

NEC3 contracts, September 2011 amendments

Changes resulting from the Local Democracy, Economic Development and Construction Act October 2009.

The Institution of Civil Engineers has approved amendments to the NEC3 contracts to cover the revisions to the Housing Grants, Construction and Regeneration Act 1996 introduced by the Local Democracy, Economic Development and Construction Act 2009. These amendments are for use in England, Wales and Scotland.

Notes for Guidance

These amendments are prepared solely for use on contracts which are subject to the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009 (“the Acts”). In other circumstances these amendments should not be used; Option W1 should be used and Option Y(UK)2 should not be included in the contract.

The amendments make revisions to both the adjudication and payment conditions. The changes required to adjudication are made by amendments to Option W2, or in the short contracts by additional conditions. Payment changes are made by amendments to Y(UK)2, or again in the short contracts by additional conditions.

The following is a summary of the changes introduced by the new Act which have an effect on the NEC3 contracts.

- 108(3A) This requires that the contract must include in writing a provision for the correction of slips. The specific wording used requires an amendment to refer to the correction of a typographical error in addition to clerical mistake or ambiguity.
- 108A A new section has been added dealing with allocating the costs of the adjudication. This makes ineffective any provision restricting the power of the *Adjudicator* to allocate his fees and expenses unless it is made after the giving of a notice of intention to refer. Option W2 is amended to give the *Adjudicator* the power to allocate his fees and expenses between the Parties.
- 110A This makes substantial amendments to the previous arrangement for notice of payment. The NEC3 contracts are amended to reflect the changes made in this provision. Where payment follows the issue of a payment certificate, the certificate and details of how the payment was calculated must be issued together, and these must be defined as the payment notice. Where payment is made without the issue of a certificate, the *Contractor's* application or *Consultant's* invoice will constitute the payment notice.

The timing of issue of the payment notice must be fixed in relation to the payment due date; it may not be issued later than 5 days before the due date.

- 111 This section replaces the notice of intention to withhold payment with a requirement to pay the notified sum or give notice of intention to pay less. The terminology and timing are revised in NEC3 contracts to comply with this new provision.
- 111(9) This introduces a provision requiring that payment must be made within 7 days of a decision by the *Adjudicator* which increases the amount due under any payment notice. This creates a conflict with the 14 day period for correcting clerical errors set out in Option W2. Option W2 is amended to change the 14 day period to 5 days, and to require payment of the amount determined by the *Adjudicator* due within 7 days of the *Adjudicator's* decision.
- 112 The Acts include a right for the *Contractor* to recover the costs of suspending performance due to non-payment of amounts due. By including suspension as a compensation event, the main NEC3 contracts already comply with this requirement. The short forms do not include any right to suspend performance; they are amended to identify suspension as a compensation event, so that the assessment is carried out as for other events.

Contract amendments

The following sections include amendments to each of the NEC3 contracts required as result of the Acts.

- NEC3 Engineering and Construction Contract
- NEC3 Engineering and Construction Subcontract
- NEC3 Engineering and Construction Short Contract
- NEC3 Engineering and Construction Short Subcontract
- NEC3 Professional Services Contract
- NEC3 Term Service Contract
- NEC3 Term Service Short Contract

NEC3 Supply Contracts cover the supply of goods only, without installation, and therefore are not subject to the Acts.

NEC3 Engineering and Construction Contract

Amendments September 2011

The following amendments have been made to the June 2005 edition (with amendments June 2006). Note that page numbers are given for the document containing all main Options.

Page 46 subclause W2.3(7): new sentence added at the end.

If the *Adjudicator's* decision changes an amount notified as due, payment of the sum decided by the *Adjudicator* is due not later than seven days from the date of the decision or the final date for payment of the notified amount, whichever is the later.

Page 46 subclause W2.3(8): new sentence added at the end.

The *Adjudicator* may in his decision allocate his fees and expenses between the Parties.

Page 46 subclause W2.3(12): replaced with the following:

The *Adjudicator* may, within five days of giving his decision to the Parties, correct the decision to remove a clerical or typographical error arising by accident or omission.

Page 55 Option Y(UK)2: Y2.1(1) replaced with the following:

The Act is the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009.

