

NEC Secondary Option X19 Termination by either Party

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Disclaimer: the legal information given on the following slides does not constitute legal advice and is presented as the interpretation and opinion of the presenter on such matters.

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GVE Commercial Solutions Ltd are a commercial management consultancy providing quantity surveying and programming services. Our consultants specialise in the NEC forms of contract.

Our NEC capability has principally been acquired through practical application and experience within 'live' project environments assisting both contractors and subcontractors.

Our specialist NEC services include;

- Commercial and contract management of projects,
- Bespoke training,
- Project health check reviews,
- Contract reviews,
- Programme management,
- Dispute avoidance and/or resolution.

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What is Termination?

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Reminder

'The act of bringing something to an end'.

What actually 'comes to an end' is determined by what the termination relates to.

Termination of a contract

A contract can be terminated for various reasons, including;

- By agreement,
- By performance,
- Breach of contract,
- Frustration,
- Contract procedure.

Importantly, the remedy available to an 'innocent' party depends upon how the contract is terminated.

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Continuing obligations



When a contract is terminated it doesn't cease to exist.

The primary contract performance obligations are discharged at the date of termination.

Performance of 'secondary obligations' continues, including;

- Maintaining confidential information,
- Obligation to pay damages for losses,
- Dispute resolution.

In addition to 'secondary obligations' any actions expressly stated in a 'survival clause' also apply.

Certain 'associated' contracts may also continue, including bonds, guarantees and warranties.

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Practicalities



Has an event actually occurred which gives the right to terminate?

Where a right to terminate arises, it needs to be acted on within a reasonable period of time.

Where action is not taken then this may constitute an act of affirmation.

Once a notice to terminate is given, it cannot be withdrawn without the other party's consent.

Consider the requirements of the Corporate Insolvency and Governance Act 2020 when considering 'insolvency' as a right.

Always take legal advice to confirm your course of action.

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Contract Procedure



These avoid uncertainty by providing for what grounds give rise to a right to terminate.

They do not have to specifically relate to common law rights.

This may also set out what procedures are required to be complied with in order to 'correctly' terminate the contract.

They also provide for what happens following termination and how the amount payable between the parties is calculated.

Terminating as a contractual right can preclude a common law claim for 'loss of bargain'.



X19 – Termination by either Party

NEC Suite



Secondary option X19 can be found in the following NEC forms of contract;

- Term Services Contract (TSC),
- Term Services Subcontract (TSS),
- Facilities Management Contract (FMC),
- Facilities Management Subcontract (FMS).

Note: Secondary option X19 is not used with option X11, which also applies to the above NEC forms.

Clause X19.1 - TSC



'After the minimum period of service, a Party may terminate the Contractor's obligations to Provide the Service for a reason not identified in the Termination Table. ...'

The only difference between the forms is the terminology in relation to the 'provider'.

The '*minimum period of (subcontract) service*' refers to an entry in (Sub)Contract Data, as follows;

The *minimum period of (subcontract) service* is years after the *(subcontract) starting date*

As these forms of contract are intended for services or maintenance works, they may be established to operate for a number of years.

X19 gives the right to terminate for an event that does not provide a contractual right under core clause 9.

Clause X19.1 - TSC



' ... If a party wishes to do so they notify the *Service Manager* and the other Party ... '

Note that there is no 'specified person' role under the TSS and FMS forms with the notification being made directly to the Contractor.

This is the same procedure as that stated at sub-clause 90.1.

A reminder that a notification is required to be communicated separately from other communications (sub-clause 13.7).

Clause X19.1 - TSC



' ... The *Service Manager* issues a termination certificate at the end of the *notice period* following the notification.'

This action is undertaken by the Contractor under the TSS and FMS forms.

The '*notice period*' refers to an entry in (Sub)Contract Data, as follows;

The *notice period* is

Sub-clause 90.1 refers to the '*notice period*' where required by 'these *conditions of (sub)contract*'.

This is a change from NEC3 to NEC4 which clarifies the notice requirements under sub-clauses 91.2 and 91.3, as well as X19.

Clause X19.2 - TSC



'If a Party terminates after the *minimum period of service* for a reason not identified in the Termination Table the termination procedures followed are P1 and P4 and the amount due on termination is A1.'

The payment of A1 is consistent between the forms.

The procedures of P1 and P4 are consistent between the forms.

The payment amount due recognises that this is a 'for convenience' reason and not due to a 'failure' on the part of any Party.

Although the 'higher party' may terminate for convenience, the payment amount due differs from that under Secondary Option X11.

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NEC3 to NEC4



The TSS, FMC and FMS forms were not published under NEC3.

Under NEC3 Option X19 applied only to the TSC form and related to a Task Order, the requirements for which were incorporated into the Core Clauses under NEC4.

Under NEC3 TSC, sub-clause 90.2 gave the Employer the right to terminate 'for any reason' although this right did not extend to the Contractor.

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Things to Consider...



Termination as a common law right or via the contract procedure?

Have you complied with the required procedures?

Remember that the contract remains in force until any termination certificate is given.

Practical steps to 'secure' the Service Areas.

Provision of 'information and other things'.

The payment amount due under X19 does not include A2 and A4, which would apply under X11.

Use of both X11 and X19, by including a cut-off point under X11 as 'before the *minimum period of (subcontract) service*'.

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