



## Highways and Streetscene Contracts - Pitfalls and Problems

John Dickinson

This talk aims to give an overview of some of the potential hazards to look out for when formulating the terms of the tender contract. Consideration of issues that can arise in the operation of a NEC3 Term Service Contract and other similar contract frameworks and how those can be addressed.

1. Highways and Streetscene contracts; examples of services that might be included:
  - (1) Cleaning and maintenance works.
    - (a) Cleaning highways.
    - (b) Cutting grass verges.
    - (c) Clearing gutters and drains.
    - (d) Cutting back hedge rows and tree maintenance.
    - (e) Sweeping streets / pavements / market areas / footpaths / allotments / cemeteries.
    - (f) Grounds maintenance in amenity areas – car parks, leisure parks and sports facilities.
  - (2) Litter picking / clearing fly tipping.
  - (3) Emptying litter bins.
  - (4) Removing fly posting, graffiti and shopping trolleys.
  - (5) Maintenance of the highway and streets surface and its facilities:
    - (a) Pot holes.
    - (b) Road markings.
    - (c) Street lighting.
    - (d) Traffic signs.
    - (e) Bridge maintenance.
    - (f) Leaf clearing / winter gritting / snow ploughing.
    - (g) Emergency weather response.
2. What form of contract? – NEC3 Term Service Contract
  - (1) An Engineering and Construction Contract – from the Institute of Civil Engineers, developed in the early 1990s.
  - (2) NEC (New Engineering Contract) a family of contracts aimed to be written in plain English and designed to implement sound project management principles and practices. It has its own website at <https://www.neccontract.com>
  - (3) The use of language – plain English. The clauses are statements made in the present tense to impose obligations rather than using words of obligation (there are mixed views as to the success of this and some judicial criticism).
  - (4) Seeks to achieve a non adversarial approach:
    - (a) The focus is on the management of contracts so as to reveal and resolve disputes as the contract works progress, rather than the disputes festering unresolved or emerging at the final account stage.

- (b) Each NEC contract has guidance notes and flow diagrams.
  - (c) An aim is to have a clear and simple set of documents.
- 3. Within NEC3 family of contracts there are other forms of contract apart from the Term Service Contract
  - (1) Term Service Short Contract
  - (2) Supply Contract
  - (3) Supply Short Contract
  - (4) Framework Contract
  - (5) Professional Services Contract
- 4. Term Service Contract framework:
  - (1) The standard forms contain
    - (a) Core clauses
    - (b) One set of 'main option' clauses (these give different pricing structures)
    - (c) Dispute resolution clauses
    - (d) Secondary options clauses
  - (2) The Contract Data: Employer.
  - (3) The Contract Data: Contractor.
- 5. Parties: Employer (Council) and the Contractor. The Service Manager is the person appointed by the Employer to oversee the contract, as part of the NEC3 project management approach.
- 6. Core Clauses:
  - (1) General
    - (a) The Employer, the Contractor and the Service Manager shall act as stated in this Contract and in a spirit of mutual trust and co-operation.
    - (b) Definitions.
    - (c) Communications – written instructions, notices and acceptances etc.
    - (d) The Service Manager can give instructions to change the Service Information (this lists the services). The Service Manager can delegate authority.
    - (e) The Employer has an obligation to provide access and facilities
    - (f) Early Warning Notices by Contractor or Employer – this is a process to give notification of risks of matters which may increase Prices, affect the timing of the delivery of services or the effectiveness of the service.
    - (g) An ambiguity or an inconsistency in or between documents gives rise to a duty to notify. The Service Manager is to give an instruction to resolve the ambiguity or inconsistency.
    - (h) There is an obligation on the Contractor to notify if the Service Information requires him to do anything that is illegal or impossible. The Service Manager, if he agrees, gives an instruction to change the Service Information.
  - (2) Providing the Service –
    - (a) The Contractor provides the Service in accordance with the Service Information.
    - (b) Contractor's Plan:

- a) This is a detailed plan contained in the Contract Data, or to be provided within the time scale set out in the Contract Data.
    - b) This shows a start and end date for the service work, the timing and order of work, the time risk allowances, dates when he will need access and facilities and a statement for each operation of how the work will be done and with what equipment and resources.
    - c) The Service Manager either accepts the plan or notifies reasons for not accepting it (which would happen if it was not realistic, lacked information, or did not comply with the Service Information).
  - (c) Design of equipment.
  - (d) Contractors' 'people' – the contractor employs the named key personal or agrees their replacement.
  - (e) Provisions for sub-contracting. The Contractor remains liable.
- (3) Time –
- (a) The Contractor provides the Service throughout the service period.
  - (b) The Service Manager may instruct the contractor to stop or not start or to re-start work.
- (4) Testing and Defects: - A regime for inspections, identifying Defects, correcting the Defect or accepting the Defect (may involve a change to the Service Information and a quotation to reduce the Prices).
- (5) Payment:
- (a) The Service Manager assesses the amount due at each assessment date
  - (b) The sum due is the Price plus other amounts to be paid less amounts to be retained (e.g. ¼ of the sum until the Contract Plan is in place)
  - (c) Defined Costs (this term means "*payments by the Contractor in Providing the Service for people who are employed by the Contractor, plant and materials, work subcontracted by the Contractor and Equipment*").
  - (d) Other costs not in the Defined Cost are treated as included in the Fee. The Fee is a set % to cover overheads etc. The Fee is the direct fee percentage x Defined Cost of work. There is a similar calculation for the fee for sub-contracted work.
- (6) Compensation Events:
- (a) Compensation Events include when the Service Manager instructs a change in the Service Information (other than to accept a Defect or at the Contractor's request), or when the Service Manager instructs the Contractor to stop work, or changes a decision. The Contractor is obliged to put the instruction or changed decision into effect and in return through the mechanism of the Compensation Event obtains a change in the Price.
  - (b) For a Compensation Event the Service Manager notifies the Contractor of the Compensation Event and instructs the Contractor to submit a quotation.
  - (c) The Service Manger can require a quotation for a proposed instruction.
  - (d) On receiving the quotation the Service Manager replies within 2 weeks:
    - To accept the quotation; or
    - To require a revised quotation; or

- To notify that a proposed instruction will not proceed; or
  - To notify that the Service Manager will make his own assessment.
- (e) If the Service Manager does not respond to the quotation and does not within two weeks respond to a notice from the Contractor stating that the Service Manager has failed to respond to the quotation then under clauses 64.2 and 64.3 the Service Manager is deemed to have accepted the quotation. **[Advice: this short 2 week timescale for responding to notices about quotations has to be monitored and adhered to. As the response from the Council may be giving the Service Manager's own assessment of the quotation, there could be a lot of work to carry out in this period of time. A Council may be deemed to have accepted a quotation that it could have reduced in value significantly].**
- (f) How to assess the compensation event – what figures go in the quotation: In assessing a Compensation Event which only affects the quantities of work shown in the Price List the change in Prices is assessed by multiplying the changed quantities of work by the appropriate rate in the Price List. **[Advice: this is very helpful in providing certainty to a Council, avoids costly disputes over quantum and the council will get the financial benefit of any change].**
- (g) For 'Other' compensation events (i.e. not in (f)) *'the changes to the Prices are assessed as the effect of the compensation event upon*
- *The actual Defined Cost of the work already done*
  - *The forecast Defined Cost of the work not yet done and*
  - *The resulting Fee.'*
- The Contractor is to prepare a quotation showing these 'effects' by adding them together to give the quotation sum as the amount by which the Prices are to change. The change in Price will be the approximate change in actual costs arising from the instruction to change the service.
- (h) **[Advice:– as far as possible include in the Price List rates for all eventualities so that an assessment of a change in service is under subparagraph (f) (where the price list has a rate) and not under (g). In the Price List split out the services into different tasks, so that any proposed change in a task will have a related rate per unit of quantity for that task in the Price List.]**
- (i) When in the 'other' category of assessment the basis of assessment is the actual Defined Cost, and not the prices in the Price List unless those are agreed to be used under clause 63.3.
- (j) In calculating the forecast Defined Cost the assessment will include risk allowances for costs for matters which have a significant chance of occurring and are at the Contractor's risk. Under clause 65.2 the assessment of the compensation event is not revised if a forecast on which it is based is shown by later recorded information to have been wrong. This is part of resolving disputes 'up front'. **[Advice: a Council should decline a contractor's suggestion to accept the forecast for the moment and see how the actual figures pan out later.]**
- (k) Core clause 63.4 provides that if the effect of a compensation event is to reduce the total Defined Cost then the Prices are not reduced 'except as stated in this Contract'. Note: If Option A is included then additional clause 63.10 is part of the contract, which provides that if the effect of a compensation event changing the Service Information is to reduce the total Defined Cost then the Prices are reduced. **[It is vital to include such a clause, if costs savings are to be made during the contract term. Ensure no clause Z modification is made to remove this clause].**

