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real value

NEC Global Reach

Use of NEC in legal jurisdictions other than English Law

Richard Patterson
Shy Jackson
July 2021

- **What are the most dangerous words in the English language?**
- **We always do it this way.**

Programme

- NEC core principles
- International use of NEC
- Drafting for legislative requirements
- Avoiding uncertainty and disputes
- Dispute avoidance and resolution
- How to implement NEC
- Questions

What key words would you set as guiding principles if drafting a new form of contract?

NEC's core principles



Flexibility



Clarity and simplicity



Stimulus to good management

Clarity – You can read it

- **plain, readable English**
- excellent **structure**
- free from references to specific laws
- minor secondary options to suit specific local law - eg Y(UK)2, Y(NZ)2

Language - FIDIC

The Employer shall indemnify and hold harmless the Contractor, the Contractor's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of (1) bodily injury, sickness, disease or death, which is attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents, and (2) the matters for which liability may be excluded from insurance cover, as described in sub-paragraphs (d)(i), (ii) and (iii) of Sub-Clause 18.3 [*Insurance Against Injury to Persons and Damage to Property*].



CORE CLAUSES

Language. NEC
Present tense and in English!

2. THE CONTRACTOR'S MAIN RESPONSIBILITIES

Providing the Works	20	
	20.1	The <i>Contractor</i> Provides the Works in accordance with the Scope.
The Contractor's design	21	
	21.1	The <i>Contractor</i> designs the parts of the <i>works</i> which the Scope states the <i>Contractor</i> is to design.
	21.2	The <i>Contractor</i> submits the particulars of its design as the Scope requires to the <i>Project Manager</i> for acceptance. A reason for not accepting the <i>Contractor's</i> design is that it does not comply with either the Scope or the applicable law. The <i>Contractor</i> does not proceed with the relevant work until the <i>Project Manager</i> has accepted its design.
	21.3	The <i>Contractor</i> may submit its design for acceptance in parts if the design of each part can be assessed fully.

