



FM PROCUREMENT Forms of FM Contract

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“Alison is a specialist in strategic FM procurement and public sector change programmes”



PURPOSE OF THIS KNOWLEDGE PAPER

Procuring a Facilities Management contract, whether it's a multi-site Total Facilities Management (TFM) contract or a single site, single service contract, can be one of the more time consuming and challenging activities undertaken by many Facilities Managers. A well-drafted FM contract can be key to the successful procurement, mobilisation and management of the contract, establishing the expectations, rights and responsibilities of the client and the FM supplier.

This guide to the standard forms of contract for Facilities Management Services currently available in the UK is intended to provide help for both Director level Facilities Managers who wish to take strategic decisions about the form of FM contract to use, and for operational Facilities Managers who manage and procure FM contracts.

This guide provides an overview of the available forms of standard FM contract, describes the advantages and disadvantages of using standard form FM contracts and provides a description of the key characteristics of best practice FM contracts with a commentary on the degree to which currently available standard forms of FM contract incorporate these characteristics.

INTRODUCTION TO FM SERVICES CONTRACTS

TERMS & CONDITIONS AND CONTRACT SCHEDULES

The terms & conditions of a contract for FM services set out the rights and obligations of the contracting parties. Standard form FM contracts are likely to include 'general conditions' which are common to all FM contracts as well as 'special conditions' which apply only to a specific contract as determined by the client. These 'special conditions' might relate to the duration of the contract, the process for contract variation or performance mechanisms.

In addition to the terms & conditions of contract, a services contract will also incorporate a set of contract schedules. According to Black's Law Dictionary, a Schedule is "a written list or inventory; esp., a statement that is attached to a document and that gives a detailed showing of the matters referred to in the document". These are often more extensive than the terms & conditions and in many cases they will link to a specific contract condition, providing more detailed contract specific drafting in respect of the processes, procedures and timescales relevant to this particular contract. In this regard, contract schedules tend to lend themselves to drafting by competent FM technical advisors/in-house FM resource as opposed to legal support.

For example, a contract condition may state "The Contract Price shall be increased annually in accordance with the provisions of Schedule 2". Schedule 2 would then set out in detail the process for increasing the Contract Price each year.

In addition, typical schedules of a best practice Facilities Management contract will include:

- The specification
- A service matrix
- Mobilisation and transition
- Pricing and payment
- Contract management and governance
- Requirements for reporting
- Performance management and measurement and the contract KPIs
- Contract exit

FORMS OF FM CONTRACT

CLIENT BESPOKE FM CONTRACTS

Standard forms may not fit all projects and where a project is particularly complex (high value contracts or contracts for clients in highly regulated industries where the requirements themselves are very bespoke) it may make more sense to prepare a bespoke contract. There are many examples of client organisations who have sufficient skilled legal, commercial and facilities management resource internally to do this. Often these are larger organisations for whom this represents a good investment of their time and money and where they might be using a bespoke FM contract to procure a number of FM contracts, perhaps on a global basis.

Conversely where a contract is very simple or low risk, eg single site, single service some organisations prefer to create their own simple bespoke form of contract. There are risks in doing this, especially where client organisations don't have the breadth of experience or expertise to protect themselves from some of the potential pitfalls of doing this.

Some client organisations who decide to create their own bespoke form of contract do this by adapting their own existing forms of contract. Although it may seem tempting to do this, unless contracts have been written with services in mind, they may prove difficult to adapt and use. The most commonly seen example of this is to seek to adapt the terms and conditions of a contract for the supply of goods to use for services. This is not advisable as the nature and complexity of long-term services contracts is very different to a supply contract. Whereas a supply contract focuses on the procurement phase only, a services contract has to be fit for purpose for a much longer period covering procurement, mobilisation, several years of services management and delivery and ultimately termination.

SUPPLIER STANDARD TERMS OF BUSINESS

There are many examples of FM services that are delivered on client Purchase Orders or which use the supplier's own standard terms of business. Both formats rarely provide the protection that clients need when entering into a service contract with a supplier. Whilst both formats are likely to cover payment terms, insurances and contract duration, it is unlikely they will include any provision for performance management or monitoring, escalation in the case of non-performance or how the contract is to be managed.

In the worst cases, supplier terms & conditions can tie clients into very long-term arrangements that give them no redress if performance is poor and include costly penalties for termination.

STANDARD FORMS OF FM CONTRACT

This guide will first of all provide an initial introduction and an overview of the structure and key elements of each of the standard form contract considered, and will then provide an overview of the advantages of a standard form contract vis-à-vis a bespoke contract. It will then go on to consider the relative strengths and weaknesses of each of the standard forms reviewed. A more detailed side by side comparison of the key contract clauses of each of the standard form contracts is provided in Appendix A.

NEC TERM SERVICE CONTRACT

The NEC Term Service Contract (TSC) is part of a family of standard construction and property contracts whose use does not have to be limited to the UK. The first NEC contract, known originally as the 'New Engineering Contract' was published in 1993 and was designed to be used for construction and engineering contracts. At the time it was intended to be a radical departure from existing construction contracts as it was written in plain language and was designed to encourage collaborative working between the client and the supplier.

In 1995, NEC2 was published, updating the contract and re-naming it the Engineering & Construction Contract. Additional contracts were also published, forming a suite to be used for professional services, appointment of an adjudicator and also introduced short forms of these contracts.

