

Welcome to

Contract strategy :
 Choosing the right X clauses under the
 NEC4 Engineering & Construction Contract
 with ref to other NEC4 members, Contract Data entries

Trainer :
Dr Jon Broome
 BEng PhD FAPM

leading | edge
 projects consulting ltd

setting | projects
 up for | success

© **JON BROOME**
 setting projects up for success 2025

+44 (0) 7970 428 929
 JON@LEADINGEDGEPROJECTS.CO.UK
 WWW.JONBROOME.COM

1

Agenda

- ❖ Start-up: agenda.
- ❖ Key Slide Re-cap from 25th June.
- ❖ A little on Incentive Plan design
- ❖ X-clauses to do with
 - **incentivisation**
 - external cost events
 - remedies in case of insolvency
 - correcting Defects
 - *Contractor* design
 - remaining ones
- ❖ Z clause
- ❖ +/- compensation events
- ❖ Final Q&As and discussion

© **JON BROOME**
 setting projects up for success 2025

+44 (0) 7970 428 929
 JON@LEADINGEDGEPROJECTS.CO.UK
 WWW.JONBROOME.COM

162

Key Slide re-cap from 25th June 2025

163

A new definition for Procurement ?

"Procurement is the process by which the benefits, enhanced capability, functions / performance or resources (goods & services) required from or by a project or programme are acquired.

It includes deciding the Package Breakdown Structure (PaBS) and, for each package, the development & implementation of

- the contracting strategy
- the contract documents, including the specific scope / requirement
- process and evaluation criteria for selection and award

leading to the effective management and administration of the contracts once entered into."

164

Two quotes :

- *"Procurement advice can have an equally dramatic impact on a project's performance when measured in terms of cost and time as can design and engineering advice on project's performance when measured in terms of function and quality"*

Yates A *Procurement and construction management in* VenmoreRowland P, Brandon P & Mole T (eds), *Investment, Procurement and Performance in Construction*, **E & F N Spon, 1991.**

- *"It is impossible to unsign a contract, so do all your thinking before you sign."*

Warren Buffet

165

Principles of Risk Allocation & Sharing

Consider :

- the effect on the organisation's business :
 - their ability to bear negative consequences with the rule being *"don't allocate to a party who will go bust"*.
 - attractiveness of the package affects the risk premium you will pay (or if they will even bid),
- who can best influence it happening,
- for negative risk, who can best mitigate the } Management consequences
- clarity over above for minor (esp. frequent) risks, generally allocated within a contract to give motivation to manage and avoid argument & transaction costs **and**
- attitude to risk.

166

Principles of Risk Allocation & Sharing

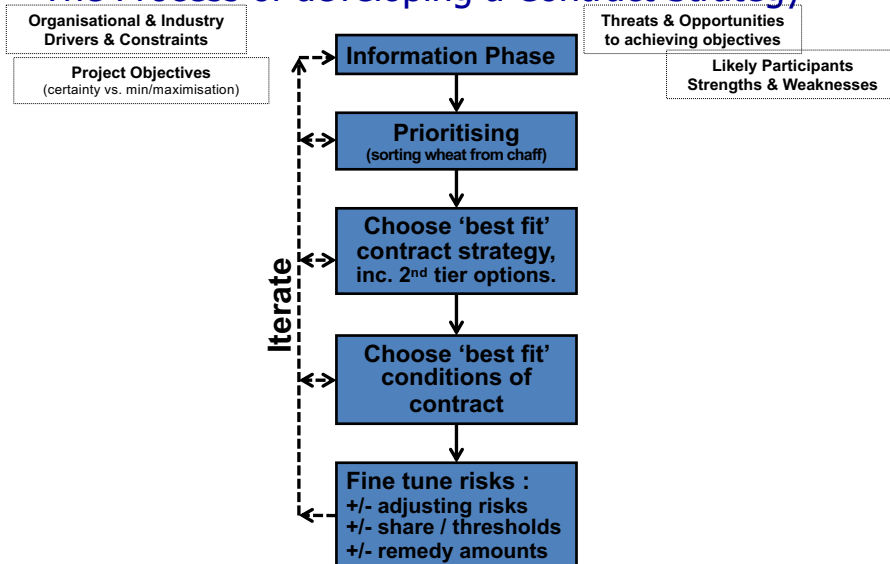
Consider :

- ❖ the effect on the organisation’s business,
- ❖ who can best influence it happening,
- ❖ for negative risk, who can best mitigate it, and
- ❖ clarity over above for minor risks.

AND Risk Attitude

167

The Process of developing a Contract Strategy



168

The NEC4 family of contracts :

- ❖ **Engineering and Construction Contract (ECC)**
- ❖ **Engineering and Construction Subcontract (ECS)**
- ❖ **Engineering and Construction Short Contract (ECSC)**
- ❖ **Engineering and Construction Short Subcontract (ECSS)**
- ❖ **Professional Service Contract (PSC)**
- ❖ **Professional Service Short Contract (PSSC)**
- ❖ **Professional Service Subcontract (PSS) - NEW**
- ❖ **Term Service Contract (TSC)**
- ❖ **Term Service Short Contract (TSSC)**
- ❖ **Term Service Subcontract (TSS) - NEW**
- ❖ **Design, Build and Operate Contract (DBOC) - NEW**
- ❖ **Supply Contract (SC)**
- ❖ **Supply Short Contract (SSC)**
- ❖ **Dispute Resolution Service Contract (DSRC) – RE-NAMED**
- ❖ **Framework Contract (FC) and**
- ❖ **Alliancing Contract (ALC) - now NEW.**