Page 55 Option Y(UK)2: Y2.2 third paragraph replaced with the following:

The *Project Manager's* certificate is the notice of payment to the *Contractor* specifying the amount due at the payment due date (the notified sum) and stating the basis on which the amount was calculated.

Page 55 Option Y(UK)2: Y2.3 replaced with the following:

If either Party intends to pay less than the notified sum, he notifies the other Party not later than seven days (the prescribed period) before the final date for payment by stating the amount considered to be due and the basis on which that sum is calculated. A Party does not withhold payment of an amount due under this contract unless he has notified his intention to pay less than the notified sum as required by this contract.

Page 61 Contract Data part one, 1 General, line 4: added "and September 2011" after "June 2006".

NEC3 Engineering and Construction Subcontract

Amendments September 2011

The following amendments have been made to the June 2005 edition (with amendments June 2006).

Page 44 subclause W2.3(7): New sentence added at the end:

If the *Adjudicator's* decision changes an amount notified as due, payment of the sum decided by the *Adjudicator* is due not later than seven days from the date of the decision or the final date for payment of the notified amount, whichever is the later.

Page 44 subclause W2.3(8): New sentence added at the end:

The *Adjudicator* may in his decision allocate his fees and expenses between the Parties.

Page 44 subclause W2.3(12): Replace with the following:

The *Adjudicator* may, within five days of giving his decision to the Parties, correct the decision to remove a clerical or typographical error arising by accident or omission.

Page 53 Option Y(UK)2: subclause Y2.1(1) replaced with the following:

The Act is the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009.

Page 53 Option Y(UK)2: subclause Y2.2 replaced with the following:

The date on which a payment becomes due is fourteen days after the assessment date.

The final date for payment is fourteen days or a different period for payment if stated in the Subcontract Data after the date on which payment becomes due.

The *Contractor's* certificate is the notice of payment to the *Subcontractor* specifying the amount due at the payment due date (the notified sum) and stating the basis on which the amount was calculated.

Page 53 Option Y(UK)2: subclause Y2.3

If either Party intends to pay less than the notified sum, he notifies the other Party not later than seven days (the prescribed period) before the final date for payment by stating the amount considered to be due and the basis on which that sum is calculated. A Party does not withhold payment of an amount due under this subcontract unless he has notified his intention to pay less than the notified sum as required by this subcontract.

Page 59 Subcontract Data part one, 1 General, line 4 add "and September 2011" after "June 2006".

Page 62 Subcontract Data part one, statement "If Y(UK)2 is used" the period for payment of "21 days" is changed to "14 days".

NEC3 Engineering and Construction Short Contract

Amendments September 2011

The following amendments have been made to the June 2005 edition.

Contract Data page 3: reference to the *conditions of contract*; add “with amendments September 2011” after “June 2005”.

Page CC 12 of 12: the text is deleted and replaced with the following.

If the United Kingdom Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009 (the Act) applies to this contract, the following additional conditions apply.

Definitions	1.1	(1) The payment due date for an application for payment by the <i>Contractor</i> is the <i>assessment day</i> which follows receipt of that application. (2) The final date for payment is three weeks after the payment due date.
Assessing the amount due	1.2	The <i>Contractor's</i> application for payment is the notice of payment specifying the sum that the <i>Contractor</i> considers to be due at the payment due date (the notified sum). The <i>Contractor's</i> application states the basis on which the amount is calculated and includes details of the calculation.
	1.3	The following replaces subclause 50.4 If the <i>Employer</i> intends to pay less than the notified sum, he notifies the <i>Contractor</i> of the amount which the <i>Employer</i> considers to be due not later than seven days (the prescribed period) before the final date for payment. The <i>Employer's</i> notification states the basis on which the amount is calculated and includes details of the calculation. A Party pays the notified sum unless he has notified his intention to pay less than the notified sum.
Compensation event	1.4	If the <i>Contractor</i> exercises his right under the Act to suspend performance, it is a compensation event.
The adjudication	1.5	The following replaces subclause 93.3(1) A Party may issue to the other Party a notice of his intention to refer a dispute to adjudication at any time. He refers the dispute to the <i>Adjudicator</i> within one week of the notice.
	1.6	The <i>Adjudicator</i> may in his decision allocate his fees and expenses between the Parties.
	1.7	The <i>Adjudicator</i> may, within five days of giving his decision to the Parties, correct the decision to remove a clerical or typographical error arising by accident or omission.