In 2005, NEC published a much expanded suite of contracts, called NEC3. All the contracts in this "family" are based on the Engineering and Construction Contract, and reflect its principles and wording. The TSC was first published with the NEC3 suite and is intended for use as a contract for a supplier to provide a service to client organisation for the duration of a service period typically for a period of years. It embodies many of the principles of the Engineering & Construction Contract although with adaptation to reflect that it is to be used for services rather than a project. It has been used for the delivery of FM contracts since its inception in 2002 and has been endorsed by both the Crown Commercial Service and the BIFM as their preferred form of FM contract.

The next generation of NEC contracts (NEC4) was published in June 2017 building on the content of NEC3 and reflecting feedback from industry.

The British Institute of Facilities Management (BIFM) has recently announced a joint initiative with the Institute of Civil Engineers to explore the development of a completely new form of FM contract, all be it likely to be incorporated within the NEC4 contract suite. Presumably this will either replace or act as an alternative to the NEC4 Term Service Contract. The initiative is a result of BIFM membership feedback on existing FM standard form contracts being born out of construction or M&E project works contracts and not being entirely fit for purpose as FM service contracts.

The TSC is a customisable off the shelf services contract. It is written in plain English, designed to be flexible and incorporates the ability to select alternative versions of clauses (for example in respect of pricing and dispute resolution) to reflect individual client needs. In using NEC TSC, the core clauses are intended not to be amended, clients then supplement the core clauses by selecting one of the Main Options Clauses for pricing and as many of the Secondary Options Clauses as are relevant or needed.

The Contract Data has two parts. Part 1 is used to record specific client/contract information (including the starting date of the contract, the contract duration, insurance levels etc). It also records which standard Main Option Clauses for pricing are used and which Secondary Option clauses are to be used. Part 2 is for completion by the supplier and includes the name and address of the supplier, the total contract price and details of the key supplier personnel.

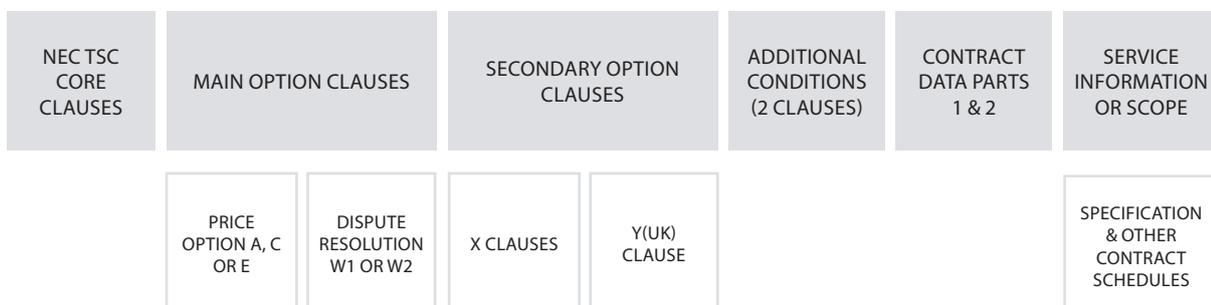
There are three Main Option Clauses to choose from for pricing (fixed price, cost reimbursable and target cost). There are also two Main Option Clauses for dispute resolution. The Contract Data also identifies which Secondary Option clauses the client has selected to be used. There are 13 Secondary Options that may be selected covering provisions such as a Parent Company Guarantee, method of indexation, how to call off additional services (so called "Task Orders") and drafting covering the limitation of liability.

Finally bespoke additional clauses called "Z Clauses" can also be added to the Contract Data. Whilst NEC discourages widespread use of Z clauses it recognises that there are instances where such clauses are required. Examples of this might include the application of TUPE, Freedom of Information provisions or specific requirements for security vetting.

What other forms of contract call the "contract schedules" are incorporated into a document called the Service Information (NEC3) or Scope (NEC4) which specifies and describes the requirements of the client for services and states any constraints on how the supplier is to provide the services.

As well as the standard form of contract, NEC has published a set of detailed Knowledge Papers and flow charts. The NEC TSC is shown below.

NEC TERM SERVICE CONTRACT



NEC TERM SERVICE SHORT CONTRACT

The NEC Term Service Short Contract (TSSC) is put forward by NEC to be used as an alternative to the TSC for FM contracts which do not require sophisticated management techniques, where the service is regarded as straightforward and where the risks imposed on the client and supplier are low. This form of contract might be used for services such as the examples below:

- A window cleaning contract
- A contract for internal planting maintenance or
- A contract for the provision of reception services

Essentially this is a simplified version of the TSC based on the same principles and using the same format as the TSC. Whilst the TSSC has fewer core clauses than the TSC, the core clauses in the TSSC are worded identically to those in the TSC. The TSSC does allow for the inclusion of what it calls “additional conditions” – these are effectively the TSSC’s version of Z clauses. However it does not provide standard Main Option Clauses or Secondary Option Clauses for use by the client. The contract is based on the application of a fixed price for the services plus additional services/work to be priced on a task by task basis.

CIOB FACILITIES MANAGEMENT CONTRACT

This standard form contract (now in its third version published in 2008) has a plain English ethos and a clear and concise approach to its subject. The 3rd Edition reflects legal and commercial changes (up to 2008) affecting the FM industry and is intended by CIOB to be a benchmark for facilities management contracting in the industry and is drafted to be fair, understandable, usable and succinct.

