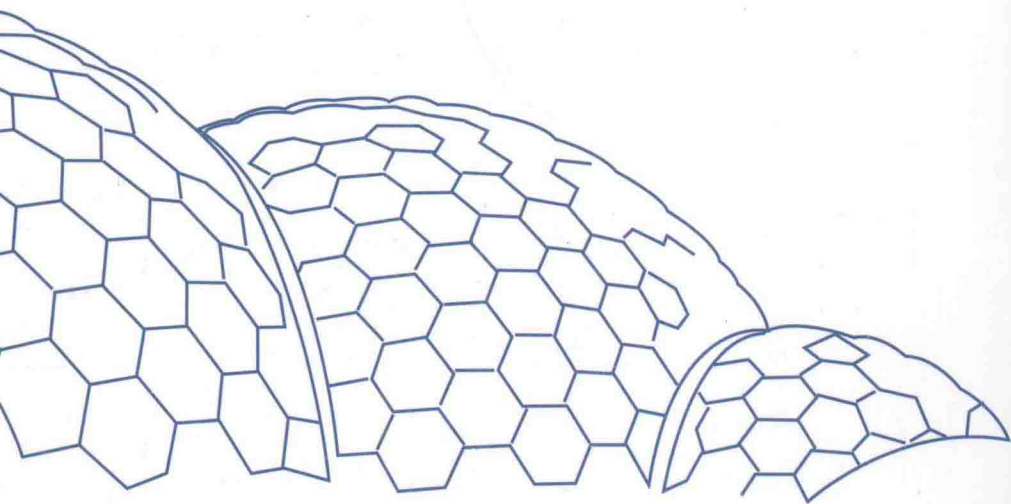


KEATING ON NEC3

David Thomas QC



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KEATING ON NEC3

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DAVID THOMAS QC and a team of contributing authors

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Many of the first drafts of the chapters of this book were prepared by members of Keating Chambers, Kate Williams of Sirius Legal Consulting gave the benefit of her considerable practical experience of the form by commenting on the drafts, and Krista Lee acted as assistant editor.

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This guide would not have been possible without the cooperation of the NEC® organisation. NEC® is a family of contracts that facilitates the implementation of sound project management principles and practices as well as defining legal relationships. It is suitable for procuring a diverse range of—Works, Services and Supply spanning major framework projects through to minor works and purchasing of supplies and goods. More information and contract purchase can be found at www.neccontract.com email info@neccontract.com or Tel. +44 (0)20 7665 2446.

FOREWORD

The third edition of the Engineering and Construction Contract, commonly known as NEC3, has seen this form of contract come into common usage in the construction industry. Since August 2011 it has become the only form of contract published by the Institution of Civil Engineers, leaving the ICE Conditions to be published by the Association of Consultancy and Engineering and the Civil Engineering Contractors' Association. It is therefore appropriate that there should now be the first major legal textbook providing a detailed commentary on that form.

The NEC form of contract uses language which has deliberately departed from that which has been familiar in other industry standard forms and which developed from forms of contract used in the nineteenth century. The use of language which generally avoids words of obligation and, instead, uses statements in the present tense to impose obligations has led to criticism by commentators and judges. That shows that the underlying purpose of the form is not to seek to mirror traditional language but to take a different approach to the way in which contractors and employers carry out projects. The contract has sought to introduce a detailed management system which brings disputes to the surface at an early stage and which avoids the need for the parties to revert to the traditional battle at final account stage. It has therefore to be seen as a form of contract which places the management of the contract in the forefront and seeks to avoid the disputes which created such a lack of confidence and trust in the construction industry in the last half of the twentieth century.

Experience has shown that use of the NEC form has led to fewer disputes which have reached the courts although there is, anecdotally, evidence that there have been a large number of adjudications. In the early days this was certainly explained by the fact that the NEC was used on contracts where both parties had an interest in seeing the major projects successfully delivered. More recently the nature of the parties has changed. The lack of disputes passing for final determination does show that through good project management intractable disputes can be minimised or avoided.

Where problems have arisen they have often had their source in the traditional areas of difficulty on construction contracts, under the NEC these areas are the Works Information and the Z Clauses. The essence of the central obligations under the contract are contained within the Works Information and the drafting of this documentation requires care to ensure that it provides the necessary information in a clear manner consistent with the contract. When problems arise it is often the Works Information on

FOREWORD

which matters are focussed. Equally the drafting of the bespoke Z Clauses in a manner which is consistent with and takes account of the other clauses is frequently a matter of difficulty, especially where the underlying clauses are worded in an unfamiliar way. These bespoke areas of drafting need particular care in the context of the NEC.

This book has been expertly edited by David Thomas QC with contributions from a number of members of Keating Chambers. It has also had input from Kate Williams of Sirius Legal Consulting. David and the team are to be congratulated on producing an authoritative legal commentary on these NEC forms, something which has been missing from the bookshelves of construction lawyers. Besides the NEC3 form, there is detailed coverage of the Professional Services Contract as well as the particular provisions of Engineering and Construction Subcontract. The commentary draws both from the few decided cases on the NEC and from the general principles of construction law. It does so in an easy to follow and concise manner. It is clear that this book will become the main reference work for those in the construction industry as well as for legal practitioners advising on issues arising under the NEC forms.

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