

Workshop 2C

# Choice of contract – why the M3NHF Schedule of Rates Form of Contract?

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**Chaired by:** David Miller

**Room:** C



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2023

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# COVERAGE

**How do you choose the form of contract?**

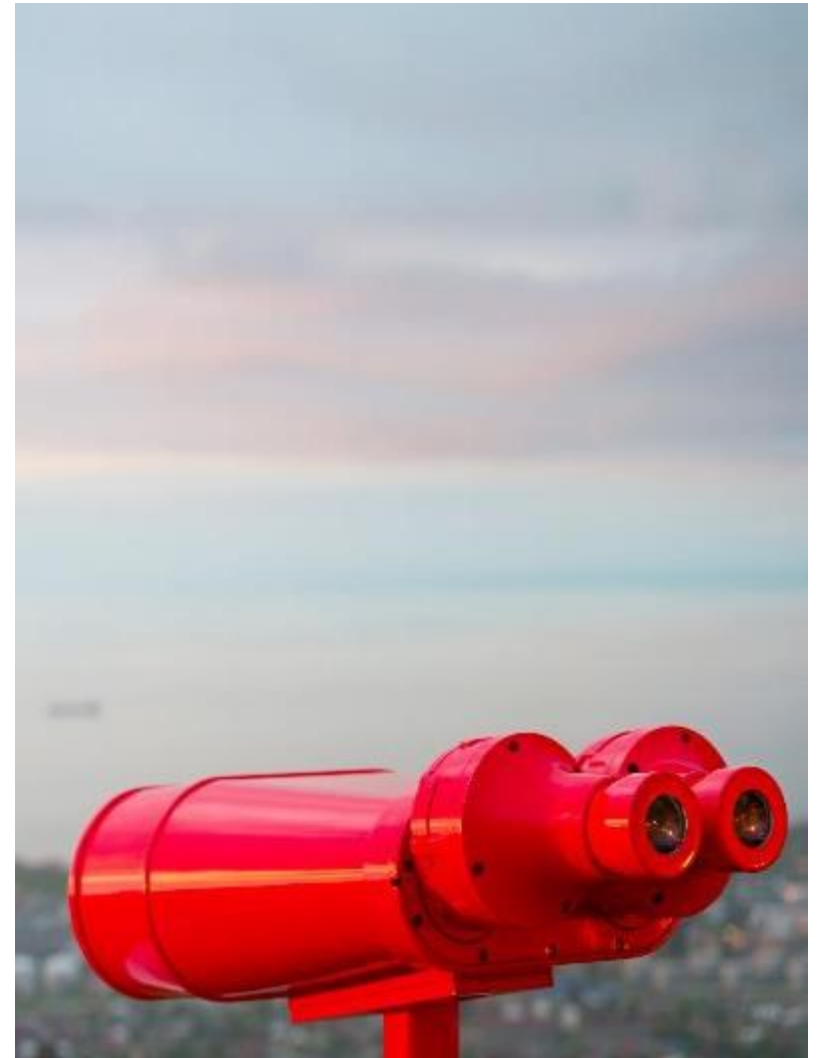
**JCT** – the traditional solution

**ACA suite (TAC/PPC)** – for a gentler approach

**NEC** – for the futuristic project manager

**NHMF Schedule of Rates** – the natural choice

- Overview
- 2023 update
- Advantages and disadvantages



# FIRST PRINCIPLES – WHAT’S A CONTRACT FOR?

**Defines the Parties and allocates roles and responsibilities**

- e.g. Employer’s Agent / Client representative

**Practical administration**

- Instructing work, programme, completion deadlines, processes, managing change, etc

