

# CLC TASKFORCE: COVID-19 CONTRACTUAL GUIDANCE



Published 21 October 2021  
Version 1.0

## TEMPLATE H – DEED OF VARIATION UNDER NEC 3 ECC

### SUMMARY

- To be read in conjunction with [CLC COVID-19 Contractual Guidance – Best Practice](#).
- If the parties to an existing contract wish to change it to accommodate the impact of COVID-19 and their agreed/negotiated approach.
- A Deed of Variation should be used to record those agreed/negotiated changes to the existing contract and ensure they are legally binding on all parties.
- This template contains a precedent Deed of Variation designed to work with the NEC 3/4 Engineering and Construction Contract (ECC). It contains a number of options which could be considered if negotiating changes to existing contracts.
- The template can be adapted for use with other forms of consultancy, sub-contract, or framework/term agreements.
- CLC advocates collaboration in the context of fair and responsible contractual behaviour and therefore encourages the parties to share risks arising from pandemics to safeguard project delivery and industry sustainability as opposed to applying commercial pressures to transfer risk.

### 1. EXPLANATORY NOTES

- 1.1. This is a template Deed of Variation to allow the parties to a NEC 3 Engineering and Construction Contract (NEC3 ECC) to record their collaborative agreement as a change to the ongoing contract.
- 1.2. The template provides for a number of options to be used, and should be amended in accordance with the agreed way forward by the parties as follows:
  - (i) Certification of payment for undelivered work due to COVID-19;
  - (ii) Amendment to existing pay schedule;
  - (iii) Advance Payment;
  - (iv) Suspension of work during an agreed COVID-19 Suspension Period;
  - (v) Extension of time by including a COVID-19 event as a Compensation Event;
  - (vi) Extension of time and payment due to a COVID-19 Event;
  - (vii) Extension of time and payment of predetermined percentage due to a COVID-19 Event; and
  - (viii) Termination provision where the works are suspended for the relevant continuous period as set out in the Contract particulars due to COVID-19 Event.

- 1.3. This is general guidance and the letter is a general template. Nothing in this document constitutes legal advice. A party's contractual rights will depend on the wording of its particular contract and the factual circumstances on its project. If in doubt, advice should be sought.
- 1.4. If you have any comments or feedback please email:  
[construction.enquiries@beis.gov.uk](mailto:construction.enquiries@beis.gov.uk)

DEED OF VARIATION OF NEC 3 ENGINEERING AND CONSTRUCTION CONTRACT

**DATED 2021**

**DEED OF VARIATION**

relating to an NEC3 Engineering and Construction Contract (April 2013 edition)

for [\*\*\*INSERT PROJECT DETAILS]

between

**(1) [\*\*\*EMPLOYER]**

and

**(2) [\*\*\*CONTRACTOR]**

This deed is dated [\*\*\*INSERT DATE]

**BETWEEN**

- (1) [\*\*\*EMPLOYER] of [\*\*\*ADDRESS] (the "**Employer**"); and
- (2) [\*\*\*CONTRACTOR] (company number [\*\*\*]) whose **registered office is at [\*\*\*ADDRESS] (the "Contractor")**

each a "Party" and together the "Parties"

**WHEREAS**

- (A) The *Contractor* entered into an NEC3 Engineering and Construction Contract agreement (April 2013 edition) with the *Employer* dated [\*\*\*INSERT DATE] pursuant to which the *Contractor* agreed to provide the [\*\*\*INSERT DESCRIPTION OF WORKS UNDER THE CONTRACT] *works* (the "**Construction Contract**").
- (B) The Parties intend to [\*\*\*INSERT DETAILS OF THE RELIEF SOUGHT DUE TO COVID-19 – PLEASE SEE THE RELIEF OPTIONS BELOW].
- (C) Consequently, the Parties have agreed to enter into this Deed to vary the Construction Contract to give relief to the *Contractor* due to the adverse impacts of COVID-19. The relief is provided during the COVID-19 Relief Period and with effect from the COVID-19 Relief Commencement Date.