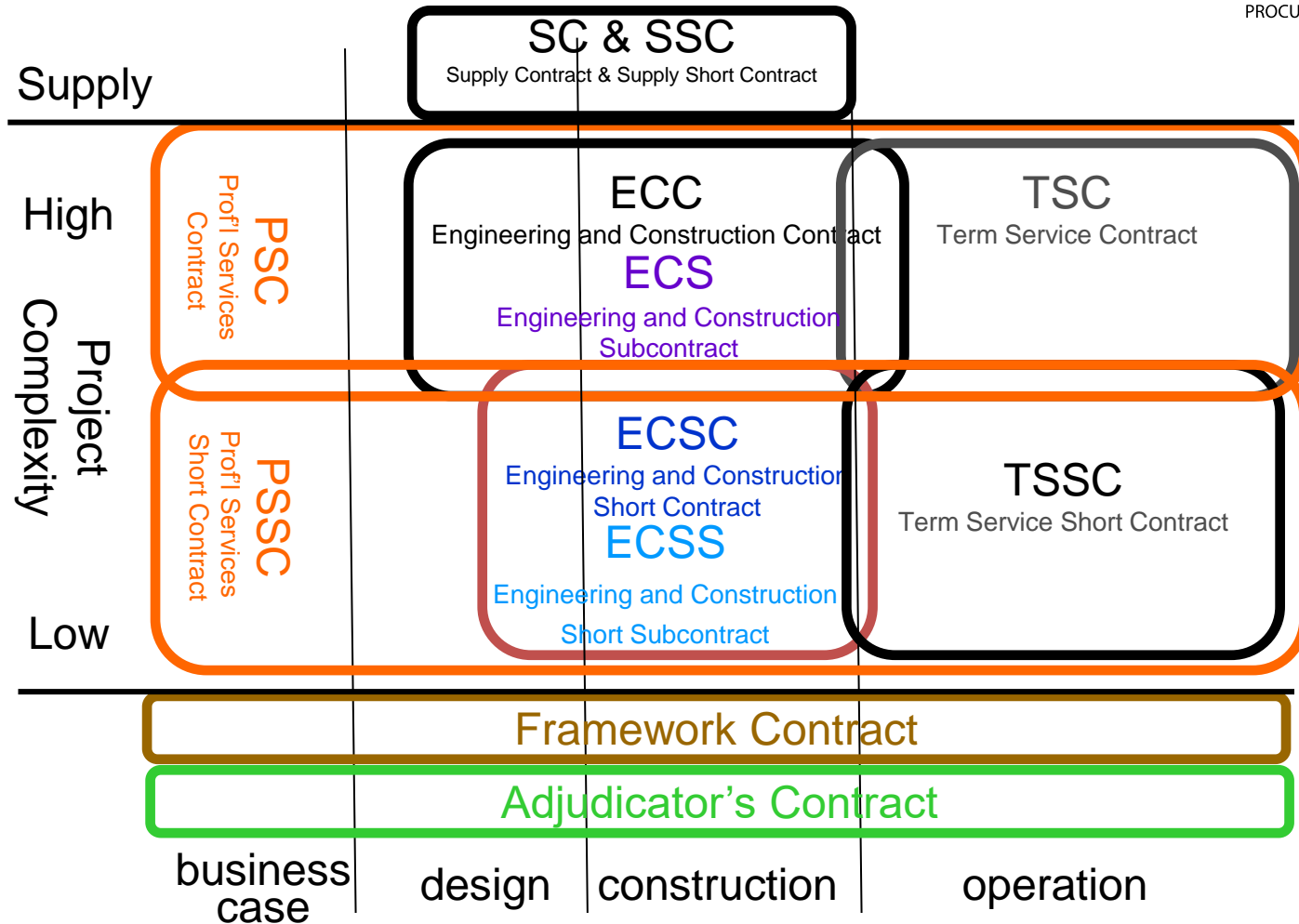
Flexibility as you need it

- any aspects of any **project**, any **service**
- and **supply**
- **'complex'** or **'simple'**
- any **sector**
- any **procurement strategy**
- any level of **'Contractor' design**
- range of **payment options**
- clear and **flexible risk allocation**
- **anywhere** in the world