**Calculates payment how much (and when)**

**Allocates risk – time and money**

**Contains remedies (e.g. damages/termination) if things go wrong (e.g. insolvency)**





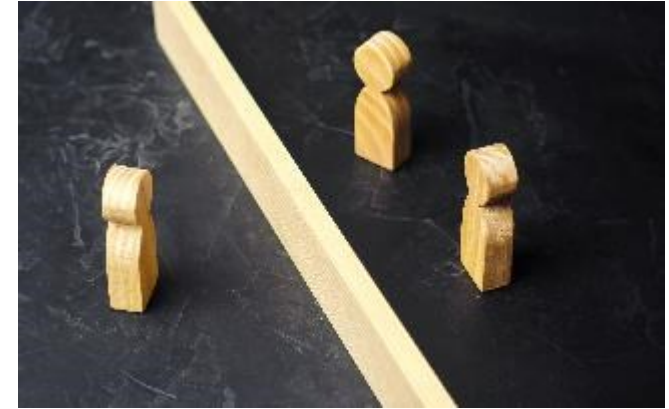
# EVALUATING DIFFERENT CONTRACT FORMS

## The importance of good relationships

- Does the form of contract promote them?

## Problem anticipation and avoidance

- Does the form of contract promote this?



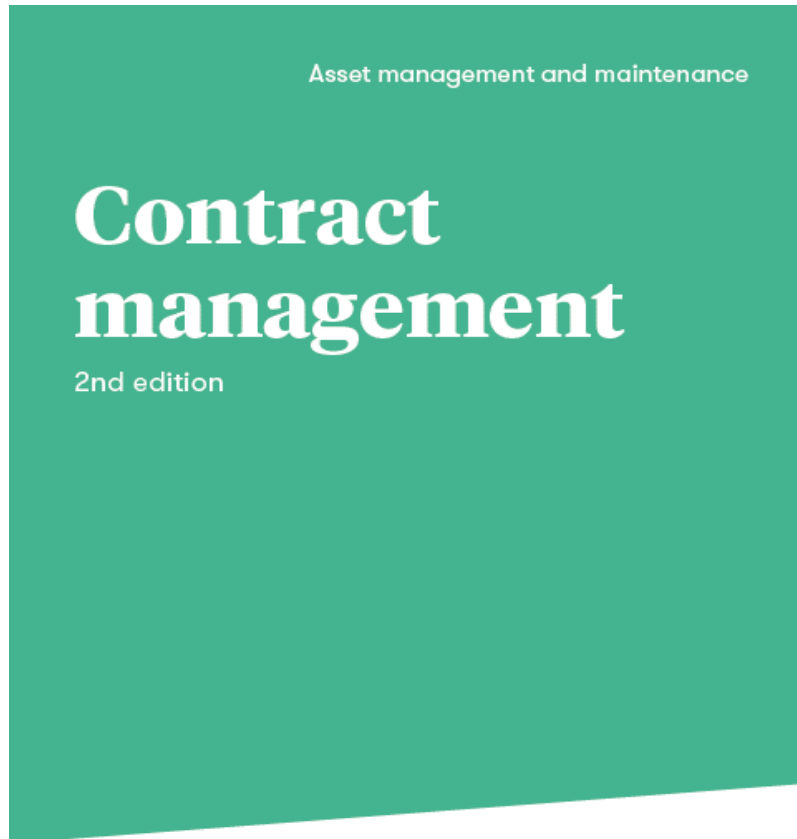
## Are there effective contractual remedies for problems?

- “When push comes to shove” can you enforce your contractual rights?

## How easy is termination and reprocurement

- Might you be stuck with a contract that is “not working”

# NHF CONTRACT MANAGEMENT GUIDE – 2<sup>nd</sup> ed



NATIONAL  
HOUSING  
FEDERATION

## NHF Contract Management Guide

- [https://www.housing.org.uk/nhf\\_catalog/publications/contract-management-2nd-edition/](https://www.housing.org.uk/nhf_catalog/publications/contract-management-2nd-edition/)

## Planning is important

- Begin well before the contract is due to start

## The four stages of contract management

- Scoping
- Procurement (tender)
- Mobilisation (preparation)
- Contract management



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# CHOOSING THE FORM OF CONTRACT

