EXAMINERS REPORT 2019

Examination for the ICE Certificate in Law and Contract Management (CLCM)

Examination for the Advanced ICE Certificate in Law and Contract Management (ACLCM)

EXAMINERS' REPORT 2019

Contents

Moderator's Report

The number of candidates sitting Module 1 was down 18% on last year but this is not viewed by the Moderators as an indication of reduced overall interest in the examinations. The increase in the percentage success rate for Module 1 Paper was very encouraging. Conversely, although the number of candidates sitting Module 2 Paper remained the same as last year, the decrease in the percentage number of candidates achieving the pass mark was disappointingly down by 17%. This year, most encouragingly, there were eight candidates sitting the Module 3 Paper all of whom achieved a pass.

The examiners make useful comments in their reports much of which merits repetition.

For the Module 1 Paper, one particular area that candidates struggled with was in relation to exclusion of liability clauses, and in particular the applicability of the Unfair Contract Terms Act 1977 on these. Exclusion (or limitation) of liability clauses are not uncommon in the construction industry and commercial contracts generally, so this is always an important issue to identify in order to consider the maximum exposure of liability for a party.

On the other hand, it was encouraging that most candidates not only properly identified the issue of liquidated damages but gave well-reasoned opinions on whether they were likely to be valid or not. Liquidated damages are common in the construction industry, so the issues to be considered will be useful for candidates in practice, both in considering whether they are valid in a particular case and setting them at an appropriate level in the first place if responsible for this.

For the Module 2 Paper, those candidates looking back at past papers would be well advised to read the questions carefully and reflect on the suggested answers which give an indication as to what the examiners are looking for. The examiners are looking for well thought through answers to a range of questions using the contract as the basis for these answers, not some arbitrary opinion of fairness. Additionally, it was apparent that the majority of candidates fared much better in the Section 1 paper than in the Section 2 paper; it was clear that many candidates had run out of time in the Section 2 paper which resulted in their failure to achieve the necessary pass mark overall. Candidates are reminded that exam technique and planning is important to ensure all questions are answered not necessarily fully but at least to a level whereby a large percentage of the available marks are attained.

For the Module 3 Paper, as mentioned above, the results are extremely encouraging. It is clear that candidates sitting this Paper are those to which the Module 3 Paper is targeted. Module 3 is aimed at those with both knowledge and some hands-on experience of civil engineering contract who may wish to further their knowledge or follow a career path in the direction of more challenging contract management and/or dispute management. It is very much hoped that a number of candidates who sat the Module 1 and/or Module 2 Papers will in time apply to sit the Module 3 Paper.

The examiners give a considerable amount of time to set and mark papers for a small honorarium and deserve our grateful thanks. The candidates evidently make a considerable effort to

assimilate all the material and present commendable scripts whether they pass or not. It is also encouraging to note the increased number of approved Organisations offering the ICE Law and Contract Management Courses.

Finally, all the candidates, whether or not they were successful this year are to be congratulated for the hard work put into learning all the law and contract they have displayed. We hope that they will be able to put it into use in their daily work and will be encouraged to improve their knowledge and take it to a higher standard in years to come.

It is our belief that knowledge and understanding of civil engineering law and contract procedures are prerequisites to competent project administration and management. Consequently, it is hoped that all candidates will concur with these sentiments and do their part to encourage their colleagues to likewise commit to advancing their own understanding and knowledge of civil engineering construction law and contract.

Pass marks
The pass marks were set at 40% for Module 1, 50% for Module 2 and 65% for Module 3.

Total Number of Candidates taking each Module and % Passing each Module								
	Module 1		**Module 2 ICE**		**Module 2 NEC**		**Module 3**	
	Nr	%	Nr	%	Nr	%	Nr	%
2019	49	80	-	-	74	57	8	100
2018	60	77	-	-	74	74	2	100
2017	70	72	-	-	79	83	3	66
2016	74	51	-	-	91	74	3	33
2015	85	70	-	-	105	76	3	33
2014	68	62	-	-	72	79	4	0
2013	42	73	-	-	51	73	3	0
2012	36	83	-	-	42	82	6	33
2011	43	81	2	50	41	53	2	50
2010	34	83	1	100	36	67	7	29
2009	46	83	2	100	44	80	2	0
2008	45	84	2	100	43	83	2	0
2007	28	74	1	0	25	52	5	20
2006	47	74	21	100	25	76	3	33
2005	57	60	14	86	37	73	5	0

A certificate is issued to a candidate who passes Module 1, 2, or 3
Copies of the current curriculum, the two case lists and a revised reading list are all available on the ICE website www.ice.org.uk/law or contact the Management Procurement and Law Department, Institution of Civil Engineer
s, One Great George Street, London SW1P 3AA, phone +44 (0)20 7665 2116 or email contractsanddisputes@ice.org.uk

The following pages are general comments on how the questions were answered and what the examiner was expecting. Each section of each module has a different examiner. Each exam script is then moderated by the LCMEC (Law and Contract Management Examination Committee) to ensure there is consistency between the examiners.

Module 1

Section 1

General comments

In general, this section was answered well, with the majority (81.6%) of candidates achieving a pass mark (40%) or above.

It was very encouraging to see most students having a firm grasp of the basics of the formation of a contract: offer, acceptance, consideration and an intention to create legal intentions, and some of the intricacies involved in this.

In terms of exam technique, candidates often lost marks by not providing full answers identifying the relevant legal principle, applying it to the facts and then giving a reasoned conclusion - with candidates sometimes missing out one or more of these steps. In practice, identifying the correct legal principle but then not providing a reasoned view can be rather unhelpful in terms of deciding which course to take.

There was, as in previous years, some confusing of principles of contract law and tort. Candidates should be careful of this when putting their learning into practice: construction professionals often have concurrent duties in both contract and tort, some construction parties (e.g. contractors with no design responsibility) may owe no professional duty of care and so reliance on contractual remedies may be the only possibility, and sometimes there are questions of whether a tortious duty of care is owed when there is a no privily of contract between parties in a contractual chain. A sound knowledge of both is therefore key.

One particular area that candidates struggled with was in relation to exclusion of liability clauses, and in particular the applicability of the Unfair Contract Terms Act 1977 on these. Exclusion (or limitation) of liability clauses are not uncommon in the construction industry and commercial contracts generally, so this is always an important issue to identify in order to consider the maximum exposure of liability for a party.

On the other hand, it was encouraging that most candidates not only properly identified the issue of liquidated damages but gave well-reasoned opinions on whether they were likely to be valid or not. Liquidated damages are common in the construction industry, so the issues to be considered will be useful for candidates in practice, both in considering whether they are valid in a particular case and setting them at an appropriate level in the first place if responsible for this.

Question 1

This was the most popular question in Section 1, with 39 of the 49 candidates answering this question. Two thirds of students achieved a score of 10 (the overall pass mark) or above for this question, but it still had the lowest average score of the three questions in this section. Students, in particular had difficulties with question 1(d).

Question 1(a)

There was a mixed response to this question, with only 24 of the 39 candidates who answered this question achieving more than 2 of the 5 marks available here.

Some candidates confused issues relevant to misrepresentation. The question here was whether there has been a breach of contract instead and therefore the starting point to consider is whether Erica's statements were incorporated as contractual terms.

Most candidates did well to identify the importance to John of Erica's statement regarding the spa having space for at least 20 guests. However, not all of these candidates explained why i.e. the importance of the statement is relevant to whether the statement was incorporated as a contractual term (*Bannerman v White* (1861)). Finally, some students lost a mark for omitting to consider whether Erica's second statement - that the spa will be the most impressive in the country - might be incorporated as a contractual term, too. Those that did, generally correctly concluded that it was likely a "mere puff" and unlikely to be incorporated as a contractual term.

Question 1(b)

Candidates generally did well on this question, considering whether there is a misrepresentation, with over three quarters of candidates achieving more than 5 marks and an average mark of over 6 for the 11 marks available.

Candidates generally did well at identifying the ingredients of misrepresentation (i.e. a false statement of fact that induces another party to enter into a contract), although students lost marks by not always applying each of these ingredients to the facts of the question in order to fully answer whether there has been a misrepresentation or not. Candidates generally did well to identify each of the types of misrepresentation: fraudulent, negligent and innocent, but again did not always apply these to the facts to consider which ones may or may not apply. It is always important to consider this in practice, as the remedies are different.

Question 1(c)

Most candidates identified this was a case of a "battle of forms" in order to consider whose standard terms of conditions, if any, applied. Generally, candidates identified that the "last shot" often wins, provided there has been acceptance of it.

Question 1(d)

This question was generally poorly answers: the average score for this question was just 1.4 for 6 marks available. A lot of candidates failed to identify the applicability of the Unfair Contract Terms Act 1977 to the question of whether the exclusion of liability clause would be found valid or not. Of those that did, not many identified the reasonableness test under the Act i.e. whether the term is a fair and reasonable one having regard to the circumstances which were or ought to have been known to or in contemplation of the parties when the contract was made. Not many students scored marks by going a step further too to consider some of the relevant factors under in Schedule 2 of the Act to decide whether the test of reasonableness was passed, such as whether Milton knew or ought to have known about the clause and the respective bargaining positions of Milton and EDM.

Some students also confused the relevance of the exclusion of liability in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964) which is relevant to negligent misstatements. Generally, the question of whether there has been a negligent misstatement is relevant only when there is no contract between the parties, as opposed to here where there is a contract and therefore UCTA needs consideration as to the validity of the exclusion of liability clause.

Question 2

This was the least popular question in Section 1, with 23 of the 49 candidates answering this question. About two thirds of students achieved a score of 10 (the overall 40% pass mark) or above for this question and the average score for this question was higher than question 1.

Question 2(a)

This question was generally answered well. Candidates generally identified that the question of the validity of the liquidated damages provision was whether it amounted to a penalty. Candidates generally did well to identify some of the relevant factors, such as that the liquidated damages of £50,000 a week seemed very high when compared to the contract sum of £200,000 and came to a reasoned conclusion.

Question 2(b)(i)

Candidates struggled more with this question, with an average score of just less than 3 for the 7 marks available.

A lot of candidates failed to appreciate the applicability of the equitable remedy of rectification here i.e. there was clear a common mistake between PowerGoals and Jackson in that the figure in the contract of £13,000 did not reflect their clear intention of agreeing £3,000 for the works. The parole evidence rule does not apply to rectification (*Joscelyne v Nissen* (1970)).

