

NEC Secondary Option X15

The (Sub)Contractor's / Service Provider's Design

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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.

1

About Us


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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.

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2



Design

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What is a design?

A 'design' may be defined as;

'A proposal or plan for the creation of an object, system, activity or process'

Note: Design can relate to both an **object** and a **system**.

'Design' may also be a reference to;

'The process by which the end product of a design is produced'

The Copyright, Designs and Patents Act 1988 combines both the noun and verb in its definition;

' ... the design of the shape or configuration ... of the whole or part of an article ... '

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Who is a designer?



The Construction (Design and Management) Regulations 2015 defines this as;

*'... any person ... who in the course or furtherance of a business –
(a) prepares or modifies a design; or
(b) arranges for, or instructs, any person under their control to do so.'*

On a construction project, who might be a designer?

- Architect,
- Consulting engineer,
- Site supervisor,
- Quantity Surveyor,
- Anyone who specifies or modifies a design as part of their work.

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5

Obligation to design



Under the NEC4 ECC and ECS forms, where this requirement applies it is stated in the Scope, as detailed at sub-clause 21.

Under the NEC4 FMC and FMS forms this requirement is contained within secondary option X15, as follows;

Obligation	ECC/ECS	FMC/FMS
Design the parts which the Scope states	21.1	X15.1
Submit particulars of design for acceptance	21.2	X15.2
May submit design for acceptance in parts	21.3	X15.3

Under the NEC4 FMC and FMS contract forms a corresponding definition of 'Defect' (Service Failure) is also provided at X15.4.

The FMC and FMS forms further provide at X15.5 for Client/Contractor use of the design, reflecting the requirements at sub-clause 22.1 of the ECC and ECS.

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6



Liability for Design

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7



Principles and Sources

Design liability may arise in different ways, as follows;

Contract Terms

Requirements in the contract may expressly provide for the level of design liability.

Statutorily Implied Terms

Where the contract does not expressly provide for the level of liability, statute implies liability terms.

Tort of Negligence

Where a 'duty of care' exists then this gives rise to liability, where losses arise from a breach of this duty.

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8

Reasonable Skill and Care



This is a requirement which creates a specific **performance obligation** equivalent to the standard of care in negligence.

It is a duty to exercise the level of skill and care expected of another reasonably competent member of the profession.

Bolam v Friern Hospital Management Committee (1957) 1 WLR 583

There is also a statutory requirement under the Sale of Goods and Services Act 1982, s13;

'In a relevant contract for the supply of service ... there is an implied term that the supplier will ... (use) ... reasonable care and skill.'

This obligation effectively creates a warranty.

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9

Fit for Purpose



Where a contractor is engaged on a 'build only' basis the obligation is usually to provide the works in a good and workmanlike manner.

Where a contractor provides both the design and 'supply' of the (constructed) product, however, this 'combined' service gives rise to a fitness for purpose obligation.

This principle is well established in case law.

There is also a statutory requirement under the Sale of Goods Act 1979, s14, as amended, that the quality of supplied goods shall be of 'satisfactory quality' which includes;

'... fitness for all the purposes for which goods of the kind in question are commonly supplied.'

This obligation effectively creates a guarantee.

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10

'Hybrid' Liability



It is common for standard wording to be amended, which in the case of 'reasonable skill and care' may be;

'... a competent consultant experienced with projects of a similar size, scope, complexity, value and intended purpose ...'

This principle may also apply to a 'build only' contract and the extension of a 'good and workmanlike manner' to comply with a performance specification.

Even though there appears to be a specific 'reasonable skill and care' obligation, 'fit for purpose' may also be buried in the documentation;

MT Hojgaard v EON Climate & Renewables UK Robin Rigg East Ltd (2017) UKSC 59
SSE Generation Ltd v Hochtief Solutions AG (2018) CSIH 26

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11

Liability Duration



Under a contract, the duration of a liability is predominantly determined by the Limitation Act 1980 as follows;

- 'Under hand' or 'Simple' contract – 6 years from breach,
- 'Under seal' or 'Deed' contract – 12 years from breach,

The limitation period usually commences at Completion for construction contracts.