## Scoping first

- contract packaging
- payment mechanism

## Framework agreement – or not

- still need to choose the call off form

## Identify possible contractors

- encouraging SMEs - familiarity with form
- economies of scale/incentive to partner

## Choose the contract form last

## Factors

- Project or term
- Applicability (e.g. does it support proposed payment mechanism)
- Familiarity or new start
- Standardisation
- Philosophy



# TYPES OF CONTRACT

“Term”

“Project”

JCT MTC/TAC-1/NEC TSC/

NHF SoR

/JCT ICD/ JCT SBC/PPC/NEC ECC/JCT D&B

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Responsive repairs

Voids

Servicing

Cyclical decorations

Planned maintenance

Major improvements

New build



# PROJECT CONTRACTS

**Project is all the work under the contract**

**Changes (e.g. following survey) technically variations**

**Stronger programme provisions (even in JCT) than term contracts**

**Power to instruct variations cannot be used to omit work and give it to someone else**

- *Abbey Developments v PP Brickwork, 2002*



# TERM CONTRACTS

## Work instructed by Orders/ Tasks

- No guaranteed volumes
- Framework agreement?

## Limited programming provisions

## Each Task/Order paid for separately

- often on a schedule of rates / archetypes basis

## Time for completion runs from instruction of individual Task

- no overview across all Tasks



# STANDARD FORM CONTRACT SUITES

## JCT

- Traditional contract remedies based
- Needs detailed specification and contract documents eg KPIs
- Assumes price based
- Generic – any workstream, sector and country
- “UK ready” but sector specific provisions need to be added

## NHF SoR

- Based on traditional approach but with “contract management” provisions
- Accompanied by full set of contract documents.
- Price based
- Detailed and specific
- Specifically drafted for the housing sector

## NEC

- Project managed contract – requires a methodical approach to contract administration
- Present tense drafting and clear layout
- Different payment options in contract
- UK option but sector specific provisions need to be added
- More comprehensive than TPC/TAC/PPC

## TPC/TAC/PPC

- Very “high level” – assumes contract is developed with the contractor through partnering/alliancing
- Contract management depends on quality of processes written into contract
- Key contract details are bespoke to each contract
- Still needs sector specific provisions

# JCT – DRAFTING AND PHILOSOPHY

## Joint Contracts Tribunal Ltd

- Both sides of building industry

## Traditional

## Building industry specific

- e.g. CDM

## Relies on case law and precedents

## “Tried and tested”

## Familiar, so only limited modernisation

## Detailed but not comprehensive



# JCT TYPICAL AMENDMENTS

## Risk rebalancing

- Discrepancies between documents
- Effect of Employer's Inspections
- Change in law risk
- Covid-19
- Concurrent delay
- Definition of Practical completion (handover requirements)
- Effect of Final Statement

## To deal with "omissions"

- Programming
- Annual "final" certificate
- Site security
- Copyright licence for any designs
- Health and safety
- Environmental protection