- 1.8 If the *Adjudicator's* decision changes an amount notified as due, payment of the sum decided by the *Adjudicator* is due not later than seven days from the date of the decision or the final date for payment of the notified amount, whichever is the later.

NEC3 Engineering and Construction Short Subcontract

Amendments September 2011

The following amendments have been made to the June 2005 edition.

Contract Data page 5: reference to the *conditions of contract*; added “with amendments September 2011” after “June 2005”.

Page CC 13 of 13: the text is deleted and replaced with the following.

If the United Kingdom Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009 (the Act) applies to this contract, the following additional conditions apply.

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|--------------------------|-----|---|
| Definitions | 1.1 | (1) The payment due date for an application for payment by the <i>Subcontractor</i> is the <i>assessment day</i> which follows receipt of that application.

(2) The final date for payment is three weeks after payment due date. |
| Assessing the amount due | 1.2 | The <i>Subcontractor's</i> application for payment is the notice of payment specifying the sum that the <i>Subcontractor</i> considers to be due at the payment due date (the notified sum). The <i>Subcontractor's</i> application states the basis on which the amount is calculated and includes details of the calculation. |
| | 1.3 | The following replaces subclause 50.4

If the <i>Contractor</i> intends to pay less than the notified sum, he notifies the <i>Subcontractor</i> of the amount which the <i>Contractor</i> considers to be due not later than seven days (the prescribed period) before the final date for payment. The <i>Contractor's</i> notification states the basis on which the amount is calculated and includes details of the calculation. A Party pays the notified sum unless he has notified his intention to pay less than the notified sum. |
| Compensation event | 1.4 | If the <i>Subcontractor</i> exercises his right under the Act to suspend performance, it is a compensation event. |
| The adjudication | 1.5 | The following replaces subclause 93.3(1)

A Party may issue to the other Party a notice of his intention to refer a dispute to adjudication at any time. He refers the dispute to the <i>Adjudicator</i> within one week of the notice. |
| | 1.6 | The <i>Adjudicator</i> may in his decision allocate his fees and expenses between the Parties. |
| | 1.7 | The <i>Adjudicator</i> may, within five days of giving his decision to the Parties, correct the decision to remove a clerical or typographical error arising by accident or omission. |

- 1.8 If the *Adjudicator's* decision changes an amount notified as due, payment of the sum decided by the *Adjudicator* is due not later than seven days from the date of the decision or the final date for payment of the notified amount, whichever is the later.

NEC3 Professional Services Contract

Amendments September 2011

The following amendments have been made to the June 2005 edition (with amendments June 2006).

Page 32 subclause W2.3(7): new sentence added at the end.

If the *Adjudicator's* decision changes an amount notified as due, payment of the sum decided by the *Adjudicator* is due not later than seven days from the date of the decision or the final date for payment of the notified amount, whichever is the later.

Page 32 subclause W2.3(8): new sentence added at the end.

The *Adjudicator* may in his decision allocate his fees and expenses between the Parties.

Page 32 subclause W2.3(12): replaced with the following:

The *Adjudicator* may, within five days of giving his decision to the Parties, correct the decision to remove a clerical or typographical error arising by accident or omission.

Page 41 Option Y(UK)2: Y2.1(1) replaced with the following:

The Act is the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009.

Page 41 Option Y(UK)2: Y2.2, third paragraph replaced with the following:

The *Consultant's* invoice is the notice of payment specifying the sum that the *Consultant* considers to be due at the payment due date (the notified sum). The *Consultant's* invoice states the basis on which the amount is calculated and includes details of the calculation in accordance with the contract.

Page 41 Option Y(UK)2: Y2.3 replaced with the following:

If the *Employer* intends to pay less than the notified sum, he notifies the *Consultant* of the amount which the *Employer* considers to be due not later than seven days (the prescribed period) before the final date for payment. The *Employer's* notification states the basis on which the amount is calculated and includes details of the calculation. A Party pays the notified sum unless he has notified his intention to pay less than the notified sum.