**NOW IT IS HEREBY AGREED AS FOLLOWS:**

**1. DEFINITIONS AND INTERPRETATION**

- 1.1 In this Deed, terms defined in the Construction Contract (as amended pursuant to this Deed) shall have the meanings set out in the Construction Contract (unless they are otherwise defined in this Deed). The rules of interpretation set out in the Construction Contract apply to this Deed.
- 1.2 In this Deed any reference to a "clause" is, unless the context otherwise requires, a reference to a clause of this Deed.

**2. VARIATION**

- 2.1 With effect from the COVID-19 Relief Commencement Date, the Parties acknowledge and agree that the Construction Contract shall be amended and restated so that it shall be read and construed as set out in the following clauses [2.2 – 2.11 (\*\*\*AMEND THESE CLAUSE NUMBERS IN LINE WITH THE RELEVANT OPTIONAL CLAUSES SELECTED)] of this Deed:
- 2.2 Insert the following new definitions at clause 11.2 of the Construction Contract and re-number the defined terms in alphabetical order accordingly:
  - (a) **Average Amount** means:
    - (i) the average of the total of the previous three payment certificates issued by the *Project Manager* and/or if applicable,

- pay less notices issued by the *Project Manager* or the *Contractor* or where fewer than three payment certificates and/or pay less notices have been issued, all payment certificates and/or pay less notices issued to date; less
- (ii) the *Contractor's* profit included within such payment certificates and/or pay less notices provided that:
- (1) if the *Project Manager* considers one or more payment certificate and/or pay less notice used to calculate (i) above has or have been disproportionately high, such payment certificate(s) and/or pay less notice (s) shall be disregarded in the calculation; and
  - (2) if no payment certificates and/or pay less notices have been issued to date, the amount reasonably forecast by the *Contractor* in accordance with the [\*\*\*SHORTER SCHEDULE OF COST COMPONENTS] / [SCHEDULE OF COST COMPONENTS] (less the *Contractor's* profit) shall be used.
- (b) **COVID-19:** means the coronavirus disease 2019, an infectious disease caused by severe acute respiratory syndrome coronavirus 2.
- (c) **COVID-19 Event:** means
- (i) the COVID-19 coronavirus outbreak and/or any mutation thereof and any other outbreak of an infectious human disease);
  - (ii) any measures, recommendations, regulations and legislation issued by the government and/or public authorities in relation to COVID-19 from time to time; and/or
  - (iii) any consequences of COVID-19 which are outside the reasonable control of the *Contractor*, which affects the works including without limitation the *Contractor* being unable to reasonably access the Site, delay in or non-delivery of any materials required for the works or the *Contractor* being unable to reasonably adequately resource the works.
- (d) **COVID-19 Related Hardship:** means is the *Contractor's* inability to meet its contractual obligations pursuant to this contract, having been adversely affected as a result of COVID-19.
- (e) **COVID-19 Relief:** means any relief contained in this contract being referred to as a COVID-19 Relief.
- (f) **COVID-19 Relief**  
**Commencement Date:** [\*\*\*INSERT DATE]
- (g) **COVID-19 Relief Payment:** means a sum that the Parties agree is required in order to allow the continuity of the *works* and the retention of the *key persons* and Subcontractors during and after the COVID-19 Relief Period provided that such sum shall:

- (i) not include an element of profit margin for the Contractor and Subcontractors;
  - (ii) be accompanied by a transparent and open- book break-down of the sum and its application (including but not limited to its application to *key persons* and Subcontractors) together with any other relevant supporting information;
  - (iii) be consistent with the Average Amount and the progress of the *works*;
  - (iv) not be subject to retention;
  - (v) be considered a COVID-19 Relief; and
  - (vi) be in lieu of any other cost relief available to the *Contractor* under or arising in connection with this contract as a result of COVID-19 (including arising out of an instruction issued under clause 19.1 or a Compensation Event under this contract occurring during the COVID-19 Relief Period).
- (h) **COVID-19 Relief Period:** means the period from [\*\*\*INSERT DATE] to [\*\*\*INSERT DATE], or such other date as may be agreed between the Parties in writing.
- (i) **COVID-19 Suspension Date:** means [\*\*\*INSERT DATE ON WHICH SUSPENSION STARTS]
- (j) **COVID-19 Suspension Period:** means the period from COVID-19 Suspension Date to [\*\*\*INSERT DATE], or such other date as may be agreed between the Parties in writing.
- (k) **COVID-19 Suspension Time Extension:** as set out at 2.6(b)(i)
- (l) **Open Book Interim Data:** means the complete and accurate financial and non-financial information which is required by the *Employer* to enable the *Employer* to understand all COVID-19 related relief, grants, interventions or other measures received by the *Contractor* and/or the *key persons* and/or Subcontractors from the Government and to verify the payments made by the *Employer* to the *Contractor* and by the *Contractor* to the *key persons* and/or Subcontractors during the COVID-19 Relief Period (including any COVID-19 Relief) and including:
- (i) *the Contractor's actual cost breakdown based on the items listed on the Activity Schedule, including the Contractor's overheads;*
  - (ii) *all interest, expenses and other third party financing costs incurred in relation to Providing the works; and*
  - (iii) *full details of the payment of the key persons and/or Subcontractors and any other third parties in relation to Providing the works.*
- (m) **Reconciled Value:** means the whole or any part of any payments

made to the *Contractor* as COVID-19 Relief the value of which is determined by the *Project Manager* and notified to the *Contractor*.

2.3 **\*\*\*OPTIONAL CLAUSE: CERTIFICATION OF PAYMENT FOR UNDELIVERED WORK DUE TO COVID-19**

- (a) In clause 50.2, at the end of the second bullet point insert: "which shall include any COVID-19 Relief Payment made in accordance with clause 50.4A."
- (b) Insert a new clause 50.4A as follows: "If the *Contractor* is suffering a COVID-19 Related Hardship during the COVID-19 Relief Period the *Contractor* shall be entitled to include within the application for payment a COVID-19 Relief Payment."

2.4 **\*\*\*OPTIONAL CLAUSE: AMENDMENT TO EXISTING PAYMENT SCHEDULE**

- (a) In the first sentence of clause 51.1, delete "one week" and insert "[\*\*\*agreed number of days for payment to be certified from the assessment date, which must be shorter than the period for payment in clause 2.4(b) below and should be the same as the period in clause 2.4(c)]".
- (b) In the first sentence of clause 51.2, delete "within three weeks" and insert "[\*\*\*agreed number of days for a certified payment to be made]".
- (c) In Option Y2.2, delete "seven days" and replace with "[\*\*\*agreed number of days after the assessment date on which payment becomes due, which should be the same period as in clause 2.4.(a) above]".
- (d) In entry "5 Payment" of Part one of the Contract Data on page 66 of the NEC3 Engineering and Construction Contract (April 2013), after "The assessment interval is" insert "[\*\*\*agreed number of days / weeks]".
- (e) In the Optional statements section of Part one of the Contract Data on page 68 of the NEC3 Engineering and Construction Contract (April 2013), at entry Option Y2.2, delete the period inserted after "The period of payment is", and replace with "[\*\*\*agreed number of days after which payment becomes due for the final date for payment, which should be the same as stated in clause 2.4(b)]".

2.5 **\*\*\*OPTIONAL CLAUSE: ADVANCE PAYMENT**

- (a) In entry Option X14 of Part one of the Contract Data on page 72 of the NEC3 Engineering and Construction Contract (April 2013):
  - (i) after "The amount of the advanced payment is" insert "[\*\*\*£agreed sum]"/ "[agreed percentage of The Price for

Work Done to Date<sup>7</sup>] provided as a COVID-19 Relief”;

