

January 2021

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No.1: Amended Contracts/Z Clauses

Introduction

Training and development support is a key part of CECA's core offer for its membership and, working in conjunction with GMH Planning, it has delivered a programme of training events around the NEC Form of Contract across several CECA UK regions.

In addition to this training, a series of monthly NEC Contract Bulletins are being produced for both Contractors and Subcontractors to improve practical awareness on key topics within the NEC. The coverage, whilst not exhaustive, is intended as a general overview on some of the contractual principles to increase a wider understanding in support of more sustainable outcomes.

For the purposes of these bulletins a contractual relationship between a "Client" and "Contractor" is assumed. The same rules/principles also apply if the contractual relationship is between a "Contractor" and a "Subcontractor" and so the term "Contractor" will be used to describe both parties.

These bulletins are based on the latest NEC4 family of contracts, but the same principles and rules would apply where parties are engaged under an NEC3 form of contract.

Coming next month:

Bulletin Nr 2: Key Dates and associated liabilities.

Please respond to Leone Donnelly should you require any further information on the CECA NEC4 Bulletins via e-mail: leonedonnelly@cecasouth.co.uk.

For further advice or guidance on the NEC details please visit www.gmhplanning.co.uk or contact GMH Planning Ltd by e-mail glenn@gmhplanning.co.uk.

NEC4 Contract Bulletin Nr 1 – Amended Contracts / Z clauses

It is obvious that if you are signing up to an NEC form of contract you need to know what the rules of engagement are. The intent of the NEC rules as drafted are generally clear and understood. However, some clients will change these standard rules when they go out to tender by using what are commonly known as “Z clauses”. These can create ambiguities or a subjectivity that would not exist under the standard contract clauses as these are generally tried and tested within the industry.

Typically, there are two different forms of amending the Contract with Z clauses. The Client can choose to add additional clauses, and/or they can amend the existing standard clauses. Both instances may change the rules or associated liability. Beware of amendments to existing clauses as the alteration to the risk profile can be more subjective and potentially beyond that normally associated with the standard clause. It is therefore important that when reviewing the tender documents that when amendments to the Contract are identified they are briefed to the wider procurement team so that they can be fully risk assessed and considered in the bid. Any contract review should be carried out by someone sufficiently competent to do so and organisations may need to outsource this function. Once the contract has been signed, the amendments become fixed with all parties obliged to honour them. The **ONLY TIME** to question, challenge, price these rule changes is during the tender stage. Reviewing a contract after it has been signed is very much shutting the stable door after the horse has bolted!

You therefore need to review any amendments to the contract, understand what they might mean and decide what you are going to do with them at tender stage? There are a range of options below that you might consider and one you certainly shouldn't:

1. Price the change in risk profile that is being identified.
2. Do not price the risk and list any amendments that have been excluded as part of your price (this may make your tender invalid).
3. Submit a tender query during the tender period to highlight the issue to the Client to see if they are willing to reconsider. Note that this will make your concern over the issue visible to all tenderers.
4. Confirm to the Client that the amendments will prevent your organisation from pricing the tender and that you plan to withdraw from the process. This may encourage them to change their position or just result in your exit from the procurement.
5. Ignore the amendments and do not price or consider the risk. Not a sustainable business strategy – you might as well go to the casino and put all your money on “red or black”.

Do you feel lucky?!



Additional Z clauses: as a rule, these are generally not too much of an issue. They are extra clauses or processes that the Client wants to make sure the Contractor will comply with. In truth, some of these Z clauses are probably not necessary as a Z clause and could have simply been referenced within the Scope to make sure they are complied with, but equally normally do not do any harm. There might be additional clauses for example on anti-slavery, fair payments to subcontractors, rules on publicity and advertising, bribery (as in not doing it!) etc. Many of these elements are things that you would be willing/expecting to comply with as a Contractor, so are normally unlikely to cause you too many issues or additional risk. They still obviously need reviewing to make sure that this is the case, and that they have not increased your liabilities and are appropriately considered within your tender price.

Amendments to exiting clauses: these are changes to the standard clauses where they are altering the existing wording. Sometimes these are given as a list just as to what has changed – e.g., “clause 63.1 delete the last sentence”, or “clause 32.1 delete the second bullet point and replace with the following...” and so you will need the unamended clause to identify the change to both wording and obligation. At other times, the Client takes the original word version of the contract and embeds the changes into the document so that it becomes a bespoke contract document for that project. Where they have embedded the changes in, sometimes they show the “tracked changes”, but equally sometimes they don’t and you need to check the whole document alongside the original to identify what has changed. Even if it is not “track changed” and you miss the amendment you are still contractually and legally liable.



Examples of Z clauses to look out for: here are just a sample of some changes that a Client might make that could significantly amend your risk profile (clauses based on the NEC4 ECC contract):

- changes to 13.8 where they can reject submissions for other reasons
- changes to 17.1 where they make any ambiguities in their Scope documents your risk
- changes to 31.3 where they can reject programme for other reasons
- changes to 36.1 where they can instruct acceleration and make their own assessment of the associated quotation
- deletions of any items identified in 60.1 as valid compensation events, meaning that any they are deleting will be your Contractor risk e.g. deleting 60.1(12) thus making all unforeseen ground conditions Contractor risk
- changing 61.3 to make all compensation events time barred if not notified within 8 weeks – even ones normally they would be obliged to notify to you
- adjustments to compensation event timescales, where they increase their time and reduce your time to produce/review quotations slowing the process down
- deletion of deemed acceptance loops if fail to respond to compensation events/programme
- change to 11.2(26) additional reasons they can disallow costs on cost reimbursable contracts.

Summary: Make sure you know what the rules are that you are signing up to and price accordingly!

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