

PRACTICE

Dealing with multiple currencies in NEC4 contracts using option X3



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KEY POINTS

- Construction contracts often include supply of resources from other countries, with payments made to suppliers in currencies other than the contract currency.
- NEC provides for payments in multiple currencies within option X3.
- Under option X3, NEC users need to ensure the contract facilitates use of the latest exchange rates and be aware that a specified person certifies payments.

The word ‘currency’ is often used interchangeably with ‘money’, although money itself represents just a small part of a monetary economy. Currency takes on different meanings depending upon the context, including providing a unit of measure for determining the price of a product, facilitating simpler transactions compared with bartering using other commodities, being used by a government to implement economic policy as it has centralised control with supply, and representing a measure of trust in the economic status of a country.

In recent years, other currencies have emerged in the form of cryptocurrencies, which are digital assets that operate as a medium of exchange. Records are stored in a database and cryptography is used to secure transaction information and to verify ownership. There are several thousand cryptocurrencies in existence, which all follow the same principles as other currencies except there is no centralised control. Popular cryptocurrencies include Bitcoin, Ethereum, Litecoin, Tether and Altcoin.

Currency exchange rates

All currencies have value in comparison to other currencies, determined by the ‘spot rate’ or ‘spot price’. This is the market rate determined by: demand on the open market (known as the floating exchange rate); whether a currency is pegged to another currency or commodity; economic conditions within the currency region; and government policies and actions. Unlike share prices, currency exchange rates are comparative and act in a linked relationship, with the correlation between them acting as a ‘pivot point’.

Items and activities

The first part of clause X3.1 states, ‘The Contractor is paid in currencies other than the *currency of the contract* for the items and activities listed in the Contract Data.’ Under the entry for option X3 in the contract data, the following information is stated in a tabular format: ‘items and activities’, ‘other currency’ and ‘total maximum payment in the currency’. This identifies what each of the items and activities relates to, what currency each of these will be paid in and what the maximum amount of payment will be in the other currency.

The second part of the clause X3.1 states, ‘The *exchange rates* are used to convert from the *currency of the contract* to other currencies.’ The term ‘*exchange rates*’ is identified in the contract data under the entry for option X3, which also identifies where these are published. A corresponding date is further stated. This is usually set close to the date for submission of tenders to facilitate pricing, whereby the supplier prices the listed items and activities using the exchange rates to convert these, as the prices in the contract are presented in the currency of the contract.

Other currency payments

The first part of clause X3.1 states, ‘Payments to the Contractor in currencies other than the

NEC option X3 on multiple currencies is an optional contract procedure that applies to the following NEC4 forms of contract: Engineering and Construction Contract (ECC), Engineering and Construction Subcontract (ECS), Professional Service Contract (PSC), Professional Service Subcontract (PSS), Term Service Contract (TSC), Term Service Subcontract (TSS), Facilities Management Contract (FMC), Facilities Management Subcontract (FMS), Supply Contract (SC) and Design Build and Operate Contract (DBOC). It applies only where the following main options are selected: option A (priced contract with activity schedule) (ECC, ECS, PSC, PSS, TSC, TSS, FMC and FMS) and option B (priced contract with bill of quantities) (ECC and ECS). Note that the

SC and DBOC do not have main options.

For NEC contracts where the payment is assessed using defined cost, the payment procedure includes a provision to convert amounts paid to the currency of the contract. This is provided at clause 50.7 for option C (target contract with activity schedule) and option D (target contract with bill of quantities), at clause 50.8 for option E (cost reimbursable contract) and option F (management contract), and at clause 50.5 for the Alliance Contract (ALC).

The guidance notes for the original ECC (commonly referred to as NEC2) stated that the procedure under option X3 (previously option K) was based upon that used by the World Bank for development funded projects. The World Bank procedure provided for payment in a maximum of three different currencies, as proposed by a bidder within a bid data sheet. However, the procedure under option X3 differs as it is led by the purchaser, who determines the amounts, currencies and what the procedure applies to.

For ease of reference, option X3 within the ECC contract is referred to in the following sections, although the options within the other contract forms are substantially the same except for the different parties and named roles, and the SC refers to ‘goods and services’ instead of ‘items and activities’.

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currency of the contract do not exceed the maximum amounts stated in the contract data.’ Note that the amount stated as the total maximum payment in the currency may also include an allowance for compensation events, depending on how compensation events are included within the pricing document. The maximum amount may also include payment for any additional quantities under an option B contract.

The second part of clause X3.1 states, ‘Any excess is paid in the *currency of the contract*.’ The value of any excess payment would be assessed using the rates and prices within either the activity schedule, bill of quantities or price list, whichever is applicable, with these documents priced in the currency of the contract.

Specified person

Under certain NEC4 forms there is a named role that performs particular contractual duties and responsibilities, including the project manager (ECC), service manager (PSC, TSC, FMC and DBOC) and supply manager (SC).

Where there is a specified person, a practical procedure will be necessary to determine how payments in another currency are assessed and made. This is because the specified person is required to certify the amount due and issue certificates to the

client without separating out any amounts that relate to option X3.

Conclusions and recommendations

The intention of option X3 is that the payer carries the risk of any movement after the date of the published exchange rates, although in practice this would only actually occur where the stated information expressly provides for a continued assessment calculation, similar to how option X1 on price adjustment for inflation operates with reference to a base date index and latest index.

Where it is determined that currency exchange calculations are made using the latest published exchange rates, this raises an issue as to when the actual calculation is made. For example, clause 51.2 (ECC) provides that a payment is made within three weeks of the assessment date, although during this period of time the identified publication could issue the latest exchange rates. The effect is that this could change the actual amount to be paid in other currencies, although the amount certified would remain the same as it would be stated in the currency of the contract.

Where option X1 and X3 both apply, consideration should be given to ensure no duplication occurs – although in practice this may be difficult to determine. ○