+44 (0) 7970 428 929
 JON@LEADINGEDGEPROJECTS.CO.UK
 WWW.JONBROOME.COM

169

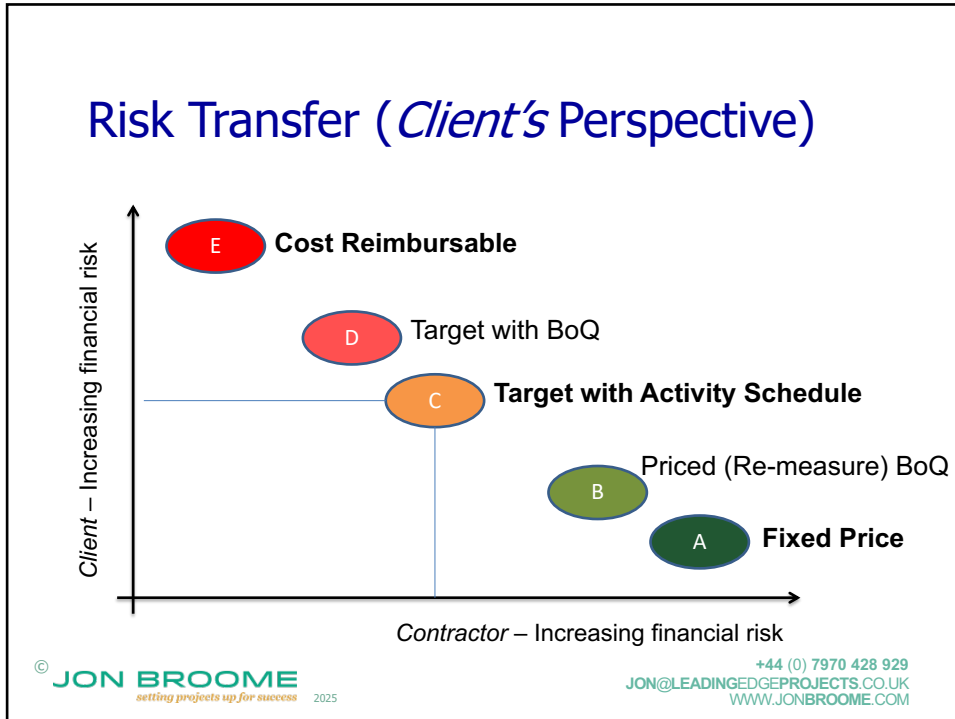
Contracting strategy at main payment option level

	ECC	ECS	PSC / PSSC	TSC / TSS	DBO	Supply Contract	Short Contracts (not Supply)
A : Priced Contract with Activity Schedules (AS)	✓	✓	✓	✓	✓	✓	✓
B : Priced Contract with Bill of Quantities	✓	✓					✓
C : Target Contract with AS / Price List	✓	✓	✓	✓			
D : Target Contract with Bill of Quantities	✓	✓					
E : Cost Reimbursable/ Time Based contract	✓	✓	✓	✓			✓
F : Management Contract	✓						

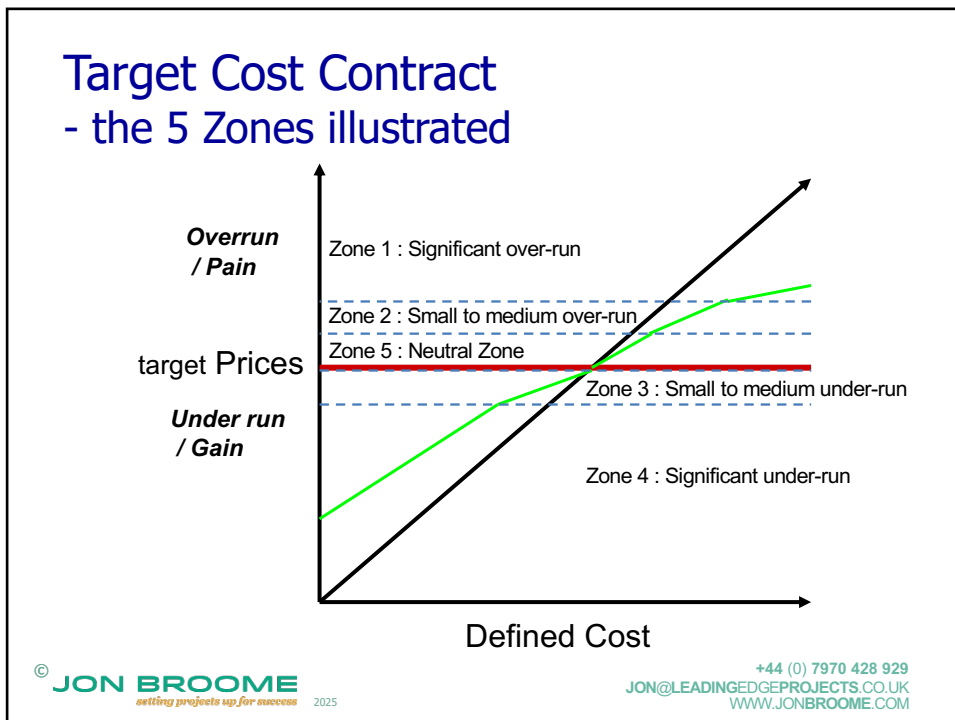
© **JON BROOME**
 setting projects up for success 2025