Appendix 1 is where bespoke client information/contract information is added including the service commencement date, name of the client’s representative, duration of the contract and so on. It does not however have the ability to add extra clauses. Appendix 2 allows for the insertion of contract specific general requirements relating to the services. CIOB examples of this set out in the standard form include maintenance of contract related records, provision of regular management reports and provision of an out-of- hours telephone number. Appendix 3 is where the services specification is to be added. There is no clear place to add other contract schedules (for example details of the price, provisions for performance measurement and KPIs, reporting and contract management governance). There are three cost options that may be used (fixed fee, reimbursable fee and a third option which might be used for a managing agent contract in which an administration charge is levied on top of sub-contractor fees).

The CIOB has published a Knowledge Paper on the use of the Facilities Management Contract.

GC WORKS 10

The GC Works suite of standard government conditions of contract was originally published in the 1970s and revised in the 1990s by the Stationery Office for the Property Advisers to the Civil Estate (PACE). The contract suite is still available and includes GC Works 10: Facilities Management (2000). As the suite is no longer being updated by the government, it is not covered by this guide as it is not considered to be of value and is now substantially out of date.

JCT FM CONTRACT

There is currently no FM contract within the JCT’s suite of standard construction contracts, however we are aware that JCT and RICS are considering a joint collaboration to prepare a standard JCT FM contract.

ADVANTAGES AND DISADVANTAGES OF BESPOKE AND STANDARD FORMS OF FM CONTRACT

PROS AND CONS

A well-drafted FM contract can be key to the success of the procurement phase of the contract and to the successful management of the contract throughout its term. It should be clearly drafted, well understood by the industry and the client FM team and should establish the expectations, rights and responsibilities of the supplier and the client. We have outlined in this guide the features of the currently available standard forms of FM contract and have summarised below the advantages and disadvantages of using both bespoke and standard forms.

ADVANTAGES OF STANDARD FORMS OF CONTRACT

Given the vital role of the contract as the backbone of the service, many client organisations consider there is a distinct advantage in using as a base document something that is tried and tested in the industry.

- Standard forms of FM contract are widely used by the FM industry and repetitive use has made them widely understood.
- The contract terms and mechanisms are generally well-understood leading to fewer misunderstandings and disputes.
- Suppliers and clients are practiced in their use.
- Unlike contracts drafted from scratch, a standard form contract is easily obtained and relatively quick, easy and less costly to put together.

DISADVANTAGES OF STANDARD FORMS OF CONTRACT

Despite the advantages summarised above, there are also a number of disadvantages in using standard forms of contract:

- Standard forms may not fit all projects and where a project is particularly complex (high value contracts, contracts for clients in highly regulated industries, where the requirements themselves are very bespoke) it may make more sense to prepare a bespoke contract.
- Standard form contracts tend to have evolved from construction or project works contracts and as such use mechanisms, language etc. that are not naturally aligned to FM service contract requirements.
- All standard forms of contract require some adaptation (irrespective of the claims of their authors) and clients are still advised to engage legal advice in adapting a standard form.
- Those who understand the standard forms of contract best are the FM suppliers who use them much more frequently than client organisations. Clients may therefore feel this puts them at a disadvantage in using a standard form.

WHICH ONE IS RIGHT FOR ME?

We have described in this guide the standard forms of contract that are currently available in the UK and we have also touched on the use of bespoke forms of contract. We recognise that there are situations in which clients will wish to use a bespoke form of contract and have highlighted above the advantages and disadvantages of doing this.

It would be overly simplistic to suggest that these are merely the reverse of the pros and cons of using standard forms and it is recommended that clients consider all the options available to them before deciding which format is best for them.

If a client decides to use a standard form of contract, which one should they use? There are strengths and weaknesses of all the forms of contract examined in this guide. It is recommended that when selecting a standard form of contract, clients consider the following:

IS IT APPROPRIATE TO THE SCOPE AND SCALE OF SERVICES PROCURED?

In deciding which form of contract to use clients should consider:

- What is the extent of the service required – many services or just one service?
- Is the contract for a single location or many locations?
- If a single location, is this a low or high value contract?
- What is the nature of the service to be delivered? Might it impact business critical functions or not?
- Does the requirement include TUPE transfer of client employees?
- Is the form of contract proportionate to the scale and value of the contract?

The NEC TSSC is deliberately designed for use with small value, low risk FM contracts where there is a limited scope of service. The CIOB FM contract lends itself better to less complex contracts. The NEC Term Service Contract is the most suitable format where the services are complex or more extensive, where more than one location is involved and where the client needs to be able to incorporate more sophisticated performance and contract governance arrangements.

IS THE FORMAT UP TO DATE?

Standard forms of contract are updated by their authors periodically, but it is not always possible for them to fully reflect current legislation relevant to the FM industry. This is a flaw of the current CIOB FM contract that whilst it fully reflected relevant UK legislation in 2008 on publication in 2008, since that date new Regulations governing issues such as TUPE and CDM come into force and which are not reflected by the CIOB contract. The NEC suite of contracts is designed to be used anywhere in the world, so the standard forms don't have an in-built risk of obsolescence. However, this does mean that many clients find the need to add drafting relating to how they deal with issues such as TUPE and CDM to be dealt with in contract specific Z clauses.