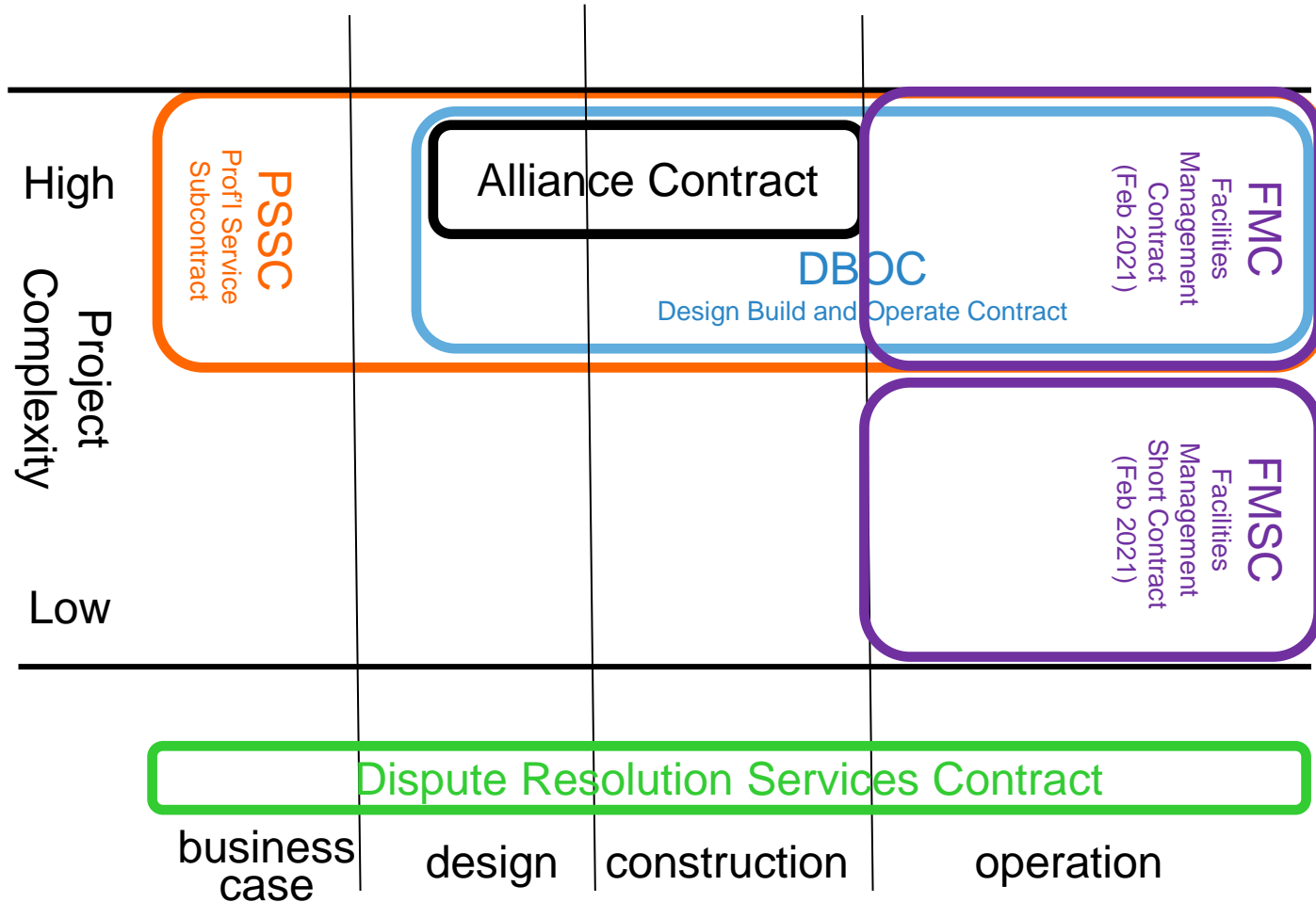
What?

How?

Where?

