

PRACTICE

Using X23 to extend the service period of NEC4 service contracts



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KEY POINTS

- NEC4 service contracts usually specify a fixed service period.
- Option X23 allows for the service period for certain forms of contracts to be extended.
- It is important to define what services are carried out during the extended service period along with any requirements as to how the services are undertaken.

A common understanding among NEC users is that compensation events assess the effects of both time and money. Although this principle applies to many NEC forms, it is not generally the case with the following NEC4 service contracts:

- term services: Term Service Contract (TSC), Term Service Short Contract (TSSC) and Term Service Subcontract (TSS)
- facilities management: Facilities Management Contract (FMC), Facilities Management Short Contract (FMSC), Facilities Management Subcontract (FMS) and Facilities Management Short Subcontract (FMSS).
- Design Build and Operate Contract (DBOC)

For all these contracts, quotations for a compensation event comprise proposed changes to the prices, and to the performance table for the facilities management and DBOC forms.

A compensation event is only assessed for time in relation to task completion (term service contracts), project completion (FMC and FMS) or works completion (DBOC). These time assessments relate to particular work that has a corresponding date for completion.

Service period

The NEC4 term services, facilities management and DBOC contracts are essentially designed to manage a facility or asset. They are different to other NEC forms, not least because the time required to provide the service is stated in contract data as the 'Service Period' and is a set duration, usually identified

as a number of weeks or months.

Where a client is seeking to award a contract for services, the initial term of the contract is an important consideration and may be determined by several factors. These include the type and range of services to be provided, cost of tendering, transfer of resources, level of associated risk and role of the service provider.

The contract duration should provide sufficient time to achieve continuous improvement, leading to a value-for-money outcome for both parties. An increased duration is commonly required to achieve a sensible return for certain contracts, particularly where the initial investment costs are high or there is a transitional period for the transfer of resources. However, if the contract term is too long, then one or both parties may end up being bound to a contract that no longer aligns with their planned expectations.

Service contracts can include mechanisms to regulate the contract duration, including termination for convenience, contract extension as a right, contract extension as a performance reward and a contract break clause.

Extending the service period

Option X23 is an optional contract procedure for extending the service period in an NEC4 TSC, TSS, FMC, FMS and DBOC. For ease of reference, option X23 within the TSC is referred to below, although the options within the other contract forms are the same except for the different parties and named roles.

The first part of clause X23.1 states: 'The *Client* may, with the agreement of the *Contractor*, extend the Service Period by a *period for extension* up to the

maximum service period.' It is noted that this clause can only be applied where there is agreement between the parties, which should be evidenced by formal communication.

Both the period for extension and maximum service period are identified terms and require information to be completed in the contract data under the entry for option X23. Note that the maximum service period should be a sufficient period of time to account for the total duration of the initial service period and all possible extensions to this.

The second part of X23.1 states: 'The *Client* notifies the *Contractor* and the *Service Manager* of each agreed *period for extension* before its *notice date*.' Each period for extension has a corresponding notice date, which is the latest date by which a notice may be given to apply a period for extension. This date should provide a sufficient period of time for all associated required actions to be completed to facilitate a timely notice to be given. As a reminder, a notice should also comply with clause 13 in that it is communicated separately.

Note that for the TSS form, the contractor was previously required to notify itself, which appeared to be a drafting anomaly, although this requirement was deleted with the October 2020 NEC amendments.

The third part of X23.1 states: 'Each *period for extension* is agreed and applied separately and in the order set out in the Contract Data.' This effectively creates an order of precedence which requires each period for extension to be addressed sequentially. It is possible to combine two or more periods for extension, although notice must be given by the notice date that relates to the earliest period.

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> Criteria for extension

Clause X23.2 states: 'If there are *criteria for extension*, the Service Period is not extended unless those *criteria for extension* are met on or before the *notice date* for the relevant *period for extension*.' This is an optional provision, with criteria for extension being an identified term that requires information to be detailed in the contract data under the entry for option X23.

It is important that any stated criteria for extension can be objectively assessed to avoid any possible ambiguity. These may also be linked to specified key performance indicators, either in conjunction with option X20 (TSC and TSS) or stated targets for

performance included within the performance table (FMC, FMS and DBOC).

The criteria for extension could operate as a performance reward mechanism. It may also be desirable to extend the service period for other reasons, for example to complete certain services where the occurrence of compensation events has created inefficiencies with the service delivery. The criteria for extension, where selected, should operate as an incentive although without applying unintended limitations.

Recommendations

Users of the TSC, FMC, DBOC and associated

subcontracts should carefully consider what criteria may be required for extending the service period and how this is presented in the contract data. They should seek agreement at an early stage to ensure that any associated governance approvals are obtained in time.

Users should detail within the contract scope what services are to be undertaken during the extended service period and what corresponding conditions or requirements may apply to the delivery of these. They should also consider how the contract procedures will operate during an extended service period, including the assessment of the price for service provided to date. ○