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## **NEC3 Top Tips**

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# NEC3 TOP TIPS

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## SECTORS

Driver Trett have the expertise and experience that brings immeasurable benefits to clients across the entire spectrum of sectors within the engineering and construction industries including:



■ Building



■ Power



■ Infrastructure



■ Process and Industrial



■ Oil and Gas



■ Transportation



■ Marine and Offshore



■ Utilities



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## THE DRIVER GROUP

- Market leader in expert witness, planning, commercial, technical and dispute avoidance / dispute resolution
- Established in 1978
- Stock exchange listed plc. AIM (2005)
- Over 500 staff worldwide
- Network of offices across Africa, the Americas, Asia Pacific, Europe and the Middle East



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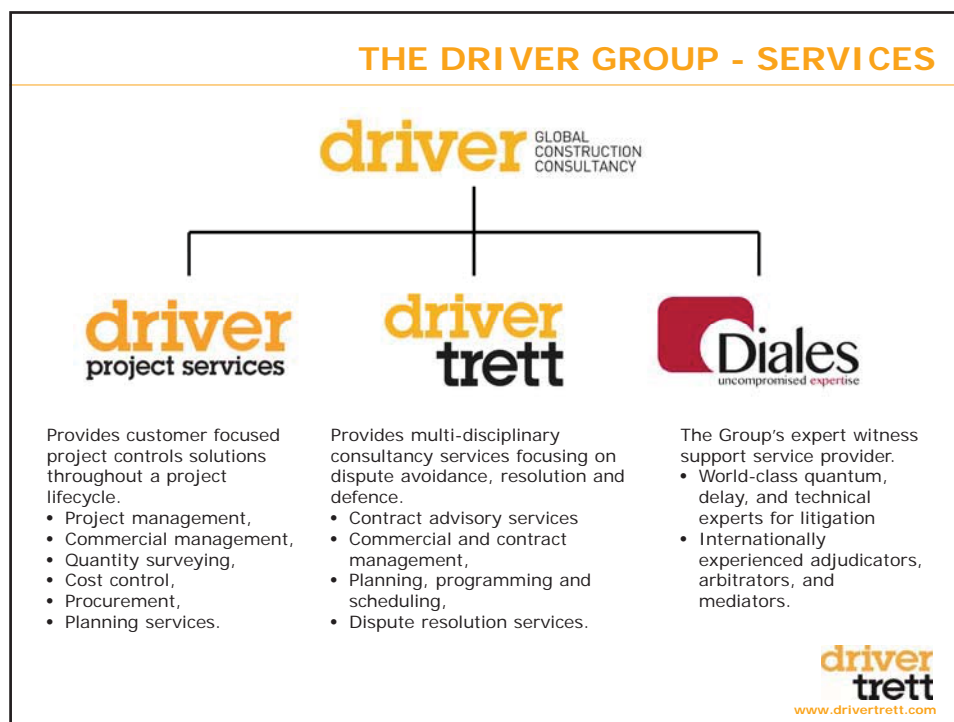
## THE DRIVER GROUP - UK

In the United Kingdom we operate from a number of regional offices to offer the widest possible geographical coverage:

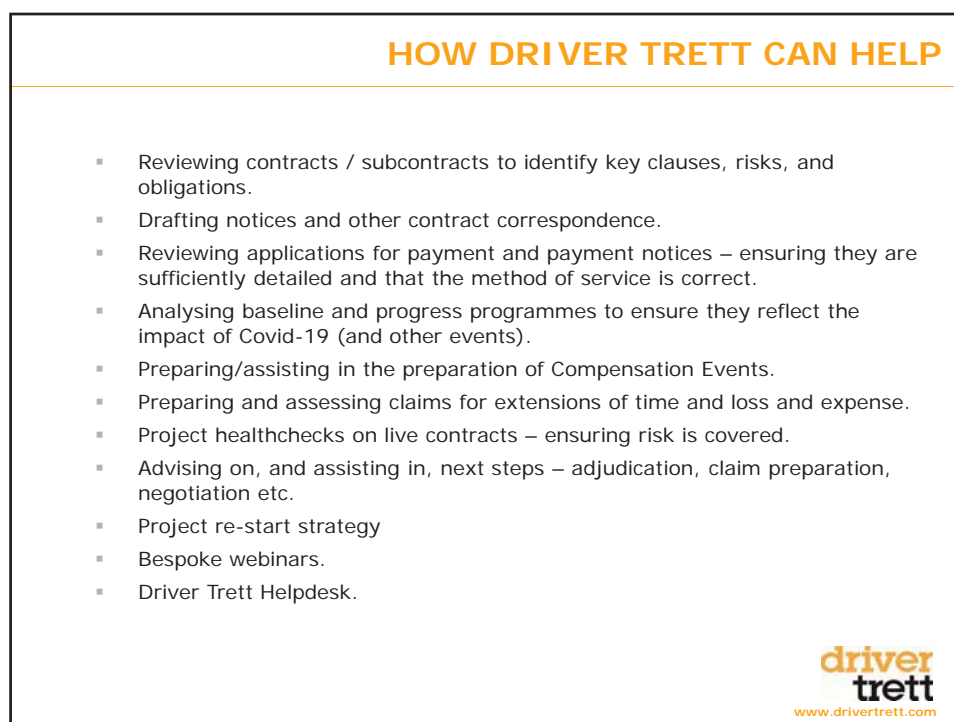
- Bristol
- Coventry
- Glasgow
- Haslingden, Lancashire
- Hooton, Cheshire
- London
- Reading
- Teesside