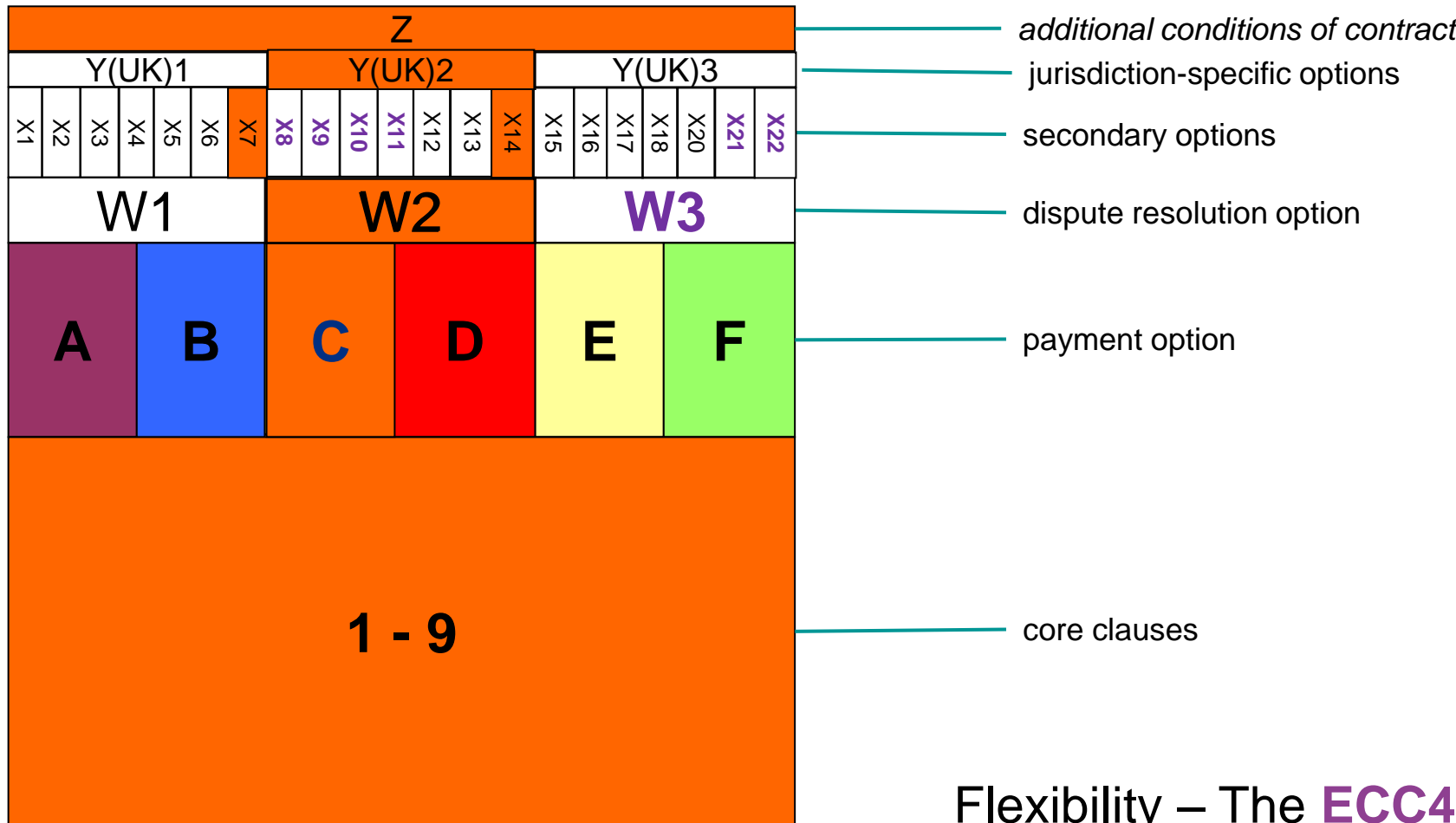


NEC3 family



NEC4 new members

NEC structure



Flexibility – The **ECC4**

Stimulus to good management

communications

Accepted
Programme

early warning

compensation
events

Compensation events

(Almost) all in one place

Assess time and cost for all

Clear timebound process for assessment

Based on 'real' effect of event

Assess *forecast* now – not 'wait and see'

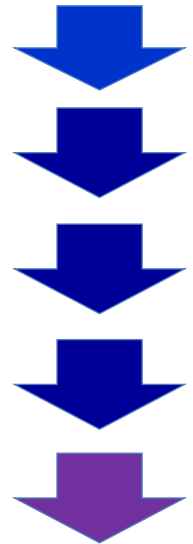


- So systematic, we can manage it ‘in the cloud’
 - Several web-based tools available
 - Excellent tools to support and promote
**professional contract / project
management** in our digital world

NEC Options for collaboration

- Core clauses: programme, early warning, compensation events
- Option X20 - Key performance incentives
- Option C - target contracts
- Option X22 (NEC4) early contractor involvement
- Option X12 – multi-party collaboration
- NEC Alliance Contract

Increasing
collaboration



International use



Jurisdiction?

- NEC designed to be used internationally
- His Honour Humphrey Lloyd QC considers that there are no real barriers to the NEC3 'Engineering and Construction Contract being used internationally'

- <https://necstorageprod.blob.core.windows.net/mediacontainer/nec/media/nec/newsletters/nec-news-lloyd-special-web-version-2.pdf>

Some thoughts on NEC3, by Humphrey Lloyd



NIGEL SHAW, NEC PANEL CHAIRMAN

With increased use of NEC contracts overseas, the NEC panel invited His Honour Humphrey Lloyd QC, a former UK Technology and Construction Court judge, to undertake a review to ensure there were no barriers to its use internationally.

His findings, entitled *Some thoughts on NEC3*, were published in the October 2008 issue of the *International Construction Law Review* journal and subsequently presented at the Institution of Civil Engineers' Inaugural management, procurement and law prestige lecture in London on 24 November 2008.

