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WHAT IS THE NEC TERM SERVICE CONTRACT?

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The NEC3 Engineering and Construction Contract is widely used within the Construction Industry and most popularly in the public sector. However, this is not the only document that the NEC3 suite of documents offers. The NEC3 also offers a Term Service Contract and this article will serve as introduction to this document and explain the purpose thereof.

In the simplest terms the NEC3 Term Service Contract (“TSC”) is contract in which a Contractor provides the specified service for a specific period of time. This service is not limited to services within the Construction Industry and this contract is therefore not limited to construction work. For example it can be used for catering services. The period for which the service will be provided by the Contractor is known as the “service period”.

Examples of where the TSC is used within the Construction Industry are:

- Maintenance of highways;
- Maintenance of nuclear power stations;
- Maintenance of public parks and landscape areas; and
- Collection and recycling of domestic waste materials.

A few examples of other uses not construction related for the TSC are:

- Provision of ambulance services for a group of hospitals;
- Service and maintenance of airport terminal buildings;
- Public-Private Partnerships enterprises perhaps along side construction projects under the ECC – an example would be the construction of a prison and the running thereof.

It is important to note that the TSC was drafted as a contract for the provision of services rather than as a contract to carry out construction work for a project. It is intended to be used for the purposes of maintenance and maintaining something for the service period. The NEC guidance notes state that *“Contracting to achieve a state B when the present state is state A is not a service – it is a project”* therefore further confirming that this is not the contract to use if you want to significantly modify or change something. This is not to say that there cannot be a small amount of modification as maintenance may require that certain things be removed and replaced which may result in the betterment of particular items.

As the TSC is part of the NEC suite of documents, the structure of the TSC is as follows:

1. As usual with NEC contracts, there are 9 Core Clauses which are always applicable;
2. One Main Option Clause must be chosen from Three Main Option Clauses which relate to the allocation of financial risk and how the service provider is to be paid. The Main Options available under the TSC are:
 - 2.1. Option A – Priced contract with price list;
 - 2.2. Option C – Target contract with price list; and
 - 2.3. Option E – Cost reimbursable contract.
3. One of Two Dispute Resolutions Options must be chosen. By default, parties in South Africa should use Option W1. W2 applies in the United Kingdom where the Housing Grants, Construction and Regeneration Act 1996 applies, and as a result of which, adjudication is a legal requirement rather than a contractual requirement.
4. Any selected Secondary Options chosen;
5. The Price List; and
6. The Contract Data.

The TSC also makes provision for the appointment of a *Service Manager* rather than a *Project Manager* (As under the ECC). The Service Manager is appointed by the Employer to bring the Employer’s objectives under the Contract to completion. The TSC assumes that the Employer has provided the Service Manager with authority to make decisions and take actions as required by the TSC which involves a wide discretion of authority. This authority includes the discretion to change the services, to give instructions to the Contractor and to apply his managerial judgement. Such authority may be exercised by the Service Manager with or without seeking the view of the Employer. However, the Employer and Service Manager generally share a close relationship which enables the Service Manager to manage the TSC more effectively.

It should be noted that clause 10.1 of the NEC TSC which is the first of the core clauses (IE the clauses which are applicable to all NEC contracts) states that *“The Employer, the Contractor and the Service Manager shall act as stated in this contract and in a spirit of mutual trust and cooperation”*. This clause is present in all NEC contracts and is a fundamental requirement thereof which is meant to encourage collaboration between the parties rather than confrontation when managing the contract. Judges in the United Kingdom have relied on this clause to require positive actions to be taken to ensure that it is not breached, for example in the case of Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd [2017] NIQB 43, the learned judge held that a consultant was required to disclose records of actual time and costs incurred in relation to a compensation event to an employer and that failure to do would be *“entirely antipathetic to a spirit of mutual trust and co-operation”*.

This particular judge went further than in the matter of Costain Limited v Tarmac Holdings [2017] EWHC 319 TCC where the learned judge found that while the clause places a positive obligation on the parties must be prevented from *“improperly exploiting”* or *“misleading”* one another, the clause does not extend this obligation so as to require the parties to act in a way that is contrary to their own self-interest. South African courts have not been called on to make any determinations in relation to this clause, and it remains to be seen how it is incorporated into our common law.

When considering whether or not to make use of the TSC, it is important to remember that while it is drafted similar to other NEC documents (in a simple and clear style) the basis of the TSC is good management rather than current practice. As with the other NEC contract forms, it may require additional administrative effort.