# JCT – ADDITIONAL CLAUSES

**Working in occupied properties (e.g. DBS checks, Code of Conduct etc)**

**Handover in batches – timing and defects rectification period**

**Linking compliance and payment (e.g. warranty provision, programme)**

**Defects correction deadlines**

**TUPE**

**PCR clauses – supply chain payment, subcontractors etc**

**Data Protection**

**Freedom of Information Act (incl new Residents rights)**

**Equality and diversity**

**Complaints (incl Ombudsman)**

**Anti-modern slavery warranties and due diligence**

**Social value - apprenticeships etc**



# PPC 2000, TAC-1 (TPC) & FAC-1

**Association of Consultant Architects**

**Multi-party based on “partnering” / “alliancing”**

- but more often used as 2 party

**Drafted in traditional legal language**

- some “clunky” drafting

**PPC written for 2 stage tendering**

- *Henry Bros case*

**Drafted as cost-reimbursable**

- but often used as priced

**Partnering Adviser (lawyer) recommended**



# PPC & TAC/TPC CONCERNS

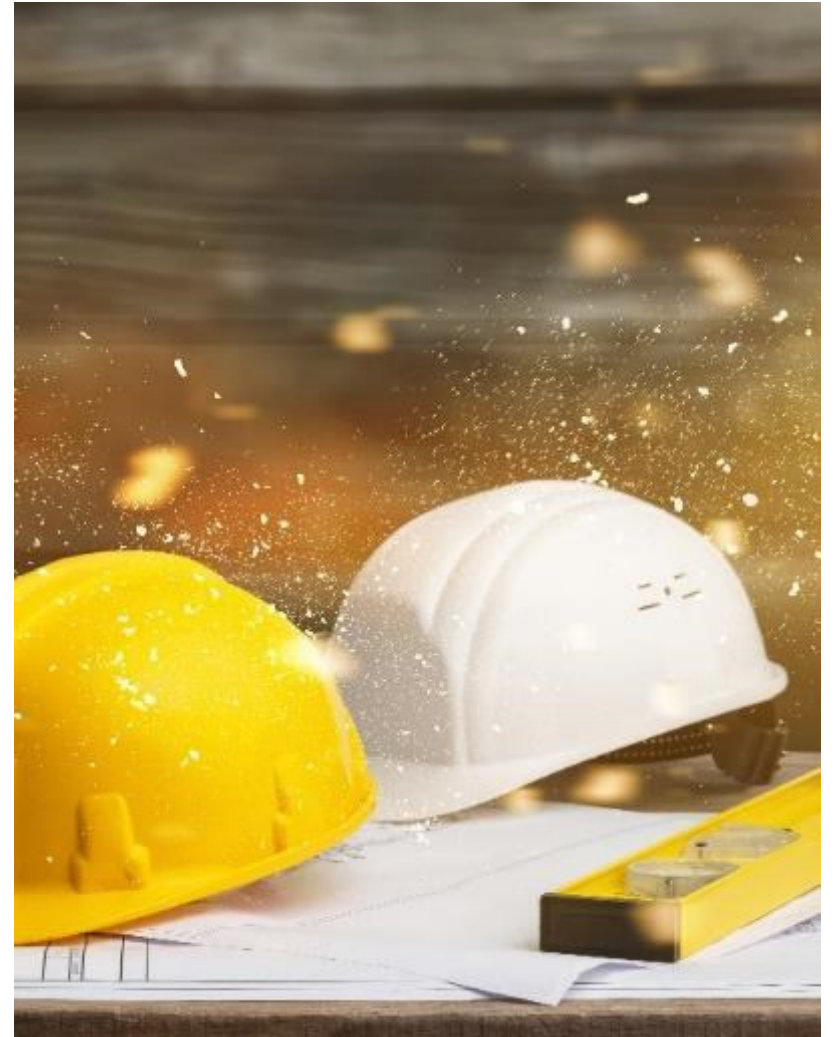
**Unclear liability and inter-partnering Team member duty of care**

**Constructor liable for all designs even if produced by a joint approach**

**All who prepare or contribute to Partnering Documents responsible for errors or omissions in designs**

“except to the extent of its reliance on any contribution or information from other Partnering Team members”

**Client duty to Constructor/Service Provider to exercise reasonable skill and care ?**



# PPC/TAC AMENDMENTS TO DEAL WITH RISK

Most of the detail in the ancillary documents

Scope to use PPA/TPA to set out remedies etc

Some additional clauses require amendments to existing clauses

Access arrangements

Enhanced health and safety duties on site

Sectional final accounts

LADs

Extra termination circumstances

Break clause in PPC?