+44 (0) 7970 428 929
 JON@LEADINGEDGEPROJECTS.CO.UK
 WWW.JONBROOME.COM

170



171



172

Six Types of ECI

No.	Headline Type	Comment &/or explanation
1	PSSC then ECC option C	Could be a term service with ECI services called off as task order under CE process
2	PSC & ?EC Short Contract?, then ECC ?option C?	Allows SI to be done b4 main contract, so 60.1(12) applies to main contract date.
3	ECC option C with X22	Allows physical work, inc SI, to be done in Stage 1 under one contract.
4	ECC option E with X22	Gain only around higher level 'Budget' which includes identified <i>Client</i> costs & risk allowances for compensation events
5	ECC option A with X22	Why not (apart from "not designed") ?
6	'Optimal' Contractor Involvement: ECC option C with amended X22	Prices 'fixed' on entering contract. Contract de-risked and designed in Stage 1. Increase in <i>Contractor</i> risk allocation between Stage 1 / 2.
7	Variations ?	

© JON BROOME
setting projects up for success 2025

+44 (0) 7970 428 929
JON@LEADINGEDGEPROJECTS.CO.UK
WWW.JONBROOME.COM

173

NEC4 Secondary Options

	ECC	ECS	TSC/ TSS	PSC/ PSS	DBO	Supply Contract	Alliance Contract
W1 : Adjudication excl UK construction	✓	✓	✓	✓	✓	✓	
W2 : Adjudication for UK construction	✓	✓	✓	✓	✓		
W3 : Dispute Avoidance Board	✓						
X1 : Price Adjustment for Inflation	✓	✓	✓	✓		✓	
X2 : Changes in the Law	✓	✓	✓	✓		✓	✓
X3 : Multiple Currencies	✓	✓	✓	✓	✓	✓	
X4 : Ultimate Parent Company Guarantee	✓	✓	✓	✓	✓	✓	✓
X5 : Sectional Completion	✓	✓		✓			
X6 : Bonus for early Completion	✓	✓		✓			
X7 : Delay Damages	✓	✓		✓		✓	

174

NEC4 Secondary Options

	ECC	ECS	TSC/ TSS	PSC/ PSS	DBO	Supply Contract	Alliance Contract
X8 : Undertakings to <i>Client</i> or Others	✓	✓	✓	✓	✓		
X9 : Transfer of Rights	✓	✓		✓	✓		✓
X10 : Information modelling	✓	✓	✓	✓	✓		✓
X11 : Termination by the <i>Client</i>	✓	✓	✓	✓			
X12 : Multi-party collaboration	✓	✓	✓	✓		✓	
X13 : Performance Bond	✓	✓	✓	✓	✓	✓	
X14 : Advanced payment	✓	✓			✓	✓	
X15 : <i>Contractor's</i> design	✓	✓					
X16 : Retention	✓	✓					
X17 : Low performance damages	✓	✓	✓			✓	
X18 : Limitation of liability	✓	✓	✓	✓		✓	✓

175

NEC4 secondary options

	ECC	ECS	TSC/ TSS	PSC/ PSS	DBO	Supply Contract	Alliance Contract
X19 : Termination by either Party			✓				
X20 : Key Performance Indicators	✓	✓	✓	✓		✓	
X21 : Whole life cost	✓	✓	✓			✓	
X22 : Early <i>Contractor</i> Involvement	✓	✓	✓	✓	✓	✓	✓
X23 : Extending the Service Period			✓		✓		
X24 : The <i>accounting period</i>			✓				
X25 : <i>Supplier</i> warranties						✓	✓
X26 : Programme of work							✓
X29 : Climate change	✓	✓	✓	✓	✓	✓	✓
Y(UK)1 : Project Bank Account	✓	✓	✓	✓		✓	✓
Y(UK)2 : HG, E & R Act (payment)	✓	✓	✓	✓	✓	✓	✓
Y(UK)3 : Rights of 3rd Parties	✓	✓	✓	✓	✓	✓	✓
Z : <i>Additional conditions of contract</i>	✓	✓	✓	✓	✓	✓	✓

176

Incentive Plan design (1)

1. Each project is unique, so the incentive plan has to be unique (to some extent) to be effective.
2. Define and weight your project objectives;
3. Develop measures of performance, which accurately reflect your key objectives, yet are easy to measure;
4. Start from a realistic base from which improved performance is rewarded;
5. Balance the incentive plan, so that
 - a. rewards to the *Contractor* for pursuing different objectives match the value added and weighting of the *Client's* objectives and
 - b. take into account risk & who has influence over it;

209

Incentive Plan design (2)

- ❖ Use a combination of positive and negative incentives, with the greater monetary emphasis on the positive incentive / bonus payments;
- ❖ To ensure alignment, at the very least consult with the other party when developing the incentive plan. This also promotes realism, understanding and joint ownership;
- ❖ On longer term projects, consider the use of milestone incentives, which are a mix of objective and subjective measures;
- ❖ If using qualitative measures, then off-site senior management determination by more senior *Client* staff is recommended, but in consultation with both the site team and the *Contractor*;
- ❖ Despite the above deliberations, the end result should be an incentive plan that is as simple as possible that is necessary to align motivations;
- ❖ Communicate the objectives and the incentive plan to all personnel involved or associated with the project.

