NEC3
Top Tips

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NEC3 TOP TIPS

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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:

- Oil and Gas
- Transportation
- Marine and Offshore
- Utilities
- Process and Industrial
- Infrastructure
- Power
- Manufacturing
- Building

SECTORS
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

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
THE DRIVER GROUP - SERVICES

Provides multi-disciplinary consultancy services focusing on dispute avoidance, resolution and defence.
- Contract advisory services
- Commercial and contract management
- Planning, programming and scheduling
- Dispute resolution services.

The Group’s expert witness support service provider.
- World-class quantum, delay, and technical experts for litigation
- Internationally experienced adjudicators, arbitrators, and mediators.

HOW DRIVER TRET CAN HELP

- Reviewing contracts / subcontracts to identify key clauses, risks, and obligations.
- Drafting notices and other contract correspondence.
- Reviewing applications for payment and payment notices – ensuring they are sufficiently detailed and that the method of service is correct.
- Analysing baseline and progress programmes to ensure they reflect the impact of Covid-19 (and other events).
- Preparing/assisting in the preparation of Compensation Events.
- Preparing and assessing claims for extensions of time and loss and expense.
- Project healthchecks on live contracts – ensuring risk is covered.
- Advising on, and assisting in, next steps – adjudication, claim preparation, negotiation etc.
- Project re-start strategy
- Bespoke webinars.
- Driver Trett Helpdesk.
GLOBAL
COVID-19 - HELPDESK


Or scan the QR code with your smartphone camera to be taken straight to the helpdesk.

DRIVER TRET DIGEST

To download the current issue of the Digest, scan the QR code with your smartphone or visit our website: www.driver-group.com

Or email marketing@driver-group.com to request a copy.
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

CONTENTS

1. Know your options
2. Secondary options
3. Communications
4. Cl 61.3 notices
5. Programme, Key Dates and LDs
6. Z clauses
7. Design
8. Contract Data Part 2
9. Provisional Sums
10. Defects Date / Defects Correction Period
11. Risk Register / Employer Risks
1. Know your options (and make sure you choose one!)

MAIN OPTIONS

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
2. What 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
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

X18 – LIMITATION OF LIABILITY

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 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 its 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.
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.

3. Communications
(email / separate)
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.

“read, copied and recorded” What about?

- Letters
- Faxes
- Emails
- Text messages
- Intranet (4projects or similar)
- Whatsapp
- Instagram
- Snapchat
- Facebook
- Verbal communications
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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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?
4. Cl 61.3 Notices

**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.
NEC NOTICES

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

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.

5. Programme, Key Dates and LDs
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

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.
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

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.
6. 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.*
### 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
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.

8. Contract Data Part 2
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

9. Provisional Sums
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

10. Defects Date
   / Defects Correction Period
Contract Data Part 1:

Defects date – normally 52 / 104 weeks
Defects correction period – can be different for different parts of the work, or even different types of defects

11. Risk Register and Employer Risks
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.

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 ........................................................
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 other than the Contractor.
- 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.
QUESTIONS

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