

NEC Secondary Option X17 Low Performance Damages

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2



Contractual performance

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3



Definition

This can be defined as;

'Completing all required actions to ensure release from any future contractual liability'

This involves various actions, including the following;

- Delivering the specified scope,
- Making required payments,
- Executing and delivering necessary documentation,
- Complying with contract 'conditions'.

Contract performance may be;

- Complete,
- Substantial,
- Breach.

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4

Measuring Performance



For certain construction projects there is a reliance on the 'output' capacity of the finished product, including the following;

- Water and sewage process facility,
- Production or manufacturing factory,
- Oil or Gas Refineries,
- Power generation plant,
- Petrochemical processing facility.

A 'performance guarantee' mechanism can be built into the contract which measures the actual performance and links to a corresponding commercial incentivisation procedure.

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5

Performance Guarantee



There are several components to a performance guarantee, including;

- Prescribing the required levels for; output, efficiency and reliability,
- Detailing the test, inspection and commissioning regime,
- Defining the associated; completion, take over and hand over stages,
- Procedural requirements for the operational interfaces,
- Formal process for capturing performance measurement,
- An incentivisation procedure to calculate financial allocation.

The entire procedure needs to be carefully managed to ensure that any commercial entitlement is maintained;

Re: Yorkshire Water Ltd v Taylor Woodrow Construction Northern Ltd (& Others)
(2004) EWHC 1660 (TCC) & (2005) EWCA Civ 894.

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6

Damages - Reminder



Damages are a legal remedy in the form of a monetary payment, awarded to a party that has suffered a loss or injury.

Many damages provide relief based on a 'compensatory principle', which seeks to place the claimant in the position they would have been in 'but for' the act(s) which have caused them loss.

Breach of Contract

Where a breach of contract causes loss, that party is entitled to be placed in the position they would have been in had the contract been performed.

There are additional rights in respect of a contractual breach, depending upon whether the breach relates to a condition, an innominate term or a warranty.

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7

Liquidated damages



To claim damages for breach of contract, the party suffering the loss is required to prove the following;

- That there has been a breach of contract,
- That the breach has caused a loss,
- The amount of the loss.

Any such claims to demonstrate the above issues can be time consuming, expensive and damage commercial relationships.

A common way to overcome the 'burden of proof' is to decide in advance what the level of damages are for a specified breach.

This process 'liquidates' the damages into a precise sum of money known as 'liquidated damages' or 'liquidated and ascertained damages'.

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8




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9



NEC Suite

Secondary option X17 can be found in the following NEC forms of contract:

- Engineering and Construction Contract (ECC),
- Engineering and Construction Subcontract (ECS),
- Term Service Contract (TSC),
- Term Service Subcontract (TSS),
- Supply Contract (SC).

The wording between the different 'types' of contract differs, although the principal intention is the same.

The following NEC forms also include a Performance Table, which may include a provision for such damages as a performance target;

- Facilities Management Contract (FMC),
- Facilities Management Subcontract (FMS),
- Design Build and Operate (DBO),
- Alliance Contract (ALC).

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10

ECC & ECS – X17



This comprises a single sub-clause as follows;

X17.1 - *If a Defect included in the Defects Certificate shows low performance with respect to a performance level stated in the Contract Data, the (Sub)Contractor pays the amount of low performance damages stated in the (Sub)Contract Data.*

The operation of this clause relates to a matter whereby;

- It constitutes a Defect (see 11.2 (6)),
- The Defect is formally notified by the Supervisor (see 43.2, 11.2 (7)),
- The Defect is included in a Defects Certificate (see 11.2 (7), 44.3),
- It specifically relates to a stated 'low performance' level,
- The 'low' performance level can be 'shown' or demonstrated.

ECC & ECS – (Sub)Contract Data



The associated performance level is to be defined along with the corresponding amount of low performance damages, as shown below;

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

amount		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"/>

The stated 'performance level' should be comprehensively and concisely defined, which may be more appropriately included as part of the Scope.

TSC & TSS – X17



This also comprises a single sub-clause as follows;

X17.1 - If a *Defect included in the Defects Certificate* part of the service does not meet the service level stated in the (subcontract) service level table shows low performance with respect to a performance level stated in the Contract Data, the (Sub)Contractor pays the amount of low performance service damages stated in the Contract Data (subcontract) service level table.

The operation of this clause relates to a matter whereby;

- It forms part of the service,
- The service level is stated in the (subcontract) service level table,
- The matter does not meet the service level stated,
- There is an objective, measurable criteria against which to assess the above.

TSC & TSS – (Sub)Contract Data



Although these forms of contract contain a Defects procedure, the operation of this option does not rely upon a matter being notified as a Defect.

The criteria to measure 'low performance' is set out in a 'service level table', which is found in (Sub)Contract Data as follows;

If Option X17 is used The (subcontract) service level table is

The service level table should contain all the information required to operate this procedure effectively.

Other associated information may be included as part of the Scope requirements, including testing and inspections.

SC – X17



This comprises a single sub-clause as follows;

X17.1 - If a Defect *included in the Defects Certificate which remains uncorrected at its defects date and* shows low performance with respect to a performance level stated in the Contract Data, the ~~Contractor~~ *Supplier* pays the amount of low performance damages stated in the Contract Data.

The operation of this clause relates to a matter whereby;

- It constitutes a Defect (see 11.2 (4)),
- There is no specific requirement to notify the Defect,
- It specifically relates to a stated 'low performance' level,
- The 'low' performance level can be 'shown' or demonstrated.

SC – Contract Data



The associated performance level is to be defined along with the corresponding amount of low performance damages, as shown below;

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

amount		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"/>

The stated 'performance level' should be comprehensively and concisely defined, which may be more appropriately included as part of the Scope.

Range of Incentives



All of the X17 procedures provide for a 'negative' incentive.

Other types of contract provide for an incentivisation mechanism which can include for both positive and negative incentives and corresponding payments.

Other NEC forms (FMC, FMS, DBOC, ALC) include a Performance Table which can include for different types of incentives and associated payment.

Where an NEC form 'only' has option X17, however, this can be accompanied by option X20 to provide a suitable 'range' of incentive measures.

Note: Where different 'types' of incentive payments are made, the calculation of VAT needs to be applied appropriately.



Things to Consider...

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What if a Defect doesn't precisely correlate with a performance level?

What if there is an act of prevention on the part of the Client?

How does option X15 and design liability as 'skill and care' relate to option X17 which provides for an 'absolute' requirement.

The testing procedure should be comprehensively set out in the Scope to determine whether a Defect actually exists.

What if the performance level criteria is changed by an instruction?

If low performance damages are to be 'deducted' then this suggests that an amount must be due for payment – X16?

Consider the application of VAT for 'types' of incentive payments.

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19

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20