Of those that did consider potential rectification, candidates lost marks by not considering each of the ingredients (the parties had a common continuing intention, there was an outward expression of accord, the intention continued at the time of execution of the contract and by mistake the contract did not reflect the intention) and not applying it to the facts. Some candidates confused this as a case of a "battle of forms", which is not the case.

Question 2(b)(ii)

This question was generally answered well, with most candidates identifying that performance of an existing duty as generally not sufficient consideration, but it can constitute valid consideration if it confers a practical benefit to the other party and is agreed freely without duress or fraud. Accordingly, most candidates identified that PowerGoals would obtain a new practical benefit of being able to host the profitable tournament if Jackson finishes in time and reasonably concluded that PowerGoals were liable to pay the extra £1,000 to Jackson.

Question 2(c)

This answer was also generally answered well, with most candidates showing a good understanding of consideration. Most candidates identified that consideration does not have to be financial or even adequate, provided it has some value - and therefore reasonably concluded that free football matches for Jackson would constitute good consideration.

Question 3

This question was also popular in Section 1, with 36 of the 49 candidates answering this question. This was the best answered question in Section 1, with the highest average score and 89% of students achieving a score of 10 (the overall pass mark) or above for this question.

Question 3(a)

This question was generally answered very well, with majority of candidates scoring most of the marks available. Almost all candidates correctly identified that goods displayed on a shelf for sale are generally only invitations to treat and not offers, and an offer was only made when Louise took the tennis shoes to the cashier. Almost all candidates therefore correctly concluded that Boson Sports did not need to sell the shoes to Louise for £30 as they were entitled to refuse to accept that offer and there was no binding contract for Boson Sports to sell the shoes for £30.

Question 3(b)

Most candidates scored the full 2 marks for this question by identifying that the statement that the shoes were the *"comfiest tennis shoes in the world, ever!"* was likely no more than a

mere puff or mere opinion, and therefore Louise likely does not have a claim with merit against Boson Sports.

Question 3(c)

This question was also answered very well, with an average score of over 4 for the 7 marks available. Almost all candidates correctly identified that David was not bound to sell his racket to Louise, given he had the right to revoke his offer before acceptance and this could be communicated via a third party (*Dickinson v Dobbs* (1875)).

Some marks were lost by candidates not fully explaining the requirements for revocation I.e. an unequivocal communication of the withdrawal of the offer before acceptance, and then applying it to the facts to reach the conclusion they did.

Question 3(d)

The answers to this question were a little more mixed, with 22 of the 36 candidates who attempted this question achieving 5 or more of the 11 marks available. Almost all candidates correctly identified Andy was in breach of contract for failing to deliver the tennis racket and correctly considered the likely remedies available, in particular damages.

Some candidates mixed up the objective of damages here for breach of contract (i.e. to place the innocent party in the post-incident position had the contract been properly performed) with the objective of damages in tort (i.e. to place the innocent party in its pre-incident position had the breach not occurred). Candidates should be careful of this in practice, as the results can be different.

Generally candidates did well to identify the issue of remoteness and consider the two limbs of *Hadley v Baxendale* i.e. losses that rise naturally from the breach, or were in the reasonable contemplation of the parties - candidates should remember these are alternatives, and both limbs do not need to be fulfilled as some suggested. Candidates generally gave well-reasoned conclusions: that Louise should have a certain claim for £200 for the tennis racket, but may struggle to prove causation for the £100,000 prize money as this was speculative.

The stronger candidates considered whether Louise may have a claim for a "loss of chance" of winning the competition, as in *Chaplin v Hicks* (1911). Loss of chance claims are common considerations when a party's potential loss is dependent on the actions by third parties, and loss of chance claims have been the subject of a lot of recent judicial scrutiny (particularly the Supreme Court case this year of *Perry v Raleys Solicitors* [2019] UKSC 5), so candidates would do well to keep this in mind in practice.

Module 1

Section 2

General comments

In general, this section was answered well, with the majority (77.6%) of candidates achieving a pass mark (40%) or above.

Most candidates had good knowledge of the general requirements for a claim for negligence: duty of care, breach, causation and remoteness.

Most candidates had very good knowledge of how breach of duty is assessed, pursuant to the principles of *Bolam v Friern Hospital Management Committee* (1957). Most candidates were able to form well-reasoned conclusions on breach, by applying the facts to the standard in question. Most candidates also had very good knowledge of the "but for test" established in (*Barnett v Chelsea & Kensington Hospital Management Committee* (1969)) and were able to apply this to the facts of the case to determine whether or not causation could be established.

It was encouraging to see that most candidates had a good general understanding of the requirements for holding an employer vicariously liable.

Question 4

This was the most popular question in Section 2, with 41 of the 49 candidates answering this question. More than 75% of these students scored more than 10 marks (the overall pass mark) or above for this question.

Question 4(a)

There was an overall good response to this question with more than two thirds of candidates achieving the pass score or above. The average mark for this question was 6.3 out of a total of 12 marks available.

Some candidates lost marks because they did not identify that Francesca was a trespasser. Some candidates wrongly determined that Francesca was a visitor and therefore that the Occupiers Liability Act 1957 applied. Some candidates then applied the provisions in the Occupiers Liability Act 1957, including that occupiers owed a higher standard of care for visitors who were minors.

Most candidates who correctly concluded Francesca was a trespasser applied Section 1(3) of the Occupiers Liability Act 1984 to the facts very well.

Question 4(b)

Candidates generally did well on this question. 33 out of 41 candidates achieved the pass score (0.8 marks) or above. Most candidates who correctly identified that the Occupiers Liability Act 1984 applied in question 1(a) were able to identify that damage to property is outside the scope of this Act.

Question 4(c)

This question was mostly answered well with 31 out of 41 candidates achieving the pass score (4.4) or above. Most candidates identified that Anthony was a visitor and therefore that the Occupiers Liability Act 1957 applied.

Most candidates applied section 2(4)(b) of the Occupiers Liability Act 1957 to the fact that Derek was an independent contractor and considered whether Raymond had taken reasonable steps to satisfy himself that Derek was competent. Most candidates identified that the Act requires a higher degree of care from child visitors (Section 2(3)(a) of the Occupiers Liability Act 1957). Only a few candidates went further and considered whether the site had any allurement factors.

Some candidates confused this question with vicarious liability and concluded that Adlard & Sons could be vicariously liable for Anthony's injuries. This was not the focus of the question.

Question 5

This was the second most popular question in Section 2, with 33 of the 49 candidates answering this question. More than 75% of students achieved a score of 10 (the overall 40% pass mark) or above for this question. The average score for this question was slightly lower than question 4.

Question 5(a)

This question was generally well answered. Candidates generally identified that the question concerned the tort of negligent misstatement. Candidates lost marks by failing to apply the principles established in *Hedley Byrne v Heller & Partners (1964)* to the facts of this case.

Most candidates correctly applied the test in *Bolam v Friern Hospital Management Committee* (1957) to assess whether Nathan fell below the standard of a reasonable investment advisor.

Only a few candidates identified that as a general principle, pure economic loss is not recoverable in tort and whether or not such a loss was recoverable in the question.

Question 5(b)

Candidates struggled more with this question, with less than half of candidates achieving the pass score for this question.

A lot of candidates failed to explain the principle of *novus actus intervenienus* properly i.e. if the causal effect of one's fault is nullified by a later event, they will not be liable in damages, or if it is made worse by a later event, he will not be liable for the further damage.

A lot of candidates considered whether Nathan could have a defence because Joe and Nathan were in a social setting. This was not the focus of the question.

Question 5(c)

This question was generally answered very well, with 28 out of 33 candidates achieving the pass score. Candidates were generally good at forming reasoned conclusions on whether or not Nathan was in the course of employment when providing the advice to Joe. Most candidates came to the conclusion that Nathan was not acting in the course of employment.

Question 6

This question was the least popular question for section 2, with only 24 candidates answering this question. This was the best answered question in Section 2, with the highest average score of 83% of students achieving a score of 10 (the overall pass mark) or above for this question.

Question 6(a)

This results from this question were mixed: only 50% of candidates achieved the pass score for this question. Whilst most candidates identified that the question concerned private nuisance because Stephanie and William had a direct proprietary interest, a lot of candidates did not apply the concept of what constitutes a 'reasonable user' and/or whether there was reasonable foreseeability of damage (*Cambridge* Water Co Ltd v Eastern Counties Leather plc [1994]).

Most candidates concluded that public nuisance was not relevant to this question.

Question 6(b)

Most candidates scored the majority of marks available for this question. Most candidates identified that the applicable remedies for private nuisance would be damages and/or an injunction. Most candidates applied the principles of *British Westinghouse* very well and concluded that Stephanie and William were unlikely to be able to claim for the full cost of the penthouse apartment in London.

Question 6(c)

This question was also answered very well, with an average score of 2 out of the 3 marks available for this question. Most candidates identified that Selena would not likely be able to bring a claim for private nuisance as she has no direct proprietary interest in the property *(Hunter v Canary Wharf).*

Question 6(d)

The answers to this question were a little more mixed, with most candidates achieving only 1 of the 2 marks that were available for this question. Most candidates identified that acts done deliberately will still constitute a nuisance claim. Other candidates directed their answered to whether or not Alistair could be criminally liable for his actions.

Module 2

Section 1

General comments

We had some good scripts completed this year. Many candidates demonstrated the required levels of knowledge and these are explained in our commentary on each question.

We have some general comments though that apply across the entire paper.

The question needs to be answered. If its asks, "for each one state if it is a Defect" then each answer should conclude that the scenario presented is, or is not, a Defect. Many candidates discussed the issues at length but did not reach the conclusion required of the answer.

Paper, in the examination, is free. The invigilators will always issue more on request. So please start each new part of each question on a new page, hopefully leaving space for coming back to a question later if needed.

Well done to the candidate who answered all 8 questions from this paper, but only four were needed. This was a basic failure to read the instructions. Ditto to the people who didn't use two answer books as instructed.

All legal documents use the notation of capitalised terms to indicate definitions. In NEC contracts these include, for example, Defect, Accepted Programme etc. By way of contrast the term compensation event is not defined and should not be capitalised. Unique to NEC documents is the use of italicised terms such as *defect correction period* to indicate identified terms in the Contract Data. These two forms of notation are crucial to the correct use of NEC contracts and candidates are expected to understand them. Many clearly do not.