No barriers to international use

His Honour told an audience of over 150 construction legal experts that he had always been a fan of NEC. He voiced his support for the NEC3 Engineering and Construction Contract, and concluded that there are no real barriers to it being used internationally.

He said, 'In a nutshell, there are no real difficulties in using the NEC3 contract either inside or outside the UK. With a couple of exceptions, the core clauses of NEC3 do not contain any significant features that would make it unwise to use it abroad.'

This statement is particularly important, as the NEC panel had always intended to draft a contract that could be used in any country.

Unnecessary Z clauses

I would like to thank Humphrey Lloyd for agreeing to review the NEC3 and for producing such a thorough report. It is great to have the endorsement of



Using NEC outside of the UK: an update



RICHARD PATTERSON MOTT MACDONALD AND PETER HIGGINS NEC4 CONTRACT BOARD CHAIR

KEY POINTS

- NEC contracts can and have been used in most jurisdictions outside the UK with only minor additional provisions to suit local law, culture and practice.
- Clients considering using an NEC contract in a new country should consult a lawyer who fully understands both local law and the NEC approach.
- Local legislative requirements can be incorporated using a secondary option Y clause, such as those already available for the UK, Ireland, Australia and New Zealand, or an additional Z clause.
- Dispute resolution options W1 and W3 are specifically designed for international use.

Nearly 12 years ago, the lead author published an article in Issue 47 on using NEC outside the UK (Patterson 2009). It followed a paper the previous year in the *International Construction Law Review* by Humphrey Lloyd QC, one of the world's leading international construction law experts, who concluded NEC3 contracts were suitable for world-wide use (Lloyd, 2008).

Since then, international adoption of NEC3 and the 2017 NEC4 contracts has steadily increased. In addition to the UK and South Africa, they are now the default public-works contract suite in Hong Kong. There is also growing take-up in Australia, Ireland, New Zealand and Peru, and there are high-profile current and recent works and supply contracts in Antarctica, Belgium, France, Germany, the Netherlands and the Philippines.

Like the 2009 article, this update is intended to encourage consideration of NEC contracts in new countries as well as assist lawyers who may be asked to review NEC contracts for use in a particular jurisdiction. As confirmed by Lloyd, NEC and its core provisions can be used in most jurisdictions outside English law with only minor

changes. There are three UK-specific Y clauses included with the contracts, and will soon be separately published Y clauses for Australia, Ireland and New Zealand (see page 1).

Issues for consideration

The plain and direct language used in NEC contracts reduces reliance on interpretation of words used in a particular jurisdiction. Instead, the natural and necessary focus of any required interpretation will be on the intended meaning of the words themselves in all key processes of an NEC contract.

Most jurisdictions recognise the principle that agreements must be observed. Clause 12.4 of ECC states, 'The contract is the entire agreement between the Parties.' In essence, the contract sets out the rules governing the actions required of the parties and rights of the parties. Anyone deciding a dispute should therefore use the words in the contract – and only deviate from them if required to do so by the governing law.

However, in some jurisdictions, it is not only permissible but normal to consider pre-contract negotiations, as well as documents such as NEC guidance notes. In such cases, clause 12.4 may

be reviewed against the requirements of the local jurisdiction.

Dispute resolution

The NEC's clear rules and time-bound process for managing and agreeing 'compensation events' is NEC's key process for dispute avoidance. Resolving any disputes that do arise is governed by one of the option W clauses.

All the main NEC contracts provide options W1 and W2 for adjudication as the first external stage in the resolution of a dispute. Option W1 is for work outside the UK but must be reviewed for compatibility with any legal requirements relating to dispute resolution in the specific jurisdiction. In 2017, the main NEC4 contracts introduced into W1 and W2 the concept of pre-named 'senior representatives', who try to resolve a dispute by agreement before going to adjudication.

