

NEC4 professional service subcontract (PSS)

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Part one: A closer look on behalf of the consultant as subcontractor

THE NEC website guidance is that NEC4 PSS (professional services subcontract) is NEC's vehicle for appointing a provider of professional services either to a consultant engaged under an NEC4 professional service contract (PSC) or to a contractor under another NEC4 main contract.

This article considers certain performance obligations and liability issues of the consultant (the subcontractor) where the subcontractor is engaged by a contractor – on an assumed design and build procurement route – where the contractor is engaged by the client under an NEC4 engineering and construction contract (NEC4 ECC), with the NEC4 ECC administered by the project manager.

The NEC4 PSS is a bi-party contract between the contractor and the subcontractor (the parties), with no contract administrator, although there are limited references to the main contract manager, but no direct linkage to any decision-making by the main contract manager in the administration of NEC4 PSS with the exception of the NEC4 PSS clause 15 early warning mechanism.

The contractor is identified within the subcontract data with an address for communications and also an address for electronic communications, the latter entry an assumed single email address, and therefore a sole channel for the exchange of written communications between the parties, to avoid the possibility of conflicting instruction or direction from the contractor to the subcontractor.

The subcontract data also includes an entry for the client in the main contract and a corresponding address for communications and an address for electronic communications, although at first glance it is unclear why the subcontractor would be willing or needs to communicate with a head party in contract with the contractor.

Standard of performance and liability issues

NEC4 PSS clause 15.2

NEC4 PSS clause 15.2 makes clear that the contractor prepares the first early warning register, but the detail here depends upon what the parties included in the subcontract data. The subcontractor should be wary of the contractor's subcontract data early warning register entries, as such entries should not be a direct pass-down of the contractor's main contract (NEC4 ECC) early warning register entries, without due cognisance to the concluded NEC4 PSS subcontract scope.

The recent judgment in *Lendlease Construction (Europe) Limited v AECOM Limited* (2023) EWHC 2620 (TCC) provides useful guidance as to where a consultant's (the subcontractor) duty to warn might cease depending on a commission for design only or for design and continuing professional services.



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It is assumed that the main contract manager stated under NEC4 PSS is the project manager under NEC4 ECC head contract.

The subcontractor takes the risk of several early warning meetings through the NEC4 PSS clause 15.2 joinder provisions where the contractor instructs the subcontractor to attend an early warning meeting between the main contract manager and the contractor if the early warning matter under the main contract also affects the subcontract. It is assumed that the main contract manager stated under NEC4 PSS is the project manager under NEC4 ECC head contract.

NEC4 PSS clauses 20.1 and 20.2

NEC4 PSS clauses 20.1 and 20.2 at first glance appear relatively benign, with NEC4

The subcontractor's obligation to co-operate with others, including in obtaining and providing information which they need in connection with the subcontract service is onerous.

PSS clause 20.2 stating the subcontractor's performance obligation as the exercise of skill and care of a professional in the discharge of the subcontract service. However, this needs to be viewed in context with any fit for purpose or other absolute performance requirement stated under the subcontract scope with reference to NEC4 PSS clause 20.1 which potentially fall outside the ambit of the subcontractor's PI insurance coverage¹.

NEC4 PSS clause 20.3

NEC4 PSS clause 20.3 and the subcontractor's liability for a defect whilst potentially drafted in favour of the subcontractor, in fact creates a problem in that where the contractor notifies a defect, the subcontractor is faced with a reverse burden of proof that the subcontract service has not been discharged negligently by the subcontractor. It is highly doubtful that liability for any expressly notified defect can be determined in the first instance as between the parties, with liability of necessity determined through the dispute resolution procedure (adjudication in the first instance) of either NEC4 PSS option W1 or W2. It is likely that the subcontractor's PI insurance coverage is based upon proven negligence established against the subcontractor.

NEC4 PSS clause 22.1

NEC4 PSS clause 22.1 and the subcontractor's obligation to 'co-operate with others, including in obtaining and providing information which it needs in connection with the subcontract service' is onerous but needs to be viewed in respect to precisely which third party others are identified in the subcontract scope, with the NEC4 PSS between the parties construed as a whole.

The diligent subcontractor needs to ensure its first programme issued under NEC4 PSS clause 31.3 (and all revisions to the accepted programme under NEC4 PSS clause 32.2) in the discharge of the subcontract scope is clearly marked in respect to obtaining and providing information from/to others under NEC4 PSS clause 22.1. The diligent subcontractor might, in any event, be wary of providing information to a third party directly (resulting in potential reliance issues) where all such information should instead be presented to the contractor – as the party under NEC4 PSS – and consistent with the subcontractor's deliverables as stated in the subcontract scope.

The subcontractor should be wary of the contractor's subcontract data entries (if any) in respect to a condition and a corresponding key date, as such entries should not be a direct pass-down of the contractor's main contract (NEC4 ECC) condition and key date entries, without due cognisance to the concluded NEC4 PSS subcontract scope. The diligent subcontractor needs to ensure that any NEC4 PSS condition and corresponding key date is manageable for the subcontractor and indeed is achievable exercising the skill and care described under NEC4 PSS clause 20.2.

NEC4 PSS clause 24.1

NEC4 PSS clause 24.1 and the subcontractor's obligation to obtain approval from others where necessary appears both equivocal and onerous but needs to be viewed in respect to precisely

which third party others are identified in the subcontract scope. And indeed what precise liaison/co-ordination duties are stated within the subcontract scope, with the NEC4 PSS between the parties construed as a whole.

The subcontractor should be wary of a contractor's subcontract scope proposal which imposes an absolute duty upon the subcontractor to obtain 'approval' from a third party other and where such duty is beyond the reasonable control of the subcontractor and/or where the contractor's subcontract scope proposal assumes that the subcontractor will act as the agent of the contractor in obtaining approval from a third party other.

NEC4 PSS clauses 31.1 and 31.2

NEC4 PSS clauses 31.1 and 31.2 state the subcontractor's requirement to submit a fully integrated critical-path analysis programme in relation to the subcontract scope. Such a requirement might be seen as onerous in respect to a contract for professional services, but no doubt essential in respect to the accepted programme monitored by the parties and upon which the contractor will decide the date of completion under NEC4 PSS clause 30.1. The unilateral decision of the contractor, as a party to the subcontract, in certifying the date of completion, is of critical importance to the subcontractor both in respect to defects notification and any liability for damages if the subcontract contains option X7: Delay damages.

The diligent contractor may be expected to insist upon a parallel limitation of liability period under the NEC4 PSS consistent with the contractor's limitation period under its NEC4 ECC. However, difficulties might arise where the NEC4 PSS subcontract scope includes a discharged design service only at completion under an NEC4 PSS and where this date of completion precedes the contractor's own construction related completion date under an NEC4 ECC.

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¹ See *MT Hogaard v E.ON Climate and Renewables UK Robin Rigg East Ltd* (2017) UKSC 59 BLR 477

Part two of this article will consider further standard of performance and liability issues of the consultant as subcontractor under NEC4 PSS.