210

Time-related incentives (1)

Use of **Key Dates** (not a secondary 'X' option) :

- ❖ *key date(s)* specified in Contract Data part one
- ❖ A Key Date = *key date* as adjusted by compensation events (but can be brought forward as CE)
- ❖ *Contractor* needs to achieve a *condition* by Key Date
- ❖ Area handed over to *Client* or an 'Other' contractor and then handed back to original *Contractor*
- ❖ If handed over late by the *Contractor* then it pays forecast additional costs arising to *Client* and *Other*.

211

Time-related incentives (2)

2 The Contractor's main responsibilities

If the *Client* has identified work which is set to meet a stated *condition* by a *key date*

The *key dates* and *conditions* to be met are

	<i>condition</i> to be met	<i>key date</i>
(1)	<input type="text"/>	<input type="text"/>
(2)	<input type="text"/>	<input type="text"/>
(3)	<input type="text"/>	<input type="text"/>

Observations on Key Dates

- ❖ Is the above enough ? I.e. Should there be a box for the area and how long it is to be handed over to the *Employer* or *Other* ?
- ❖ Key Dates are also in the PSC, so can be used for the supply of design information.
- ❖ Many contracting organisations are wary of uncapped damages, so damages per day often stated.

212

Time-related incentives (3)

X7 Delay damages per day if Completion after the Completion Date.

Damages still should be set at not more than a 'genuine pre-estimate of likely loss',

but 2017 court case significantly expanded what can be included e.g. reputational damage.

Courts very loath to over-turn agreed damages, especially between commercial organisations.

But have to consider cost of risk transfer.

Completion Date is adjusted by compensation events so damages remain valid if *Client* breach occurs.

If X7 not specified damages are 'at large' i.e. whatever cost is to *Client*.

213

Related clause

X5 Sectional Completion.

In a pure civil engineering contract, a section is a geographical area.

But could be a 'state' e.g. installation & commissioning; optimising; continuous run; with Completion of whole of *works* being supply of all documents.

X5: Sectional Completion			
If Option X5 is used	The completion date for each section of the works is		
	section	description	completion date
	(1)	<input type="text"/>	<input type="text"/>
	(2)	<input type="text"/>	<input type="text"/>
	(3)	<input type="text"/>	<input type="text"/>
	(4)	<input type="text"/>	<input type="text"/>

214

Contract Data entry when X5 & X7 used together

X7: Delay damages			
If Option X7 is used without Option X5	Delay damages for Completion of the whole of the works are	<input type="text"/>	per day
If Option X7 is used with Option X5	Delay damages for each section of the works are		
	section	description	amount per day
	(1)	<input type="text"/>	<input type="text"/>
	(2)	<input type="text"/>	<input type="text"/>
	(3)	<input type="text"/>	<input type="text"/>
	(4)	<input type="text"/>	<input type="text"/>
	The delay damages for the remainder of the works are	<input type="text"/>	

215

Incentive clauses

X6 : Bonus for early Completion per day relative to (adjusted) Completion Date(s). Mirrors X7, except can specify whatever bonus amount you want.

X6: Bonus for early Completion			
If Option X6 is used without Option X5	The bonus for the whole of the works is	<input type="text"/>	per day
If Option X6 is used with Option X5	The bonus for each section of the works is		
	section	description	amount per day
	(1)	<input type="text"/>	<input type="text"/>
	(2)	<input type="text"/>	<input type="text"/>
	(3)	<input type="text"/>	<input type="text"/>
	(4)	<input type="text"/>	<input type="text"/>
	The bonus for the remainder of the works is	<input type="text"/>	

216

Performance related incentives

X17 : Low performance damages. No means of adjusting the base from which they are calculated so rarely able to apply i.e. easy for *Contractor* to get out of.

X17: Low performance damages

If Option X17 is used The amounts for low performance damages are

amount	for	performance level
<input type="text"/>	for	<input type="text"/>
<input type="text"/>	for	<input type="text"/>
<input type="text"/>	for	<input type="text"/>
<input type="text"/>	for	<input type="text"/>

X20 : Key Performance Indicators. The opposite of X17. Can be added to as contract progresses and can be for 'results'.

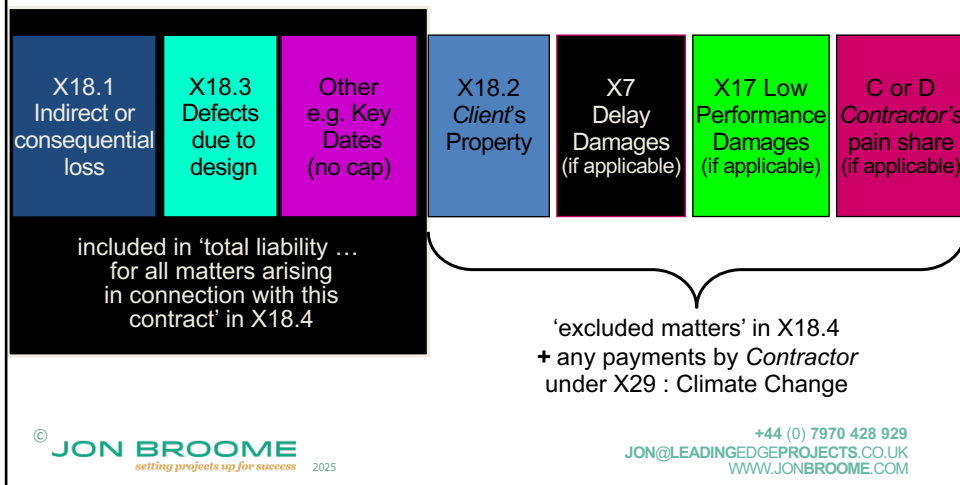
X20: Key Performance Indicators (not used with Option X12)

