
Chapter 1

Introduction

1.1 General

In writing this guide I have set out to provide a view, much of it personal, as to how to get the most out of the 3rd edition of the New Engineering Contract Professional Services Contract (NEC Panel, 2005a). It is no secret that I am a fan of the family of contracts that the PSC is a member of and, as a result, may be willing to overlook what many perceive as faults or weaknesses. In this guide I have tried to identify and suggest ways in which the procedures and aims of the Professional Services Contract can be simplified so that users do not become unnecessarily bogged down in procedure, but instead concentrate on achieving the goals of the PSC. This guide therefore goes through the procedure in detail as intended by the relevant clauses, but concentrates on practical issues to provide suggestions which the parties can use to achieve the overall intent and spirit of the PSC and to reach the common goal.

With this guide, you get what it says on the cover: a practical guide to the NEC3 PSC Form of Contract. It is a guide to provide users of the PSC, both novice and experienced, with a view of all of its various philosophies, principles, mechanisms and vagaries. The reader will be guided through the contract in a manner that will enable him or her to use this guide for reference without necessarily having to read it all: in other words, a practical guide rather than a stuffy text book. That said, there will be an amount of cross-referencing between sections in order to avoid repetition; users will need to follow these references to find more detailed supporting guidance to particular issues. One area that is not cross-referenced is the term 'spirit of mutual trust and cooperation' as found in clause 10.1 of the PSC, although used extensively throughout the guide. If users are uncertain of the meaning of this phrase, then they need to re-read Chapter 4.

To assist the reader in finding where any particular clause, related legal case or UK statute is referred to in the text, a comprehensive index of such references is included in Tables A1.1–A1.3 in Appendix 1.

The more I have worked with this contract over the years, the more I have come to think of it not as a contract but as a Project Management Procedures Manual. This should not be a surprise as the original contract was drafted by project managers for construction professionals (and not by lawyers for other lawyers and judges). That I refer to a contract for professional services in terms of a Project Management Procedures Manual means that those professionals who may work with this contract perhaps need

to consider how they manage their relationship with their employer. This approach is different to that which many professionals will be used to in respect to their own appointment. They will find it is much more closely related to construction contracts than other forms of consultancy agreements.

Nevertheless, we must not lose sight of the fact that the PSC is a contract and, as such, legally binds those parties that enter into a contract incorporating these standard terms.

1.2 Mechanics not law

Being a practical guide, this book considers the mechanics of the contract and not of the law. As a practising construction professional, I am interested in the successful outcome of the project for all parties involved at whatever level of the project supply chain. From my point of view, the employing organisation should get what it wants in terms of a project finished on time, to the required quality and within budget (providing, of course, that the budget was reasonable in the first place). The consultants should be recognised for their contribution, whether design, management or commercially orientated, and be paid a reasonable fee for the service they provide. The contractors and subcontractors who carry out the work should be allowed to work efficiently, be recognised as having contributed to the project and make a profit.

Only those projects that satisfy all of the above criteria should be considered as being successful. Every organisation, whether a company, partnership or individual who is involved in a project, has its own needs and goals from that project. A good project will recognise this simple fact of business. It is when all the parties involved recognise each other's business goals (see Section 4.4.3) from the project, and work to align these goals, that success is achieved for all. As soon as one of the organisations involved feels dissatisfied, then the seeds of a dispute have been sown. As the industry knows, such seeds germinate easily and freely; once they appear on a project they can spread faster than any invasive weed.

Following on from the earlier editions, the PSC is drafted to impose the best practices within project management on the parties with the goal of avoiding disputes. It is the mechanics of these procedures and how to make them work effectively that is the focus of this guide.

As a consequence the guide does not consider the law in relation to the PSC except where reference is needed to explain why something is included or to confirm that, in relation to the law in the United Kingdom, those requirements have been complied with by the PSC (or not as the case may be).

1.3 A simple formula for understanding a contract

Let's face it: all contracts are confusing when you first try to work out what it all means. I picked up a simple formula for considering contracts many years ago from an experienced Chief Quantity Surveyor of a contracting organisation, who came to my then

local centre of The Chartered Institute of Building to give an evening talk on Joint Contracts Tribunal (JCT) Contracts. It didn't matter that he was talking about JCT Contracts. What I took away from that talk was a formula which I still use today in relation to any contract or procedural document that I encounter; this formula holds good in all such situations. I still have the piece of paper on which I noted the few words I needed to remind me of what to do. I rarely look at that piece of paper now as the formula has become second nature to me in relation to every contract or set of procedures which I read.

