

NEC Secondary Option X29

Reducing the impact of the works on climate change

Presented by
Andrew Wooldridge-Irving



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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.

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Climate Change

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Background

At the 1992 United Nations Convention, 'climate change' was defined as;

'A change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.'

'Global warming' was a more common reference to this phenomenon at the time, but 'climate change' increased in popularity in the early 2000's.

The cause of climate change is generally acknowledged to be an increase in the average surface temperature of the earth.

This occurs as 'greenhouse gases' accumulate in the atmosphere which are transparent to sunlight and allow this to heat up the Earth's surface.

When this heat is emitted as infrared radiation the 'greenhouse gases' absorb it, trapping the heat and prevent it escaping.

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Greenhouse Gases



These have been identified as follows;

- Carbon dioxide,
- Methane,
- Nitrous oxide,
- Hydrofluorocarbons,
- Perfluorocarbons,
- Sulphur hexafluoride.

The greenhouse effect is mostly due to carbon dioxide and methane from;

- Burning fossil fuels for energy,
- Agriculture,
- Industrial production,
- Deforestation,
- Decay of organic waste.

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Timeline of events



1820 – Joseph Fourier proposed the greenhouse effect to explain why Earth's temperature was higher than sun's energy alone could explain.

1856 – Eunice Newton Foote demonstrated that the warming effect of the sun is greater for air with water vapour.

1859 – John Tyndall established that nitrogen and oxygen are transparent to radiated heat but that water vapour, methane and carbon dioxide are not.

1950s – Gilbert Plass created a computer model that predicted that increasing carbon dioxide would cause warming.

1988 – Intergovernmental Panel on climate change set up.

1992 – United Nations convention on climate change.

1997 – Kyoto Protocol.

2015 – Paris Agreement.

2021 – UN Climate Change Conference – COP26.

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UK Statutory Regulation



The Climate Change Act 2008 (CCA 2008) received Royal Assent on 26 November 2008 and provided for a number of key actions, including;

- to set a target for 2050 for the reduction of targeted greenhouse gas emissions,
- to provide for a system of carbon budgeting,
- to establish a Committee on Climate Change,
- to establish trading schemes to limit, reduce or remove greenhouse gas emissions,
- to provide for adaptation to climate change,
- to make schemes to incentivise producing less waste and increase recycling,
- to make provision about the collection of household waste,
- to charge for single use carrier bags,
- to amend the Energy Act 2004 regarding renewable transport fuel,
- to make provision about carbon emissions reduction targets,
- to make provision about climate change.

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NEC Suite

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NEC Suite



Secondary option X29 can be found in the following forms of contract;

- Engineering and Construction Contract (ECC).

Secondary option X29 was published in March 2022 in consultative draft form only.



X29 – Reducing the impact of the works on climate change

X29.1 – Additional Terms



Several defined and identified terms are introduced as follows;

Climate Change Requirements

These are the climate change requirements stated in the Scope.

Climate Change Execution Plan

This is the *climate change execution plan* or the latest Climate Change Execution Plan accepted by the *Project Manager*.

Climate Change Partners

These are the people or organisations who contribute to the achievement of the Climate Change Requirements.

Performance Table

This is the *performance table* unless later changed. It states the targets to be achieved and the adjustment to payment for associated performance.

X29.2 – Collaboration



The *Contractor* collaborates with other Climate Change Partners as stated in the Climate Change Requirements.

The requirement to collaborate mirrors the requirement at X10.2 in relation to Information Modelling.

This differs from the obligation to 'act in a spirit of mutual trust and co-operation' which operates within the boundary of the contractual relationship with the other Party and named roles.

The required 'amount' of collaboration is essentially determined by the Climate Change Requirements.

To facilitate this requirement, the NEC guide states;

'... relevant versions of the secondary Option (X29) will be developed for each of the main and subcontracts in the NEC4 suite.'

X29.3 – Early warning



The *Contractor* and the *Project Manager* give an early warning by notifying the other as soon as either becomes aware of any matter which could adversely affect the achievement of the Climate Change Requirements.

This requirement supplements the stated bulleted 'reasons' listed at sub-clause 15.1.

Unlike the other bulleted reasons, however, 'adversely affect' is a far more subjective view of the effect of a matter.

X29.4 – Plan



This details the procedure for the Climate Change Execution Plan (CCEP), which is similar to the programme at sub-clauses 31/32.

A CCEP may be identified in Contract Data or submitted for acceptance within the period of time stated.

There is a formal acceptance procedure at X29.4 (2), including 'deemed acceptance' where the *Project Manager* fails to respond.

Clause X29.4 (3) details when a revised CCEP is to be submitted for acceptance, noting that there is no 'regular' update.