- (ii) after “The *Contractor* repays the instalments in assessments starting not less than” insert “[\*\*\**agreed number of weeks for reimbursement of advance payment to the Employer*]”;
  - (iii) after “The instalments are” insert “[\*\*\*£amount(s)],[percentage of payment due%]”; and
  - (iv) delete [\*\*\*“is”][“is not required”] after the wording “An advanced payment bond”.
- (b) Clause X14.2 is deleted and replaced by “*The advanced payment is made on the [[\*\*\*first assessment date following the [insert description of the amendment agreement if payment to be immediately after the amendment is agreed] or [insert such other assessment date as is agreed]]*”.
- (c) Insert a new fourth bullet point in clause 19.1: “is not a COVID-19 Related Hardship or any event occurring as a result of or caused by a COVID-19 Related Hardship or COVID-19”.
- (d) Insert new clause 60.4: “A COVID-19 Related Hardship or any event occurring as a result of or caused by a COVID-19 Related Hardship or COVID-19 shall not be considered to be a compensation event for the purposes of this contract.”
- (e) Insert a new clause 91A as follows: “Notwithstanding clauses 90 and 91, the Contractor shall not be entitled to terminate this Contract neither:
- (i) during the COVID-19 Relief Period; nor
  - (ii) for any period thereafter as a result of COVID-19 or a COVID-19 Related Hardship, where COVID-19 Relief Payments are being made or reviewed (and where appropriate, such payments are set-off or deducted from further payments) in accordance with Clause Z2.5.”
  - (iii) In clause X2.1, at the end of the first sentence insert: “except if the change in the law is due to COVID-19”.
- (f) In clause Y2.4, at the end of the clause insert: “except if such suspension is as a result of or caused by a COVID-19 Related Hardship or COVID-19”.

2.6 **\*\*\*OPTIONAL CLAUSE: SUSPENSION DURING AN AGREED COVID-19 SUSPENSION PERIOD**

- (a) The Contractor’s main responsibilities under clause 20, clause 21, and 23 shall be disapplied for the Suspension Period.
- (b) For the purposes of clauses 30.1 and 30.3 and, it is agreed that:
  - (i) the Contractor shall be treated as having made an application for an extension of time for the Key Dates and Completion of



the Works equal to the COVID-19 Suspension Period (the "COVID-19 Suspension Time Extension");

and

- (ii) the COVID-19 Suspension Time Extension shall be treated as if the cause of the delay to the Works during the COVID-19 Suspension Period was a compensation event (whether or not it would normally amount to such an event or whether any notification has been provided) and the Employer shall be deemed to have given an extension of time for the Key Dates and Completion of the Works equal to the COVID-19 Suspension Period.

provided always that the following terms of the Construction Contract shall be disapplied during the COVID-19 Suspension Period:

- (iii) Clause 24 (in relation to 'People'); and
  - (iv) Clause 25 (in relation to 'Working with the Employer and Others'); and
  - (v) Clause 27.2 (in relation to providing access to the work being done and to Plan and Materials being stored); and
  - (vi) Clause 32.2 (in relation to the Contractor submitting a revised programme); and
  - (vii) Clause 36 (in relation to 'Acceleration'); and
  - (viii) Clause 42 (in relation to 'Searching for and notifying Defects'); and
  - (ix) Clause 82.1 (in relation to 'Repairs').
- (c) At clause 81.1 (in relation to 'The Contractor's Risks'), delete "." and insert ", except during the COVID-19 Suspension Period where this shall be carried by the Employer".
  - (d) The Employer shall not issue any instructions to the Contractor in connection with the Works during the COVID-19 Suspension Period.
  - (e) For the duration of the COVID-19 Suspension Period, at Clause 50.1 "Later assessment dates occur" and the two bullet points are to be replaced with "The next assessment date shall occur on the COVID-19 Suspension Date. There shall be no further assessment during the COVID-19 Suspension Period."
  - (f) For the duration of the COVID-19 Suspension Period, in entry "5 Payment" of Part one of the Contract Data on page 66 of the NEC3 Engineering and Construction Contract (April 2013), after "The *assessment interval* is" insert "The next assessment date shall occur on the COVID-19 Suspension Date. There shall be no further assessment during the COVID-19 Suspension Period."

- (g) The following shall be disapplied during the COVID-19 Suspension Period in relation to 'Reasons for Termination':
  - (i) At Clause 91.2 (R11) shall be disapplied
  - (ii) At Clause 91.3 (R14) shall be disapplied
  - (iii) At Clause 91.6 (R18), (R19) and (R20) shall be disapplied
  - (iv) At Clause 91.7 (R21) shall be disapplied.

