

Is there a hierarchy of documents under the ECC ?

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Introduction

Various writers ^{1 2} on the NEC in previous editions of this Newsletter have stated that, to quote Keown, "there is no hierarchy of documents in the ECC" with the contract being "very precise over the functions of each of the ... components and they do not conflict". I agree with the second statement and the first in principle, but not necessarily in practice. To illustrate the point, I will give some examples of where one document would take precedence of the other in the case of an ambiguity or inconsistency between them. I will conclude with a generalised hierarchy for documents under the ECC.

Contract Data vs. other documents

The Contract Data is an expansive Appendices compared with traditional conditions of contract. It :

- ❖ significantly affects the contract structure in terms of which main payment and secondary options are selected;
- ❖ fine tunes the conditions of contract in respect things such as the maintenance period (or *defects date* in NEC speak), extent of damages and liability etc; and
- ❖ by referencing other documents, such as the Works Information, Site Information, the pricing document (whether the Activity Schedule or Bill of Quantities) and the initial Accepted Programme, incorporates them into the contract.

Consequently, it would generally be presumed to sit above all other documents in the contract.

However, beware of assuming this is cast in stone ! I give two examples to illustrate my point (and there are others) :

- ❖ My reading of the contract, in terms of what is contractually meaningful when it comes to determining the Prices is the sum of the prices in the Activity Schedule or Bills of Quantities and not "the tendered total of the Prices" as put forward by the *Contractor* in Contract Data Part 2. An arithmetic check is necessary !
- ❖ Seemingly innocuous phrases inserted by the *Contractor* in documents referenced in Contract Data Part 2 can undermine the application of percentages tendered by him.

¹ Keown K, *A new user's guide to NEC contract formation*, NEC User's Group newsletter, issue 38, April 2007.

² Gerard R, FAQs, in response to Form of Agreement, NEC User's Group newsletter, issue 41, January 2007.

Original Conditions of Contract vs. Option Z clauses.

The legal *contra-preferentum* rule, now known as *Construction against the grantor* rule, means that where there is ambiguity or inconsistency, the words will be construed against the party who drafted or put forward the document.

In an ECC context, this means that there is not a problem if the option Z clauses clearly delete and replace the relevant original ECC contract clauses as written by the NEC Panel. However, when this is not the case and there is an ambiguity or inconsistency, all other things are equal, interpretation will be construed against the *Employer* and for the *Contractor*.

As 80%+ of disagreements on which I am asked to comment on are related in some way to the option Z clauses, there are some key lessons for *Employer's* to learn :

1. Minimise the use of option Z clauses, as the longer they not only increase the risk of ambiguity within them, but also with the original conditions of contract.
2. Use people knowledgeable of the NEC conditions of contract, who will know if they are creating any conflicts. I would also say use people who have bought into the NEC philosophy, rather than a traditional legalistic one, as you are less likely to have philosophical differences.

Bills of Quantities vs. 'another document' (under options B & D).

This 'another document' is likely to be the Works Information, but could be the Site Information. In the former, it could be the description of work to be done in the Works Information is different from that in the Bills of Quantities. In the latter, it could be the conditions in which the work are to be done are described differently from that shown in the Site Information.

Under Option B & D clause 60.6, if the *Project Manager* "corrects mistakes in the Bills of Quantities which ... are due to ambiguities or inconsistencies", then it is a compensation event. These ambiguities or inconsistencies are not limited to those in the Bills of Quantities, but could be with other documents. If the *Project Manager* corrects the Works Information as a result of such an inconsistency, then it is a compensation event under clause 60.1.

How are either of these changes assessed ? Clause 60.7 of options B & D states :

"In assessing a compensation event which results from a correction of an inconsistency between the Bill of Quantities and another document, the *Contractor* is assumed to have taken the Bills of Quantities as correct."

In other words, the Bills of Quantities sits above the Works Information and Site Information when interpreting the contract for payment purposes. As per tradition, the

onus therefore falls on the *Employer* to make sure his Bills of Quantities complies with what is said elsewhere in the contract.

Employer's Works Information vs. Contractor's Information for his design.

Under the ECC, there may be two design documents in existence at the signing of the contract :

- ❖ the Employer's Works Information which is incorporated into the contract by reference in Contract Data Part 1; and
- ❖ the *Contractor's* Work Information which is incorporated into the contract by reference in Contract Data Part 2.

Under traditional contracts, such as the ICE and JCT conditions, the Employer would perhaps at tender give an output or functional based specification (which under the NEC would be the equivalent of the *Employer's* Works Information) and the Contractor 'offers', along with his price, his design proposals to satisfy this specification (equivalent to the *Contractor's* Works Information). The Employer then 'accepts' the Contractor's 'offer'. Under contract law, this effectively means that the Contractor's offer has overwritten the Employer's. Consequently, if there is an ambiguity, it is the Contractor's design information which has precedence.

What is the situation under the ECC ? Clause 60.1 (1), with its second supporting bullet point, reads :

"60.1 The following are compensation events

(1) The *Project Manager* gives an instruction changing the Works Information except

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- a change made to the Works Information provided by the *Contractor* for his design to comply with other Works Information provided by the *Employer*."