Following adjudication, if a party disputes the decision of an adjudicator, it can take the matter to what the NEC calls a 'tribunal', which the client defines as either arbitration or the courts. NEC4 ECC also introduced a new option W3 for using a dispute avoidance board, as is commonly used on significant international construction contracts.

Regarding adjudicators, Lloyd noted they should be competent to put themselves in the position of the parties being expected to operate the contract. As such, in a country where NEC contracts are relatively new, it may be difficult to find a single individual with experience and understanding of the technical aspects of the project, local law and NEC contracts.

However, if necessary, the appointment of a single named adjudicator could confirm that they can have access to advice from a person competent to advise on issues specific to NEC contracts. The Institution of Civil Engineers, for

<https://www.neccontract.com/About-NEC/News-and-Media/Using-NEC-outside-of-the-UK-an-update>

Webinar:

<https://www.youtube.com/watch?v=sOBvZVcyZ>

W

The lawyer's perspective

- What is a construction contract for?
- Can you draft for all eventualities?
- Who is the contract for?
 - Project director
 - Lawyers
 - Commercial team
 - Site supervisor
- Is it worth trying something new? Beware the Sunk Cost Fallacy.

Is there such a thing as an international contract?

- Understand the impact of governing law, for example:
 - Delay damages – Option X7
 - Notices, for example clause 61.3
 - Design and fitness for purpose - Option X15
 - Concurrent delay – NEC4 ECC Practice Note 11
 - Liability caps and exclusions – Option X18
- NEC4 Clause 10.2 - “*act in a spirit of mutual trust and co-operation*” – Good faith a feature of Civil Law but not English law

Is there such a thing as an international contract?

- Use of Y clauses for local legislation:
 - Y (UK) 1-3
 - Y (NZ) – October 2011 and being updated for NEC4
 - Y (Aus) – March 2021
 - Y (IR) – March 2021
- Use of Z clauses
- The risk of amendments to the NEC form

Assessment of time and money

Avoiding commercial uncertainty (disputes):

- The role of the programme, communications and early warnings in managing risks
- Compensation events in one place allowing additional payment and time, assessed as events happen and prospectively
- The Project Manager – a pro-active role
- Transparency and open book accounting

Dispute avoidance and resolution

- Option W1** - Senior representatives' meeting, followed by adjudication and then tribunal
- Option W2** - Senior representatives' meeting, UK statutory adjudication and then tribunal
- Option W3** - Standing Dispute Avoidance Board makes a recommendation, a dissatisfied party refers disputes to the tribunal

How to implement NEC effectively?

- Training and education - Understand the contract, the flexibility it offers and what collaboration means - Use of target cost contracting to align interests
- Implement and follow contractual processes within the specified periods
- Communicate, communicate, communicate
- Invest in sufficient resources with the necessary skills and training
- Use collaboration effectively – Example: NEC Practice Note on assessing delay due to compensation events