If Option X20 is used The incentive schedule for Key Performance Indicators is in

A report of performance against each Key Performance Indicator is provided at intervals of months

217

Option X18 : Limitation of liability



218

Instead of, and combining

X17 **X20**

Negative 'performance damages'
for missing targets Positive payments for beating
targets

damages **bonuses**

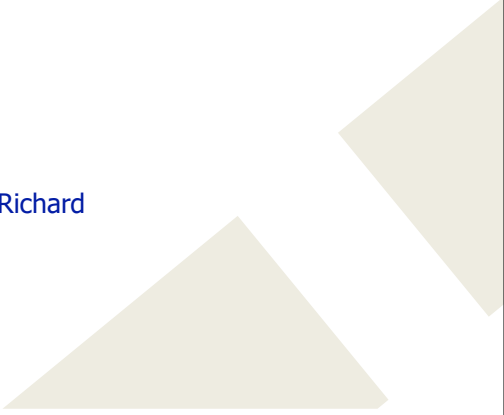
© **JON BROOME**
setting projects up for success 2025

+44 (0) 7970 428 929
JON@LEADINGEDGEPROJECTS.CO.UK
WWW.JONBROOME.COM

219

**Climate Change
Requirements**

Slides based on those provided by Richard
Patterson of Mott MacDonald

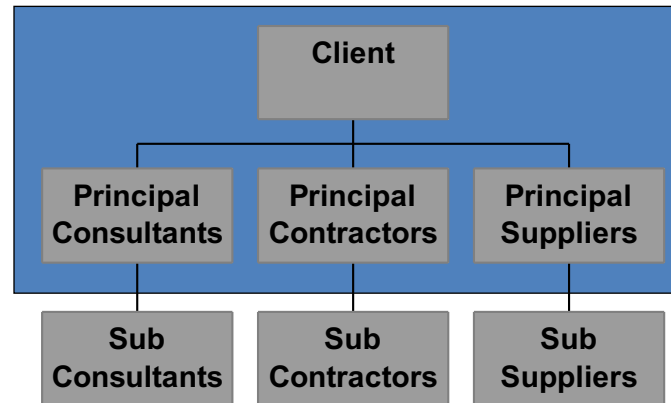


© **JON BROOME**
setting projects up for success 2025

+44 (0) 7970 428 929
JON@LEADINGEDGEPROJECTS.CO.UK
WWW.JONBROOME.COM

220

Alliance Contractual Framework



236

3 forms of Alliance : the **Simple Alliance**

- ❖ Enacted under NEC 3 & 4 through option X12.
- ❖ Re-named 'Multiparty Collaboration' option where:
 - set of X12 add-on clauses to individual contracts;
 - covers Core Group, Partnering Information and KPI's against which positive only incentives can be set;
 - high level extra clauses for early warnings, joint timetable (programme) & a compensation event for changes to the Partnering Information.
 - easiest to put in place as only upside for 'Partners'.

237

NEC4 X12 : Multiparty Collaboration overview

CORE GROUP

- senior people from organisations: involved, but not on a day-day basis
- set direction, monitor performance, last tier of non-contractual dispute resolution
- maintain 'Schedule of Partners' (SoP)

A timetable showing the proposed timing of each Partner's contributions. A change in timing is a CE.

Early warnings are given to other Partners .

Client
 X12
 X12 clauses added to each **individual** contract
 X12
Consultant but otherwise have same contracts as before. *Supplier*
 No legal partnership created.
Contractor

PARTNERING INFORMATION

- describes how Partners work together;
- similar or same in all contracts;
- can be changed by Core Group, but is a CE.

KEY PERFORMANCE INDICATORS

- is an aspect of performance for which a target is stated in the Schedule of Partners;
- a Partner is paid amount stated in the SoP if the target is improved upon or achieved;
- only *Client* may add a KPI and associated payment and may not delete one.

© **JON BROOME**
setting projects up for success 2025

+44 (0) 7970 428 929
 JON@LEADINGEDGEPROJECTS.CO.UK
 WWW.JONBROOME.COM

238

Pause for Thought

- ❖ What are peoples' experience of using any X options to positively incentivise the supply chain, so you get more of what you want ?
- ❖ On forthcoming (sub)contracts, what incentives could you use to get more of what you want ?
- ❖ Any questions : clarifications, amplifications, challenges etc ?

