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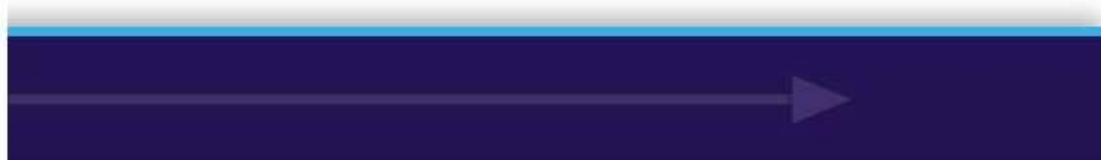


**CONSTRUCTING
EXCELLENCE**
South East Wales Club

NEC Option Z

Jurys Inn, Cardiff

12th September 2017



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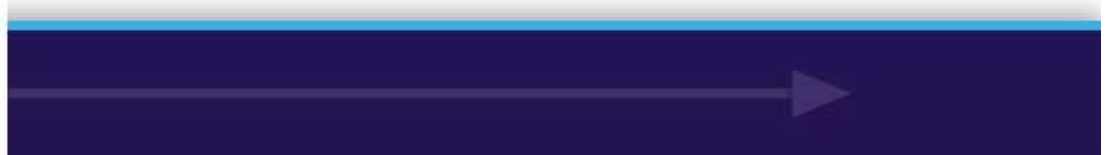


**CONSTRUCTING
EXCELLENCE**
South East Wales Club

Welcome

Tony Norris

Chair





South East Wales Best Practice Club



12th September 2017

Z Clause Workshop

Barry Trebes NEC Consultant

- This is a half-day workshop covering the use of Z clauses in NEC contracts has been developed following feedback from the 2016 annual NEC USERS' GROUP conference workshop on Z clauses.
- This workshop indicated that Z clauses are being widely used and that they were often poorly drafted and often led to disagreements and disputes between the Parties to a contract.

This workshop has been designed:

- to help and remind users of the purpose and role of Z clauses in NEC contracts
- to set out a step by step good practice guide to drafting Z clauses
- for delegates to share and discuss their experiences of the use of Z clauses in the real world.
- for delegates to provide feedback to NEC on the use of Z clauses

At the end of the course participants should be able to:

- To understand how and when the use of Z clauses is appropriate.
- To understand good management practice in relation to Z clauses
- To apply the step by step guide on the drafting of Z clauses to their own projects.

Session 1 Z clauses

- Nec warns of misuse of Z clauses in contracts
- The 'curse of the Z clause'
- Workshop feedback
- What are Z clauses?
- Danger Z clauses
- Poorly drafted clauses

Session 2 Good practice

- NEC3 guidance notes examples of use
- Reminder
- The Z clause process
- Good practice methodology for Z clauses
- Summary of key messages
- Guidance and support the NEC can offer
- Feedback from delegates

NEC warns of misuse of Z clauses in contracts

OCTOBER 27, 2014



NEC warns of misuse of Z clauses in contracts

OCTOBER 27, 2014



- In a bid to continually improve industry standards, NEC has this month started a campaign to reduce the misuse of Z clauses in NEC contracts, with a view to increase understanding of the clauses by all users, worldwide.
- Within a recent webinar, Peter Higgins, previous Chairman of the NEC Drafting Panel and member of the NEC Board, and Robert Gerrard, NEC Users' Group Secretary, warned NEC users of the **incorrect use of Z clauses, which, as a result, is counteracting the effectiveness of the contracts.**
- Z clauses can be inserted into NEC contracts to enable parties to agree *additional conditions of contracts*, in order to cater for specific needs relating to the project and the terms of its delivery. Within the NEC webinar, which was attended by hundreds of industry professionals, NEC panellists discussed the need for Z clauses, the types available and the major impact incorrect usage can have on NEC contracts, **which raised the debate of whether practitioners are using Z clauses appropriately.**

NEC warns of misuse of Z clauses in contracts

OCTOBER 27, 2014



Rekha Thawrani, general manager for NEC, comments: **‘The biggest problem with the misuse of Z clauses is that when they’re used incorrectly, they change the risk profile of a contract.** The issue all users can face is that if a Z clause is **wrongly inserted, it can make the contract ambiguous.** As a result, good project management can be hampered and the project is likely to cost more, or take longer to complete.

‘NEC contracts have a balanced risk allocation to tailor to almost any circumstance, which means that if you don’t like the balance, then both parties should reconsider the contract you’re using, before adding clauses. If an additional clause does need to be inserted then the client should ensure that it complements the existing contract terms, avoids duplication and what’s more is; flexible, clear and stimulates good project management.