Page 42 Contract Data part one, 1 General, line 4: added "and September 2011" after "June 2006".

NEC3 Term Service Contract

Amendments September 2011

The following amendments have been made to the June 2005 edition (with amendments June 2006).

Page 31 subclause W2.3(7): new sentence added at the end.

If the *Adjudicator's* decision changes an amount notified as due, payment of the sum decided by the *Adjudicator* is due not later than seven days from the date of the decision or the final date for payment of the notified amount, whichever is the later.

Page 31 subclause W2.3(8): new sentence added at the end.

The *Adjudicator* may in his decision allocate his fees and expenses between the Parties.

Page 31 subclause W2.3(12): replaced with the following:

The *Adjudicator* may, within five days of giving his decision to the Parties, correct the decision to remove a clerical or typographical error arising by accident or omission.

Page 40 Option Y(UK)2: Y2.1(1) replaced with the following:

The Act is the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009.

Page 40 Option Y(UK)2: Y2.2, third paragraph replaced with the following:

The *Service Manager's* certificate is the notice of payment to the *Contractor* specifying the amount due at the payment due date (the notified sum) and stating the basis on which the amount was calculated.

Page 40 Option Y(UK)2: Y2.3 replaced with the following:

If either Party intends to pay less than the notified sum, he notifies the other Party not later than seven days (the prescribed period) before the final date for payment by stating the amount considered to be due and the basis on which that sum is calculated. A Party does not withhold payment of an amount due under this contract unless he has notified his intention to pay less than the notified sum as required by this contract.

Page 41 Contract Data part one, 1 General, line 3: added "and September 2011" after "June 2006".

NEC3 Term Service Short Contract

Amendments September 2011

The following amendments have been made to the June 2005 edition.

Contract Data page 3: reference to the *conditions of contract*; added “with amendments September 2011” after “September 2008”.

Page CC 10 of 10: the following text is deleted,

If the United Kingdom Housing Grants, Construction and Regeneration Act 1996 applies to this contract, the following clause replaces clause 93.3(1) above.

The adjudication 94.1 A Party may issue to the other Party a notice of his intention to refer a dispute to adjudication at any time. He refers the dispute to the *Adjudicator* within one week of the notice.

and replaced with the following:

If the United Kingdom Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009 (the Act) applies to this contract, the following additional conditions apply.

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|--------------------------|------|--|
| Definitions | 1.1 | (1) The payment due date for an application for payment by the <i>Contractor</i> is the <i>assessment day</i> which follows receipt of that application.

(2) The final date for payment is three weeks after the payment due date. |
| Assessing the amount due | 1.2 | The <i>Contractor's</i> application for payment is the notice of payment specifying the sum that the <i>Contractor</i> considers to be due at the payment due date (the notified sum). The <i>Contractor's</i> application states the basis on which the amount is calculated-and includes details of the calculation. |
| | 1.3 | The following replaces subclause 50.3

If the <i>Employer</i> intends to pay less than the notified sum, he notifies the <i>Contractor</i> of the amount which the <i>Employer</i> considers to be due not later than seven days (the prescribed period) before the final date for payment. The <i>Employer's</i> notification states the basis on which the amount is calculated and includes details of the calculation. A Party pays the notified sum unless he has notified his intention to pay less than the notified sum. |
| Compensation event | .1.4 | If the <i>Contractor</i> exercises his right under the Act to suspend performance, it is a compensation event. |

The adjudication

1.5 The following replaces subclause 93.3(1)

A Party may issue to the other Party a notice of his intention to refer a dispute to adjudication at any time. He refers the dispute to the *Adjudicator* within one week of the notice.

1.6 The *Adjudicator* may in his decision allocate his fees and expenses between the Parties.

1.7 The *Adjudicator* may, within five days of giving his decision to the Parties, correct the decision to remove a clerical or typographical error arising by accident or omission.

1.8 If the *Adjudicator's* decision changes an amount notified as due, payment of the sum decided by the *Adjudicator* is due not later than seven days from the date of the decision or the final date for payment of the notified amount, whichever is the later.