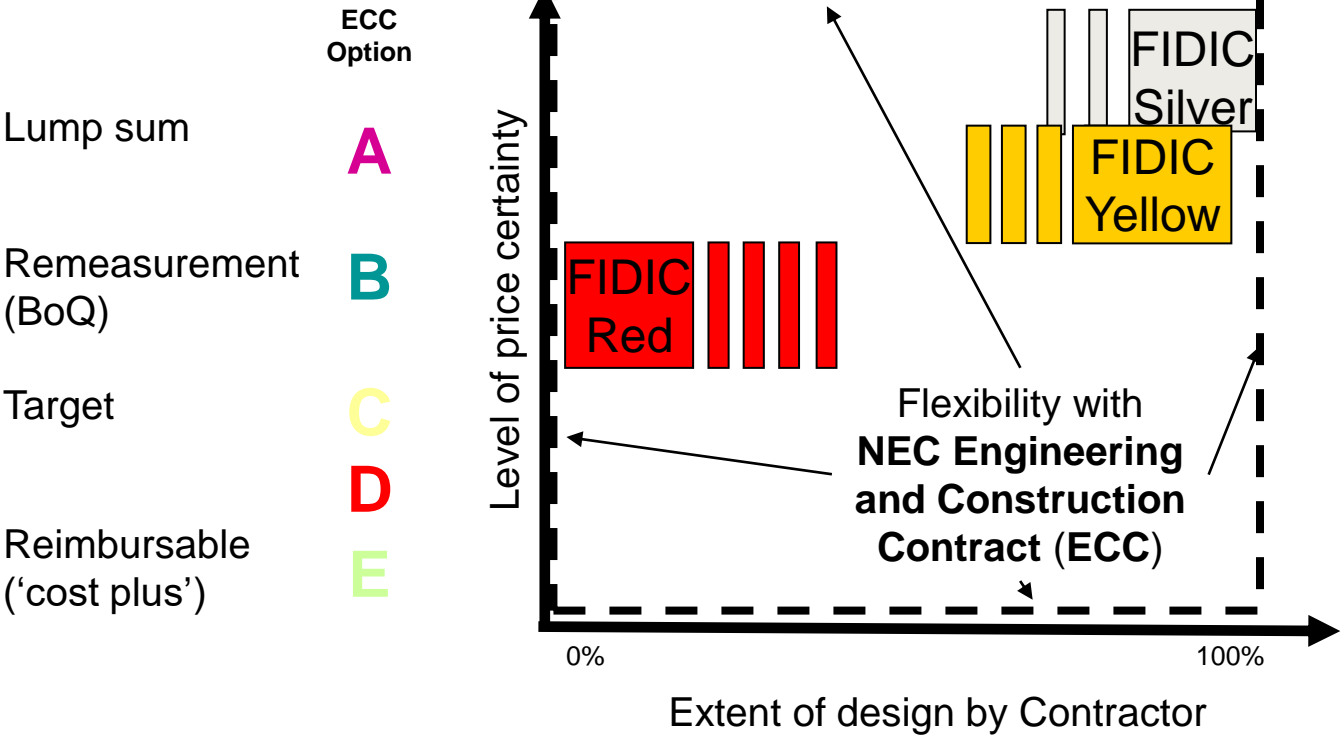
Questions?

Back-up slides

Flexibility – Range of Contracts

	FIDIC	NEC
Consultancy	White Book	Professional Services Contract (PSC) Professional Services Short Contract (PSCC)
Works	Various contracts: Red , Yellow and Silver (next slide)	Engineering and Construction Contract (ECC)
Subcontracts	Subcontract to Red Book	Engineering and Construction Subcontract (ECS) Engineering and Construction Short Subcontract (ECSC)
Services	-	Term Service Contract (TSC)
Design, Build, Operate	Gold Book	NEC4 Design Build Operate (DBO)
Framework	-	Framework Contract
Alliance	-	Alliance Contract
Joint Venture (JV)	Joint Venture agreement for international JVs	-

Flexibility – works contracts





Sir John Armit, Chair of the Olympic Delivery Authority on the BBC describing the **collaboration** that delivered the London 2012 Olympics venues

‘We could not have done it without the NEC’

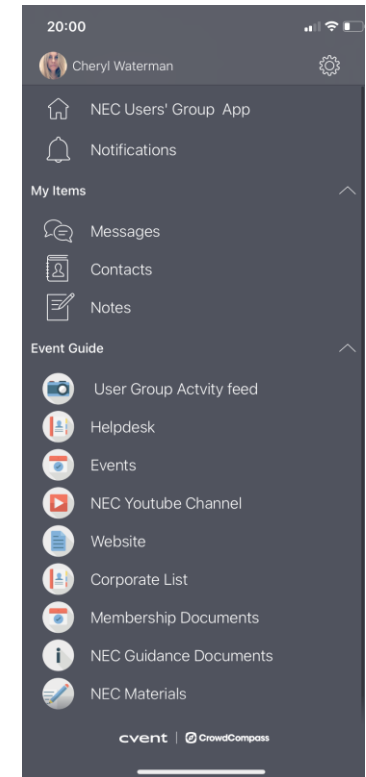


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 - Third level

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