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○ the engineering
○ and construction
○ contract

ADDENDUM Y(UK)2

To take into account

**THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION
ACT 1996 (PART II)**

For use with

**NEC ENGINEERING AND CONSTRUCTION CONTRACT
OPTIONS A-F**

NEC Engineering and Construction Contract

ADDENDUM

to take into account

THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996 (PART II)

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The Institution of Civil Engineers has approved amendments produced by its NEC Panel to cover the introduction of the Housing Grants, Construction and Regeneration Act 1996 (Part II) for use with the NEC Engineering and Construction Contract in England, Wales, Scotland and Northern Ireland.

NOTES FOR GUIDANCE

Option Y(UK)2: The Housing Grants, Construction and Regeneration Act 1996

This option is prepared solely for use on contracts which are subject to the Housing Grants, Construction and Regeneration Act 1996 ("the Act"). The option should not be used in other circumstances.

If the contract is subject to the Act, this option is incorporated into the contract by making the following statement in the Contract Data:-

1. General The *conditions of contract* are the core clauses for Options and Y(UK)2 (published by the ICE April 1998) of the second edition (November 1995) of the NEC Engineering and Construction Contract.

The two principles contained in this Act, which affect the NEC family of contracts, are those related to payment and adjudication. The definition of a "construction contract" in this Act is wide ranging and can be found in Section 104. It covers not only an agreement to carry out "construction operations" but also an agreement to provide professional services for a "construction operation".

The definition of a "construction operation" can be found in Section 105(1) of the Act. The operations and contracts that are not subject to the Act are defined in Sections 105(2) and 106. In the United Kingdom (England, Wales, Scotland and Northern Ireland), the Parties to a contract should consider carefully whether the operation is subject to the Act before proceeding. If the operation or contract is subject to the Act, it is intended that, by incorporating Option Y(UK)2 in to the contract, the provisions of the statutory Scheme for Construction Contracts do not become implied terms of the contract (S. 114(4)). Parties must be aware that it is not possible to contract out of a statutory requirement.

Clauses Y2.1 to 2.4 have been drafted with the intention of complying with Sections 109 to 113 and Clauses Y2.5 and 2.6 have been drafted with the intention of complying with Section 108 of the Act.

Y2.1 In the NEC family of contracts periods of time are usually measured in weeks thus avoiding complications of rest days and statutory holidays in different countries in which these contracts are used. The Act, however, defines most periods as a number of days. S.116(3) of the Act states that Christmas Day, Good Friday and bank holidays are excluded from any period specified in the Act. Where the time period associated with the Act is referred to, that period has been stated in days in Option Y(UK)2.

Y2.3 These additional clauses in Y(UK)2 are drafted to accommodate Sections 109 to 111 of the Act. The *Employer* is now required to give notice to the *Contractor* of the payment to be made, and the basis on which the calculation is made. This is achieved by stating that the *Project Manager* specifically carries out this function on behalf of the *Employer*. The *Employer's* certificates may need to be changed to cover this point.

The Act uses very specific language about what and when “payments become due”, when particular notices are issued and defining the “final date for payment”. The latter applies to each certified payment and not just to the final payment “after Completion of the whole of the *works*”. Provision has been made for a different payment period to be stated in the Contract Data.

Clause 56.1 sets out time periods and circumstances to meet the requirements of S. 110 (1) and 110(2) of the Act. S. 110(1)(a) requires an “adequate mechanism for determining what payments become due under the contract and when”. This mechanism is provided by the *Project Manager's* certificate which is required to be issued by the date due which is 7 days after the assessment date. S. 110(1)(b) requires that there should be “a final date for payment in relation to any sum which becomes due”. This is 28 days, or the period stated in the Contract Data, after the assessment date. The significance of the final date for payment is that if the *Employer* intends to withhold part of the amount due, he must give notice not later than a “prescribed period” ie 7 days before the final date for payment as indicated in S. 111 of the Act.

Y2.4 Under S.112 of the Act, where a sum due is not paid by the final date for payment and no effective notice to withhold payment has been given, the *Contractor* has a right to suspend performance. This right can only be exercised if the *Contractor* gives 7 days' notice of his intention. The right to suspend ceases when payment is made in full. Under S. 112(4) of the Act, the Completion Date is, in effect, delayed by the period of suspension. The effect of the additional clause 60.7 is to treat such suspension as a compensation event. Thus, in addition to the extra time, the *Contractor* is entitled to additional costs resulting from the suspension.