Candidates for this examination are expected to understand how the NEC contracts are used in practice. Some threaten termination or dispute resolution without understanding the processes involved or recognising that these tend to be steps of last resort. They are best avoided in this examination unless expressly asked for.

Latin terms are still in use in the UK legal jurisdictions but their use in this paper should be avoided, particularly where the candidate doesn't understand the legal doctrine or phrase in question. Included in these comments are prima facie, contra proferentem etc.

Early warnings are given or notified. Compensation events are notified. Neither of these communications are 'raised' or 'issued'.

Question 1

This was a popular question, answered by the vast majority of candidates. Marks ranged from 4 to 24 marks out of 25.

Candidates need to understand when an early warning should be notified as distinct from a notification of a compensation event. The final sentence of clause 15.1 should be studied and learned.

Candidates for the examination need to demonstrate that they understand the difference between the Prices and the Price for Work Done to Date (PWDD) in each option. We have seen in several questions that a question about the effect of a compensation event is answered with an explanation of the PWDD. Candidates must answer the question asked and focus on the terms in question.

The question asked how the change to the Prices should be assessed. This requires a knowledge of clause 63.1, then Defined Cost and what it means in the relevant main option. Falling back on the use of lump sums without explaining the use of the Schedule of Cost Components is insufficient. The default assessment methodology must be described.

Question (d) needed an answer about the effect of the lack of an early warning on the £47k claimed. The answer needed an explanation of clauses 61.5 and 63.7.

Question 2

There were only a few answers to this question so no general advice can be given. Marks ranged from 3 to 19 out of 25.

Question (a) was about Others (11.2(12)). Even without detailed knowledge we would expect a candidate to use the index in the contract to find the appropriate references. Some did not.

References to a 'competent contractor' are irrelevant as the contract does not use such a term.

Knowledge of the principles behind liquidated damages must be explained when a question refers to delay damages.

Question 3

There were only a few answers to this question so no general advice can be given. Marks ranged from 5 to 23 out of 25.

This question was primarily about Defects and we have already commented about the correct use if that defined term. Defects are clearly defined in the contract and therefore any answer should refer to 11.2(6).

Contract terms such as *defect correction period*, Defects Certificate, *defects date* must be spelt and notated correctly and understood. The content and role of the Defects Certificate was not explained correctly by several candidates.

Question 4

This was a popular question, answered by the vast majority of candidates. Marks ranged from 4 to 23 marks out of 25.

Part (a) asked if there was a compensation event. The answer is either yes, or no. But some candidates did not make a conclusion.

The question required an understanding of the interaction between compensation events and other clauses, for example 34.1 and 60.1(4).

Question (d) required an understanding of the costs and time assessments of a compensation event. Many answers omitted the necessary references to clause numbers.

Question (e) needed an answer that described 63.1, the Short Schedule of Cost Components and the impact on the bill of quantities.

Answers to question (f) needed to address the contract (clause 73.2) and the Scope rather than perceived notions of fairness and, in a few candidates, an over-zealous desire to prevent the Contractor benefiting in any way.

Module 2

Section 2

General comments

Those candidates looking back at past papers would be well advised to read the questions carefully and reflect on historical suggested answers which give an indication as to what the examiners are looking for. The examiners are looking for well thought through answers to a range of questions using the contract as the basis for these answers, not some arbitrary opinion of fairness.

Q5 was the most popular with 67 candidates attempted this and the average mark was 9.8 out of 25. For Q6, 63 candidates attempted this and the average mark was 8.6. Q7 had 4 candidates attempting this, returning an average mark of 12. Finally, 11 candidates attempted Q8 but returning an average mark of 10.18. These were all extremely disappointing marks, perhaps because of the move to using only NEC4 ECC as a basis and that is still a relatively new contract?

Some comments which may be in addition to, or replacing those in similar reports are:

- Please state clause numbers in with your answers, but there is no need to re-cite clauses. We know what they say and we want to know what part of the clause is relevant to the scenario you are answering, and why.
- If you offer up absolutely no answer for a part or all of a question, which some candidates did, you will not score any marks.
- Surely candidates can identify that the issue is perhaps about a 'Defect' then use the index to point to the relevant parts of the contract? A quick read over the clause(s), even when time is against you, might help shape some sort of answer, at worst worth a few marks.
- This statement is made every year but please carefully read and re-read the question. Do not rush this. Where it says "What should the *Contractor* do next?", then answering this from the perspective of the *Supervisor* is not going to get you any marks.
- There is plenty of paper in the booklets so use this. On a similar note, do not start b) immediately after a), leave a few lines. Better even, with the space generally available, start a), b) etc on separate pages. If you need to go back to add something in this will be easily accommodated.
- Candidates are clearly told to answer questions from Section 1 and 2 in separate booklets, yet so many get this wrong. Why?
- Take care to number the questions and parts of questions carefully, this is not always done.
- Do an essay plan, reflect on the question, look in the contents and the index, make sure you have considered the broad range of matters that may be affected.

- Do not just list a series of clauses with the expectation of gaining many marks. Maybe you are right with the references but would you say to a *Contractor* in correspondence 'the answer lies somewhere in these clauses? I don't think so.
- Don't just assume the early warning process is appropriate for every part of every question. It is not. Think about what you are saying.
- Don't use the word 'raise' for early warning, Defects, or compensation events – the contract does not use that language, instead it uses the word 'notify'.
- Clear instructions on answer sheets said do not write candidate name, so what did a few do?!
- It is becoming more difficult for most of us to write for a while and I appreciate that, but please try and slow down a little and make the words more legible.

A few particular points on these questions:

- For Q5e, the part of the question 'should be replaced' is surely clear that they must indeed be replaced and therefore the accepting Defects clause is not appropriate.
- For Q7a, if you just state 'notify an early warning' then there's a mark but there were 8 available so that surely is a hint that more is needed?
- In Q6b, the Contractor is looking at finishing early, this is not acceleration as almost all suggested. Why should the *Client* pay for this where they haven't asked for it?
- In Q6d a number of candidates said X6 seemed to be missing from the question but why would this be included where the question clearly states there is no benefit to the *Client* of early Completion? One candidate was so worried about the *Contractor* finishing early they suggested the *Project Manager* should instruct additional works to keep the *Contractor* on Site…..
- In Q6e, recognise the difference between Completion and take over.
- For Q7b, there are 2 separate contracts that need discussing/managing here.
- For Q8c, hardly anyone grasped the new NEC4 ECC provisions of clause 50.9, where Defined Cost can be finalised at various points during the contract.
- For Q8e, hardly anyone grasped the new NEC4 ECC provisions of clause 53, the final assessment.

Module 3

Section 1

General comments

8 people sat the paper this year, a welcome increase on last year but still with scope for many more to sit the paper.

We had some good scripts completed this year. Many candidates demonstrated the required levels of knowledge and these are explained in our commentary on each question.

We have some general comments though that apply across the entire paper.

Paper, in the examination, is free. The invigilators will always issue more on request. So please start each new part of each question on a new page, hopefully leaving space for coming back to a question later if needed.

Candidates in this paper will need to understand both the contract and the underlying legal issues in detail and be able to apply that understanding to practical problems in construction. Most candidates this year were successful in doing so.

Question 1

This question was compulsory; all 8 candidates provided an answer. Scores ranged from 10 to 23 marks out of 25.

The process of novation was generally understood by candidates albeit some lost marks by not answering all of the question concerning the reasons for using novation which generally concerns a single point o responsibility for the client. Candidates alo needed to describe how the contractual processes provide for novation.

Part (b) required a knowledge of the requirement for reasonable skill and care and the *Bolam* case. There were three questions in (b) and not all candidates addressed all three.

Part (c) needed the candidate to justify whichever answer was provided using the *Bolam* test. The role of the Contractor could be discussed – should the error have been spotted before construction? Answers arguing either answer correctly earned marks here.

Part (d) reflected a growing tactic in adjudication and the *Trant v Mott MacDonald* case was correctly named by many candidates.

Question 2

All but one candidate answered this question. Marks ranged from 16 to 23 out of 25 reflecting a generally good quality of response.

Parts (a) and (b) referred to the provisions in HGCRA as amended and the corresponding sections of the Scheme. As these documents are allowed into the examination their use should be understood and prepared for.

Parts (c) and (d) explore other legal principles and how they impact on construction contracts. Issues such as without prejudice or parol evidence will feature in the work of the people targeted by this exam which includes those aiming to become adjudicators and arbitrators. These principles must be understood.

Part (e) concerned the statutory obligation to pay interest on contractual debts. Candidates should be able to name the legislation, what interest rate it allows and what the position on costs recovery is.

Question 3

There was only one answer to this question so no general advice can be given. The sole candidate scored 12 marks out of 25.

Question 4

Nobody answered this question, so no commentary has been provided.

Module 3

Section 2

Question 5

This question was compulsory, all 8 candidates provided an answer. Marks awarded ranged from 19 to 15. The question required candidates to provide advice to either the *Project Manager, Contractor or Supervisor*. Many candidates did not draft their answer as advice.

Part (a) required advice to the *Project Manager* on being notified of potential archaeological find. Most candidates answered this correctly with reference to Clause 73.1 and the *Contractor* having no title to objects of historical interest. A number of candidates said that the *Project Manager* should invite an archaeologist to the early warning meeting.

Part (b) required advice to the *Contractor* in dealing with potential defects in precast concrete piles and instructions issued by way of notes of meeting rather than independently. Only two candidates considered the *Contractor* / subcontractor relationship and what action the *Contractor* should take under the subcontract.

Part (c) required advice to the *Supervisor* concerning the failure of the *Contractor* to follow their temporary works method statement for supporting bridge beams prior to grouting the bearings. Issues to be considered, is this a Defect, responsibility of *Supervisor* under Health and Safety at Work Act and lack of delegation by the *Project Manager*. This part of the question received the widest range of marks indicating that many candidates had difficulty differentiating between contractual obligations and H&S obligations which is a real life situation with no easy answer.

Part (d) required advice to the *Client* following failure of the temporary beam propping and a beam toppling onto the motorway resulting in extended closure incurring costs to the *Client* and the *Contractor* receiving a prohibition notice from HSE. Answer required consideration of recovery of costs, pay less notice and potentially insurance requirements.