© **JON BROOME**
setting projects up for success 2025

+44 (0) 7970 428 929
 JON@LEADINGEDGEPROJECTS.CO.UK
 WWW.JONBROOME.COM

239

NEC4 Secondary Options

	ECC	ECS	TSC/ TSS	PSC/ PSS	DBO	Supply Contract	Alliance Contract
W1 : Adjudication excl UK construction	✓	✓	✓	✓	✓	✓	
W2 : Adjudication for UK construction	✓	✓	✓	✓	✓		
W3 : Dispute Avoidance Board	✓						
X1 : Price Adjustment for Inflation	✓	✓	✓	✓		✓	
X2 : Changes in the Law	✓	✓	✓	✓		✓	✓
X3 : Multiple Currencies	✓	✓	✓	✓	✓	✓	
X4 : Ultimate Parent Company Guarantee	✓	✓	✓	✓	✓	✓	✓
X5 : Sectional Completion	✓	✓		✓			
X6 : Bonus for early Completion	✓	✓		✓			
X7 : Delay Damages	✓	✓		✓		✓	

240

NEC4 Secondary Options

	ECC	ECS	TSC/ TSS	PSC/ PSS	DBO	Supply Contract	Alliance Contract
X8 : Undertakings to <i>Client</i> or Others	✓	✓	✓	✓	✓		
X9 : Transfer of Rights	✓	✓		✓	✓		✓
X10 : Information modelling	✓	✓	✓	✓	✓		✓
X11 : Termination by the <i>Client</i>	✓	✓	✓	✓			
X12 : Multi-party collaboration	✓	✓	✓	✓		✓	
X13 : Performance Bond	✓	✓	✓	✓	✓	✓	
X14 : Advanced payment	✓	✓			✓	✓	
X15 : <i>Contractor's</i> design	✓	✓					
X16 : Retention	✓	✓					
X17 : Low performance damages	✓	✓	✓			✓	
X18 : Limitation of liability	✓	✓	✓	✓		✓	✓

241

NEC4 secondary options

	ECC	ECS	TSC/ TSS	PSC/ PSS	DBO	Supply Contract	Alliance Contract
X19 : Termination by either Party			✓				
X20 : Key Performance Indicators	✓	✓	✓	✓		✓	
X21 : Whole life cost	✓	✓	✓			✓	
X22 : Early Contractor Involvement	✓						✓
X23 : Extending the Service Period			✓		✓		
X24 : The <i>accounting period</i>			✓				
X25 : <i>Supplier</i> warranties						✓	✓
X26 : Programme of work							✓
X29 : Climate change	✓	✓	✓	✓	✓	✓	✓
Y(UK)1 : Project Bank Account	✓	✓	✓	✓		✓	✓
Y(UK)2 : HS, C & R Act (payment)	✓	✓	✓	✓	✓	✓	✓
Y(UK)3 : Rights of 3rd Parties	✓	✓	✓	✓	✓	✓	✓
Z : <i>Additional conditions of contract</i>	✓	✓	✓	✓	✓	✓	✓

242

X1 : Price adjustment for inflation

- ❖ Adjusts the **Prices** i.e.
 - under options A & B, what is paid to the *Contractor* as the contract progresses
 - under options C & D, the target Prices which only comes into play at Completion when the pain / gain reconciliation is done.
- ❖ Historically used for contracts over 18 months'ish in duration, but now used on shorter contracts.

243

The Contract Data entry is

X1: Price adjustment for inflation (used only with Options A, B, C and D)

If Option X1 is used The proportions used to calculate the Price Adjustment Factor are

0.	<input type="text"/>	linked to the index for	<input type="text"/>
0.	<input type="text"/>		<input type="text"/>
0.	<input type="text"/>		<input type="text"/>
0.	<input type="text"/>		<input type="text"/>
0.	<input type="text"/>		<input type="text"/>
0.	<input type="text"/>		<input type="text"/>
0.	<input type="text"/>		<input type="text"/>
0.	<input type="text"/>	non-adjustable	<input type="text"/>
1.00	<input type="text"/>		

The base date for indices is

These indices are

244

X2 : Changes in the Law

- ❖ In unamended form, any change in the law which 'occurs' after the Contract Date & affects the Contractor's costs is a compensation event.
- ❖ In the UK, this could be by
 - Act of Parliament with the 'occurs' date being when King Charles signs the Act.
 - under Statute by a delegated body e.g. regional assembly / govt, HSE.
- ❖ Usually amended to restrict which change in laws apply.
- ❖ Needs to be fairly direct link to apply.
- ❖ Clients are wary of double-bubbling this & inflation.

245

X3 : Multiple Currencies

- ❖ Allows *Client* to (partly) take risk of currency fluctuation for a specific item.

X3: Multiple currencies (used only with Options A and B)

If Option X3 is used The *Client* will pay for the items or activities listed below in the currencies stated

items and activities	other currency	total maximum payment in the currency
<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>

The exchange rates are those published in

on (date)

246

X14 : Advanced payment to the *Contractor*

- ❖ Under NEC3 :
 - it allowed the *Contractor* to be reimbursed before the *starting date* : the normal reference point for payment and when insurances have to be in place,
 - so did not have to have full mechanisms of contract up & running for long lead in items,
 - advanced payments were repaid in instalments as stated in Contract Data & *Employer* could require a bond.
- ❖ Under NEC4 :
 - it is paid at an assessment date as per a normal payment ...
... so what is the point of having the facility ?
 - is it only so that the *Client* can get a bond ?

247

X4 : Ultimate Holding Company Guarantee

- ❖ In NEC3, call 'Parent Company Guarantee' (PCG).
- ❖ Prevents parent company from closing down an unprofitable subsidiary and getting out of all obligations.
- ❖ Problems in enforcing if parent company is based abroad, so often modified to apply to ultimate holding company in the same country.
- ❖ Contractors don't like as full value is on balance sheet.