The formula is in two parts. The first part can be remembered by four words: WHO, WHAT, WHEN and HOW.

To expand, a contract is a document which sets out the rights and obligations of the parties to that contract, no matter what the contract is for. In the construction and related industries such contracts cover (usually by necessity) a range of extensive rights and obligations for both parties, how such rights and obligations are to be administered and the involvement of agents to carry out specified duties for one or both of the parties. WHO, the first of our four key words, relates to the administration of these rights and obligations. The WHO in the PSC will be one of the four named persons including the Employer, the Employer's Agent (if employed), the Consultant or the Adjudicator. The specific roles of these individuals are covered in detail in Sections 5.2–5.5.

By its processes and procedures, the PSC sets out WHAT must or may be done in the event that a certain circumstance arises. The WHAT will involve the WHO doing something as set out in the contract.

WHEN that something is to be done is also set out by the contract. In the case of the PSC, the timetable for WHEN these things shall be done is clear and forms a key part of the processes and procedures under the contract. Failure to comply with these processes and procedures in accordance with the requirements specified by WHEN can result in a right being forfeited because of this failure.

Finally, the PSC sets out HOW the process or procedure shall be carried out. Again the PSC is prescriptive as to the HOW, although much of the HOW is set out in general terms that apply across all of the subsequent detailed processes and procedures.

To summarise, the first part of the formula (which holds good for all contracts and not just the PSC) is to consider WHO does WHAT, WHEN they do it and HOW it is to be done. Understanding these things is important as the PSC creates what are known in legal circles as conditions precedent. Although the English Courts do not like such provisions, they can be effective if drafted in certain terms (for further comment on conditions precedent see Section 1.5 below).

When dealing with specific processes and procedures in this guide, the WHO, WHAT, WHEN and HOW will be summarised as appropriate in each case.

1.4 Mandatory or discretionary

The second part of the formula I learnt that evening was to consider whether an obligation, requirement or procedure was mandatory or discretionary. The distinction is quite clear: if something is mandatory then it must be done in order to create a right

for you and/or an obligation on someone else. If something is discretionary, then the party concerned can do it if they feel it is appropriate but lose nothing if they do not.

The key to whether something is mandatory or discretionary is in the little words. If a provision says that a party 'shall', 'must' or 'will' do something then the requirement to do that something is mandatory; that key little word leaves that party with no other option.

On the other hand, if the provision in question says that the party 'may' or 'can' do something, then that requirement is left to the discretion of that party i.e. the action is discretionary.

Appreciating whether a requirement or a provision is mandatory or discretionary is key to making sure that you, as a party or agent to the contract, do what is required of you at the right time and in the right way.

In the PSC, and indeed every other contract in the NEC3 family together with all the previous editions, there is little to doubt or question as to whether things are mandatory or discretionary. The first clause in the PSC, clause 10.1, clearly states that the Employer and the Consultant *shall* act as stated in this contract. The meaning is plain and clear: they are all required to carry out the procedures set out in the contract at all times and in the way stated. There is no discretion about it, unless such discretion is given expressly in a particular clause (there are a small number of such instances which will be highlighted as they arise).

1.5 Conditions precedent

Put as simply as possible, a condition precedent is a condition which acts to prevent either a right or an obligation from coming about until such time as the event prescribed as the condition precedent occurs. If a time limit is attached to the occurrence of the event (which is a condition precedent to a right or an obligation) and the event has not occurred within the time limit stated, the right or obligation can never come about.

It is important for users of the PSC to understand this principle; part of a mechanism which is commonly used includes such a condition precedent with a time limit. This actual condition will be highlighted when it is commented on.

While the courts in the UK do not traditionally like or support such clauses, they have enforced numerous examples where the wording has been clear. The first and second editions of the PSC were said to include conditions precedent but it is generally felt that those conditions were not clearly enough worded to be effective. However, with the current edition, it is generally considered that the wording now used is almost certainly clear enough to be considered as an effective condition precedent.

1.6 Note on use of upper case in key words and phrases

Capital initial letters are used to identify terms that are defined as a feature of the PSC as set out in clause 11.1. Whenever I have referred to any such term I have maintained consistency with the PSC and followed that principle of using upper case for the first

letter of defined terms throughout the text of this guide. The reader will however come across instances where the same terms are referred to in a general sense, when lower case is used. I have adopted this approach in order to distinguish between specific references to procedures, rights, obligations and other such matters which are directly linked to the PSC and more general comments about good practice, the construction industry and other non-contract-specific items.

For example, 'Consultant' refers to a specific issue that concerns the Consultant under the PSC and 'consultant' refers to the consultant in general terms.

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