‘Clauses should only be inserted if they define what is required and should be drafted by someone with experience of NEC, who understands how the clauses will affect the rest of the contract.’

The 'curse of the Z clause'



CURSE

The 'curse of the Z clause'



The 'curse of the Z clause' was the focus of an article by Rudi Klein, President of the NEC Users Group, in the November 2015 issue of the group newsletter.

Klein remarks: "Unfortunately, through the 'loophole' of option Z, far too many NEC contracts are amended beyond recognition and fail to deliver as they should".

Klein also states: "The Z clause option in NEC contracts was never intended to provide a carte blanche invitation to amend NEC contracts at will.

On the contrary, **its aim was to include additional contract conditions to suit the unique nature of the work involved.**"

ONLY 8% of Z clauses are valid – remainder
are

unnecessary

or

attempt to change the risk profile of the contract

(source: Emma Jane Houghton KPMG – The Z Factor 2012)

“Poor Z clauses
destroys
good management
practice”

Workshop Feedback:

**What are your experiences?
What are the most serious impacts?**



WHAT ARE Z CLAUSES?



Option Z: *Additional conditions of contract*



This Option should be used where the *Employer* wishes to include additional conditions. These should be carefully drafted in the same style as the core and optional clauses, using the same defined terms and other terminology. They should be carefully checked for consistency with the other conditions.

Additional conditions should be used only when absolutely necessary to accommodate special needs, such as those peculiar to the country in which the work is to be done. The flexibility of the ECC main and secondary Options minimises the need for additional conditions. Additional conditions should never be used to limit how the Contractor is to do the work in the contract as this part of the function of the Works Information.

(source: NEC3 Guidance Notes for the NEC Engineering and Construction Contract page 119)

What are Z clauses?



- *Additional conditions of contract*
 - Have the same status as core and optional clauses
 - Incorporated through the Contract Data

1 General The *conditions of contract* are the core clauses and the clauses for main Option A, dispute resolution Option **W1** and secondary Options **X3, X4, X7, X13, X16, Y(UK)2, Y(UK)3 and Z** of the NEC3 Engineering and Construction Contract (April 2013)

(source: NEC3 Guidance Notes for the NEC Engineering and Construction Contract page 149)

If Option Z is used

- The *additional conditions of contract* are **set out in part 2 of the enquiry documents**

(source: NEC3 Guidance Notes for the NEC Engineering and Construction Contract page 155)

Flexibility



- Z clauses are an important part of the flexibility of NEC3/NEC4
- But they need to be used in the right way

What is the purpose of a Z clause?



- Should be used where the *Employer* wishes to include additional conditions.
- Should be carefully drafted in the same style as the core and optional clauses, using the same defined terms and other terminology.
- They should be checked for consistency with other conditions.

What is the purpose of a Z clause?



- Use ONLY when absolutely necessary to accommodate special needs such as those peculiar to the country in which the work is being undertaken.
- The flexibility of the ECC main and secondary Options minimises the need for additional conditions.
- Should NEVER be used to limit how the *Contractor* is to do the work in the contract as this is part of the function of the Works Information.

Well Drafted – Poorly Drafted



Getting it Wrong,
←
Getting it Right
→



**Well drafted Z
clauses contribute
to the
management of
the contract**

**Poorly drafted Z
clauses detract
from the
management of the
contract**



Z Clauses

- Z1. Clause 10.1, delete the words '*Project*' '*Manager*' from the first sentence
- Z2. Clause 16.1, after the fourth bullet add 'any changes in the programme'
- Z3. Delete clause 60.1(12)
- Z4. Delete clause 60.2
- Z5. Delete clause 62.6
- Z6. Delete clause 63.8
- Z7. Clause 11.2(25) after 'and the cost of', first bullet delete the word 'after' and replace with 'before'

From Clarity to Subjectivity



From Clarity to Subjectivity

Clause 60.1 (9) The *Project Manager* withholds an acceptance (other than acceptance of a quotation for acceleration or for not correcting a Defect) for ~~a reason not stated in this contract~~ **for any reasonable reason.**

Risk Transfer?



“The *Contractor* has had an opportunity of inspecting the physical conditions (including the sub-surface conditions) and other conditions of or affecting the site of the works and is deemed to be fully acquainted with the same before the date of this contract and to have obtained all necessary information as to risks, contingencies and all other circumstances which may influence or affect the execution of the works. No failure on the part of the *Contractor* to discover or foresee any such condition, risk, contingency or circumstance entitles the *Contractor* to any additional payment (whether by way of an addition to the Prices or otherwise) or to any change to the Completion Date.”



