

NEC Secondary Option X25 Supplier Warranties

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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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Reminder

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Contract Assurance

Many construction projects have a potentially complex structure of contract relationships and multiple participants, with inherent commercial risks.

Specific contract tools are frequently used to safeguard against these risks by providing some form of assurance, including the following;

- Bonds,
- Guarantees,
- Warranties,
- Indemnities,
- Payment security,
- Third party rights,
- Direct agreements,
- Insurances.

Further reminder that these are specialised subjects.


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Supplier Warranties

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Warranty

Definition

'A statement that specific facts or conditions are true.'

Where a party to a contract relies upon such an assurance, then they have the right to claim damages if the assurance is not true.

Any such claim would relate to a 'breach of contract' and is for the loss and damage that is foreseeable as a result of the breach.

A damages calculation would be made to put the claimant in the position they would have been in had the warranty been true.

Any indirect or consequential loss, however, may prove difficult to claim.

With a warranty, the onus is on the purchaser to prove both breach of contract and quantifiable loss.

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Indemnity



Definition

'A promise to 'make good' in respect of a specified loss'.

An indemnity provides greater certainty and protects one party from suffering financial loss in relation to defined liabilities.

In principle a warranty provides protection against the 'unknown' and an indemnity allocates risk in respect of a known liability.

An indemnity is a primary obligation and does not depend on having to prove a 'fault'.

One of the main 'issues' with an indemnity is that the drafting should be clear and avoid any ambiguities;

- Wood v Capita Insurance Services Ltd (2017) UKSC 24

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Collateral Warranty



Definition

'A warranty between somebody who has an interest in a project (beneficiary) and a person or party who contributed to the project'.

If a beneficiary to a collateral warranty incurs losses it may be able to recover these via a contractual remedy rather than relying on tort and avoiding the 'privity of contract' rule.

A party to a collateral warranty will depend on the interests of a beneficiary and the contractual arrangements of a project, which may typically include;

- Project funder to Contractor / Designer / Subcontractor / Supplier,
- Client to Subcontractor / Supplier,
- Facility operator to Contractor / Designer / Subcontractor / Supplier.

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Statutory Considerations

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Consumer Rights Act 2015

This provides rights for consumers and protection of their interests by imposing certain warranties within an agreement between a trader and a consumer.

Despite the above Act, warranties remain in common use for the sale of goods and services.

Where a consumer warranty is extended this is effectively a guarantee.

For business to business transactions some of the implied terms may be restricted or excluded.

Any such 'limitations', however, must comply with the requirements of the Unfair Contract Terms Act (UCTA) 1977.

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UCTA 1977



This provides for the following issues;

Contract – s3

Requirements where the contract is on one party's written standard terms, which includes the 'reasonableness' test.

The 'reasonableness' test – s11

This refers to the 'reasonableness' which was in the contemplation of the parties when the contract was made, with guidelines provided at Schedule 2 of the Act.

Note that the restrictions under this legislation do not apply to international supply contracts.



NEC Suite

NEC Suite



Secondary option X25 can be found in the following NEC forms of contract;

- Supply Contract (SC).

Option X25 did not appear in the NEC3 contracts.

Under the NEC3 Supply Contract, the intention, as stated in the NEC guidance notes, is that a 'warranty' is effectively provided by the period of time between Delivery and the *defects date*.

Under NEC3 if there are 'multiple' delivery date(s), (sub-clause 12.5), each of these effectively has a separate 'warranty period'.



Option X25

X25 – Contract Data



'The Supplier gives the Purchaser warranties for the amounts stated in the Contract Data ...'

Contract Data Part 1 states the following;

The warranties the *Supplier* gives the *Purchaser* are

warranty	amount
<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>

Each warranty must be referenced, with a corresponding 'amount' stated against each required warranty.

The 'amount' column suggests that this relates to a 'liquidated' compensation issue and represents an indemnity rather than a warranty.

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X25 - Scope



'... and in the form set out in the Scope. ...'

The Scope sets out the details of the 'warranty', which could actually be an indemnity, guarantee or insurance.

As the form is 'set out in the Scope', can the Supply Manager change the requirement by instructing a change to the Scope at sub-clause 14.3?

Where a 'warranty' is changed to an 'indemnity', for example, how would a corresponding compensation event be assessed?

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X25 - Delivery



'... A warranty is given to the Purchaser before Delivery.'

This states that a warranty must be given before Delivery which is a defined term and is the equivalent of 'Completion' under an ECC form.

Clause 11.2 (6) defines Delivery as when the Supplier has;

- done all the work stated in the Scope,
- corrected Defects which prevent use of the goods,
- provided a required warranty.

The consequence when warranties are not provided before Delivery is that where option X7 is selected then delay damages would accrue.

Note that Delivery and Delivery Date may apply to multiple supplies.



Things to Consider...

Things to Consider...



What form of legal document is actually required?

How does the compensatory 'amount' stated apply in conjunction with option X7?

What happens if an instruction is given to change the form in the Scope?

Ensure that where there are multiple *delivery date(s)* any required warranties align with these.

How does a 'warranty' align with the defects procedure under core clause 4?

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