Part (e) required advice to the *Project Manager* on the termination process following request from the *Client.* Answer required detailed consideration of Core Clause 9, use of Option X 11 and independence of the Project Manager, which no candidate considered.

Question 6

Two candidates answered this question. Marks were 16 and 20. The question was broken down into five parts.

Part (a) required the candidates to consider the role of the *Project Manager* and duties towards the *Client* and the *Contractor.* Both candidates referred to *Costain v Bechtel,* However the leading case is *Scheldebouw BV and St James Homes (Grosvenor Dock) Ltd [2006]EWHC 89(TCC)* and it is suggested that the Curriculum is updated to reflect this.

Part (b) required consideration of disallowed cost under an Option C contract.

Part (c) required the consideration of the situation of there being no amount stated in Contract Data part 1 for Delay Damages even though Z7 is included.

Part (d) required consideration of hopefully an uncommon situation of forged welding certificates. Both candidates answered the question from a legal perspective, quoting Derry v Peek and Misrepresentation Act.

Part (e) referred to effects of failure to achieve a Key Date.

Question 7

Six candidates answered this question. Marks ranged between 15 and 22. The question was broken down into five parts. The question required candidates to provide advice to either the *Project Manager* or the *Contractor*. Many candidates did not draft their answer as advice.

Part (a) required advice to the *Project Manager* on whether the *Contractor* should be paid Defined Cost when staff are not in the Working Area.

Part (b) required advice to the *Contractor* on how to extend the Working Area and maintain records.

Part (c) required advice to the *Project Manager* on whether he should authorise payment for a subcontract which he has not accepted.

Part (d) required advice to the *Contractor* on procedures to follow for subcontractor acceptance.

Part (e) required to reconsider their advice in parts a to d on the basis of the contract being Option A rather than Option C. Question was testing candidates understanding of the differences, e.g.

Defined Cost v Activity Schedule;

Schedule of Cost Components v Shorter Schedule of Cost Components;

Appointment of subcontractors no change

Question 8

No candidate attempted this question.

Institution of Civil Engineers

Examination for the ICE Certificate in Law and Contract Management (CLCM) 2019

Module 1: Law (English and Scots Law)

Tuesday 4th June 2019

Time permitted: 14:00 to 17.20 (3 hours 20 minutes)

There are three questions in Section 1 and three questions in Section 2.

Answer any **two** questions from **each section**; a total of **four** questions.

Please answer questions in the yellow books provided, answer section 1 and section 2 in **separate** books.

All questions carry equal marks.

Please indicate on the outside of the answer books if your answers will be based on Scots Law.

References to cases and legislation should be quoted where possible.

Reference to documents during the examinations
Only unmarked copies of Statutes and Statutory Instruments may be taken into the Examination.

Section 1

Question 1

Milton Hotels Limited ("**Milton**"), the owner of a 40-room luxury spa hotel in the Lake District, is in negotiations with EDM Limited ("**EDM"**), a construction company, in respect of the design and construction of a new spa at the hotel.

On the 12th January and prior to agreement, John, Milton's Procurement Manager, met Erica, EDM's Construction Director, at the site to discuss the proposed works. John informed Erica that they need the works completed by 15th May because they had taken a booking for the entire hotel to host an international football team for a week shortly afterwards.

During the meeting, Erica makes the following statements to John:

(1) Her design for the spa will be able to hold 20 people at the same time. John said this is important for them as it is the minimum they require for the number of guests they have at a time; and

(2) After completion, the spa will be the most impressive in the country and Milton will no doubt attract more sports teams to stay.

The statements made by Erica were not expressly written into their subsequent contract.

Milton appointed EDM but, due to delays by EDM, the works did not finish until 15th June, four weeks late. As a result, the football team and dozens of other customers cancelled their bookings, causing the hotel to lose substantial profits.

Further, it transpired that Erica accidentally got her sums wrong and her design only allowed 10 people to safely use the spa at the same time.

a) **Advise Milton whether they have a claim against EDM for breach of contract for the statements Erica made.** **(5 marks)**

b) **Advise Milton whether they have a claim against EDM for misrepresentation for the statements Erica made.**

(11 marks)

EDM says that it can have no liability for Erica's statements made, given that its standard terms included an exclusion of liability for such statements. Looking back over the pre-contractual correspondence, Milton finds that:

- On the 3rd January, Milton sent a letter to EDM inviting them to quote for the works. Milton's letter said any works would be pursuant to Milton's standard terms and conditions, which were enclosed. Milton's standard terms did not include any exclusions of liability.

- On the 8th January, **EDM sent a letter** to Milton in response with a quoted fee of £50,000. EDM's covering letter said that acceptance of their quotation will be on the basis of their standard terms and conditions, a copy enclosed, which included a clause headed "Exclusion of Liability" which stated: *"This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter.* ***Each of the parties acknowledges that in entering into this Agreement it has not relied on any oral or written representation, warranty or other assurance (except as provided for or referred to in this Agreement) and waives all rights and remedies which might otherwise be available to it in respect thereof".***

- After the meeting on 12th January, John had sent Erica an email saying, *"Thank you for today, we agree to your quotation and agree to contract with EDM Limited for the works pursuant to the terms provided."*

c) **Advise Milton whether EDM's or Milton's standard terms and conditions are likely to apply to their agreement.** **(3 marks)**

d) **If EDM's terms and conditions do apply and EDM are liable for misrepresentation, advise Milton whether the Exclusion of Liability clause is likely to be effective for the statements made by Erica.** **(6 marks)**

Total **(25 marks)**

Section 1

Question 2

PowerGoals Limited ("**PowerGoals**") operate 5-a-side football centres nationally. As part of their expansion plans, they plan to open a new centre in Manchester and renovate their existing centre in Liverpool. PowerGoals want the works finished and the centres open by the start of Autumn, as this is the most popular time for new players to join when the football season starts.

For the construction of their new Manchester centre, they contract with McWelsh Construction Limited ("**McWelsh**") to design and construct the centre for a total contract sum of £200,000. The contract provides that the works are to be completed by 1st July and, should they not, then McWelsh is liable to pay PowerGoals liquidated damages of £50,000 a week.

As part of the renovation of their existing Liverpool centre, the manager of the Liverpool centre approaches Jackson, a local painter and decorator who is a regular player at the centre. In a chain of emails, they negotiate and agree the price for painting the centre is £3,000 and the works need to be completed by 1st July. A written contract is typed up, which records that the works need to be completed by 1st July. However, due to a typographical error, the sum of £13,000 is entered into the written contract instead of the £3,000 agreed in the email correspondence. Both the manager of the centre and Jackson miss the error when signing the contract.

As 1st July draws near, it is clear that the works at the Manchester and Liverpool centres are behind schedule. The construction of the Manchester centre is ultimately 6 weeks late due to delays by McWelsh and their subcontractors. PowerGoals therefore bring a breach of contract claim against McWelsh for £300,000 in liquidated damages. McWelsh claims this is excessive.

As for the Liverpool centre, PowerGoals offered Jackson an extra £1,000 if he could complete the painting works by 1st July, given that subsequent to their contract with Jackson they had taken a booking to host the UK national 5-a-side tournament at the centre in August, which they do not wish to miss out on as it will bring in an extra £50,000 on top of their usual profits. Jackson agrees to this extra payment and is able to complete the works in time.

When preparing his invoice, Jackson spots that the written contract he and PowerGoals signed wrongly refers to £13,000 instead of the £3,000 agreed in their emails. He therefore sent an invoice of £13,000 to PowerGoals, relying on the signed contract and saying PowerGoals cannot rely on the pre-contractual emails. PowerGoals said that they only had to pay £3,000, pointing out the pre-contractual emails from both parties referring to £3,000. Incredulous at what he saw as an underhand conduct, the manager of the Liverpool centre also refused to pay Jackson the extra £1,000 agreed for completing the works in time.

a)	In regards to the Manchester centre, advise PowerGoals whether McWelsh is liable to pay liquidated damages of £300,000 as a result of their breach of contract for late performance.	(5 marks)
b)	In regards to the Liverpool centre, advise PowerGoals whether they are likely to be liable to pay Jackson:	
I.	£3,000 or £13,000 pursuant to the signed contract;	(7 marks)
II.	The £1,000 extra agreed for finishing the works on time.	(7 marks)
c)	Would PowerGoals still have an enforceable contract with Jackson if, instead of agreeing to pay the monetary sums referred to in exchange for Jackson's works, they had agreed with him to provide him free, unlimited 5-a-side games for 3 years?	(6 marks)
	Total	(25 marks)

Section 1

Question 3

Louise is entering a tennis tournament in Wales, the first ever Welsh Open, with a prize of £100,000. She needs a new pair of tennis shoes for the tournament and sees Boson Sports advertising a new range of Nike tennis shoes. She goes to the store and finds a pair she likes on display marked just £30. She decides to buy them and goes to the counter to pay, but the cashier tells her that they have been price marked wrongly and they are in fact £130. Louise is annoyed but the cashier tells her that he has the same pair and they are the *"comfiest tennis shoes in the world, ever!"*, and persuades Louise to buy them.

Louise tries them on whilst practising in the week ahead of the tournament and finds them quite comfortable but her last pair were definitely more comfortable.

Unfortunately, whilst practising, she accidentally snaps her racket frame whilst diving for a shot. Louise therefore starts searching for a new racket so she can play in the tournament. David, someone she meets at her local tennis club, offers to sell his spare Slazenger racket to Louise for £150, but says Louise needs to come back to him with a response before that Friday 17th May, otherwise she plans to sell it someone else to use in the upcoming tournament. On Thursday 16th May and before Louise responds to David, a friend of David tells Louise that David has told him to inform Louise that David needs to withdraw his offer because David broke his own racket as well and therefore needs to use this spare one for the tournament himself. Louise ignores this and, later the same day, tells David that he accepts his offer of £150 for the Slazenger racket, asserting there is a binding contract between them.

