



Law

The Proposed NEC Term Service Contract

The ICE has just closed its consultation period on a proposed Term Service Contract (TSC). Thus I thought, why not share some views on their progress.

Why a New Term Contract

Term contracts will be familiar to many readers. As the name suggests they are generally used when services may be required over a period of time at irregular intervals. Some of the characteristics one might expect to see in such contracts would be undertakings to carry out certain categories of works, for agreed periods of time, within defined geographical areas, at agreed rates. All of these are hallmarks of such forms. For the most part, term contracts are used in maintenance work where the general scope and precise nature of the work can vary until some need arises. Whether that need will or will not arise can be an unknown and thus for this reason the pricing of the rates for such work is always difficult to determine. Under traditional term contracts, theory would tell us that exceptional items that could arise which a contractor has to price will be offset by other events which will occur and thus some leveling of both the contractor's prices and risks will occur. The TSC, as will be seen, tries to take some of the uncertainty out of this process and thus reduce the risks for both parties by providing three main options to choose from.

Contract Layout and Format

Anyone familiar with the NEC will immediately be struck by the similarity in layout and format of the TSC to the wider family of forms. Thus, in common with those forms, the TSC shares 9 Core clauses, 3 main option clauses, 7 secondary option clauses and a Contract Data. Underlying the layout and format are also the well worn NEC drafting principles which seek to add flexibility, clarity and simplicity to contract use as well as to stimulate good management. Much of the wording and most of the procedures in the TSC are thus common with the other NEC forms.

Main Options

The TSC offers the choice of three main options or risk allocations between the parties and three main payment modes. Main option A is a priced contract with a Price List in lieu of a schedule of rates used under other forms. Price Lists, it may be noted, have also been used in the NEC Short Contract. Under option A, the normal method of payment would be a monthly fixed amount

given satisfactory service levels, while under options C and E, the payments are cost-reimbursable. Option C, it may be noted, is a target contract to better incentivise the contractor.

Some changes

While the TSC takes its lead from the other NEC forms there are some differences and new terminology as well. Thus, the Project Manager is replaced by the Service Manager and the Supervisor disappears altogether. More importantly, the contractor's main responsibility is to provide a service, rather than providing the works, as he does for example under the NEC Engineering and Construction Contract. These changes accentuate the management and provision of services in this way rather than the management and delivery of projects.

In keeping with the back-to-back nature of NEC contracts, the TSC simply substitutes some key NEC features with others appropriate for the nature of term work. Thus, the Working Areas in the NEC has become the Affected Property to reflect the absence of a site but recognizing that the service still has to be performed somewhere. Similarly, the now familiar Works Information has become the Service Information. One particularly notable absence though is the program, long a hallmark of the NEC. Absent from the TSC, this reflects the fact that the provision of the service is a continuous process. However, it has not meant that the controls which the program affords on other NEC projects are gone, rather that comparable controls now fall to be exercised through the so-called contractor's plan. Like the program in one important sense at least, the contractor's plan, once accepted by the Service Manager, still serves to bind the contractor to carrying out his service in the agreed time and manner.

Multidisciplinary

The NEC holds out its use across all sectors as an advantage. Most use, it has to be noted though, has been in the engineering sector with some penetration coming gradually in the building sector. The TSC will likely have a wider take up in the building and process plant sectors than its predecessors. It has the potential of as broad an application as the NEC Professional Services Contract (PSC) when introduced but which, in our view, will likely be more successful in its efforts at brand extension than the PSC has been. This is because there may be less note and less opposition taken by the professions to a term contract than a form such as the PSC which went directly to their traditional terms of engagement. That said, usage may not go as far as the extremes envisaged by the drafting team – a sort of soup to nuts cum nuclear power station maintenance to street sweeping swath. There is of course still a fairly wide ambit that can be given to the meaning and types of services renderable in between these ends, from IT contracting and consulting to PPP service delivery. In our view, for the most part, the form stands up to scrutiny in both areas notwithstanding some nuances.

A View

Summing up the Term Services Contract puts another arrow in the quiver of the ICE as it works to further broaden the appeal of its NEC family of forms. Depending upon who picks the form up a quick glance through it might reveal the form to be an odd but workable term contract, or just a dyed-in-the-wool NEC contract. The challenge to the success of the form will be in getting those holding each perspective to see and appreciate the other's side.

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