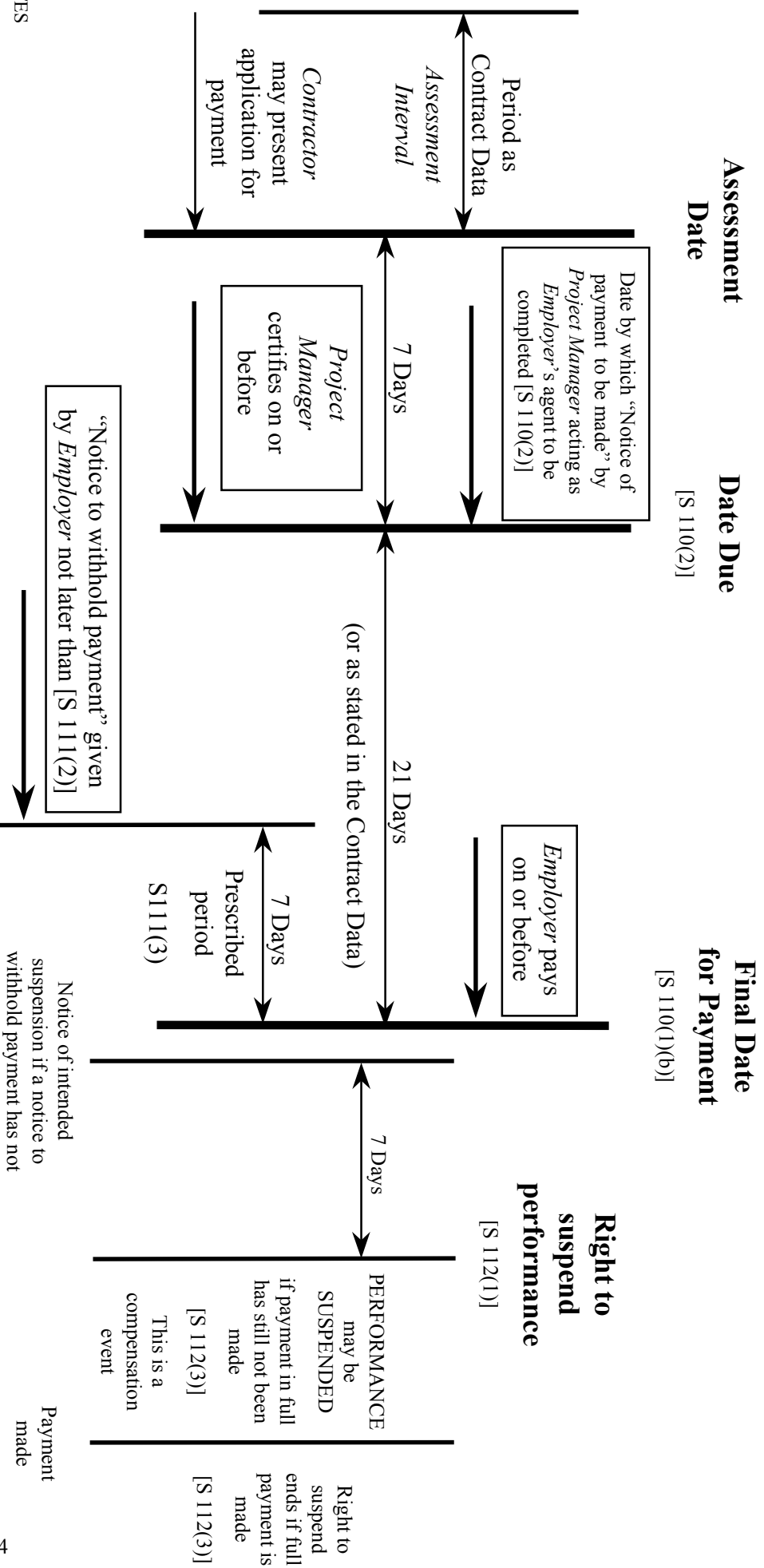
Y2.5 Like nearly all other forms of contract before the 1996 Act, the provisions in the NEC family of contracts for settling disputes do not comply with the Act. The purpose of Section 9 has always been to overcome where possible the causes of disputes and, in those cases where disputes may still arise, to facilitate their clear definition and early resolution. Hence this amendment replaces core clause 90 with new clauses which should comply with the Act. The intention of the new clauses is to retain the principles of the adjudication provisions in the ECC in managing disputes, and at the same time comply with the Act so that the fall-back “Scheme for Construction Contracts” does not apply.

The new clauses require a meeting to be held to discuss any matter of dissatisfaction, with a view to resolving the matter. If this procedure fails to resolve the matter, a dispute arises after which either Party can give notice of his intention to refer it to adjudication. The remaining procedure in the clause is similar to that in core clause 90.

Y2.6 Y(UK)2 clause 90 supersedes core clause 91.1 which is now deleted. The new clause 91.1 extends the procedure for a meeting to resolve a matter of dissatisfaction, to include a subcontractor, where the relevant matter is one which involves the subcontractor.