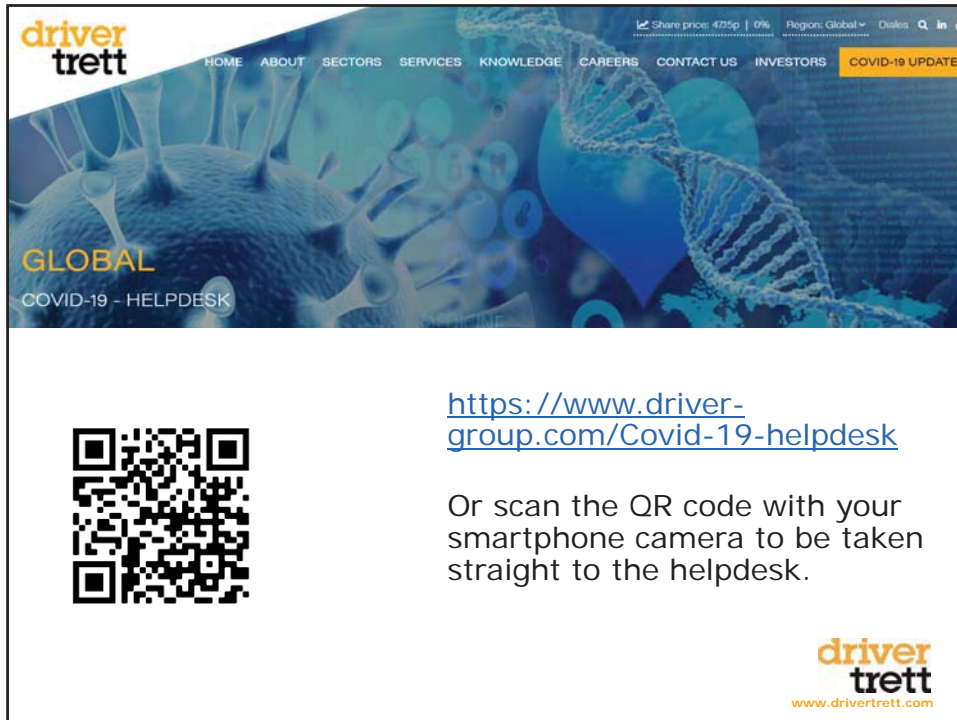
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The image shows a screenshot of the Driver Trett website. At the top left is the 'driver trett' logo. A navigation menu includes 'HOME', 'ABOUT', 'SECTORS', 'SERVICES', 'KNOWLEDGE', 'CAREERS', 'CONTACT US', and 'INVESTORS'. A 'COVID-19 UPDATE' button is highlighted in orange. The main banner features a blue background with a DNA helix and a virus-like structure. Below the banner, the text 'GLOBAL COVID-19 - HELPDESK' is displayed. A QR code is positioned on the left, and a URL <https://www.driver-group.com/Covid-19-helpdesk> is on the right. Below the URL, it says 'Or scan the QR code with your smartphone camera to be taken straight to the helpdesk.' The 'driver trett' logo and website URL are in the bottom right corner.