**POORLY
DRAFTED**



Defect 11.2(5)



(5) A Defect is

- a part of the *works* which is not in accordance with the Works Information or
- a part of the works designed by the *Contractor* which is not in accordance with the applicable law or the *Contractor's* design which the *Project Manager* has accepted
- any defect, shrinkage or other fault in the *works* which is due to failure of the *Contractor* to comply with his obligations under this contract or to frost occurring before Completion

What does this amendment add? Why add “frost occurring”?

No Release from obligation



Notwithstanding any other provision of this contract, the *Contractor* is not relieved from any of his obligations or liabilities under or arising out of this contract nor are such obligations or liabilities removed, restricted, limited or qualified in any way by the presence of the *Employer*, the *Supervisor* or the *Project Manager* or any of their agents or representatives on the Site or the carrying out of tests on the instructions of the *Employer*, the *Project Manager* or the *Supervisor*, nor by any instruction, direction, admission, consent, approval, acceptance, confirmation, comment, certificate, sanction, acknowledgement, advice or inspection made or given by or on behalf of the *Employer*, the *Supervisor* or the *Project Manager*

What does “Notwithstanding” mean? I cant be bothered to read the rest of the contract? Isn’t this already covered by clause 14.1? So long (115 words) lost the gist of the clause?

Early Warning (16.1)



The *Contractor* and the *Project Manager* 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

.....continued



interfere or affect the design and/or the work of the *Contractor*, the *Employer*,
Other Subcontractors or Others

- delay or advance Completion
- delay or advance meeting a Key Date
- change the Accepted Programme
- constitute a Defect
- constitute a breach of this contract by the *Contractor*
- cause or contribute to the breach of any Applicable Law
- affect the safety of any person
- contribute to additional delay or expense in the course of maintenance, upgrading, extension, repair or renewal of the *works*

Be careful what you wish for? Are all these additional words necessary? Do they add anything?

Ambiguity and inconsistency (17.1)



The *Project Manager* or the *Contractor* notifies the other as soon as either becomes aware of an ambiguity or inconsistency in or between the documents which are part of this contract. The *Project Manager* gives an instruction resolving the ambiguity or inconsistency.

..... continued



If any ambiguity, inconsistency or discrepancy in or between the various documents included in the Works Information is found, the *Project Manager* decides in its absolute discretion which document or part of a document prevails. • The *Contractor* is not entitled to any payment or any addition to the amount due to the *Contractor*, nor to any adjustment of the period or periods for the completion of the *works* or any part thereof, nor to any change to the date by which a Condition for a Key Date is to be achieved, arising out of or in any way in connection with such ambiguity, inconsistency or discrepancy or any decision made by the *Project Manager* under this clause, nor is any such decision by the *Project Manager* a compensation event under clause 60.1(1) unless the *Project Manager* in his absolute discretion decides otherwise.

Poor Use of Z clauses



- Unnecessary clauses – eg compliance with the law
- Provisions which should have been in Works Information/ Service Information or Scope
- Repetition of provisions covered by existing contract clauses, thus creating conflict/ ambiguity – Change to risk profile of contract



NEC3 GUIDANCE NOTES EXAMPLES OF USE

- When Option C, D or E is used in a partnering arrangement it is common for the *Project Manager* to want more influence over the selection of a subcontractor. This can be achieved by setting down the processes to be followed in an Option Z clause.
- Especially under Option F, detailed procurement procedures should be stated clearly, preferably in a Z clause. These should include such matters as
 - · minimum number of competitive tenders,
 - · criteria on how a subcontractor is appointed, and
 - · involvement of the *Project Manager* in the procurement process and acceptance of Subcontractors.

(source: Guidance Notes for the NEC Engineering and Construction Contract page 45)

Boundary conditions



One method of reducing disputes on this topic is to define in the contract the boundary line between the risks carried by the *Employer* and *Contractor*, i.e. to state what tenderers should allow for in their tenders. This can be done, for example, in tunnel works or extensive foundation works by stating the boundary conditions. This should be done by using Option Z to state boundary conditions covering such matters as

- · soil characteristics,
- · levels of rock/soil interface,
- · groundwater levels,
- · permeability limits, and
- · overbreak in rock excavation.

Tenderers will then be able to tender on a common basis, knowing that they must allow in their pricing for the occurrence of physical conditions within the stated boundary conditions.