At Clause 90.2 the Termination Table shall be amended to disapply references to (R11), (R14), (R18), (R19), (R20) and (R21).
- (h) The Contractor shall not be responsible for protection or security of the Works during the Suspension Period.
- (i) Neither party shall have a claim against the other for any loss and/or expense relating to or connected with or arising from this Deed, including, without limitation, as the result of, or arising from, or connected with:
  - (i) Any delay in the carrying out or completion of the Works during the COVID-19 Suspension Period; or
  - (ii) The COVID-19 Suspension Time Extension made pursuant to this Deed; or
  - (iii) Any claim or loss and/or expense due to prolongation of the Works during the Suspension Period under the Construction Contract.
- (j) Not later than once every 2 weeks during the COVID-19 Suspension Period, the parties agree to review, in good faith, whether the COVID-19 Suspension Period should be adjusted. If so, then what steps, if any, should be taken to mobilise, labour and materials so as to enable the Works to proceed in a proper and workmanlike manner after the expiry of the COVID-19 Suspension Period. The parties shall record any adjustment to the COVID-19 Suspension Period in writing.

2.7 **\*\*\*OPTIONAL CLAUSE: EXTENSION OF TIME BY INCLUDING COVID-19 EVENT AS A COMPENSATION EVENT**

- (a) Add new clause 60.1(20): "A COVID-19 Event"
- (b) Add new clause 61.8: "Notwithstanding any other provision in this contract, there shall be no change to the Prices where and to the extent that a compensation event is an event of the type referred to in Clause 60.1(22)."

2.8 **\*\*\*OPTIONAL CLAUSE: EXTENSION OF TIME AND PAYMENT DUE TO A COVID-19 EVENT**

- (a) Add new clause 60.1(20): "A COVID-19 Event"

2.9 **\*\*\*OPTIONAL CLAUSE: EXTENSION OF TIME AND PAYMENT OF PREDETERMINED PERCENTAGE DUE TO COVID-19 EVENT**

- (a) Add new clause 60.1(20): "A COVID-19 Event"
- (b) Add new clause 63.15: "Notwithstanding any other provision in this contract, any increase to the Prices as a result of a compensation event of the type referred to in clause 60.1(22) shall be reduced by [\*\*\*INSERT FIGURE]%."

2.10 **\*\*\*OPTIONAL CLAUSE: TERMINATION PROVISION WHERE THE WORKS ARE SUSPENDED FOR THE RELEVANT CONTINUOUS PERIOD AS SET OUT IN THE CONTRACT PARTICULARS DUE TO COVID-19 EVENT**

- (a) In the termination table in clause 90.2, insert 'R17A' i) after 'R21' in the row regarding termination by the Client and ii) after 'R17 or R20' in the row regarding termination by the Contractor.
- (b) Add a new clause 91.5A: "Either Party may terminate if the works have been suspended for at least [\*\*\*INSERT NUMBER] days due to a COVID-19 Event (R17A)."

2.11 Insert a new clause Z2 as follows: "**COVID-19 Relief Open Book Reporting**"

- Z2.1 During the COVID-19 Relief Period and for any period thereafter where COVID-19 Relief Payments are being made or reviewed (and where appropriate, such payments are set-off or deducted from further payments) in accordance with Clause Z2.5, the *Contractor* shall:
- Z2.1.1 at the *Employer's* request, promptly provide a full cost breakdown which sets out the Contractor's actual costs, expenses, cash flow and profits contained in the [\*\*\*SHORTER SCHEDULE OF COST COMPONENTS]/[SCHEDULE OF COST COMPONENTS] for the previous three months;
- Z2.1.2 ensure that the payments made by the *Employer* as a COVID-19 Relief are promptly and solely applied to the purposes for which they are made including payments to *key persons* and/or Subcontractors;
- Z2.1.3 make available to the *Employer* upon request any information and/or evidence (including Open Book Interim Data) which the *Employer* may reasonably require in order to:

- (a) verify and assure that the *Contractor* has applied any monies received as a COVID-19 Relief for the intended purpose (or as agreed with the *Employer*), including copies of accounts, ledgers, cash-flow forecasts, balance sheets, profit and loss accounts and any other documentary evidence; and
  - (b) verify and assure that monies intended for *key persons* and/or Subcontractors have been properly and promptly paid;
- Z2.1.4 ensure that all invoices clearly set out which elements of the invoice are attributable to COVID-19 Relief;
- Z2.1.5 maintain full and accurate records and a written audit trail of COVID-19 Relief received, which the *Contractor* will provide to the *Employer* on request; and
- Z2.1.6 act transparently and with integrity and at all times in good faith and using best endeavours in relation to any COVID-19 Relief.”

#### **Payment during COVID-19 Relief Period**

- Z2.2 During the COVID-19 Relief Period, the *Contractor* shall not be entitled to combine and shall procure that the *key persons* shall not combine any COVID-19 Relief provided pursuant to this Deed or otherwise with any Government COVID-19 related relief, grant, intervention or other measure which results in the *Contractor* and/or *key persons* and/or Subcontractors receiving relief more than once for the same underlying cashflow issue which in the reasonable opinion of the *Employer* would amount to the *Contractor* and/or *key persons* and/or Subcontractors taking undue advantage of any COVID-19 Relief.

#### **Recovery of payments by *Employer***

Z2.3 If the *Contractor*:

- Z2.3.1 fails to comply with the provisions of any of this clause Z.2; and/or
- Z2.3.2 *key persons* and/or Subcontractors in the *Employer's* opinion takes undue advantage of any COVID-19 Relief; and/or
- Z2.3.3 has failed to expend any COVID-19 Relief for the intended purpose (or as agreed by the *Employer*) the *Employer* shall be entitled to, without limitation, retain or set-off the Reconciled Value from any amount due and/or outstanding to the *Contractor* under this Deed or any other contract and/or recover the Reconciled Value from the

*Contractor* as a debt due and payable by the *Contractor* to the *Employer* and the Reconciled Value shall be deducted from the Prices.

## **Warranties**

Z2.4 The *Contractor* warrants to the *Employer* that during the COVID-19 Relief Period:

Z2.4.1 the receipt of any COVID-19 Relief will not place the *Contractor* in breach of any financial or non-financial covenants pursuant to the terms of any finance agreement or other agreement which the *Contractor* has entered into in relation to Providing the *works* or otherwise; and

Z2.4.2 it will not seek to enforce any security against any Subcontractors or other third party engaged in relation to the *works*.

## **Payments**

Z2.5 The *Contractor* agrees and acknowledges that any payment paid to the *Contractor* by the *Employer* during the COVID-19 Relief Period are not acceptance by the *Employer* as to the validity of the application for payment, payment certificate, and/or pay less notice and that the *Employer* shall be entitled to subsequently review any application for payment, payment certificate, and/or pay less notice and set-off or deduct from further payments due to the *Contractor* under this Deed any sums that it considers should not have been included within such application for payment, payment certificate, and/or pay less notice.

## **3. CONSTRUCTION CONTRACT REMAINS EFFECTIVE**

3.1 This Deed is supplemental to the Construction Contract. It is agreed and declared that, except to the extent that they are varied by this Deed, the terms and conditions set out in the Construction Contract shall remain in full force and effect.

3.2 Except to the extent set out in this Deed, this Deed shall not constitute a waiver of any right or remedy of the *Employer* or the *Contractor*, arising before, during or after this Deed.

## **4. EXCLUSION OF RIGHTS UNDER THE CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

A person who is not party to this Deed shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Deed. This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

**5. JURISDICTION AND LAW**

This Deed and any dispute or claim arising out of or in connection with it or its subject matter or formation (including any non-contractual dispute or claim) shall be governed by and construed in accordance with the law of England and Wales and subject to the jurisdiction of the courts of England and Wales.

**THIS DEED** is executed and delivered as a deed on the date stated at the beginning hereof. [\*\*\*INSERT EXECUTION BLOCKS]