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The image is an advertisement for the 'DRIVER TRETT DIGEST'. At the top right, the title 'DRIVER TRETT DIGEST' is written in orange. Below it, text reads: 'To download the current issue of the Digest, scan the QR code with your smartphone or visit our website: [www.driver-group.com](http://www.driver-group.com)'. A large QR code is centered on the left. To the right is a graphic of a dial with 'SKILL' on top and 'EXPERT' on the bottom, with a needle pointing towards 'EXPERT'. Below the dial, it says 'Developing Experts'. The 'driver trett' logo and website URL are in the bottom right corner.

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## GERALDINE FLEMING

BSc (Hons) Quantity Surveying

MRICS

Worked for main contractor for five years as site QS

Completed law degree in 2002

Completed solicitor's exams in 2004

Worked in construction claims consultancy for over 20 years



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11. Risk Register / Employer Risks



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# 1. Know your options (and make sure you choose one !)

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## MAIN OPTIONS

Lump sum  
milestone

### **Option A – Priced Contract with Activity Schedule**

Option B – Priced Contract with Bill of Quantities

### **Option C – Target Contract with Activity Schedule**

Option D – Target Contract with Bill of Quantities

Option E – Cost Reimbursable Contract

Option F – Management Contract

Cost reimb plus  
twist

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## 2. What secondary options?

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### X – SECONDARY OPTIONS

- X1- price adjustment for inflation (A, B, C, D)
- **X2 - changes in law**
- X3 - multiple currencies (A, B only)
- X4 - parent company guarantee
- X5 - sectional completion
- X6 - bonus for early completion
- **X7 - delay damages**
- X8-X11 – NOT USED

Brexit, living wage, building regs, covid? etc

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## X – SECONDARY OPTIONS

- X12 - partnering
- X13 - performance bond
- X14 - advance payment to Contractor
- **X15 - limitation of Contractor's design liability**
- **X16 - retention (not with option F)**
- X17 - low performance damages
- **X18 - limitation of Contractor's liability**
- X19 - NOT USED
- X20 - key performance indicators (not with X12)

VIP for Contractor / Sub-Contractor

VIP for Contractor / Sub-Contractor

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## X18 – LIMITATION OF LIABILITY

### X18


- X18.1 The Contractor's liability to the Employer for the Employer's indirect or consequential loss is limited to the amount stated in the Contract Data.
- X18.2 For any one event, the liability of the Contractor to the Employer for loss of or damage to the Employer's property is limited to the amount stated in the Contract Data.
- X18.3 The Contractor's liability to the Employer for Defects due to his design which are not listed on the Defects Certificate is limited to the amount stated in the Contract Data.
- X18.4 The Contractor's total liability to the Employer for all matters arising under or in connection with this contract, other than the excluded matters, is limited to the amount stated in the Contract Data and applies in contract, tort or delict and otherwise to the extent allowed under the law of the contract.
- The excluded matters are amounts payable by the Contractor as stated in this contract for
- loss of or damage to the Employer's property,
  - delay damages if Option X7 applies,
  - low performance damages if Option X17 applies and
  - Contractor's share if Option C or Option D applies.
- X18.5 The Contractor is not liable to the Employer for a matter unless it is notified to the Contractor before the end of liability date.

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**If Option X18 is used**

- The Contractor's liability to the Employer for indirect or consequential loss is limited to .....
- For any one event, the Contractor's liability to the Employer for loss of or damage to the Employer's property is limited to.....
- The Contractor's liability for Defects due to his design which are not listed on the Defects Certificate is limited to .....
- The Contractor's total liability to the Employer for all matters arising under or in connection with this contract, other than excluded matters, is limited to.....
- The end of liability date is.....years after the Completion of the whole of the works.



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**3. Communications  
(email / separate)**



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## CLAUSE 13 - COMMUNICATIONS

- 13.1 Each instruction, certificate, submission, proposal, record, acceptance, notification, reply and other communication which this contract requires is communicated in a form which can be read, copied and recorded. Writing is in the *language of this contract*.
- 13.2 A communication has effect when it is received at the last address notified by the recipient for receiving communications or, if none is notified, at the address of the recipient stated in the Contract Data.

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## CLAUSE 13 - COMMUNICATIONS

*"read, copied and recorded"* What about?

- Letters
- Faxes
- Emails
- Text messages
- Intranet (4projects or similar)
- Whatsapp
- Instagram
- Snapchat
- Facebook
- Verbal communications

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## CLAUSE 13 - COMMUNICATIONS

13.2 A communication has effect when it is received at the last address notified by the recipient for receiving communications or, if none is notified, at the address of the recipient stated in the Contract Data.