- (l) When the compensation event is implemented (e.g. a change in the Service Information) then the Price List changes as well. This change in the Price List is the only right of the Contractor has arising from a compensation event.
  - (m) A compensation event which is an instruction to change the Service Information in order to resolve an ambiguity or inconsistency is assessed as if the Prices were for the interpretation most favourable to the party which did not provide the Service Information. **Advice: as the Council will invariably by the party providing the Service Information this clause gives a strong incentive for a Council to avoid any ambiguity or inconsistency in the Service Information. For the same reason it encourages Contractors to search out any ambiguity or inconsistency to their advantage.**
- (7) Use of equipment, its return, provision of information.
- (8) Risk and insurance:
- (a) The Councils' risks will include the unavoidable claims and costs arising from the Service or from the Providing the service.
  - (b) Contractor's risks: all other risks.
  - (c) Indemnities.
  - (d) Insurance cover and provision of certificate, in default of which the Council can insure at the Contractor's cost.
- (9) Termination:
- (a) The Contract provides for termination if certain specified reasons apply and then gives the procedure and amounts due. The relevant reasons depend upon which optional clauses have been chosen.
  - (b) The Service Manager issues a Termination Certificate, if appropriate.

7. The 'main option' pricing clauses.

- (1) The parties must choose one or a combination of the pricing options:
  - (a) Option A: Priced Contract with price list
  - (b) Option C: Target Contract with price list
  - (c) Option E: Cost reimbursable contract
- (2) Option A 'Priced Contract with price list' is a lump sum contract in which the total price is broken down into individual prices for separate services listed in the Price List. The price is due for completing the service, so the Contractor takes the risk that the service will require more or less work than anticipated. The Contractor also takes the risk of changes in the costs of performing the service, as the Contractor provides the prices up front.
- (3) Option C: Target Contract with price list. The Price List is used to set a target price. The Contractor is paid his defined costs and at the end of the contract there is an assessment by the Service Manager to adjust the sum payable to reward the Contractor for a pre-agreed share of any savings in the defined costs as against the target (or he must pay a pre-agreed share of any excess). This produces a financial incentive to save costs. The pre agreed share may vary in percentage for different ranges of saving or excess. Under Option C both the Contractor and the Council share the risk (and reward) of the changes in the level of work and costs of performing the service.