EASE OF TAILORING

A standard form of contract is designed to be tailored to adapt to the specific needs of the client. In considering which standard form to use, it is important to decide how easy it will be to tailor the standard form. Whilst the NEC TSC and TSSC do need a good deal of tailoring to meet client needs, they are flexible enough for this to be done effectively. NEC also provides comprehensive guidance about how to tailor the standard form and there is now a wide understanding in the FM community about how to do this successfully. The CIOB standard form of contract can also be tailored but has much more limited means to do this with the risk that what is created is unwieldy and difficult to use as a holistic product.

RELATIONSHIP

It is recommended that the client considers the organisational philosophy/approach to the management of suppliers, both in policy and in practice. Both the NEC and CIOB formats promote fairness, co-operation, openness and trust. In order for the client and supplier to have the best chance of success in creating and maintaining a successful relationship, the client should ensure that their contract management culture, policy and processes are aligned to a collaborative ethos (see below).

ALIGNMENT WITH EXISTING CONTRACT MANAGEMENT

Each standard form of contract has its own approach to contract management. The NEC TSC is widely regarded as being somewhat heavy on administrative procedures and while these may be seen as codifying and identifying good contract management, this may be difficult to adapt for some client teams. The degree to which a client is prepared to adapt its ways of working to align with the contract's management principles is therefore likely to be a factor in whether or not that contract will work well for that client.

It is therefore recommended that the client considers what changes can be made, the timescale available for change, the extent of training that might be needed and how easy the contract will be to implement in the context of the client's culture. There is a risk that even with a well written contract and an effective procurement process, a contract can be unsuccessful if the client is not structured or appropriately resourced to manage it.

RECOGNITION AND ACCEPTANCE

The majority of clients embarking on the procurement of a new FM contract wish to use a format that will be readily understood and accepted by the FM market. This provides them with the assurance that they can be seen to be adopting good, tried and tested formats that are "leading edge" without being "bleeding edge".

FOR FURTHER INFORMATION OR SUPPORT



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APPENDIX A

KEY CONTRACT CLAUSES AND CHARACTERISTICS

KEY CONTRACT CLAUSES AND CHARACTERISTICS

We have set out in this section of the guide details of the contract clauses we typically expect to see in a Facilities Management contract, along with our professional technical FM opinion on what makes the drafting of each clause good practice. We have not sought to differentiate between use of contract clauses or stand-alone schedules, with either being acceptable in most cases as long as schedules are clearly sign posted within the contract. For each clause we have also included an assessment of whether and how standard forms of contract reflect the clause.

Where a client organisation decides to use their own bespoke form of contract, it is recommended that it considers incorporation of all of these characteristics in conjunction with their legal advisors and considering the unique context of the FM contract(s) to be procured.

GOVERNING LAW

We would expect to see a clause confirming the jurisdiction of law governing the contract.

| CIOB | NEC4 TSC | NEC4 TSSC |
|---------------------|---|--|
| States English Law. | Covered under “law of the contract” to be completed by the client in the Contract Data. | Covered under core clause 12 “Interpretation and the Law”. |

PRECEDENCE

We would expect to see the following characteristics:

- a) Clarity and definition of the primacy of contract documents.
- b) Confirmation of how suppliers bid submission sits within the primacy of contract documents.

| CIOB | NEC4 TSC | NEC4 TSSC |
|------------------------|--|--|
| No specific provision. | No specific provision. Can be added as a Z clause. | No specific provision. Can be added as an additional condition in the Contract Data. |

CONTRACT TERM

We would expect this to provide details of the length of contract. When considering this, clients should consider the advantages and disadvantages associated with different contract durations. Traditionally, many organisations have let three-year FM contracts because shorter terms are seen as being beneficial for the following reasons:

- Provides opportunity to re-procure after three years if the relationship with the service provider is unsuccessful.
- Advantageous to market test the prices to maintain value for money.

With regard to the latter of these benefits, if the first year is taken up with mobilisation and familiarisation, the second year with maintaining steady-state and the third year in re-procurement and exit, this can provide little time to achieve value.

Longer contract terms (ie five years or more) are increasingly used as they tend to provide clients with better value for money as a result of:

- Greater service continuity for both parties with potentially more opportunities for continuous improvement and innovation.
- Better opportunities to create a collaborative relationship in which the service provider gains a real understanding of the client’s needs.
- Potentially reduced costs for the client as re-procurement is less frequent and also reducing the frequency of payment for contract mobilisation.
- As longer terms are more attractive to the market, they may invite interest from a wider spectrum of service providers providing greater competition with the possibility of greater efficiencies from larger service providers.

| CIOB | NEC4 TSC | NEC4 TSSC |
|-----------------------------------|---|---|
| For completion within Appendix 1. | To be completed by the client in the Contract Data. | To be completed by the client in the Contract Data. |

EXTENSION

We would expect to see the following characteristics:

- a) A clear definition of circumstances/conditions under which the client may elect to extend the contract with possible linkage to supplier performance during the contract term.
- b) A clear definition of the timings for notification of contract extension.
- c) A clear definition of supplier’s rights or otherwise to refuse contract extension.
- d) A clear definition of the approach to pricing and the charges under contract extension with due consideration of length of extension, inflation etc.

| CIOB | NEC4 TSC | NEC4 TSSC |
|-----------------------------------|---|---|
| For completion within Appendix 1. | To be completed by the client in the Contract Data. | To be completed by the client in the Contract Data. |