David refuses to sell the racket and Louise therefore subsequently buys a Babolat racket from Andy, an online seller, for £200 instead. Despite Andy taking payment, the tennis racket never arrives. As Louise does not have time to buy another, she is unable to enter the tournament and loses out on potentially winning the £100,000 prize.

a) **Was there a contract between Louise and Boson Sports to buy the Nike tennis shoes for £30?** **(5 marks)**

b) **Is Louise likely to have a claim with merit for breach of contract against Boson Sports for the claim that the shoes are the *"comfiest tennis shoes in the world, ever!"*?** **(2 marks)**

c)	**Advise Louise whether she has a binding contract with David for him to sell the Slazenger racket to her for £150.**	**(7 marks)**
d)	**Advise Louise as to any claims and the merits of the potential heads of loss she has against Andy for the failure to deliver the Babolat tennis racket.**	**(11 marks)**
	Total	**(25 marks)**

Section 2

Question 4

Derwent Hill is a newly opened tennis club owned by Raymond Savage. It is an exclusive, members-only, club with a hefty membership fee. The tennis courts themselves are open to members, but the clubhouse (which features a bar and restaurant) remains closed whilst building works are being carried out.

The tennis club features a large sign on the front gates of its entrance stating:

Members and their family members only.

Children to be accompanied by an adult at all times.

Opening hours 10am-8pm daily.

No admission after hours.

Thank you.

Andrew, a member of the tennis club, takes his sixteen-year-old daughter Francesca to the tennis club on a Saturday morning in June. Francesca is set to compete in her school's tennis tournament the following week and would like to practice her serving technique. Andrew and Francesca arrive at the club at 8am. On her way over to the tennis courts, Francesca trips on a protruding tree trunk. Raymond recently decided to have this particular tree removed, but had not yet got around to organising for specialists to come in and dispose of the tree trunk. Unfortunately, Francesca fractures her leg. Her expensive, top of the range tennis racket also breaks as a result of the fall. Francesca is taken to hospital.

Raymond had hired Derek, an independent contractor and owner of Adlard & Sons Ltd, to start works to the clubhouse. Derek continues building works at the clubhouse. He does not block off the area of the clubhouse he is working on to prevent access to the site. However, at Raymond's request, Derek does place a small, discrete, sign on the front door of the clubhouse which reads:

Enter at your own risk. Builder at work.

Anthony, who is 4 years old, arrives at Derwent Hill with his grandad, Harry, a member of the club the following Monday. They arrive just after 12pm to watch the afternoon tennis tournament. During the interval, Harry begins chatting to the other members of the club and does not notice that Anthony has wandered off. Anthony walks into the clubhouse. Unfortunately, while inside, part of the ceiling that Derek was dismantling fell on his head Anthony suffers cuts to his head.

a)	**Is Raymond liable to Francesca for her injuries? Explain your reasoning.**	**(12 marks)**
b)	**Is Raymond liable to Francesca for the cost of replacing her new tennis racket?**	**(2 marks)**
c)	**Is Raymond liable to Anthony for his injuries? Explain your reasoning.**	**(11 marks)**
	Total	**(25 marks)**

Section 2

Question 5

Nathan recently received a substantial inheritance of £1,200,000 from his great aunt Christine. He decides that he should invest some of this money to maximise his returns.

Nathan contacts his friend, Joe, an investment advisor employed by Guaranteed Returns Ltd, an investment firm in Manchester. Joe is an experienced advisor, and has been practising in the market for 15 years. Nathan and Joe meet at the pub to discuss what possible investments Nathan could make. Joe tells him about a property development company called Reetham Ltd, based in Greater Manchester. Joe says he has looked thoroughly at Reetham Ltd and strongly recommends Nathan to invest in it. At first, Nathan is apprehensive about investing in a development company, but decides to invest £750,000 in Reetham Ltd after some comfort from Joe.

Two months later, Nathan is surprised to learn the share price has declined fast such that, two months after investing, he has lost £500,000 of his original investment. Nathan looks into the matter further and quickly discovers from publicly available information online that Reetham Ltd was the subject of an investigation. As such, it had not been active for the past 6 months. News about the investigation was also displayed on the website and twitter page of Guaranteed Returns Ltd.

Upset by this discovery, Nathan decides to get a second opinion. He goes to see Ian, an experienced and well-regarded property advisor in the North West of England. Ian has been in practice for 20 years. Having reviewed all information available, Ian tells Nathan that he believes the special investigation will end soon and that, once that happens, Reetham Ltd's share price will rapidly increase in value. As a result, Nathan leaves in what remains of his investment. Unfortunately, the share price of Reetham Ltd continues to fall as the special investigation continues. By the end of the next month, Nathan's investment is now only £50,000. Nathan does not withdraw his investment in Reetham Ltd. Nathan approaches you for some advice.

a)	**On what basis does Nathan have a claim against Joe?**	**(15 marks)**
b)	**To what extent, if at all, can Joe avoid liability in respect of any claim by Nathan?**	**(5 marks)**
c)	**What claims, if any, can be brought against Guaranteed Returns Ltd?**	**(5 marks)**
	Total	**(25 marks)**

Section 2

Question 6

Stephanie and William bought a three-bedroom Eco-House in Wimbledon in 2016. They have a twenty-year-old daughter, Selena, who is studying a Biochemistry degree at a university in Leeds. Selena travels down from Leeds on weekends to stay with her parents so that she can study for her exams. She is in her final year at university.

In 2017, Alistair bought the neighbouring property. Alistair, who is an architect, bought this property as a design and development project, constructing a new extension, underground carpark and basement with a gym and swimming pool. The property is to feature on a popular television programme, Super Designs, when complete and television crew frequently attend the property to film any progress.

The project has now been ongoing for two years because the builder went bust at the beginning of 2018, which caused some delays. The works have created significant vibrations and noise. The builders are instructed by Alistair to continue work during the weekends in order to speed up progress. Stephanie believes that Alistair has done this deliberately to annoy her and William, who regularly complain to Alistair about the noise and vibrations.

Stephanie has had enough of the noise from the builders and television crew, particularly at weekends and makes the decision to rent a penthouse apartment in the centre of London for her and William to stay. Stephanie, William and Selena stay in this apartment for at least two nights of the week.

a)	**What claim, if any, can Stephanie and William bring against Alistair?**	**(15 marks)**
b)	**What remedies, if any, are available to Stephanie and William?**	**(5 marks)**
c)	**What claim, if any, can Selena bring against Alistair?**	**(3 marks)**
d)	**What difference, if any, would it make if Alistair had instructed the builders to work at the weekends to purposely annoy Stephanie and William?**	**(2 marks)**
	Total	**(25 marks)**

MODULE 1

Section 1

Question 1 - Points for Answer

a) Advise Milton whether they have a claim against EDM for breach of contract for the statements Erica made **(5 marks)**	
A contractual term can be oral as well as written.	1 mark
In regards to the first statement, if Milton communicated the importance of it to Erica then it may be a term of the contract (*Bannerman v White* (1861)).	1 mark
John mentioned the importance of the spa having at least space for 20 guests, so this could well mean it is incorporated as contractual term .	1 mark
Credit for consideration of the parol evidence rule – that since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should not be considered when interpreting the contract (*Henderson v Arthur* (1907)).	1 mark
The second statement is likely to be interpreted as a mere puff.	1 mark
Total	**5 marks**
b) Advise Milton whether they have a claim against EDM for misrepresentation for the statements Erica made (**11 marks**)	
A misrepresentation must be of fact and not opinion (*Bissett v Wilkinson* (1927) (1 mark). Erica's first statement was a fact but her second likely only an opinion (2 marks).	3 marks
A misrepresentation must be false and (at least) the first statement was false.	2 marks
A misrepresentation must also be reasonably relied upon by the other party and induce them into entering the contract (*Smith v Land and House Property* Corp (1884)). Some discussion of whether Milton was induced to enter the contract based on the statements. The first statement seems to induce EDM, given the importance of the minimum number of guests referred to.	2 marks
Candidates should consider the types of misrepresentation, including under the Misrepresentation Act 1967, and apply them to the scenario.	3 marks
A reasoned conclusion should be given.	1 mark
Total	**11 marks**
c) Advise Milton whether EDM's or Milton's standard terms and conditions are likely to apply to their agreement (**3 marks**)	
Candidates should appreciate that this is a "battle of forms".	

Candidates should identify that Milton sent their standard terms of conditions first (1 mark), but Erica's subsequent response was an offer to contract on her standard terms (1 mark).	2 marks
John's reply saying "*Thank you for today, we agree to your quotation and agree to contract with EDM Limited for the works pursuant to the terms provided."* will probably be construed as an agreement to Erica's terms as they were the last offered and he did not clearly object to them (*Butler Machine Tool Co. Ltd. v Ex-Cell-o Corporation (England) Ltd*. (1979))	1 mark
Total	**3 marks**
d) If EDM's terms and conditions do apply and EDM are liable for misrepresentation, advise Milton whether the Exclusion of Liability clause is likely to be effective for the statements made by Erica (**6 marks**).	
Candidates should identify this is a commercial contract and that a contractual term which excludes liability for pre-contractual misrepresentation or any remedy available for such misrepresentation shall have no effect except insofar as it satisfies the requirement of reasonableness set out in the Unfair Contract Terms Act 1977 (section 3 of the Misrepresentation Act 1967) (2 marks).	2 marks
An exclusion shall satisfy the 'requirement of reasonableness' if the term is a fair and reasonable one to be included having regard to the circumstances which were or ought reasonably to have been known to or in the contemplation of the parties when the contract was made (1 mark). Consideration should be had to the factors in Schedule 2 of UCTA, such the strength of the respective parties' bargaining positions and whether the customer knew or ought reasonably to have known of the existence or extent of the term (1 mark).	2 marks
Candidates should apply the facts to the test and give a reasoned opinion on whether the exclusion clause is likely to be found reasonable and therefore effective. (2 marks).	2 marks
Total	**6 marks**