X13 : Performance Bond

- ❖ From *Client's* perspective serves same purpose as a PCG.
- ❖ But *Contractor* has to take out bond and this cost is ultimately passed onto the *Client*.
- ❖ Contractors may also have issue getting enough bonds for all their contracts.

248

NEC4 Secondary Options

	ECC	ECS	TSC/ TSS	PSC/ PSS	DBO	Supply Contract	Alliance Contract
W1 : Adjudication excl UK construction	✓	✓	✓	✓	✓	✓	
W2 : Adjudication for UK construction	✓	✓	✓	✓	✓		
W3 : Dispute Avoidance Board	✓						
X1 : Price Adjustment for Inflation	✓	✓	✓	✓		✓	
X2 : Changes in the Law	✓	✓	✓	✓		✓	✓
X3 : Multiple Currencies	✓	✓	✓	✓	✓	✓	
X4 : Ultimate Parent Company Guarantee	✓	✓	✓	✓	✓	✓	✓
X5 : Sectional Completion	✓	✓		✓			
X6 : Bonus for early Completion	✓	✓		✓			
X7 : Delay Damages	✓	✓		✓		✓	

249

NEC4 Secondary Options

	ECC	ECS	TSC/ TSS	PSC/ PSS	DBO	Supply Contract	Alliance Contract
X8 : Undertakings to <i>Client</i> or Others	✓	✓	✓	✓	✓		
X9 : Transfer of Rights	✓	✓		✓	✓		✓
X10 : Information modelling	✓	✓	✓	✓	✓		✓
X11 : Termination by the <i>Client</i>	✓	✓	✓	✓			
X12 : Multi-party collaboration	✓	✓	✓	✓	✓	✓	✓
X13 : Performance Bond	✓	✓	✓	✓	✓	✓	✓
X14 : Advanced payment	✓	✓			✓	✓	
X15 : <i>Contractor's</i> design	✓	✓					
X16 : Retention	✓	✓					
X17 : Low performance damages	✓	✓	✓			✓	
X18 : Limitation of liability	✓	✓	✓	✓		✓	✓

250

X11 : Termination by the *Client*

- ❖ Allows the *Client* to terminate for a reason not in the Termination Table of the core clauses.
- ❖ But in unamended contract, means *Contractor* gets *fee percentage* applied to outstanding value of original *works* (as well as being paid for work done and costs committed).
- ❖ In NEC3, provision was core and why wouldn't you specify this as it gives you the option ?

251

X16 : Retention

- ❖ Allows *Client* to retain monies as contract progresses as an 'incentive' to correct Defects.
- ❖ Half paid back on Completion of the whole of the works & remainder at *defects date* (typically a year after Completion of whole of *works*).

X16: Retention (not used with Option F)

If Option X16 is used The retention free amount is

 The retention percentage is %

Retention bond The Contractor may/may not give the *Client* a retention bond. (Delete as applicable)

252

X8 : Undertakings to the *Client* or Others

- ❖ In NEC3, was called 'Collateral Warranties' & was only in PSC. Changed to broaden application by sector or correction period.
- ❖ A Collateral Warranty creates an obligation between two parties who are not in contract e.g. a supplier to a Subcontractor & the purchaser of the finished asset (the 'Other').
- ❖ Change of wording also effectively allows the *defects date* to be extended for a particular component of the *works*.

X8: Undertakings to the *Client* or Others

If Option X8 is used The *undertakings to Others* are provided to

The *Subcontractor undertaking to Others* are works provided to

The *Subcontractor undertaking to the Client* are works

253

X9 : Transfer of Rights

- ❖ Applies to intellectual property developed for the contract.
- ❖ Without this, the default is that *Contractor* owns it except as stated in the Scope.
- ❖ This option reverses that position.

X10 : Information Modelling

- ❖ In construction, this is Building Information Modelling (BIM)
- ❖ The 'B' is left off so can apply to other datasets.
- ❖ Refers to Scope for detail, but includes provisions
 - acceptance of Information Acceptance Plan
 - rights to/ownership of Information Model
 - liabilities for errors in it.

254

X15 : the *Contractor's* design

- ❖ In NEC3, was 'Limitation of *Contractor's* design to reasonable skill and care'.
- ❖ It made
 - the correction of Defect a compensation event or
 - excluded liability arising from a Defect
 if the *Contractor* could demonstrate that it had used reasonable skill and care in design.
- ❖ NEC4 added in what was missing from NEC3, namely :
 - use of material generated
 - requirement to have Professional Indemnity (PI) insurance.
 - cap on liability
 - requirement to keep documents etc for the *period of retention*
 and changed burden of proof onto claimant i.e. the *Client*.
- ❖ Note that it is only for design, not other professional services.

255

Referencing *Contractor's Scope*

- ❖ I.e. work done pre-contract that the *Client* wants to be a contractual obligation.
- ❖ Reference from Contract Data part two (the bit tendered by the *Contractor*) :



- ❖ This way any ambiguity or inconsistency :
 - within it (see clause 63.10) or
 - between it and the *Client's Scope* (see clause 60.1(1))
 is interpreted in the *Client's* favour.