(source: Guidance Notes for the NEC Engineering and Construction Contract page 69)

Removal of Plant



If the *Project Manager* gives his permission for the removal of Plant and Materials, title in them reverts to the *Contractor*. This may cause problems if Plant and Materials which have been paid for are removed from the Working Areas for work to be done on them elsewhere, such as being returned to the manufacturer for modifications. If this is known to be likely to happen at tender stage, the *Employer* may wish to include a suitable Z clause to safeguard their title. If no such clause is included and the need to remove Plant or Materials happens for an unforeseen reason, the *Project Manager* should ensure that he agrees suitable arrangements with the *Contractor* to safeguard the *Employer's* position before he gives permission for the Plant and Materials to be removed from Site

(source: Guidance Notes for the NEC Engineering and Construction Contract page 83)

▪

Contract specific requirements

Public sector Z clauses for use with NEC3 contracts

The following z clauses are intended for **UK Government clients** when using the NEC3 forms of contracts. These clauses are additional conditions to the main NEC3 contract and are not intended for independent use. Whilst optional, public sector users should consider their use in conjunction with the main contract. **NEC and the Office of Government Commerce have produced the generic clauses in collaboration to ensure compatibility with both the NEC3 suite of contracts and public sector terminology**

Link: <https://www.neccontract.com/getmedia/a0d6ab16-a1da-4256-a9c6-6d20f0f9a256/PublicSectorZClausesForUseWithNEC3Contracts.pdf.aspx>



NEC Drafting Objectives



- The NEC is the “Martini of contracts” it can be used any time, any place, anywhere.
- The Works Information identifies if the contract is to be fully *Employer* designed or fully *Contractor* designed or somewhere in between.
- A choice and range of main Options from main Option A (lump sum) to Option E (cost reimbursable).
- Risk Allocation - NEC contracts have been developed and written to provide a clear balanced approach to risk allocation between the Parties to a contract.
- Flexibility of risk allocation is achieved through the core clauses and the
 - choice of main Option
 - choice of secondary Options
 - and through the use of **Z clauses**

Clarity and simplicity



- Plain English
- No legal ease
- Short sentences
- Clear language and terminology
- Every procedure has been work flowed
- No woolly words e.g. “to the satisfaction of the *Project Manager*”, “at the discretion of the *Project Manager*”
- Clear defined and identified terms

Stimulus to good management



“The two principles on which the ECC is based and which impact upon the objective of stimulating good management are:

- foresight applied collaboratively mitigates problems and shrinks risk, and
- clear division of function and responsibility helps accountability and motivates people to play their part” (source: NEC3 ECC Guidance Notes page 3)

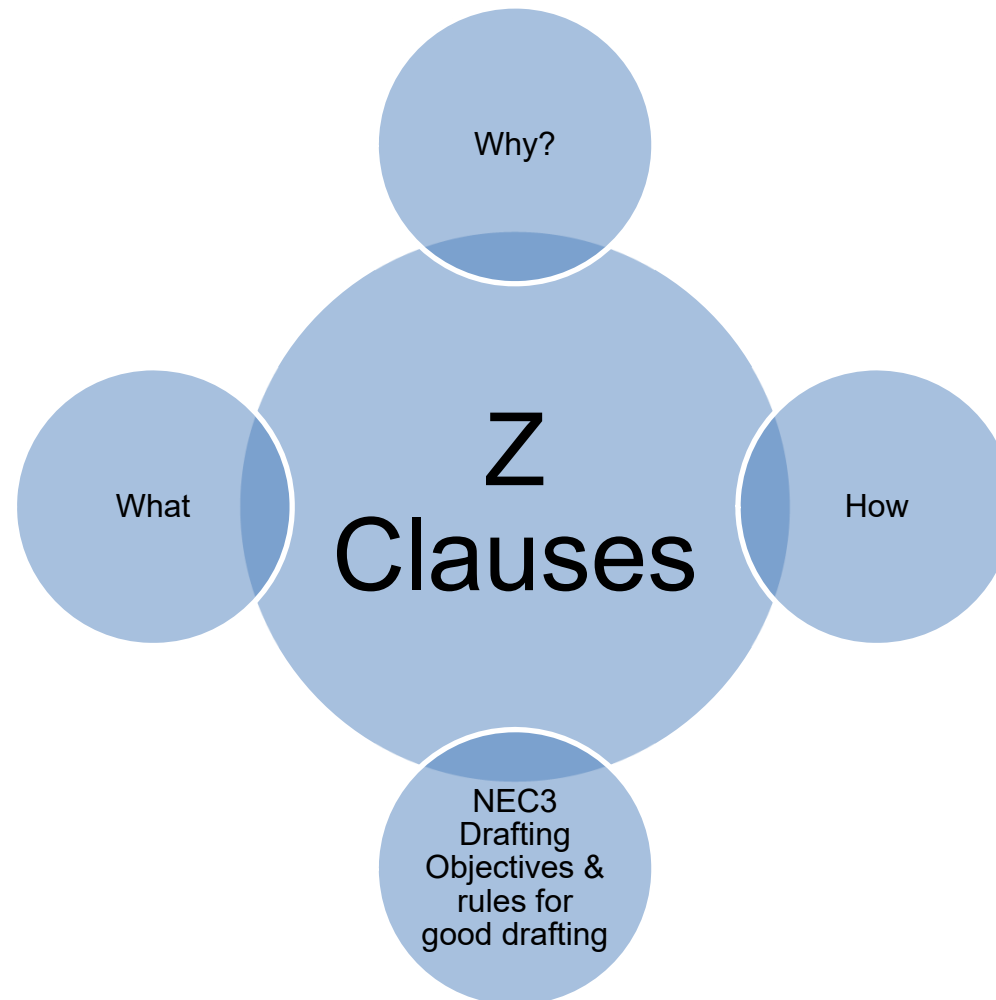
- Every procedure in the NEC has been **work flowed** to check that the clause works correctly and does not have any unforeseen consequences.
- **To encourage good management** the contract provides for:
- **Objective tests** e.g. 60.1.(13) weather events
- **Reasons** for decisions – e.g. clause 31.3 reasons for not accepting a programme
- Ambiguities and inconsistencies are construed against the drafter of the document – clause 63.8