Section 1

Question 2 - Points for Answer

a) In regards to the Manchester centre, advise PowerGoals whether McWelsh is liable to pay liquidated damages of £300,000 as a result of their breach of contract for late performance (**5 marks**).	
Liquidated damages could be a penalty clause if not a genuine estimate of the level of damages.	1 mark
The test as to whether they are a genuine estimate of the level of damages is not whether the LDs are reasonable, but whether there is a substantial discrepancy between the level of damages stipulated in the contract that was likely to be suffered. The test is objective. (*Alfred McAlpine Capital Projects v Tile Box Ltd* (2005)) Main cases here are from the Supreme Court *ParkingEye v Beavis* [2015] UKSC	2 marks
Candidates should provide a reasonable view on whether the £300,000 sum of LDs that was likely to be suffered by late opening of the Manchester centre. Factors could include that the sum far exceeded the amount of the works and it was a new centre which might have taken some time to build up business.	2 marks
Total	**5 marks**
b) i. In regards to the Liverpool centre, advise PowerGoals whether they are likely to be liable to pay Jackson: £3,000 or £13,000 pursuant to the signed contract (**7 marks**)	
Candidates should demonstrate a good understanding of the requirement of 'consideration' in the formation of a contract.	
Candidates should identify that whilst there is an express written term to pay £13,000, there is the potential equitable remedy available of rectification to reflect their contractual intention.	1 mark
Given that both parties missed the error in the contract, there appears to have made been a common mistake where both parties mistakenly believe that the document gives effect to their common intention of agreeing £3,000.	1 mark
The requirements for a rectification are that the parties had a common continuing intention in respect of a particular matter in the contract, there was an outward expression of accord, the intention continued at the time of the execution of the instrument sought to be rectified and by mistake the instrument did not reflect that common intention. Candidates should comment on whether these appear to be satisfied – they likely are.	3 marks

The parol evidence rule does not apply to rectification, so PowerGoals should be able to rely upon the pre-contractual emails (*Joscelyne v Nissen* (1970))	2 marks
Total	**7 marks**
b) II. The £1,000 extra agreed for finishing the works on time (**7 marks**)	
Jackson is under an existing contractual duty to complete the works by 1st July	1 mark
Performance of an existing contractual duty owed to the other party shall not be sufficient consideration (*Stilk v Myrick (1809)*) (1 mark) and Jackson has provided no extra consideration to complete the works on time (1 mark)	2 marks
However, if performance of an existing contractual duty confers a practical benefit on the other party and the contract is entered into freely without duress or fraud, then this can constitute valid consideration and the promise to make a bonus payment therefore enforceable (*Williams v Roffey Bros & Nicholls (Contractors) Limited* (1991))	2 marks
Candidates should apply this to the facts to reach a conclusion. Given that the Liverpool centre will be able to host the tournament, arranged after the initial contract with Jackson, and obtain the increased profits, and there was no evidence of duress or fraud, then PowerGoals appear liable to pay the extra £1,000.	2 marks
Total	**7 marks**
c) Would PowerGoals still have an enforceable contract with Jackson if, instead of agreeing to pay the monetary sums referred to in exchange for Jackson's works, they agree with him to provide him free, unlimited 5-a-side games for 3 years? (**6 marks**)	
A binding contract requires consideration.	1 mark
Consideration is a benefit to the promisor and a detriment to the promise (*Currie v Misa (1875)*).	1 mark
Consideration need not be adequate, but must be sufficient (i.e. have some value), and the courts will generally not be concerned with whether it constitutes a good bargain (*Currie v Misa* (1875)).	2 marks
Applying this to the scenario, PowerGoals and Jackson appear free to enter into the contract and agree to provide free matches in consideration of the works. The contract will therefore still be enforceable.	2 marks
Total	**6 marks**

Section 1

Question 3 - Points for Answer

a) Was there a contract between Louise and Boson Sports to buy the Nike tennis shoes for £30? (**5 marks**)	
The display of goods on shelf is not an offer but an invitation to treat (*Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Limited* (1953)).	2 marks
Louise made an offer for £30 for the tennis shoes when she took the shoes to the counter and Boson Sports did not accept her offer to buy the shoes for £30.	2 marks
There was no valid contract for Louise to buy the tennis shoes for £30.	1 mark
Total	**5 marks**
b) Is Louise likely to have a claim with merit against Boson Sports for the claim that the shoes are the *"comfiest tennis shoes in the world, ever!"*? (**2 marks**)	
The statement is likely to be construed as a "mere puff" and therefore she is unlikely to have any claim with merit Carlill v Carbolic Smoke Ball Co. (1893, C.A.)	2 marks
Total	**2 marks**
c) Advise Louise whether she has a binding contract with David for him to sell the Slazenger racket to her for £150 (**7 marks**)	
David made an offer to sell his Slazenger racket to Louise for £150 (1 mark). David's friend telling Louise that David was withdrawing his offer was an attempt at revoking his offer (1 mark).	2 marks
An offer can be validly revoked if the withdrawal is unequivocal and communicated before acceptance.	2 marks
David appears to have unequivocally communicated the withdrawal of his offer before Louise's acceptance via his friend.	1 mark
A communication by a third party that an offer had been withdrawn is valid and would be treated as if it came from the person themselves (*Dickinson v Dodds* (1875))	1 mark
Therefore, there is no binding contract between Louise and David. David does not have to sell his racket to Louise.	1 mark
Total	**7 mark**
d) Advise Louise as to any claims and the merits of the potential heads of loss she has against Andy for the failure to deliver the Babolat tennis racket. (**11 marks**)	

There was a contract between Louise and Andy for the supply of the tennis racket ordered and Andy is in breach of an express term of the contract to deliver the racket.	1 marks
Contractual damages compensate the innocent party for the loss which he has suffered as a result of the breach of contract. The objective of damages in contract is to place the innocent party in the position he would have been in had the contract been performed.	2 marks
There needs to be a causal connection between the breach and the loss i.e. causation established.	1 mark
The innocent party can recover damages for its losses: • Which arise naturally from the breach (the first limb); and/or • Were in the reasonable contemplation of the parties at the time of the contract as the probable result of the breach (the second limb) (*Hadley v Baxendale*)	2 marks
Louise appears to have a certain claim to recover the £200 cost of the tennis racket.	1 mark
In regards to the potential loss of winnings of £100,000, Louise may struggle to establish causation, on the grounds that it cannot be said that she would have certainly won the winnings if she received the racket (i.e. arising naturally from the breach i.e. within the first limb of *Hadley*).	1 mark
Louise is likely to struggle to establish that the potential loss of £100,000 falls within the second limb of *Hadley* either since the order for the racket was placed online and it is unlikely that the seller knew of Louise' intentions for the use of the racket. If the seller did know, then Louise would need to satisfy the requirements of a claim for loss of chance. There should be reference to *Chaplin v Hicks [1911] 2 KB 786 CA* and the distinction between the situations when a claimant has to prove on balance of probabilities that a particular result would have occurred and when he merely needs to show only that a chance has been lost.	3 marks
Total	**11 marks**

Section 2

Question 4 – Points for Answer

Is Raymond liable to Francesca for her injuries? Explain your reasoning (12 marks)	
Candidates should identify that Raymond is an "occupier", as someone who has sufficient degree of control over the premises.	1 mark
Francesca is a trespasser as she does not have permission to be on the premises before 10am. This is consistent with the sign at the entrance giving the opening hours of Derwent Hill.	1 mark
Accordingly, the OLA 1984 applies.	1 mark
Duty - as a consequence, Raymond's duty does not arise automatically.	1 mark
Section 1(3) of the OLA 1984 sets out three requirements, all of which must be satisfied before an occupier owes a duty to a trespasser.	1 mark
Applying these requirements to the facts, candidates should consider: Whether Raymond is aware of the danger or has reasonable grounds to believe that it exists. Raymond made the decision to remove this tree and had not yet arranged for specialists remove the tree trunk. At the very least, Raymond has reasonable grounds to believe that the danger exists.	1 mark
Raymond had reasonable grounds to believe that a trespasser may come into the vicinity of the danger (whether or not he had lawful authority to do so).	1 mark
The risk is one against which Raymond, in all the circumstances of the case, may reasonably be expected to provide some protection. There was no sign, or any barrier put up to alert people or protect them from the danger. Neither of these options would be unreasonable.	1 mark
Breach – Raymond is required to take such care as is reasonable to see that Francesca does not suffer injury (section 1(4) of the OLA 1984).	1 mark
On the facts, Raymond has taken no steps, and breach is therefore established.	1 mark
Causation/Loss - Applying the 'but for' test (*Barnett v Chelsea & Kensington Hospital Management Committee* (1969)) Raymond will be liable for Francesca's injury.	1 mark

as the loss was of a foreseeable type and not too remote.	1 mark
Total	**12 marks**
Is Raymond liable to Francesca for the cost of replacing her new tennis racket? (2 marks)	
Candidates should identify that damage to property is outside the scope of the OLA 1984. Accordingly, Francesca could not recover the costs of replacing the tennis racket	2 marks
Total	**2 marks**
Is Raymond liable to Anthony for his injuries? Explain your reasoning (11 marks)	
Candidates should identify that Raymond is an "occupier", as someone who has sufficient degree of control over the premises.	1 mark
Anthony is a "visitor": the sign at the entrance to Derwent Hill expressly refers to family members having permission to enter.	1 mark
Candidates will also note that Anthony and Harry arrived at 12pm, which is after Derwent Hill opened for the day. Accordingly, the OLA 1957 applies.	1 mark
Duty – sections 2(1) and 2(2) of OLA 1957 impose a "common duty of care" to visitors: an occupier has duty to take such care as is reasonable in all the circumstances to see that a visitor is reasonably safe in using the premises for which he is permitted to be there.	1 mark
Breach – Candidates to consider whether Raymond failed to reach the standard of a reasonable occupier in all the circumstances, having regard to the following: The type/nature of the visitor. Section 2(3)(a) of the OLA 1957 singles out child visitors as requiring a higher degree of care from an occupier than other visitors. Antony is only 4 years old and cannot be expected to appreciate dangers which would be obvious to an adult.	1 mark
Whether there are any allurement factors. On the facts, it does not appear there are any.	1 mark
The warning posted on the door to the clubhouse about builder's work. Candidates should identify that the mere fact a warning is given will not necessarily suffice (section 2(4)(a) OLA 1957) – the crucial issue is whether the warning was sufficient to enable the visitor to be reasonably safe. This is a question of fact. On the facts, a small, vaguely worded sign on the door would not be sufficient – it says nothing about the nature of the danger – i.e. that the	2 marks

ceiling panels having been removed. Furthermore, a written warning to a child may not be enough to enable him to be reasonably safe, as he is unlikely to understand it in the same way an adult would.	
The scope and application of section 2(4)(b) of the OLA 1957. Candidates should note that Derek is an independent contractor and consider whether Raymond took reasonable steps to satisfy himself that Derek was competent and whether he had done the work properly.	2 marks
Causation/Loss – Applying the 'but for' test (*Barnett v Chelsea & Kensington Hospital Management Committee* (1969)), Raymond will be liable for Anthony's injury, as the loss was of a foreseeable type and not too remote.	1 mark
Total	**11 marks**