For certain actions in tort the duration of a liability is 6 years.

The limitation in tort commences from the date the breach occurs or the tort is committed.

Note that these timescales may be extended by relevant statute or amended within contract terms.

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12

PI Insurance



Whatever the level of design liability, Professional Indemnity (PI) insurance is a common requirement.

PI insurance covers the cost of compensating for loss or damage caused by breach of liability.

PI cover for a 'fitness for purpose' liability is almost non-existent.

Because of recent events there is a 'hardening' of the PI market.

A recent Construction Leadership Council survey, published in March 2021, found that market restrictions were having an increasing impact upon businesses.

Note that PI insurance is commonly offered on a 'claims made' basis which means that an insurer will only provide cover for claims that are brought during the term of a policy.

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13



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14

NEC Suite



Secondary option X15 can be found in the following NEC forms of contract:

- Engineering and Construction Contract (ECC),
- Engineering and Construction Subcontract (ECS),
- Facilities Management Contract (FMC),
- Facilities Management Subcontract (FMS).

There are variances between the forms due to the different names of the respective parties and roles.

The FMC and FMS forms also include obligations in relation to the design procedure, as previously stated.

ECC form – X15



This comprises 5 sub-clauses as follows;

X15.1 - *The Contractor is not liable for a Defect which arose from its design unless it failed to carry out that design using the skill and care normally used by professionals designing works similar to the works.*

Note: This is sub-clause X15.6 under the FMC and FMS forms.

Regardless of the prescribed design specification, any 'failures' would be measured using this standard.

Under NEC3 the burden of proof was with the Contractor to demonstrate the requisite standard of care, but this was reversed under NEC4.

Note that the definition of 'Defect' includes compliance with;

- the Scope,
- applicable law,
- accepted design.

ECC form – X15



X15.2 - *If the Contractor corrects a Defect for which he is not liable under this contract it is a compensation event.*

The Contractor is obliged to correct a Defect under sub-clause 44.1.

Where the Defect is due to the Contractor's design, compliance with Option X15 means that the correction is a compensation event.

X15.3 - *The Contractor may use the material provided by it under the contract for other work unless*

- *the ownership of the material has been given to the Client or*
- *it is stated otherwise in the Scope.*

This requirement replicates sub-clause 23.4 under the NEC Alliance contract.

Note: this provision does not 'override' any issues relating to IPR.

This requirement was not included in NEC3.

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17

ECC form – X15



X15.4 - *The Contractor retains copies of drawings, specifications, reports and other documents which record the Contractor's design for the period for retention. The copies are retained in the form stated in the Scope.*

The *period for retention* following Completion of the whole of the works or earlier termination is

This requirement replicates that at sub-clause 13.9 under the NEC Professional Services Contract (PSC).

There is no specified role for the Project Manager, unless stated otherwise in the Scope requirements.

The cost of 'retention' needs to be considered which depends upon which main option is selected under the contract form.

This requirement was not included in NEC3.

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18

ECC form – X15



X15.5 - The Contractor provides insurance for claims made against it arising out of its failure to use the skill and care normally used by professionals designing works similar to the works. The minimum amount of this insurance is as stated in the Contract Data. This insurance provides cover from the starting date until the end of the period stated in the Contract Data.

The minimum amount of insurance cover for claims made against the Contractor arising out of its failure to use the skill and care normally used by professionals designing works similar to the works is, in respect of each claim

The period following Completion of the whole of the works or earlier termination for which the Contractor maintains insurance for claims made against it arising out of its failure to use the skill and care is

This requirement was not included in NEC3.



Things to Consider ...

Things to Consider ...



Do you actually have any design responsibility?
 If so, has secondary option X15 been included in the contract?
 Be aware of a 'disguised' fit for purpose obligation.
 X15 applies to Defects arising from the design, not to the design itself.
 The limitation of liability applies only to Defects.
 Ensure any associated contracts, such as collateral warranties, do not exceed the intended liability.
 A contractual remedy doesn't preclude an action in tort.
 Consider including a clause which specifically excludes a 'fit for purpose' obligation.

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21

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22