- (4) Option E: Cost reimbursable contract. The Contractor is paid the defined cost plus the fee. This is the cost the Contractor incurs in providing the Service. This places considerable risk on the Council both as to the risk that the tasks of providing the Service will require more work than anticipated and as to the underlying costs increasing.
- (5) **Advice: Option A is the best choice in terms of managing risk. Unless a Council is confident that it can accurately estimate the Target costs Option C's potential overall efficiency savings are unlikely to outweigh the greater price risks than under Option A. Option E has no real benefits for a Council.**

8. Dispute Resolution option clauses:

- (1) Option W1: applies if none of the services are a 'construction operation' under section 104 of the Housing Grants, Construction and Regeneration Act 1996. The term 'construction operation' is defined in section 105(1)(b) to include *"construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks .... pipe-lines, reservoirs, water-mains, wells, sewers ... and installations for purposes of land drainage"*.
- (2) Option W2: applies when the works include work under the Housing Grants, Construction and Regeneration Act 1996. Often this will be the case as road maintenance works such as pot hole repairs are a 'construction operation' under the Act. In compliance with the minimum Adjudication provisions set out in the Act, Option W2:
  - (a) Allows a party to give notice referring a dispute to adjudication.
  - (b) The Contract has a timetable to appoint an adjudicator and refer the dispute within 7 days of the notice.
  - (c) Requires the Adjudicator's decision within 28 days of the referral or such longer period as is agreed by the parties.
  - (d) The contract allows the Adjudicator to extend the 28 day period by up to 14 days with the consent of the referring party.
  - (e) The Adjudicator has to take the initiative in ascertaining the facts and the law.
  - (f) The decision of the Adjudicator includes written reasons and is binding until the dispute is determined by the 'tribunal' which may be specified as arbitration or the courts.
  - (g) The costs of taking part in the adjudication are borne by each party. The Adjudicator has discretion as to who ultimately bears his or her fees.
- (3) Dispute:
  - (a) A 'dispute' arises when a claim is not admitted<sup>1</sup>.
  - (b) Adjudication is a mandatory step before proceeding to the 'tribunal' which will be defined as either arbitration or litigation in the Courts.
- (4) **Advice:**
  - (a) **Costs can be saved by appointing the Adjudicator and agreeing the Adjudicator's terms at the time the contract is agreed, rather than under the pressure of an adjudication notice. Otherwise there is little time for**

---

<sup>1</sup> AMEC Civil Engineering v Secretary of State for Transport [2005] 1 WLR 2339.

the parties to select an Adjudicator so that the nominating board ends up selecting an Adjudicator.

- (b) The timetable is very tight and a Council needs if possible to anticipate a dispute, start gathering and assembling evidence in advance and line up its officers and any external legal or expert help that may be required.
- (c) The Adjudicator only has jurisdiction to decide matters inside the terms of the Referral Notice.
- (d) After an Adjudication decision there is only a four week period in which a party can give notice that they are dissatisfied with the decision and intend to refer it to the tribunal. Otherwise the decision remains binding and cannot be challenged.

9. Secondary option clauses:

- (1) There are secondary option clauses to choose from, X1 to X20 and Y(UK)2 and 3.
- (2) Some of the more common choices are:
  - (a) Option X1 – price adjustment for inflation.
  - (b) Option X4 – Parent Company Guarantee on the terms set out in the Service Information [**Advice: - ensure that this clause is included, that the guarantee comes from the 'real' ultimate parent company and that the guarantee is executed. Sometimes this completion step is overlooked.**]
  - (c) Option X13 – performance bond – **Advice: this is useful if the parent company may itself have financial difficulties in paying. Ask to see financial information.**
  - (d) Option X18 – limitation on liability. **Advice: the Council should look to remove or restrict the scope of these clauses so that the risks allocated to the Contractor do not get diverted onto the Council.**
  - (e) Option X19 – task orders. This allows the Service Manager to instruct the Contractor to carry out a service within a stated period. The task order can specify the service, the price list item it relates to, the start and end dates and the price for the task if Option A applies. **Advice: this is very useful for services provided over long periods of time. The task order can be used to specify the tasks on say a monthly basis. The task orders provide a useful record against which to assess payments that can be matched to a Council's procurement payment accounting system.**

Some option clauses vary the terms of the core clauses. It is necessary to cross refer between clauses. The final layout is not straightforward.