DEFINITIONS AND TERMINOLOGY

We would expect to see the following characteristics:

- a) Where appropriate use of industry standard definitions with sources quoted.
- b) Comprehensive and clear approach to contract terminology.
- c) Consistent use of definitions across all contract documents, especially where contract schedules are used.

| CIOB | NEC4 TSC | NEC4 TSSC |
|--------------------------------|--------------------------------|--------------------------------|
| Clearly stated in Condition 1. | Clearly stated in Condition 1. | Clearly stated in Condition 1. |

CONFIDENTIALITY AND FREEDOM OF INFORMATION

We would expect to see the following characteristics:

- a) A clear approach to confidentiality.
- b) Clear Freedom of Information requirements in public sector contracts.
- c) Data protection.
- d) Publicity .

| CIOB | NEC4 TSC | NEC4 TSSC |
|--|--|--|
| Confidentiality generally reciprocal with particular wording protecting the client. FOI covered comprehensively and gives client right to disclose without needing permission of the supplier. | No specific provision. Can be added as a Z clause. | No specific provision. Can be added as an additional condition in the Contract Data. |

INTELLECTUAL PROPERTY RIGHTS

Intellectual property is something unique that a person or organisation physically creates, for example a report or a design for a building. You own intellectual property if you:

- Created it (and it meets the requirements for copyright, a patent or a design).
- Bought intellectual property rights from the creator or a previous owner.
- Have a brand that could be a trade mark, eg a well-known product name.

Having the right type of intellectual property protection in an FM contract helps a client to stop the supplier stealing or copying:

- The names of their products or brands
- The design or look of their products
- Things they have written, made or produced

We would expect to see intellectual property protection in an FM contract with the following characteristics:

- Ownership or as a minimum royalty free unlimited licence to be held by the client for Intellectual Property developed exclusively for the contract.

| CIOB | NEC4 TSC | NEC4 TSSC |
|---|---|---|
| <p>Client has licence to copy and use the material and reproduce any designs contained in it for any purpose whatsoever so long as all sums owed are paid.</p> <p>Provides the client with rights to copy rather than assigning full ownership with the client.</p> | <p>No specific provision. Can be added as a Z clause.</p> | <p>No specific provision. Can be added as an additional condition in the Contract Data.</p> |

INSURANCES

We would expect to see the following characteristics:

- An insurance clause which sets out which insurances are required and their value.
- Ability to include bespoke client specific insurance levels.

| CIOB | NEC4 TSC | NEC4 TSSC |
|--|--|--|
| <p>Covered in the main conditions with specific levels of insurance to be completed in Appendix 1. Allowance made for client's insurances.</p> | <p>Covered in a core clause with specific requirements to be completed by the client in the Contract Data.</p> | <p>Covered in a core clause with specific requirements to be completed by the client in the Contract Data.</p> |

HEALTH AND SAFETY

We would expect to see the following characteristics:

- a) Requirements to comply with H&S law as it applies to services provided.
- b) Requirements to meet H&S standards.
- c) Requirements for documented H&S policy.

| CIOB | NEC4 TSC | NEC4 TSSC |
|--|---|---|
| Broadly states duties will be performed in accordance with H&S and other statutory regulations | Refers to compliance with requirements in Scope and supplier's plans. | Not specifically covered except that the services must comply with the law. |

ENVIRONMENT AND SUSTAINABILITY

We would expect to see the following characteristics:

- a) Requirements to comply with environmental law as it applies to services provided.
- b) Requirements to meet environmental and sustainability standards.
- c) Requirements for documented environmental and sustainability policies.

| CIOB | NEC4 TSC | NEC4 TSSC |
|------------------------|--|--|
| No specific provision. | No specific provision. Can be added as a Z clause. | No specific provision. Can be added as an additional condition in the Contract Data. |

RECORDS

We would expect to see the following characteristics:

- a) Requirements of what records are required to be kept and for how long.

| CIOB | NEC4 TSC | NEC4 TSSC |
|--|--|--|
| Save for accounting records there is no specific provision for record keeping. | Covered under the heading of Communications. | Covered under the heading of Communications. |

TUPE

A TUPE (Transfer of Undertaking (Protection of Employment)) transfer from supplier to supplier or from the client to a supplier commonly occurs when a new FM contract is let. The TUPE process protects the terms and conditions of staff transferring from one employer to another when the service they provide is transferred. We would expect to see a condition in the contract to cover TUPE and that it would have the following characteristics:

- a) Requirements to comply with TUPE law as it applies to the contract.
- b) Practical timeframes for completing the various elements.

| CIOB | NEC4 TSC | NEC4 TSSC |
|--|---|---|
| <p>Includes provisions relating to the 2006 TUPE Regulations rather than the revised 2014 TUPE Regulations.</p> <p>Makes the supplier responsible for TUPE at the start of the contract and service variations. Also details supplier duties for TUPE information disclosure at the end of the contract.</p> | <p>No specific provision. Can be added as a Z clause.</p> | <p>No specific provision. Can be added as a Z clause.</p> |

MOBILISATION

We would expect to see this set out in a contract schedule with a cross-reference to the schedule in one of the contract conditions.