“...has effect when it is received at the last address notified”

- What if the letter gets lost in the post?
- Are emails valid?
- When would an email be deemed to be received?
- What about documents given by hand (eg handed over in the progress meeting)

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## CLAUSE 13 - COMMUNICATIONS



13.7 A notification which this contract requires is communicated separately from other communications.

- Can / should you use progress reports?
- What about an email with three separate pdf attachments – containing an early warning notice, a CE notification and a revised programme?

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## 4. CI 61.3 Notices

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### DIFFERENT IN THE DIFFERENT NEC CONTRACTS

#### NEC – cl 61.3 (June 2005)

If the *Contractor* does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the *Project Manager* should have notified the event to the *Contractor* but did not.

#### NEC – cl 61.3 (April 2013)

If the *Contractor* does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the event arises from the *Project Manager* or the *Supervisor* giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption.

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## NEC NOTICES

Watch out for amendments – how would this affect the Contractor / Sub-Contractor's obligations

two

If the *Contractor* does not notify a compensation event within ~~eight~~ <sup>two</sup> weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date ~~unless the event arises from the Project Manager or the Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption.~~

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## 5. Programme, Key Dates and LDs

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### NEC3 – KEY DATES – CLAUSE 25.3

- Key Date - a date by which work is to meet the Condition stated in the Contract Data -11.2(9)
- If Project Manager decides that works do not meet the Condition by the Key Date and Employer incurs additional cost, cost is paid by the Contractor
- The amount of additional cost – EITHER
  - In carrying out work; or
  - By paying an additional amount to Others
- Additional cost to be assessed within 4 weeks of date when condition is actually met
- This is the Employer's only right in such circumstances

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### DELAY DAMAGES

- X7**
- X7.1 The *Contractor* pays delay damages at the rate stated in the Contract Data from the Completion Date for each day until the earlier of
- Completion and
  - the date on which the *Employer* takes over the works.
- X7.2 If the Completion Date is changed to a later date after delay damages have been paid, the *Employer* repays the overpayment of damages with interest. Interest is assessed from the date of payment to the date of repayment and the date of repayment is an assessment date.
- X7.3 If the *Employer* takes over a part of the works before Completion, the delay damages are reduced from the date on which the part is taken over. The *Project Manager* assesses the benefit to the *Employer* of taking over the part of the works as a proportion of the benefit to the *Employer* of taking over the whole of the works not previously taken over. The delay damages are reduced in this proportion.

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## DELAY DAMAGES – MAIN CONTRACT

- Delay damages = liquidated damages
- Note “per day” not per week
- Repayment plus interest
- If X7 isn’t chosen, then the Contractor is exposed to general or unliquidated damages

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## DELAY DAMAGES - SUBCONTRACT

### Spot the difference ...

- X7.1 The *Subcontractor* pays delay damages at the rate stated in the Subcontract Data from the Subcontract Completion Date for each day until the earlier of
- Completion and
  - the date on which the *Contractor* takes over the *subcontract works*.
- X7.2 If the Subcontract Completion Date is changed to a later date after delay damages have been paid, the *Contractor* repays the overpayment of damages with interest. Interest is assessed from the date of payment to the date of repayment and the date of repayment is an assessment date.
- X7.3 If the *Contractor* takes over a part of the *subcontract works* before Completion, the delay damages are reduced from the date on which the part is taken over. The *Contractor* assesses the benefit of taking over the part of the *subcontract works* as a proportion of the benefit of taking over the whole of the *subcontract works* not previously taken over. The delay damages are reduced in this proportion.
- If Option X7 is used (but not if Option X5 is also used)**
- Delay damages for Completion of the whole of the *subcontract works* are  
..... per day.

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## 6. Z clauses

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### Z CLAUSES

- Incorporated via Contract Data (along with the W, X and Y clauses)
- Will have the same status as other clauses
- Often – just wrong, eg refer to provisions which should be part of the WI or deal with compliance with the law (CDM clauses)
- Changes the risk profile of the whole contract
- NEC – October 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.*

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## Z CLAUSES

- The trickle down effect ... if the Employer changes the contract by adding in Z clauses, then what will the Contractor do down the line to the Sub-Contractors?
- Consider the change to cl 61.3 we looked at earlier. If this was the main contract, then what period of time would be inserted in the subcontract? (ie the 2w notification clause)

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## 7. Design

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**DESIGN**

The contract states

*The Contractor Provides the Works in accordance with the Works Information*

- This is a fit for purpose obligation
- More onerous than “reasonable skill, care and diligence
- Contractors - ensure you choose X15

**X15**

X15.1 The *Contractor* is not liable for Defects in the *works* due to his design so far as he proves that he used reasonable skill and care to ensure that his design complied with the Works Information.