Alterations to the CCEP are submitted with a compensation event quotation, although it is not clear whether a revised CCEP is required to be submitted for acceptance where the alterations are accepted as part of a quotation.

The *Project Manager* may instruct correction of a compliance failure with the CCEP, which is not a compensation event.

X29.5 – Disclosure



The Climate Change Requirements state

- information that the Parties may use, disclose and publicise and
- the purposes for which it may be used, disclosed and publicised

This requirement is in addition to the Disclosure requirements within the core conditions at sub-clause 29.

This requirement extends beyond 'disclose' and 'publicise' and includes 'use' which may also include 'rights of use' for Intellectual Property.

As the Climate Change Requirements are stated in the Scope, this may be changed by an instruction given by the *Project Manager*.

X29.6 – Quotations



Quotations for acceleration and accepting Defects include any proposed changes to the Performance Table.

If the quotation is accepted the *Project Manager* changes the Performance Table accordingly.

This expressly considers quotations for;

- an acceleration proposal (sub-clause 36.2),
- accepting a Defect (sub-clause 45.2).

This is based upon the assumption that the Performance Table may include an incentivisation in relation to Completion.

This does not include, however, any proposal under X21 – Whole life cost, which could relate to an earlier Completion Date.

X29.7/8/9/10 – CE's



These sub-clauses all relate to the compensation event procedure at core clause 6 and supplement this with any affect to the Performance Table, in relation to;

- Notification,
- Quotations,
- Assessment,
- Implementation.

This provides for proposed changes to the Performance Table to be included in a quotation assessment and for the Performance Table to be changed where a corresponding compensation event is implemented.

X29.11 (1) Proposal



'The Contractor may propose to the Project Manager that the Scope is changed in order (to) reduce the impact of the creation, operation, maintenance or demolition of the works on matters which may affect climate change.'

Any such proposal must demonstrate that the impact would be reduced.

A change to the Scope must be the direct cause of how any proposed impact is given effect.

'The Project Manager consults with the Client and the Contractor about the change.'

This requirement is supplemental to the comparable procedure under X21.1.

X29.11 (2)



'If the *Project Manager* is prepared to consider the change, the *Contractor* submits a quotation which comprises'

- a detailed description,
- an analysis of the reduction in the impact of the creation, operation, maintenance (or demolition) of the *works* on matters which may affect climate change,
- an analysis of the resulting risks to the *Client*,
- any changes to the Prices and Performance Table,
- a revised programme showing any changes to the Completion Date and Key Dates.

It is not clear how 'prepared to consider' is formally communicated.

The quotation provisions are quite extensive and require sufficient information to allow an 'informed' decision to be made.

The quotation is not obliged to be prepared in accordance with any specified requirements, as is the case for a compensation event.

X29.11 (3)



'The *Project Manager* consults with the *Contractor* about a quotation. The *Project Manager* replies within the *period for reply*. The reply is acceptance of the quotation or the reasons for not accepting it. The *Project Manager* may give any reason for not accepting the quotation.'

Any 'consultation' would need to be undertaken promptly to ensure complying with the required timescales.

The 'period for reply' may be extended but only by agreement (cl 13.5).

It may be useful for the *Contractor* to state a 'long stop' date by which a decision is required.

Any 'non acceptance' is essentially a stated reason(s) for not accepting.

What if the *Project Manager* simply doesn't respond?

X29.11 (4)

'The Project Manager does not change the Scope as proposed by the Contractor unless the Contractor's quotation has been accepted.'

This prevents the *Project Manager* from 'adopting' any good ideas without the *Contractor* assuming any benefit from the proposal.

Does this mean that the *Project Manager* can change the Scope for 'part' of a submitted proposal?

X29.11 (5)

'When a quotation to reduce the impact of the asset on climate change is accepted the Project Manager changes the Scope, the Prices, the Performance Table, the Completion Date and the Key Dates accordingly and accepts the revised programme. The change to the Scope is not a compensation event.'

Note that the Prices, the Performance Table, the Completion Date and Key Dates can be *'changed in accordance with the contract'*.

The Scope, however, can only be changed by *'an instruction given in accordance with the contract'*, which is given under clause 14.3.

Note that it states that the change to the Scope is not a compensation event, although this does not align with clause 60.1 (1).

How does the 'revised programme' relate to the Accepted Programme?




Things to Consider...

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Things to Consider...

Clarity of the procedural requirements and interactions.

Identify an appropriate methodology as to how any climate change impact reduction assessments are made.

Possible amendments to the wording to provide 'clarity and simplicity' of any Scope changes which are 'not a compensation event'.

Tidy up the textual inconsistencies.

How does a proposal operate throughout the supply chain?

Consideration to operate X29 in conjunction with other options, including X10, X12, X21.

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