10. Contract Data – Part one; from the Council. This will include:

- (1) A List of the 'conditions of contract', the core clauses and the option clauses chosen.
- (2) Setting out the bespoke Z clauses, to modify the NEC3 standard terms as appropriate to the circumstances. **Advice: bespoke clauses need to be drafted with care both individually and so that the terms are consistent with the other clauses and the method of measurement and the price list. Ambiguities will be exploited against the Council's interest.**
- (3) Identify the Adjudicator or the nominating body.

- (4) Define various terms including the start date.
- (5) Identify who is at risk for different eventualities and give details of insurance provisions.
- (6) Identify a contract plan or when it is to be submitted by the Contractor for approval.
- (7) The Service Information:
  - (a) Preliminaries - set out:
    - a) What facilities the Council is to provide / what charges (Depots / vehicles).
    - b) What resource levels are required from the Contractor.
    - c) What skill levels are required for staff / training / qualifications. (staff / supervisors) – regulations / proof of compliance.
    - d) What records / how this interfaces with the Council's IT systems.
    - e) Health and Safety requirements.
    - f) Compliance with legislation and other requirements such as nature conservation:
      - Wildlife and Countryside Act 1981
      - Countryside and Rights of Way Act 2000
      - Habitats Regulations 1994
      - Hedgerow Regulations 1997
      - Voluntary schemes / Council's own standards.
  - (b) The form of parent company guarantee and the identity of parties to that document.
  - (c) The procedure for contract management including frequency and types of meetings, records and performance assessment. **[Advice: consider who you want to meet, where, how often and what information they should bring and you should be entitled to inspect].**
  - (d) 'Specification of the service' – Give the details of each task. State what work is to be completed, how the task is to be carried out and when, giving a frequency or possibly specifying if it is seasonal. **Advice on the Service Information specification: (1) It is very important that the Service is specified in detail and clearly. (2) The service description must be consistent with the terms of the contract including the Price List's method of measurement and detailed description of prices. (3) the wording of the specification and the price list need to match and correlate so that and future changes to the Service Information specification can be matched to price list items, and preferably so that the change will relate to a price list item stated to be paid by a quantity and at a rate per unit of quantity, so that can used in any assessment of a compensation event. Input will be required from different departments of the Council to adequately specify the tasks and ensure that the task descriptions can be matched to price list items that have a separate rate for each task.**

11. Contract data – part two; from the Contractor. This will include:



- (1) The direct fee percentage and the sub-contractor fee percentage.
- (2) A list of the key persons [**Advice – the Council should require the names, job description, responsibilities, qualifications and experience. This will enable the council to hold the Contractor to having these staff provide the management of the service provision and if they have to change staff enable the Council to seek equivalent replacement staff**].
- (3) The Contract Plan or details as to when it is to be submitted.
- (4) The Price List consisting of a method of measurement document and a detailed price list document setting out for each service information specification task or part of a task, the description of the task element, the unit of measurement of the quantity of service provided and the rate for that unit [**Advice: Though this comes from the Contractor its precise terms should be set by the Council in the tender leaving only gaps for the contractor in the tender process to submit the individual prices / rates for each service element**]