Rules for good drafting



- Add to existing clauses, do not amend existing clauses
- Use existing NEC provisions in drafting eg use existing reason for termination, in preference to creating new reason
- Adopt NEC text when possible eg; "a reason or not accepting ... Is ..." clause 21.2

The Z Clause Process



NEC DRAFTING OBJECTIVES

Why?

- **DEFINE THE PROBLEM**
- What is mischief that necessitates a Z clause?

What

- Write down rationale for additional clause – “**clause function statement**” before trying to draft

How

- Refer back to the contract strategy
- What does the *Employer* wish to achieve?
- Flow chart changes
- Use experienced drafters
- Check with NEC3 drafting objectives

Why?



- What is mischief that necessitates a Z clause?
- ‘Additional conditions should be **USED ONLY WHEN ABSOLUTELY NECESSARY** to accommodate special needs such as those peculiar to the country in which the work is to be done.’

Define the Problem



Decide what the problem is that needs an additional provision Recognise the effect of the new provision on the rest of the contract Use Works/Service Information or Scope for things within their definition Remember – Flexibility, clarity and simplicity, stimulus to good management Do not change the risk allocation simply because you do not like it – use a different contract!

- The question why identifies any omission or need for addition to the contract. It requires the drafter to understand the contract as a whole and recognise any issue that needs to be dealt with differently Is additional condition of contract needed or can this be dealt with through the Works Information/ Scope?
- Write down rationale for additional clause – “**clause function statement**”