Section 2

Question 5 – Points for Answer

a) On what basis does Nathan have a claim against Joe? (15 marks)	
Candidates should identify that Nathan's loss is purely economic, being the loss of his investment money. As a general rule, such loss is not recoverable in tort (*Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* (1972))	2 marks
Notwithstanding the general rule, candidates should identify that Nathan can bring a claim against Joe for the tort of negligent misstatement, applying the principles from *Hedley Byrne v Heller & Partners* (1964)	2 marks
Duty: Candidates should identify that a duty is owed only if a special relationship exists between Nathan and Joe. This requires: An assumption of responsibility by Joe. Candidates should assess whether there was an assumption of responsibility by considering and applying the following factors:	1 mark
• Joe was aware of the purpose for which his advice was required	1 mark
• Joe communicated the advice to Nathan directly	1 mark
• Joe knew or ought to have known that Nathan (as a lay investor with no experience) was likely to act on that advice without independent inquiry	1 mark
• Nathan has acted on Joe's advice to his detriment	1 mark
• Reasonable reliance on that advice by Nathan	1 mark
Breach: Discussion of whether Joe fell below the standard of a reasonable investment advisor. Joe will be assessed against the skilled defendant in his field (*Bolam v Friern Hospital Management Committee* (1957)). On the facts, Joe has fallen below the required standard: he ought to have known that Reetham Ltd was being investigated, yet failed to advise Nathan of this fact, shown most clearly by the twitter and blog post on Guaranteed Returns Ltd's website that predates Joe's advice to Nathan. Furthermore, Nathan, a lay person, was able to quickly find public information online **(3 marks)**	3 marks
Causation/Loss: Applying the 'but for' test, the loss which Nathan suffered is as a result of reliance on the negligent advice.	1 mark

and is a foreseeable type and not too remote.	1 mark
Total	**15 marks**
b) To what extent, if at all, can Joe avoid liability in respect of any claim by Nathan? (5 marks)	
Ian's advice may represent a *novus actus interveniens* that breaks the chain of causation in Joe's negligence.	1 marks
Candidates should identify the relevant principle from *McKew v Holland, Hannen and Cubitts* (1969): if the causal effect of Joe's fault is nullified by a later event, he will not be liable in damages, or if it is made worse by a later event, he will not be liable for the further damage**.**	2 marks
On the facts, Ian told Nathan to keep his investment in Reetham Ltd. Candidates should therefore conclude that Ian's advice was a *novus actus intervenienus.*	1 mark
and that Joe is not liable for damage beyond the loss Nathan had already suffered when he went to see Ian**.**	1 mark
Total	**5 marks**
c) What claims, if any, can be brought against Guaranteed Returns Ltd? Explain your reasoning. (5 marks)	
Candidates should identify that Nathan may be able to bring a claim against Guaranteed Returns Ltd, who may be vicariously liable for Joe's negligence.	1 mark
For there to be vicarious liability, Nathan would need to satisfy three elements**:** - Joe was an employee; - Joe committed a tort; and - The tort was committed during the course of Joe's employment. (*Limpus v London General Omnibus Co* (1862)).	2 marks
Candidates should then apply these elements to the facts presented: - Joe is specifically named as being an employee of Guaranteed Returns Ltd - Joe has committed the tort of negligent misstatement (as discussed above). - Guaranteed Returns Ltd is an investment firm, and Joe is named as an investment advisor. The tort was committed during his employment. Candidates should form a reasonable conclusion on whether the tort was committed during the period of which he was employed.	2 marks
Total	**5 marks**

Section 2

Question 6 – Points for Answer

What claim, if any, can Stephanie and William bring against Alistair? (15 marks)	
Candidates should identify that Stephanie and William can bring an action against Alistair for private nuisance.	1 mark
Candidates should identify that a claim for public nuisance is not possible.	1 mark
Candidates should identify that Stephanie and William can bring a claim for private nuisance as they have a direct proprietary interest in the land as the owners of the property.	2 marks
Candidates should identify that Stephanie and William's claim is for loss of amenity (the noise and vibration is causing loss of enjoyment of their proprietary interest). Substantial noise and vibration is an actionable nuisance.	2 marks
Candidates should identify the concept of what is 'reasonable user' of a property and conclude whether it is reasonable for Alistair/the builders to make the noise and vibrations just in normal business hours instead of weekends.	4 marks
Candidates should identify there is no liability in nuisance for damage which is not reasonably foreseeable (Cambridge Water Co) and identify whether Stephanie and William's damage is reasonably foreseeable.	3 marks
Candidates should identify that private nuisance generally involves an ongoing or repeated harm. As the building works have been continuing for 2 years would likely establish an ongoing or repeated harm.	2 marks
Total	**15 marks**
What remedies, if any, are available to Stephanie and William? (5 marks)	
Candidates should identify that Stephanie and William could claim for: Injunctive relief to require Alistair to abate the continuing nuisance and to prevent its recurrence; and/or	5 marks

Damages to compensate them for their loss of amenity.	
Candidates should be able to explain that a claimant cannot recover damages in respect of loss that could reasonably have been avoided (British Westinghouse). Candidates should go on to advise that Stephanie and William are unlikely to be able to recover the full amount of the cost of the rent for the penthouse in central London because they have a duty to mitigate their losses.	3 marks
Total	**5 marks**
What claim, if any, can Selena bring against Alistair? (3 marks)	
Candidates should identify that Selena will not likely be able to bring a claim for private nuisance as she has no direct proprietary interest in the property (Hunter v Canary Wharf [1997]) **(3 marks)**	3 marks
Total	**3 marks**
What difference, if any, would it make if Alistair had instructed the builders to work at the weekends to purposely annoy Stephanie and William? (2 marks)	
Candidates should recognise this would make little difference and that acts done deliberately to annoy others will be a nuisance (Christie v Davey).	2 marks
Total	**2 marks**

Institution of Civil Engineers

Examination for the ICE Certificate in Law and Contract Management (CLCM) 2019

Module 2: NEC 4 (English and Scots Law)

Monday 10th June 2019

Time permitted: 14:00 to 17.20 (3 hours 20 minutes)

There are four questions in Section 1 and four questions in Section 2.

Answer any **two** questions from **each Section**; a total of **four** questions.

Please answer questions in the green books provided, answer section 1 and section 2 in **separate** books.

All questions carry equal marks.

References to cases and legislation should be quoted where possible.

Please indicate on the outside of the answer books if your answers will be based on Scots Law.

Reference to documents during the examinations

Only unmarked copies of NEC4 Engineering and Construction Contract (ECC), NEC4 Engineering and Construction Subcontract (ECS), Statutes, CDM Regulations and CESMM4 may be taken into the Examination.

Section 1

Question 1

A *Contractor* is refurbishing a combined rail and bus interchange. The Contract used is the NEC4 Engineering and Construction Contract with Main Option A.

The Scope requires the floor of the ticket office to be re-tiled. On removing the existing tiles, the *Contractor* finds that the old floor's timber frame is rotten and will not support the new floor.

a) **The *Contractor* thinks that this may be a compensation event. Is this correct and what should the *Contractor* do here? Is there a time limit?** **(6 marks)**

An expert's report suggests that the floor's sub-structure requires complete replacement; this wasn't anticipated by anyone. Re-design will take three weeks and the additional works will require eight weeks. The floor replacement is on the critical path of the project's programme.

The *Project Manager* gives an instruction changing the Scope to allow for the revised works.

b) **In addition to this instruction, what else should the *Project Manager* do?** **(6 marks)**

c) **How should the change to the Prices be assessed?** **(6 marks)**

The installation of new bike racks in the interchange's car park is disrupted by the presence of uncharted underground, abandoned, services. These were discovered when the *Contractor* was trying to construct new foundations for the bike racks. Records show that the *Contractor* incurred Defined Cost of £47,000 removing these services and the subsequent installation of the bike rack's foundations. The *Contractor* notifies a compensation event to the *Project Manager* seven weeks later stating that the additional cost will need to be recovered.

The *Project Manager* is shocked at this news. The designers say that the bike racks could have been re-positioned elsewhere in the car park to avoid these services at minimal cost if only they had been told.

d)	**How might this affect the assessment of any compensation event?**	**(7 marks)**
	Total	**(25 marks)**

Section 1

Question 2

A *Contractor* is designing and constructing a new football stadium for the *Client*, a major football club. The contract used is the NEC4 Engineering and Construction Contract with Main Option A, dispute resolution option W2 and Secondary Options X7, X11 and X21. Delay damages are identified in the Contract Data as £2m per week or part thereof.

Before the stadium is allowed to open it needs to obtain a safety certificate from the local authority. The Scope states that the safety certificate needs to be obtained before the Completion Date.

There are design errors in the works; some emergency exits are not wide enough for the planned capacity and the public address system isn't audible in some areas. Based on the most recent inspection the local authority's inspectors refuse to grant a certificate saying that the errors are a breach of safety legislation. It provides a list of the remedial works required in order to grant a certificate.

The club is currently playing its 'home' games at another nearby ground with a much-reduced capacity and consequently lower match day revenues. It has found that it is losing more than £3m per week caused by the delay to Completion of its new ground, much more than the delay damages in the contract.

a) **The *Contractor* states that the refusal of the local authority to grant a safety certificate is a compensation event. What provisions does the contract have in this regard?** **(8 marks)**

b) **The *Contractor* notifies the *Project Manager* of a compensation event in respect of the remedial works, saying that they are not in the Scope. Is the *Contractor* correct?** **(6 marks)**

c) **The *Client* notifies the *Contractor* that it will increase the delay damages to £3.5m per week from next week "*to cover the increased losses that the Contractor's late Completion has caused*." Can the *Client* do this?** **(4 marks)**

The *Project Manager*, under instruction from the *Client*, starts deducting retention at 5% as a way of mitigating its losses. The *Contractor* argues that this is wrong as secondary option X16 has not been included in the contract.

d)	**Is the *Contractor* correct? Should any amounts already retained be returned?**	**(4 marks)**
e)	**The *Contractor* continues to complain that the retention and higher delay damages payments should be returned. If the *Client* refuses to do so, what options remain for the *Contractor*?**	**(3 marks)**
	Total	**(25 marks)**

Section 1

Question 3

The *Client*, a joint venture of a university and a pharmaceutical developer wants to construct an animal testing laboratory. There is a need for enhanced security due to the fear of protester action at the site and possibly elsewhere.