12. Tender stage:

- (1) Have the contract documents including the completed Specification ready before going out to tender.
- (2) Information provided to potential contractors:
  - (a) Estimates of service quantity, costs / staff numbers– **Advice: the Council needs to declare if any information is an estimate on the face of the document and in covering letters. Keep notes of any meetings.**
  - (b) Actual measured figures **Advice: declare in the tender and on the face of documents that no warranty is given as to the accuracy and the contractor is invited to carry out their own measurements. Provide access for this.**
  - (c) Provide in the tender a review as to whether the existing services are different to what is being tendered for. **Advice: Note if quantities or services are changing over time.**
  - (d) Keep a record of what documents are seen by the potential contractors, e.g. hardcopy plans and maps, spreadsheets.
  - (e) If potential contractors are given access to a Council's Geographical Information Systems ('GIS') data be aware that this may run on a real time basis or have frequently changing information and data. Consider how this data has been compiled and in what ways this may differ from the definitions in the Contract. For example if the contract provides for payment of a set sum per km of pavement swept but the maps show routes highlighted by a line or shading without stated distances then the tender needs to explain this. Or the map may show distances but these distances may not be the Contract pavement lengths, if say the distance is the road centre line. Such a centre line would be roughly half the length of both pavements. A Council as a highway authority is obliged to compile a List of Streets under section 36(6) of the Highways Act 1980. The Department of Transport scheme for 'elementary street units' requires that measurements are taken for half the distance around a roundabout and the single centre line of dual carriage way, roughly this will equate to the distance travelled in a journey. Such measurements will not be useful for or equate to the street measurements for areas that are

to be cleaned or maintained. This creates problem if the Council's statutory highways data is used to give estimates of actual lengths to be cleaned.

- (f) There is a need to keep historic data as evidence to defend any possible misrepresentation claim.
  - (g) **Advice (1) state if the definitions for the GIS data or other data differ from the contract definitions (2) record the same caveats about accuracy and suggest that each potential Contractor carries out their own measurements and (3) take and save a dated backup of the GIS data (4) consider how the method of measurement in the price list relates to data on any statutory highways maps.**
  - (h) **Ensure any tender instructions or requirements match the contract definitions.**
  - (i) **Define how any tender estimate has been measured and state if this differs from the Price List method of measurement .**
  - (j) **Advice: include in the tender caveats on the accuracy of any GIS or other information, for example '... the Council provide GIS data or other data for information only without accepting responsibility for its accuracy, the method of measurement for any figures or visual representation may differ from that in the Contract.'**
- (3) Keep a log recording the tender being sent out, all responses, who asked which tender questions and what answer were given. **Advice: Ensure each question and response is sent out to each tender participant and that this can be evidenced.**
- (4) Having awarded the tender to the successful Contractor, ensure that the contract is drawn up to deal with:
- (a) Any changes in the Specification since the Tender contract was sent out and how that impacts on the Price List figures given in the tender by the Contractor. If there has been a change in the Specification but the parties consider that the prices are not to change then that should be recorded in the contract.
  - (b) Any changes in the maps or information provided in the tender as compared to any updated information obtained and circulated since then.
  - (c) Ensure that the contract exhibits the correct and up to date versions of any documents used to identify the services and these are signed for by the Contractor.

13. Performance:

- (1) Consider how to measure and monitor the service provided.
- (2) Log and notify all defects. Use the early warning notices to identify risks of underperformance.
- (3) Any change in Service must be recorded in a notice of a Compensation Event with a requirement for the Contractor to provide a quotation for the effect on

the Prices. **Advice, follow the contract procedure for each change no matter how small. Do not 'save up' changes over time to notify as one exercise.**

- (4) Ensure that the Service Manager issues compensation event notices and not someone who has not received delegated authority. If this task is to be delegated then make a written delegation and notify the Contractor of the delegation and the scope of the authority delegated. **Advice: it is easy to overlook the notification to the Contractor of a service manager's delegation.**
- (5) **Advice: keep contract notices separate from other communications. Maintain a log of notices and update this log with details as to how each matter has been resolved.**
- (6) Consider the ability to request a quotation for a proposed instruction so that potential cost savings can be considered prior to the Council committing to a reduction in service to achieve the costs saving.

14. **Summary: (1) give a detailed and clear definition of the Service Information which is consistent with the price list (2) Split out tasks in the price list and provide rates per unit of quantity for each task.**

*Caveat: these notes are prepared in a summary form and cannot be relied upon as a substitute for considering the detailed terms of any contract.*

John Dickinson  
St John's Chambers  
28<sup>th</sup> April 2015