Clause Function Statement

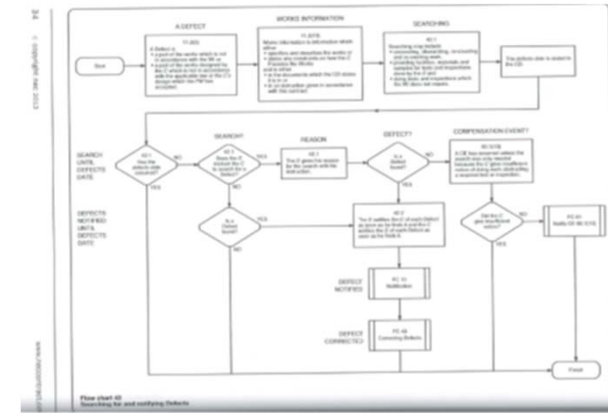
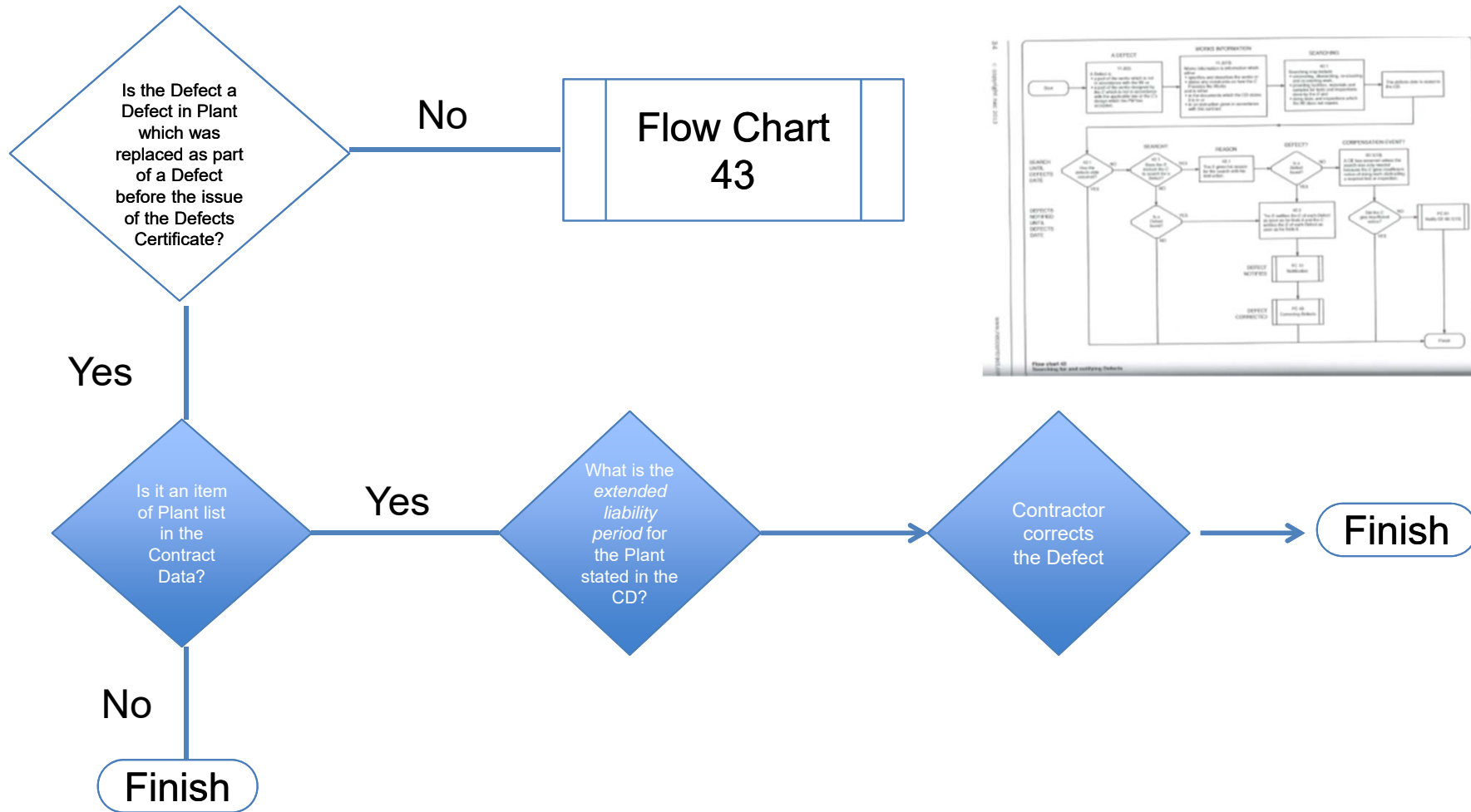


Item Ref	Why? What is mischief that necessitates a Z clause?	What Write down rationale for additional clause – “clause function statement”	How Refer back to contract strategy, defining what the <i>Employer</i> wishes to achieve, and the Risk Register, identifying risks to success, Flow chart changes to identify effects	Section of contract	Existing clause no
1	Replacement of parts of the Plant on the contract before the <i>defects date</i> . If a part is replaced a week before the <i>defects date</i> there is no extended liability period for correction.	In the event that a part of the Plant which has been replaced as part of a Defect that there is an extended liability period to cover this replacement part. Identify the Plant to which this requirement will apply.	Add additional wording to core clause 43.3 Identify the Plant to which this clause will apply in the Contract Data Identify the extended liability period in Contract Data	4	43.4

Should always refer back to:

- contract strategy - the definition of what the employer wishes to achieve,
- the risk register - identifying risks to success,
- flow chart changes to identify effects,
- drafting by people experienced in NEC
- follow the key NEC drafting objectives

Flow Chart



Extended liability period for Plant



43.3 The *Supervisor* issues the Defects Certificate at the later of the *defects date* and the end of the last *defect correction period*. The *Employer's* rights in respect of a Defect which the *Supervisor* has not found or notified are not affected by the issue of the Defects Certificate.