X15.2 If the *Contractor* corrects a Defect for which he is not liable under this contract it is a compensation event.

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## 8. Contract Data Part 2

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## CONTRACT DATA PART 2

- Watch where the Employer (or Contractor) has retyped this document for completion at tender stage
- In **every** case, check the version you are to submit against the original in the contract to ensure all entries are completed

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## 9. Provisional Sums

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## PROVISIONAL SUMS

- Oh no you can't !
- NEC does not refer to provisional sums
- NEC works on the basis that if works cannot be clearly defined, then it should not be included in the contract
- Right approach, the work is instructed afterwards, followed by CE notifications etc
- Consider whether part of the PS work could be fully described and included

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## 10. Defects Date / Defects Correction Period

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## DEFECTS / DEFECTS DATE

### Contract Data Part 1:

#### 4 Testing and Defects

- The *defects date* is . . . . . weeks after Completion of the whole of the works.
- The *defect correction period* is . . . . . weeks except that
  - The *defect correction period* for . . . . . is . . . . . weeks
  - The *defect correction period* for . . . . . is . . . . . weeks.

Defects date – normally 52 / 104 weeks

Defects correction period – can be different for different parts of the work, or even different types of defects



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## 11. Risk Register and Employer Risks



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### RISK REGISTER AND EMPLOYER RISKS

- Compensation Events are Employer Risk events.
- All risks in the project which are not identified as Employer Risk are at the Contractor’s risk.
- Therefore
  - the CEs,
  - risks in clause 80.1 and
  - any additional risks identified in the Contract data part 1 are the only Employer risks
- Therefore the Contractor needs to consider what other risks there may be in the project.



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### RISK

- Clause 80.1 identifies Employer risks
- 81.1 provides that from the *starting date* until the Defects Certificate the risks which are not carried by the Employer are carried by the Contractor.
- Therefore the Employer risks are expressed. The Contractor’s risks are ‘everything else’.
- Contract Data part 1 allows additional Employer risks to be included.

**If there are additional Employer’s risks**

- These are additional Employer’s risks

- 1 .....
- 2 .....
- 3 .....



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## DEFECTS / DEFECTS DATE

80.1 The following are *Employer's* risks.

- Claims, proceedings, compensation and costs payable which are due to
  - use or occupation of the Site by the works or for the purpose of the works which is the unavoidable result of the works,
  - negligence, breach of statutory duty or interference with any legal right by the *Employer* or by any person employed by or contracted to him except the *Contractor* or
  - a fault of the *Employer* or a fault in his design.
- Loss of or damage to Plant and Materials supplied to the *Contractor* by the *Employer*, or by Others on the *Employer's* behalf, until the *Contractor* has received and accepted them.
- Loss of or damage to the works, Plant and Materials due to
  - war, civil war, rebellion, revolution, insurrection, military or usurped power,
  - strikes, riots and civil commotion not confined to the *Contractor's* employees or
  - radioactive contamination.
- Loss of or wear or damage to the parts of the works taken over by the *Employer*, except loss, wear or damage occurring before the issue of the Defects Certificate which is due to
  - a Defect which existed at take over,
  - an event occurring before take over which was not itself an *Employer's* risk or
  - the activities of the *Contractor* on the Site after take over.
- Loss of or wear or damage to the works and any Equipment, Plant and Materials retained on the Site by the *Employer* after a termination, except loss, wear or damage due to the activities of the *Contractor* on the Site after the termination.
- Additional *Employer's* risks stated in the Contract Data.



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## RISK REGISTER – NOT RISK ALLOCATION

- NEC 3 provides for a risk register. All project risks are to be included on the risk register.
- Contract Data parts 1 and 2 provide identical provision for either party to identify risk items to be included on the risk register. This does not allocate contractual liability.

**Contract data part 1**

- The following matters will be included in the Risk Register

.....  
 .....

**Contract data part 2**

- The following matters will be included in the Risk Register

.....  
 .....

- Both Contractor and Employer risks items are to be identified and included on the risk register so any mitigating action can be undertaken. This is the early warning provision.



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## QUESTIONS



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