So if the *Contractor's* Works Information is changed to comply with the *Employer's*, then it is not a compensation event. The effect of this is that the *Employer's* Works Information has precedence over, or sits above in any hierarchy, the *Contractor's*.

The key change in practical terms is that the onus of checking for discrepancies between the two documents now falls upon the *Contractor* as he is the one who will have to bear the consequences of any discrepancy.

The Works Information vs. the Accepted Programme.

The Accepted Programme may be incorporated into the contract by referencing the *Contractor's* tender programme in Contract Part 2. However, once into the contract, it should be revised regularly by the *Contractor* and hopefully accepted by the *Project*

Manager, with "the latest programme accepted by the *Project Manager*" superseding "previous Accepted Programmes" (clause 11.2 (1)).

Under clause 31.3, "a reason for" the *Project Manager* "not accepting a programme is that ... • it does not comply with the Works Information." So, in terms of a hierarchy of documents, the Works Information sits above the Accepted Programme.

The Accepted Programme vs. the Activity Schedule

When under options A or C, the *Contractor* is allowed to submit a revision to the Activity Schedule if, due to changes, the activities in it no longer relate to the operations on the Accepted Programme (options A & C, clause 54.2).

Under option A & C clause 54.3 "a reason for" the *Project Manager* "not accepting a revision of the Activity Schedule is that ... • it does not comply with the Accepted Programme". Hence, in terms of a hierarchy of documents, the Accepted Programme sits above the Activity Schedule.

The Activity Schedule vs. another document (under options A & B)

So far, it would seem that the Activity Schedule is at the bottom of the pile when it comes to hierarchy of documents !

As there are no equivalent words with respect to ambiguities or inconsistencies as per the Bill of Quantity options, the *contra preferentum* / *Construction against the grantor* rule applies (see [Original Conditions of contract vs. Option Z clauses](#)). The grantor is the *Contractor* as it is he who normally prepares the Activity Schedule to match his programming sequence.

This is reinforced by the wording of core clause 20.1 :

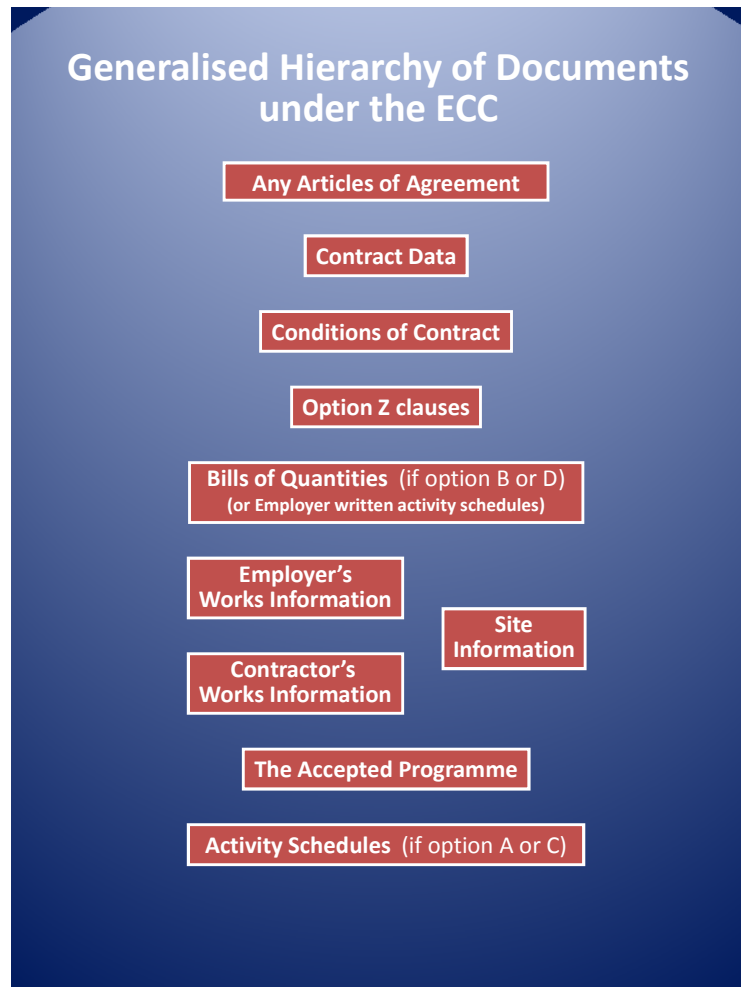
"20.1 The *Contractor* Provides the Works in accordance with the Works Information".

In other words, if it is in the Works Information and the *Contractor* has failed to take it off and price it in the Activity Schedule, then it is he who suffers : so Works Information and arguably Site Information sit above an activity schedule in any hierarchy.

However, if the *Employer* has written the activity schedule and there is ambiguity or inconsistency, then the *contra preferentum* / *Construction against the grantor* rule would apply against the *Employer* as he is the one who has created the ambiguity !

Review & Conclusion

Given the above comments, my hierarchy of documents under the NEC would be in the order illustrated below.



However, as with most contractual issues, the devil is in the detail. It is partly for this reason that many *Employer's*, in their Articles of Agreement, state the hierarchy or order of precedence of the documents that make up the contract if there is an ambiguity or inconsistency between them. I suggest they use the above as a starting point.



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