# PPC /TAC – ADDITIONAL CLAUSES

Working in occupied properties (e.g. DBS checks, Code of Conduct etc)

Handover in batches – timing and defects rectification period

Linking compliance and payment (e.g. warranty provision, programme)

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# NEC PHILOSOPHY & APPROACH

## Contracting flexibility

- Different contract/payment strategies

## Project management

- Drafted “by engineers for engineers”

## Drafting style

- Present tense, simple language, no cross references
- Layout and flowcharts

## Subjective decisions minimised

- avoiding, for example, “fair” or “reasonable”



# NEC PROJECT MANAGEMENT “TOOLS”

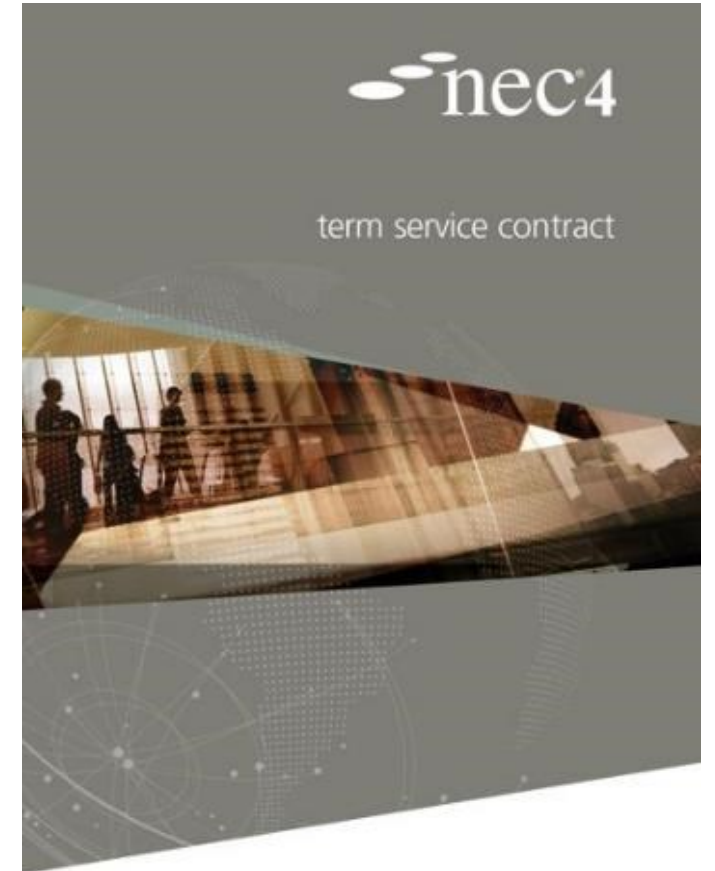
## Management of

- **Time** –programmes
- **Risk** – early warnings and identifying and managing problems as they arise
- **Change** – change mechanism with quotation process
- **Conflict** – defined of roles and responsibilities

## Single procedure for each process

- e.g., single “period for reply” for any instruction, certificate, submission, etc.

**Procedures devised “from first principles” rather than from “what has gone before**



June 2017



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# NEC AMENDMENTS – Z CLAUSES

**Amendments to NEC drafting will be needed through Z clauses to:**

- “beef up” NEC terms in certain areas of weakness
- shift the balance of risk in some places
- add in UK provisions – eg CDM requirements

**When drafting Z clauses**

- Follow NEC drafting conventions
- Don't just copy standard T&Cs



# ADDITIONAL Z CLAUSES NEEDED

Working in occupied properties (e.g. DBS checks, Code of Conduct etc)

Handover in batches – timing and defects rectification period

Linking compliance and payment (e.g. warranty provision, programme)

Defects correction deadlines

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# NHF SCHEDULE OF RATES

**Written specifically for maintenance and repairs**

**Now includes planned works and gas servicing and repair in the same set of Contract Conditions, Preliminaries etc**

**Drafted to accompany the NHF SoR**

**“Best of all worlds”**

- “traditional” remedies and approach of JCT;
- contract management “tools” from NEC (and ACA)