256

NEC4 Secondary Options

	ECC	ECS	TSC/ TSS	PSC/ PSS	DBO	Supply Contract	Alliance Contract
X8 : Undertakings to <i>Client</i> or Others	✓	✓	✓	✓	✓		
X9 : Transfer of Rights	✓	✓		✓	✓		✓
X10 : Information modelling	✓	✓	✓	✓	✓		✓
X11 : Termination by the <i>Client</i>	✓	✓	✓	✓			
X12 : Multi-party collaboration	✓	✓	✓	✓		✓	
X13 : Performance Bond	✓	✓	✓	✓	✓	✓	
X14 : Advanced payment	✓	✓			✓	✓	
X15 : <i>Contractor's</i> design	✓	✓					
X16 : Retention	✓	✓					
X17 : Low performance damages	✓	✓	✓			✓	
X18 : Limitation of liability	✓	✓	✓	✓		✓	✓

257

Y(UK)1 : Project Bank Account

- ❖ Only works with UK legislation, but do not have to have it.
- ❖ A separate bank account is set up into which all *Client* payments are made.
- ❖ Payments are made out of it direct to *Contractor* and down supply chain to 'Named Suppliers'.
- ❖ *Client* and *Contractor*, as trustees, have a fiduciary duty to act in best interest of beneficiaries i.e. the Named Suppliers.
- ❖ Advantages :
 - Protects supply chain in case of employing party insolvency,
 - Faster payment down supply chain,
 - Transparency that payments have been made, especially useful under cost-based contracts & with JV's.
- ❖ Often set up at framework level.

259

A Quote :

"The Universe never did make sense
... I suspect it was built using a government contract."
Robert Heinlein, American Science Fiction Writer

My view on excessive use of option Z clauses :

- ❖ Many are simply not needed, the contract covers it already or should be in the Scope.
- ❖ Many undermine the 'big picture' intent of the contract & work against the *Client's* interests when you think through the 2nd & 3rd order effects.
- ❖ Many I see create ambiguity & inconsistency, which due to the *contra proferentum* rule, inadvertently push risk (after an argument) back onto the *Client*.
- ❖ As a result, experienced NEC clients have cut down on number.

264

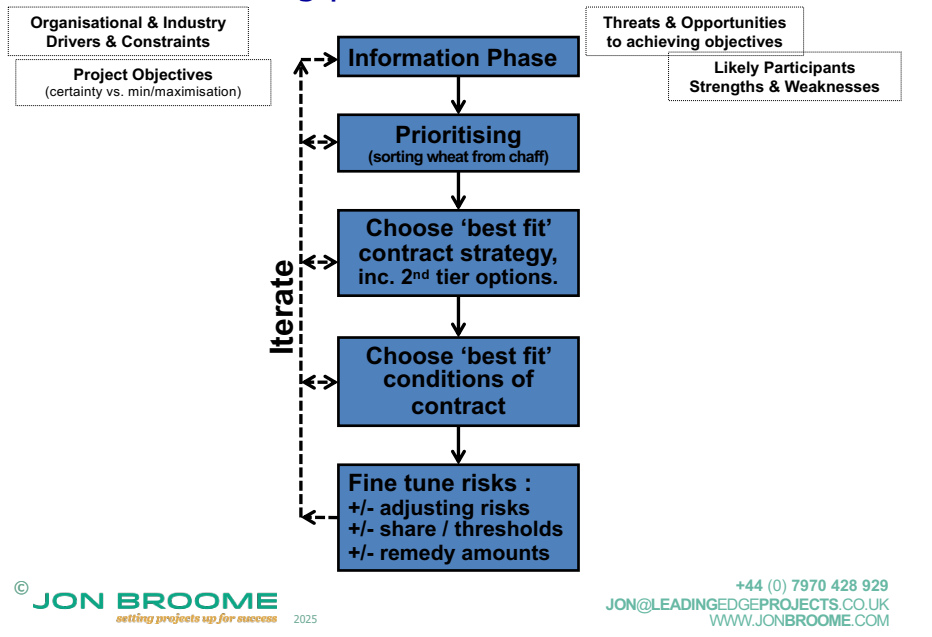
Principles of Risk Allocation & Sharing

Consider :

- the effect on the organisation’s business :
 - their ability to bear negative consequences with the rule being “*don’t allocate to a party who will go bust*”.
 - attractiveness of the package affects the risk premium you will pay (or if they will even bid),
 - who can best influence it happening,
 - for negative risk, who can best mitigate the consequences
- } Management
- clarity over above for minor (esp. frequent) risks, generally allocated within a contract to give motivation to manage and avoid argument & transaction costs **and**
 - attitude to risk.

265

There is a thinking process



266

Fine tuning risks

- ❖ Have discussed how can fine tune in Contract Data, both under
 - main payment options e.g. pain / gain share &
 - secondary options e.g. caps on liability etc.

- ❖ Can also, in Contract Data part one :
 - delete compensation events through a Z-clause i.e. allocate to the *Contractor*.
 - allocate risk to the *Client* either as
 - additional compensation events or
 - additional *Client's* liabilities.

267

6 Compensation events

If there are additional compensation events

These are additional compensation events

8 Liabilities and insurance

If there are additional *Client's* liabilities

These are additional *Client's* liabilities

(1)

(2)

(3)

268

Final questions ?

Biggest 'Aha' moment
from today or the course ?

© **JON BROOME**
setting projects up for success 2025

+44 (0) 7970 428 929
JON@LEADINGEDGEPROJECTS.CO.UK
WWW.JONBROOME.COM

271