1. If, prior to the issue of the **Defects Certificate**, the correction of a **Defect** in the **Plant** stated in the **Contract Data** requires the replacement of part of the **Plant**, the *Contractor* corrects any further **Defect** in the part which has been replaced during the *extended liability period*.
2. The *Contractor* carries the risk of loss or damage caused by or resulting from his work in correcting a **Defect** after the *defects date*.

NEC DRAFTING OBJECTIVES

Why?

- **DEFINE THE PROBLEM**
- What is mischief that necessitates a Z clause?

What

- Write down rationale for additional clause – “**clause function statement**” before trying to draft

How

- Refer back to the contract strategy
- What does the *Employer* wish to achieve?
- Flow chart changes
- Use experienced drafters
- Check with NEC3 drafting objectives

Sources of information



JULY 07, 2015

Additional Public Sector Z Clauses

Additional clauses have been drafted in response to The Public Contracts Regulations 2015 which replace The Public Contracts Regulations 2006. Download below:

Guidance from the Cabinet Office:

The Regulations implement the EU's 2014 Public Sector Procurement Directive (2014/24/EU) in England, Wales and Northern Ireland. The majority of the provisions came into force from 26 February 2015. The requirement for electronic tender processes will apply from 18 October 2018.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407236/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Feb_2015_update.pdf

Central Procurement Directorate – Northern Ireland

<https://www.finance-ni.gov.uk/publications/procurement-guidance-note-0115-standardisation-nec3-engineering-and-construction>

Sources of information



This guide sets out some practical steps on using BIM with NEC3 Contracts, dealing with the contractual and technical matters that arise.

April 2013
neccontract.com

Sources of information



Z Clause Webinar - 25 SEPTEMBER 2014



Watch **Peter Higgins, NEC consultant**, and **Robert Gerrard, NEC Users' Group Secretary**, discuss the types of Z clauses that are available and their impact on the NEC contracts.

The Z clause is there to enable the parties to agree *additional conditions of contract* to cater for specific needs relating to the project or type of project. In most cases, there is very little need to incorporate Z clauses. NEC contracts were structured to provide flexibility, and they offer a choice of main and secondary options to cater for a range of payment regimes and risk profiles.

[Download the presentation slides.](#)

- NEC Users' Group
- NEC Champion
- NEC ECC Advanced Training:
 - NEC3: ECC Compensation Events Workshop
 - NEC3: ECC Programming Workshop
 - NEC3: Managing Risk under the ECC
 - NEC3: ECC *Project Managers* Workshop

Summary



- NEC to add any marketing/promotional material here

We will now break out into groups to explore Z clause and collaboration links

- Quick Survey
- Correlation between Z clauses and collaboration in action

Optional Survey



- How many of the contracts you see have or use Z clauses?
 - None of them?
 - Between 0 to 25%
 - 25% to 50%
 - 50% to 75%
 - 75% to 100%
 - All of them?

- What proportion of Z clauses are tailored for the specific contract or project i.e. relevant to the particular case?
 - 0 to 25%
 - 25% to 50%
 - 50% to 75%
 - 75% to 100%

- What proportion of Z clauses are being used in the right way?
 - 0 to 25%
 - 25% to 50%
 - 50% to 75%
 - 75% to 100%

- What proportion Z clauses are fully understood in terms of their impact on the contract processes contract 'spirit'
 - 0 to 25%
 - 25% to 50%
 - 50% to 75%
 - 75% to 100%

- In your experience, to what extent do Z clauses that impact on the contract's ability to realise successful collaboration?
 - 1 Minimally
 - 2 Fairly important
 - 3 Important
 - 4 Very important
 - 5 Essential

- In your experience, what are the drivers for the use of Z clauses?

- Identify the top three reasons?

-

-

-

NEC4 KEY CHANGES



NEC4 is “evolutionary not revolutionary” the key changes build on the key features of NEC3

The Changes are designed to:

- Support the on-going drive for further collaboration and integration of teams,
- Greater use of modern work methods
- Better avoidance of disputes and
- More effective identification and management of risk and opportunity
- all of which will help lead to more successful outcomes.

- **Early warning provisions** – the 'Risk Register' has been re-named the 'Early Warning Register' to distinguish it from the project risk register often used for wider project management purposes. There are now default periods for early warning meetings.
- **Programming changes** – there are new 'dividing date' provisions similar to those used in compensation events. New provisions provide for 'treated acceptance' of the contractor's programme in situations where the project manager does not respond to a programme issued by the contractor for acceptance, or to a reminder. This is to unlock the impasse which can sometimes occur.
- **Terms standardised** – 'Employer' becomes 'Client', and 'Works Information' becomes 'Scope'.
- **New Provisions** - there are also some important new provisions in ECC and ECS to help promote collaboration, as follows.