**Can be used “off the shelf”**





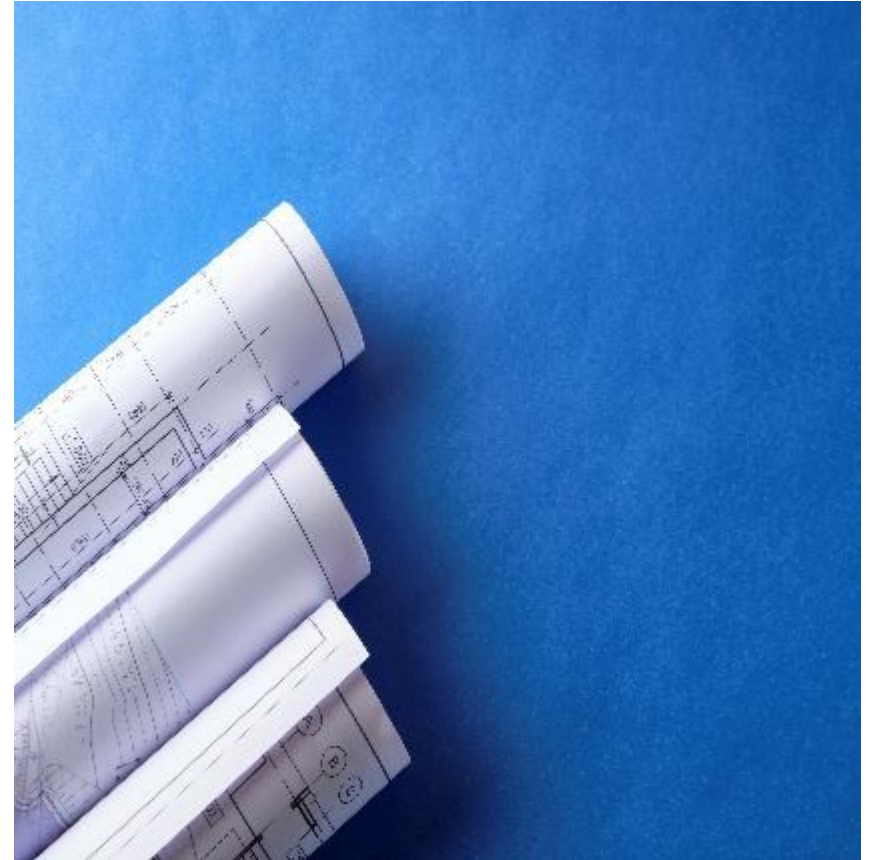
# NHF SoR FORM OF CONTRACT 2023 UPDATE

**Responsive, voids, gas and planned Contract Conditions and Prelims combined into a single contract document covering all these workstreams**

**Post Brexit provisions – e.g. PPN 3/22 data protection**

**Disrepair works provisions**

**Building Safety Act 2022 maintenance provisions**



# NHF SOR ADDITIONAL CLAUSES

**NONE**

# DISADVANTAGES OF THE SoR CONTRACT FORM

## Several contract documents

- May be intimidating or too detailed for small contracts

## Less flexible

- Comprehensive document suite gives less scope for developing contract documentation “alongside the contractor”

## Can encourage laziness

- Temptation to adopt the documentation without thinking about whether any changes are needed



# WHY USE THE NHF SOR FORM OF CONTRACT

**It now covers all workstreams**

**Drafted specifically for housing maintenance**

**Complete solution – no need for lots of “additional clauses”**

**Strong contract management “tools”**

**“Collaboration” provisions to assist with contract management and help prevent disputes**



# ADVICE ON USING THE NHF SoR CONTRACT

**Read it thoroughly (particularly the Prelims) to ensure it matches your processes**

- amend if not

**Use the flexibility (ITT, Price Framework, Contract Details, KPIs)**

- simplify wherever possible

**Understand the constraints**

- e.g., TUPE transfers involving LGPS / SHPS
- amend through Schedule of Amendments if necessary

**If amending, use legal advisers who understand the form and follow its language**

- *Sutton Housing Partnership v Rydon Maintenance*





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## QUESTIONS?

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# Thank you.

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