

# NEC Secondary Option X11 Termination by the Client (etc)

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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.

## About Us




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.

For further information please see our website: [www.gvecs.co.uk](http://www.gvecs.co.uk) and follow us on LinkedIn 

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## What is Termination?

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### Definition

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'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'.



## **X11 – Termination by the Client / Contractor / Purchaser**

## NEC Suite



Secondary option X11 can be found in the following NEC forms of contract;

- Engineering and Construction Contract (ECC),
- Engineering and Construction Subcontract (ECS)
- Professional Services Contract (PSC),
- Professional Services Subcontract (PSS),
- Term Services Contract (TSC),
- Term Services Subcontract (TSS),
- Facilities Management Contract (FMC),
- Facilities Management Subcontract (FMS),
- Supply Contract (SC).

**Note:** The short form NEC contracts provide for the 'higher' party to terminate for 'any other reason' at core clause 9.

## Clause X11.1 ECC



'The *Client* may terminate the *Contractor's* obligation to Provide the Works for a reason not identified in the Termination Table by notifying the *Project Manager* and the *Contractor*.' – X11.1

This contractual right existed within core clause 9 under NEC3 but is now only an 'optional' right and may be initiated for a reason not identified in the Termination Table.

Differences between the main forms relate to the Parties or named roles and the specific defined terms of a particular NEC form.

Inconsistencies within the drafting;

- notification under PSS and TSS (Contractor),
- the word 'not' is repeated under the PSC and PSS forms.

## Clause X11.2 ECC



'If the *Client* terminates for a reason not identified in the Termination Table, the termination procedures followed are P1 and P2 and the amounts due on termination are A1, A2 and A4.'

The amounts due recognise that this is 'for convenience' and not due to a 'failure' as the reason for termination.

The payment on termination is consistent between the various forms.

The procedures on termination are not consistent in that the obligation in relation to 'assignment' only applies to the ECC and ECS forms.

## NEC3 to NEC4



Under NEC3 Option X11 only applied to the PSC form, providing as follows;

X11.1 The *Employer* may terminate the *Consultant's* obligation to Provide the Services for a reason not stated in this contract by notifying the *Consultant*.

X11.2 If the *Employer* terminates for a reason not stated in this contract, an additional amount is due on termination which is 5% of the difference between

- the forecast of the final total of the Prices in the absence of termination and
- the total of the other amounts and costs included in the amount due on termination.

## Things to Consider...



Do you have the right to terminate?

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

Have you complied with the required procedures?

Remember that a contract remains in force until any termination notification is properly given.

What happens when both parties are in breach?

Practical steps to 'secure' a Site or place of work.

Terminating a contract and awarding the work to someone else;

- Abbey Developments Ltd v PP Brickwork Ltd [2003] EWHC 1987 (TCC),
- Van Oord UK Ltd v Dragados UK Ltd [2021] CSIH 50

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