| CIOB | NEC4 TSC | NEC4 TSSC |
|--|---|---|
| <p>No specific provision but provisions can be added to Appendix 2 or 3.</p> | <p>No specific provision. This can form a separate schedule or appendix in the scope.</p> | <p>No specific provision. This can form a separate schedule or appendix in the scope.</p> |

SERVICES

We would expect this to be set out in a contract schedule with a cross-reference to the schedule in one of the contract conditions

| CIOB | NEC4 TSC | NEC4 TSSC |
|---|--|--|
| <p>No specific provision but it is intended that the specification will be added to Appendix 3.</p> | <p>No specific provision. This forms the main part of the scope.</p> | <p>No specific provision. This forms the main part of the scope.</p> |

CDM

We would expect to see the following characteristics:

- a) Contractor’s and client’s responsibilities under CDM.
- b) Application of CDM.

| CIOB | NEC4 TSC | NEC4 TSSC |
|--|--|--|
| Provisions are included but relate to the CDM Regulations 2007, not the revised 2015 CDM Regulations. This would need to be amended before use. | No specific provision. Can be added as a Z clause. | No specific provision. Can be added as a Z clause. |

SUPPLIER’S PLANS

Where these are used in a contract, the supplier’s plan sets out the supplier’s methodology for delivering each aspect of the contract requirements. The plan is agreed at contract award and is incorporated into the contract as a schedule. The plan should be reviewed regularly and may be amended by mutual agreement to reflect changing requirements or service delivery solutions.

We would expect to see a cross-reference to the schedule in one of the contract conditions and for the condition to include the following:

- a) Contractor’s Plans or Service Delivery Plans as a contractual requirement.
- b) Plans included in contract hierarchy considered in Precedence (see earlier).
- c) Updating/revision requirement.

| CIOB | NEC4 TSC | NEC4 TSSC |
|---|--|--|
| No requirement for the supplier to deliver the services in accordance with a pre-agreed plan. | A fundamental principle of the NEC form of contract and covered comprehensively. | A fundamental principle of the NEC form of contract and covered comprehensively. |

PARTNERSHIP, COLLABORATION AND TEAMWORK

We would expect this to include principles of how the client and the supplier will work together in the best interests of the contract.

| CIOB | NEC4 TSC | NEC4 TSSC |
|--|---|---|
| Supplier and client to act fairly towards each other in a spirit of trust and mutual co-operation and help each other resolve problems which may otherwise prejudice the performance of the service. Requires both parties to cooperate with each other but does not provide specific duties and is deemed to be brief and inadequate. | <p>A fundamental principle of the NEC contract suite for the parties to act "in a spirit of mutual trust and cooperation".</p> <p>A secondary contract option covers a partnering arrangement where there is a group of partners to the contract.</p> | A fundamental principle of the NEC contract suite for the parties to act "in a spirit of mutual trust and cooperation". |

SUB-CONTRACTING/SUPPLY CHAIN

We would expect to see the following characteristics:

- a) Procedures for selection (and where appropriate approval) of sub-contractors.
- b) Cascading of relevant principles of the contract.
- c) Principles of relationships with supply chain.

| CIOB | NEC4 TSC | NEC4 TSSC |
|--|---|---|
| Prescribes stringent procedures for selection of sub-contractors. No mention of partnership with supply chain and cascading down the principles of the contract. | Subcontracting is covered. However no mention of partnership with supply chain, but does cover cascading down the principles of the contract. | Subcontracting is covered. However no mention of partnership with supply chain, but does cover cascading down the principles of the contract. |

ASSIGNMENT

The purpose of this condition is to protect a client from the contract being "sold on" to another supplier without the clients permission.

| CIOB | NEC4 TSC | NEC4 TSSC |
|--|---|---|
| Neither party can assign the contract without agreement. | Not specifically covered but general provision that no change to the contract can be made unless it is agreed in writing. | Not specifically covered but general provision that no change to the contract can be made unless it is agreed in writing. |

CONTRACT GOVERNANCE

We would expect to see the following characteristics:

- a) A clear definition of process for formal contract notices.
- b) A clear definition and role of key personnel for both parties.
- c) A clear definition of contract management meetings.
- d) Clearly defined routes of escalation.

| CIOB | NEC4 TSC | NEC4 TSSC |
|---|--|--|
| <p>Notice requirements laid out but no timescales stated. Provision to insert key personnel of both parties in Appendix 1. No specific requirement for meetings and no clear lines of escalation.</p> | <p>Notice requirements covered under the general provisions for communications but no timescales stated. Details of key personnel set out in Contract Data and role and responsibilities of the client's Service Manager is well defined.</p> <p>No specific requirement for meetings and no clear lines of escalation. This can be added as a separate schedule or appendix in the scope.</p> | <p>Notice requirements covered under the general provisions for communications but no timescales stated. No information about key personnel set out in Contract Data. No role of client's Service Manager, but a client's agent can be appointed to manage the contract for the client.</p> <p>No specific requirement for meetings and no clear lines of escalation. This can be added as a separate schedule or appendix in the scope.</p> |

REPORTING

We would expect this to be set out in a contract schedule with a cross-reference to the schedule in one of the contract conditions. Within the schedule we would expect to see the following characteristics:

- a) A clear definition of supplier performance reporting requirements.
- b) A clear definition of service management reporting requirements.