Construction Act - Payment Periods - April 1998

Engineering and Construction Contract



NOTES

1. Durations stated in days include weekends but exclude Christmas Day, Good Friday and bank holidays. [S 116]

ADDENDUM

Option Y(UK)2: The Housing Grants, Construction and Regeneration Act 1996

Y2.1 In this Option

- the Act means The Housing Grants, Construction and Regeneration Act 1996 and
- periods of time stated in days are reckoned in accordance with Section 116 of the Act.

Y2.2 **Clause 51 is amended as follows:-**

Clause 51.1 the first sentence is deleted and replaced with the following sentence:-

“The *Project Manager* certifies a payment on or before the date on which a payment becomes due.”

Clause 51.2 the first sentence is deleted and replaced with the following sentence:-

“Each certified payment is made on or before the final date for payment.”

Y2.3 **The following clauses are added**

Dates for Payment 56

56.1 For the purpose of Sections 109 and 110 of the Act,

- the *Project Manager*'s certificate is the notice of payment from the *Employer* to the *Contractor* specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated,
- the date on which a payment becomes due is seven days after the assessment date and
- the final date for payment is
 - twenty one days or
 - if a different period for payment is stated in the Contract Data, the period stated

after the date on which the payment becomes due.

56.2 If the *Employer* intends to withhold payment after the final date for payment of a sum due under this contract, he notifies the *Contractor* not later than seven days (the prescribed period) before the final date for payment by specifying

- the amount proposed to be withheld and the ground

- for withholding payment or
- if there is more than one ground, each ground and the amount attributable to it.

Y2.4 **The following is added to clause 60**

- 60.7 Suspension of performance is a compensation event if the *Contractor* exercises his right to suspend performance under the Act.

Y2.5 **Clause 90 is deleted and replaced by the following:**

Avoidance and settlement of disputes 90

- 90.1 The Parties and the *Project Manager* follow this procedure for the avoidance and settlement of disputes.

- 90.2 If the *Contractor* is dissatisfied with an action or a failure to take action by the *Project Manager*, he notifies his dissatisfaction to the *Project Manager* no later than

- four weeks after he became aware of the action or
- four weeks after he became aware that the action had not been taken.

Within two weeks of such notification of dissatisfaction, the *Contractor* and the *Project Manager* attend a meeting to discuss and seek to resolve the matter.

- 90.3 If either Party is dissatisfied with any other matter, he notifies his dissatisfaction to the *Project Manager* and to the other Party no later than four weeks after he became aware of the matter. Within two weeks of such notification of dissatisfaction, the Parties and the *Project Manager* attend a meeting to discuss and seek to resolve the matter.

- 90.4 The Parties agree that no matter shall be a dispute unless a notice of dissatisfaction has been given and the matter has not been resolved within four weeks. The word dispute (which includes a difference) has that meaning.

- 90.5 Either Party may give notice to the other Party at any time of his intention to refer a dispute to adjudication. The notifying Party refers the dispute to the *Adjudicator* within seven days of the notice.

- 90.6 The Party referring the dispute to the *Adjudicator* includes with his submission information to be considered by the *Adjudicator*. Any further information from a Party to be considered by the *Adjudicator* is provided within fourteen days of referral.

- 90.7 Unless and until the *Adjudicator* has given his decision on the dispute, the Parties and the *Project Manager* proceed as if the action, failure to take action or other matters were not disputed.

- 90.8 The *Adjudicator* acts impartially. The *Adjudicator* may take the initiative in ascertaining the facts and the law.

- 90.9 The *Adjudicator* reaches a decision within twenty eight days of referral or such longer period as is agreed by the Parties after the dispute has been referred. The *Adjudicator* may extend the period of twenty eight days by up to fourteen days with the consent of the notifying Party.
- 90.10 The *Adjudicator* provides his reasons to the Parties and to the *Project Manager* with his decision.
- 90.11 The decision of the *Adjudicator* is binding until the dispute is finally determined by the *tribunal* or by agreement.
- 90.12 The *Adjudicator* is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith and any employee or agent of the *Adjudicator* is similarly protected from liability.

Y2.6 **Clause 91 is amended as follows:-**

Side heading “**The adjudication**” is replaced with “**Combining procedures**”

Clause 91.1 is deleted and replaced by the following:-

- 91.1 If a matter causing dissatisfaction under or in connection with a subcontract is also a matter causing dissatisfaction under or in connection with this contract, the subcontractor may attend the meeting between the Parties and the *Project Manager* to discuss and seek to resolve the matter.

Clause 91.2 line 4 “settles” is replaced with “gives his decision on”

Y2.7 **Clause 92 is amended as follows:-**

Clause 92.1 line 1 “settles” is replaced with “gives his decision on”

Clause 92.2 line 6 “settle” is replaced with “decide on”

Clause 92.2 line 7 “had not been settled” is replaced with “a decision had not been given”

Y2.8 **Contract Data Part 1 - Optional statements**

The fifth optional statement is deleted and replaced by the following:-

“If the period for payment is not twenty one days

- The period within which payments are made is days”



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