- **Identifying opportunities** – an additional procedure includes the identification of opportunities by either party. These are discussed jointly and the contractor can share in the cost savings of opportunities that it initiates
- **Early contractor involvement** – this is now included as a secondary option, based upon the clauses published by NEC in 2015.
- **BIM** - supporting information modelling – a new secondary option is added specifically to support the use of information models and digital engineering models. This requires the contractor to provide an information model execution plan either for incorporation in the contract from the outset, or within a period defined by the client.

- **Dispute negotiation** – a 4 week period for escalation and negotiation of a dispute has been introduced, which takes place prior to commencing any formal proceedings. This requires nominated senior representatives of each party to meet and try to reach a negotiated solution.
- **Dispute avoidance** – the works contracts now include a dispute avoidance option W3 which can be used if the UK Housing, Grants, Construction and Regeneration Act does not apply. This is to refer any dispute to a dispute avoidance board. The benefit of this new option is to encourage and support the parties in resolving any potential dispute consensually, and to support users who wish to use this facility on their projects.

- **Financial agreement** – for payment applications and final accounts, there are now procedures aimed at reaching agreement on the final amounts due. Provisions have been introduced to the cost-based contracts (main options C to F) that allow the contractor to instigate a review and acceptance of its defined cost by the project manager, upon request. This encourages checking and agreement of defined cost and disallowed cost progressively as the work proceeds, and not to defer the exercise until the project has been completed.

NEC4 KEY CHANGES – other changes



- **Collaboration** – in secondary option X12, 'Partnering' has been changed to 'Collaboration' better to reflect the intent.
- **Retention** – the secondary option X16 for retention now includes the optional provision of a retention bond instead of having money retained.
- **Confidentiality** – a new core clause deals with confidentiality, restricting the disclosure of project information.
- **Communication** – the use of a communication system, including an electronic one, are recognised through amended clause 13.2, and if required is defined in the scope.
- **Quality** – section 4 quality management provisions introduce a requirement for the contractor to prepare and issue a quality management system and a plan.

NEC4 KEY CHANGES – other changes



- **Schedules of cost components** – some changes have been made to simplify the schedules of cost components and associated contract data inputs. The 'Schedule of Cost Components' is used only for main options C, D and E and the 'Short Schedule of Cost Components' has been removed from these contracts. The short schedule is now used exclusively in options A and B and only to assess compensation events. It adopts a pre-priced approach for people cost to replace the previous cost-based approach.
- **Fee percentage** – there is now only one fee percentage, with no separate fee percentage for subcontracted works. The application of fee to defined cost is consistent across all main options.

ECSC and ECSS

- A number of the above ECC and ECS changes have been passed through to the ECSC and ECSS.
- The main change specific to the ECSC and ECSS is that the compensation event procedure has been simplified and shortened.

(SOURCE: NEC Users Group 2017)

NEC4 and Z Clauses



Nothing in NEC4 significantly changes the carefully-balanced risk allocation. As well as providing new features, the authors' aim is firmly to reduce the volume of Z clauses (ie amendments to the standard form), many of which are market driven and commonplace.

In recent years we have seen increasing numbers of Z clauses, some good, some bad and some ?????

NEC4 looked at the amendments being made and the NEC4 Contract Board made a conscious effort put the most relevant into the core clauses or Options and by doing so reduced the need for Z clause amendments.

Dispute resolution procedure (section 9)

NEC4 introduces two new concepts:

- a four-week period for escalation and negotiation (new core clause)
- the use of a Dispute Avoidance Board (new secondary Option W3)
- Both are non-mandatory if Option W2 is used (ie the statutory right to refer to adjudication at any time). Again, the changes are driven by common market practice of having a tiered dispute resolution procedures via Z clauses, so a reduction is welcome.

Third parties

- - Collateral warranties are now provided for via an X Option, despite Y(UK)3 promoting the Contracts (Third Party Rights) Act 1999, which no-one seems to have been using. This will neatly reduce volume and content of Z clauses. Agreed forms to be included in the Scope.
- - Either party may assign (new core clause). However, in my experience it is common to prohibit the Contractor from so doing, notwithstanding what the authors say.

Compensation events

There are two key changes to the regime:

- the Contractor may now recover the costs of a quotation. This is a common complaint and a justified one in some circumstances
- Contract Data Part 1 now includes space for project specific compensation events, which should reduce the use of Z clauses