| CIOB | NEC4 TSC | NEC4 TSSC |
|---|---|--|
| <p>Requires the supplier to comply with any management and reporting system that may be agreed between the two parties. Further details may be added to Appendix 2.</p> | <p>The process for communication is covered well. There are no specific provisions for reporting but this can be added as a separate schedule or appendix in the scope.</p> | <p>The process for communication is covered. There are no specific provisions for reporting but this can be added as a separate schedule or appendix in the scope.</p> |

CHARGES / PRICES

We would expect to see the following characteristics:

- a) Flexibility in pricing strategies for different services & service elements to allow due consideration of data availability and a tailored approach to price risk allocation for each.
- b) A clear approach to determining the charges and payment for mobilisation services linked to a mobilisation clause/schedule.
- c) A clear methodology for charging/pricing of variable priced services, such as quotations procedures, schedules of rates (personnel and activity unit rates).
- d) A process for making annual increases to prices where this is a feature of the contract. This should be clear about the process for agreeing an increase and the criteria and/or index to be used when determining price increases.
- e) A clear approach to determining the charges for contract exit requirements linked to contract exit clause/schedule.
- f) A separate price book which provides granular details of the price for the services broken down by service, by location and by cost type (labour, equipment, sub-contracts etc).

(Please refer to our guide 'FM Procurement - Contract and Pricing Strategies' for more detailed consideration of the issues to be addressed in FM contract pricing)

| CIOB | NEC4 TSC | NEC4 TSSC |
|---|--|--|
| <p>Three cost options that may be used (fixed fee, reimbursable fee and a third option which might be used for a managing agent contract in which an administration charge is levied on top of sub-contractor fees). However, these options lack full and clear contract drafting within the contract documentation.</p> <p>No provision for variable pricing for additional works/ services or items priced on a per unit basis.</p> | <p>There are three secondary pricing options (fixed price, cost reimbursable and target cost) and the clauses covering these are comprehensively drafted.</p> <p>The ability to use variable prices for additional works/ services called off by means of a Task Order.</p> <p>A Price List is required for the fixed price and target cost pricing options. This can be included in a separate schedule or appendix in the scope.</p> | <p>No pricing options, simply a lump sum price set out in a simple Price List in the Contract Data and the ability to use variable prices for additional works/services called off by means of a Task Order.</p> |

PAYMENT

We would expect to see the following characteristics:

- a) Absolute clarity about the timescales and procedure for submitting invoices and making payments.
- b) Appropriate methodology by which disputed payments do not hold up non-disputed payments to avoid negative impacts on service provider cash flow.

| CIOB | NEC4 TSC | NEC4 TSSC |
|--|---|---|
| <p>Process and procedures covered comprehensively. Appendix 1 does not state the address to which invoices should be sent but this can be added.</p> | <p>The processes for submitting invoices and making payments is covered by a core contract condition. This includes a provision for delay damages where tasks are completed late. This provision may be stated in the Z clauses as being omitted, especially where Option X20 KPIs is used.</p> <p>The core clause does not state the address to which invoices should be sent. This can be added to the scope.</p> | <p>The processes for submitting invoices and making payments is covered by a core contract condition. This includes a provision for delay damages where tasks are completed late.</p> <p>The core clause does not state the address to which invoices should be sent. This can be added to the scope.</p> |

CONTRACT VARIATION

We would expect to see the following characteristics:

- a) A clear variation process.
- b) A process to determine costing of variations.
- c) A consideration of potential impact on Contract Exit arrangements.

| CIOB | NEC4 TSC | NEC4 TSSC |
|---|--|---|
| <p>Both client and supplier can request variations and a process for dealing with change request is set out. Full flexibility to expand and contract services provided by the supplier is afforded to the client. However instances where the proposed change is unacceptable to the supplier are not dealt with.</p> | <p>Both client and supplier can request variations and a process for dealing with change requests is set out. Covered under Compensation Events and Early Warning.</p> | <p>Both client and supplier can request variations and a process for dealing with change request is set out. Covered under Compensation Events and Early Warning.</p> |

QUALITY MANAGEMENT

We would expect to see the following characteristics:

- a) Requirements to meet quality standards.
- b) Requirements for documented quality policy.
- c) Requirements for contract specific quality management plan.

| CIOB | NEC4 TSC | NEC4 TSSC |
|------------------------|--|--|
| No specific provision. | No specific provision in the contract, however this can be required to be part of the Contractor's Plan. | No specific provision in the contract, however this can be required to be part of the Contractor's Plan. |

PERFORMANCE

We would expect to see this set out in a contract schedule with a cross-reference to the schedule in one of the contract conditions. The schedule should include:

- d) Details of the SMART KPIs tailored to the requirements of the client for the purpose of management information and/or performance management information.
- e) A FM Performance Mechanism suited to the requirements of the client & the relationship sought with the supplier, e.g. balanced scorecard, measurement only, risk only, risk & reward etc.
- f) Allowances for linkages between performance outcomes and step-in rights, partial or full termination rights or contract extension.

