connection with the contract.
4. Liability for death of or bodily injury to employees of the Contractor in the course of their employment in connection with the contract.

Termination

If either Party wishes to terminate the Contractor’s obligation to Provide the Works he notifies the Project Manager and the other Party giving details of his reason for terminating. If the reason complies with the contract then the Project Manager promptly issues a termination certificate to both Parties (Clause 90.1).

There are 21 reasons to terminate stated in Clause 91. Some reasons are available just to the Employer, some just to the Contractor and the rest available to either Party.

There are four procedures, P1 to P4, which apply as directed in the Termination Table (Clause 90.2) depending upon who has terminated and for what reason. There are four calculations detailed in Clause 93 that are used to determine the amount due to the Contractor (or the
Employer). The amount due on termination includes an amount assessed in accordance with A1 (Clause 93.1) and one or more of A2 to A4 (Clause 93.2), again depending upon who has terminated and for what reason.

Dispute Resolution

The ECC has two dispute resolution procedures and the Employer chooses the one which he will use in the Contract Data Part 1. Both Options have many similarities. Both require that:

- the Adjudicator is employed by both Parties using the NEC Adjudicator’s contract
- adjudication as the first level of dispute resolution
- the adjudicator’s decision is binding, in that the Parties have to put it into affect, and
- either Party may subsequently refer the dispute to the tribunal, which is identified in the Contract Data Part 1 for a final decision, but
- if they do not notify their intention to do so within 4 weeks of the Adjudicator’s decision that decision becomes final as well as binding.

Option W1

W1 is the standard NEC form of dispute resolution. It provides for adjudication by an Adjudicator identified in the Contract Data or, if not identified, jointly chosen or chosen by an Adjudicator nominating body. Under this Option the time scales for starting and completing an adjudication are limited.

This Option includes an Adjudication Table which identifies the reasons for the dispute, the name of the referring Party, and the time scales for the Parties to notify the dispute to each other and to refer it to the Adjudicator. Times for notifying and referring a dispute can be extended by the Project Manager if the Contractor agrees.

Option W1 also allows a dispute under a subcontract which is also a dispute under the ECC to be referred to the Adjudicator at the same time.

A dispute is not referred to the tribunal unless it has first been referred to the Adjudicator.

Option W2

This Option is only used in the UK when and if the Housing Grants, Construction and Regeneration Act 1996, as subsequently amended by the Local Democracy, Economic Development and Construction Act 2009, applies. It is drafted in such a way as to fully comply with this legislation whilst still retaining as many features of W1 as possible.

Its main features are:

- Adjudication is allowed to commence at any time. There is no constraint as to when a dispute has to be referred to the Adjudicator.
- The dispute cannot be referred to the tribunal until it has first been decided by the Adjudicator
- There is a procedure to ensure that if the Adjudicator is unable to decide the dispute another Adjudicator is appointed and the dispute is referred to him within seven days.
- A dispute under a subcontract which is also a dispute under the ECC may be referred to the Adjudicator at the same time, but only with the agreement of the subcontractor
- The Adjudicator makes his decision within 28 days of the dispute being referred to him. This period can be extended with the agreement of the referring Party and the Adjudicator by up to 14 days and by any other period with the agreement of both Parties and the Adjudicator.