(Please refer to our guide 'FM Procurement - Contract Performance Provisions' for more detailed consideration of the issues to be addressed in FM contract pricing)

| CIOB | NEC4 TSC | NEC4 TSSC |
|---|---|------------------------|
| Very general provision for the client to monitor performance of the services and make deductions if performance standards in the specification are not made. The specification is not the best place to include this but it could be added as a part of Appendix 2 or 3. | Includes secondary condition X20 KPIs. This can be supplemented with a separate schedule or appendix in the Scope that sets out the KPIs and the performance mechanism. | No specific provision. |

INNOVATION/GAIN SHARE

Often this would be part of the performance provisions. We would expect to see the following characteristics:

- a) Requirements for proactive approach to identifying service quality and service cost innovations.
- b) A mechanism for payments relating to innovation/gain share.

| CIOB | NEC4 TSC | NEC4 TSSC |
|------------------------|--|------------------------|
| No specific provision. | Shared saving covered under the Supplier's Share if Option C but relates more to cost reduction than introduction of innovation. | No specific provision. |

CONTINUED POOR PERFORMANCE

Often this would be part of the performance provisions. We would expect to see the following characteristics:

- a) A clear definition of continued poor performance linked to contract performance mechanism.
- b) Clear consequences of continued poor performance.
- c) Clear procedures for resolving continued poor performance.

| CIOB | NEC4 TSC | NEC4 TSSC |
|------------------------|---|------------------------|
| No specific provision. | No specific provision although the early warning process in the core conditions is intended to mitigate the risk of poor performance. | No specific provision. |

SUPPLIER DEFAULT

We would expect to see the following characteristics:

- a) A clear definition of what constitutes a contract default.
- b) Clear consequences of supplier default.
- c) Clear procedures for resolving supplier default.

| CIOB | NEC4 TSC | NEC4 TSSC |
|---|--|--|
| Termination of contract if breached and not remedied within 15 days of written notice unless there is no remedial period. | Default circumstances clearly stated along with put right periods. | Default circumstances clearly stated along with put right periods. |

DISPUTE RESOLUTION

We would expect to see the following characteristics:

- a) Clear dispute resolution procedures.
- b) Clear roles and responsibilities.
- c) Clear time-scales for resolution.
- d) Allowance for final resolution.

| CIOB | NEC4 TSC | NEC4 TSSC |
|---|--|---|
| Requires the parties to co-operate in good faith to resolve disagreements. Disputes to be referred to adjudication in accordance with the scheme for construction contracts. Scheme for construction contracts not relevant for FM. | Covered under Options W1 and W2 depending if Housing Grants, Construction and Regeneration Act applies. No requirement for dialogue prior to appointment of adjudicator. | Simplified form of W1 and W2 used with no requirement for dialogue prior to appointment of adjudicator. |

STEP IN RIGHTS

In an extreme situation (for example, if the supplier ceases trading) the client may decide to step in and deliver the services themselves. We would expect to see the following characteristics:

- a) A clear definition of circumstances under which the client may exercise step in rights.
- b) Clear definition of process and roles and responsibilities of both parties should step in be used.
- c) A clear definition of the consequences of step in.

| CIOB | NEC4 TSC | NEC4 TSSC |
|------------------------|------------------------|-----------|
| No specific provision. | No specific provision. | |

AUDIT

We would expect to see the following characteristics:

- a) A clear right of audit for the client.
- b) Details of the circumstances under which audits may take place.
- c) A process for undertaking audits.
- d) A clear definition of the roles and responsibilities of both parties in relation to undertaking of audits, payment of third party auditors, and the consequences of audit outcomes.

| CIOB | NEC4 TSC | NEC4 TSSC |
|---|--|--|
| Refers to National Audit Office access but no other specific rights of audit. | Some allowance made under Tests and Inspections, however not particularly suitable for service type provision. More relevant drafting can be added to the Z clauses. | Some allowance made under Tests and Inspections, however not particularly suitable for service type provision. More relevant drafting can be added to the additional conditions. |

TERMINATION

We would expect to see the following characteristics:

- a) A clear definition of circumstances under which termination is allowable for both parties, which might include termination for convenience, material breach and termination for poor performance.
- b) A clear definition of partial termination allowances.
- c) A clear definition of process and time-scales for each termination scenario.
- d) A clear definition of consequences of termination, including any financial consequences detailed in cash terms or fully worked up formula rather than obscure statements which leave room for interpretation.

| CIOB | NEC4 TSC | NEC4 TSSC |
|---|---|---|
| <p>Three months prior notice at any time for the termination of service.</p> <p>Contract can be terminated at any time by either party which does not allow any assurance to client of service provision.</p> | <p>Termination Table gives reasons, procedures and payment on termination.</p> <p>No at will termination for the Supplier. At will termination allowance for the client.</p> <p>No allowance for termination periods which could raise issues regarding handover and TUPE, possibly demonstrating its origins from the construction sector.</p> | <p>Simplified version of the termination provisions of the TSC including at will termination by client.</p> |

CONTRACT EXIT

We would expect to see the following characteristics:

- a) A clear definition of the requirements placed on client and supplier during demobilisation and handover to a new service provider.
- b) Requirements may include transfer of asset and service related data, hand back of premises or physical property, handover protocols for service requests in progress etc, TUPE transfer protocols, etc.
- c) A clear definition of any pricing/charge/payment arrangements associated with contract exit requirements linked to the charges/prices clause/schedule.

| CIOB | NEC4 TSC | NEC4 TSSC |
|---|---|--|
| <p>Supplier to bring to an end his performance of services in an orderly manner but with all reasonable speed and economy. All intellectual rights to be transferred to client.</p> | <p>Information provision and payment on exit covered.</p> <p>However see comments under 1.33 – Termination.</p> | <p>Only covers return of equipment at the end of the term.</p> |