The *Client* intends to use the NEC4 Engineering and Construction Contract.

Market consultation has identified nervousness in potential contractors to take on the work due to the potential consequences of protests at the site and elsewhere.

a) **What options or amended provisions might the client choose to include in the contract to encourage companies to bid for the contract?** **(4 marks)**

Approaching Completion, the following issues are detected by the *Supervisor*. For each one state if it is a Defect and what the *Supervisor* should do next.

b) **There is no 'backwash' contamination protection within the clean hot water provision designed by the *Contractor*. The local water company has said that this conflicts with the relevant regulations.** **(4 marks)**

c) **There are insufficient small power sockets in offices compared with Scope. The room data sheets in the Scope require at least 24 240V sockets, but only 20 are provided in rooms TE23 and TE24.** **(4 marks)**

d) **There is a regular tripping-out of the electricity supply to air handling units which might be caused by faulty wiring.**

What would the position be if no defect is found? **(5 marks)**

e) **The car park, built to the *Client*'s design contained in the Scope, has insufficient disabled spaces to comply with disability legislation.** **(4 marks)**

f) **A week before planned Completion, the *Contractor* has not provided any operations and maintenance manuals. The Scope specifically requires these, but the *Contractor* says that they will be provided before the defects date.**

(4 marks)

Total **(25 marks)**

Section 1

Question 4

A *Contractor* is constructing a high-pressure gas transmission pipeline, primarily across open country. The contract used is the NEC4 Engineering and Construction Contract with Main Option B and Secondary Option X7.

An unusual group of stones arranged into a circle has been discovered in overgrown grass at the side of a farm's field. The *Project Manager* instructs the *Contractor* to stop all work within 200m of the area. Archaeologists visit the site and pronounce that the stone circle is probably over 10,000 years old and that this is a major discovery. As such the pipeline can't go anywhere near the stones.

a) **Is there a compensation event here? If so, which clauses are relevant?**

(4 marks)

The *Contractor* is instructed by the *Project Manager* to provide welfare and car parking facilities for the archaeologists and to make an excavator and operator available for the use of the archaeologists.

b) **Which provisions of the contract will enable the *Contractor* to be paid for this provision?**

(4 marks)

After news of the discovery reaches the media, a previous owner of the farm announces that she created the stone circle no more than 30 years ago. After checking her statement the archaeologists agree with her and announce that the pipeline works can continue as before.

c) **The *Project Manager* instructs the *Contractor* to re-start the works, nine weeks after they were suspended. Which clause is relevant to this instruction?**

(3 marks)

d) **The *Contractor* wants to recover the costs incurred in the nine weeks suspension and avoid delay damages for potentially finishing the works nine weeks after the *completion date*. What communications should be issued and how long would the *Project Manager* have to respond?**

(5 marks)

e) **How would any payment due to the *Contractor* be calculated?** **(5 marks)**

The works also include demolishing an abandoned pumping station at one end of the pipeline within a depot owned by the *Client*. It is built of imperial bricks and contains copper cabling, metal pipework and other materials with recycling value. The *Contractor* sells the materials to a broker and receives £24,000 payment. The *Project Manager* is concerned about this transaction and thinks that the materials belonged to the *Client*.

f) **How might the *Project Manager* establish if the *Contractor* is entitled to keep the payments from the sale?** **(4 marks)**

Total **(25 marks)**

Section 2

Question 5

A local authority awarded a £1m contract for some bridge strengthening works. The contract was under NEC4 ECC Option B. In the first week of the contract the *Project Manager* instructs a change to the Scope to add new parapet rails, because on closer inspection the existing ones being in a far worse state than initially thought. *The Project Manager* notified this as a compensation event and instructs the *Contractor* to submit a quotation.

a) What is the default method of assessment of this compensation event and are there any alternatives? (5 marks)

Some four weeks later, the *Contractor* has still not submitted a quotation for this.

b) What does the contract provide for here? (6 marks)

In the meantime, the additional works have been carried out, but the *Supervisor* thinks there may be a problem with the holding down bolts. These may be the wrong size.

c) What can the *Supervisor* do here and what must the *Contractor* do? (3 marks)

It turns out the bolts are a Defect and the *Supervisor* notifies this immediately. The *Contractor* considers these will be adequate and do not need replacing.

d) What process is available to allow this to be explored further? (5 marks)

Finally, some advice from the *Client's* structural engineer suggests these bolts may not be adequate and should be replaced.

e) What happens next? (6 marks)

Total (25 marks)

Section 2

Question 6

A 52-week contract is awarded under an NEC4 ECC Option A contract for a large highways project. The Contract Data provides that the first programme should be submitted for acceptance within 4 weeks of the Contract Date. The programme is submitted in time, but there are no statements of how the *Contractor* plans to do the work. The *Project Manager* is disappointed with this, especially as the tender presentation by the *Contractor* referenced their NEC programming skills and experience, on more than one occasion. The *Project Manager* is due to issue the first payment certificate in one week.

a) **What steps are available to the *Project Manager* and *Contractor* in relation to rectifying this issue?** **(8 marks)**

A few months later, the project is on track and the team are working well together. The *Contractor* decides to inject some additional resources into the project with the intention to try and bring forward the current planned Completion shown on the Accepted Programme. The *Contractor* wants to submit a revised programme showing planned Completion now at 45 weeks.

b) **How can the *Contractor* do this?** **(3 marks)**

c) **What does the *Project Manager* do now?** **(4 marks)**

In discussions between the *Client* and the *Project Manager*, it is clear that there is no benefit to the *Client* of early Completion as the highways connects to other schemes which are considerably behind their programmes. The *Project Manager* is not sure how to deal with this and says nothing. Some 3 weeks later, there is still no response from the *Project Manager*.

d) **How does the contract deal with this?** **(5 marks)**

In the end, the *Contractor* does achieve Completion on week 45 and this is certified immediately by the *Project Manager*. The *Client* tells the *Project Manager* they do not want to take over the *works*, as per previous discussions.

e)	**How does the contract deal with this?**	**(5 marks)**
	Total	**(25 marks)**

Section 2

Question 7

A *Contractor* has recently been awarded an NEC4 ECC contract using Option C for a civil engineering project. The NEC4 Engineering and Construction Subcontract (ECS) is being used for one of the subcontracts. During the first few months, the Parties become aware of a new initiative to use project bank accounts on all public sector projects over £0.5m. This project missed the cut off date by some 6 months, but the *Client* is interested to discuss with you whether this could now be incorporated into the contract.

a)	**As *Project Manager*, how would you handle this and how might this be put into effect?**	**(8 marks)**

The *Contractor* is alerted in weekend press articles that one of their major Subcontractors is experiencing serious financial difficulties.

b)	**What should the *Contractor* do in both the ECC and ECS contracts?**	**(7 marks)**

The *Project Manager* carries out an inspection of parts of the Defined Cost. Most of it appears to be fine but there is one recurring item that has wrongly appeared in the accounts and has been paid for in all instances it has been applied for. The *Contractor* argues this is deemed accepted as has been applied for, certified and paid for 6 months now.

c)	**As *Project Manager*, how do you react to this?**	**(5 marks)**
d)	**What if the reverse happens, that during inspection an item, for a considerable amount of money, has been wrongly crossed out and not applied for by the *Contractor* – what happens next?**	**(5 marks)**
	Total	**(25 marks)**

Section 2

Question 8

A *Contractor* has recently been awarded an NEC4 ECC contract using Option C with Option W1. Part way through the project the *Project Manager* realised that they have been continually striking out the rental cost of the *Contractor's* computing equipment as the *Project Manager* believed was not recoverable by the *Contractor*, but in fact the *Project Manager* was wrong and realises the error.

a) **Can this be added into the account at the next assessment, are any other sums payable as a result of this and how are they assessed?** **(4 marks)**

The *Client,* however, is not convinced this amount should be paid and says the *Contractor* is too late to be paid this money. A dispute arises.

b) **Explain the procedure that applies in W1 and how would this be different if W2 were used instead.** **(6 marks)**

The *Contractor* is concerned that the *Project Manager* is not inspecting their accounts and records regularly enough? The *Contractor* is worried that the *Project Manager* may use the Disallowed Cost provisions too late in the project for the *Contractor* to recover its position.

c) **Explain the process in Option C that the *Contractor* is able to use here.** **(7 marks)**

d) **Does the *Project Manager* have to inspect the *Contractor's* accounts and records?** **(2 marks)**

e) **Explain how the contract is financially closed after the *defects date.*** **(6 marks)**

Total	**(25 marks)**

MODULE 2

Section 1

Question 1 – Points for Answer

a)	It is a CE. See clause 60.1(12). Notify CE (clause 61.3). 8 weeks time limit.	[2 marks]
	CE to be notified by Contractor to PM. (61.3)	[2 marks]
	CE to be notified within 8 weeks. (61.3)	[2 marks]
	Total	**[6 marks]**
b)	*Project Manager* should notify the *Contractor* that the change to the Scope is a compensation event and instruct the *Contractor* to submit a quotation. Clauses 61.1 and 61.2.	[6 marks]
	Total	**[6 marks]**
c)	The change to the Prices should be assessed by the effect on Defined Cost and Fee (clause 63.1).	[3 marks]
	Defined Cost in option A is the cost of components in the Short Schedule of Cost Components (clause 11.2(23).	[3 marks]
	Total	**[8 marks]**
d)	*Contractor* should have notified an early warning as this would affect the total of the Prices and/or Completion. Clause 15.1.	[2 marks]
	Clauses 61.5 and 63.7 – compensation event to be assessed as if the early warning had been given.	[2 marks]
	Based on designers' comments, most of the £47,000 could have been avoided and therefore will not form part of the assessment.	[3 marks]
	Total	**[7 marks]**
		[25 marks]

Section 1

Question 2 – Points for Answer

a)	Any CE for the failure of the local authority would be under 60.1(5) as the authority is 'Others' (11.2(12)). Any role of the LA would need to have been on the Accepted Programme (11.2(1)). See also 31.2.	[3 marks] [2 marks] [1 mark]
	The Contractor has not obtained a certificate because it has not Provided the Works in accordance with the Scope (clause 20.1). It cannot benefit from its own breach if the LA's reasons for refusing the certificate are correct.	[2 marks]
	Total	**[8 marks]**
b)	No, the *Contractor* is not correct. It is not a CE as the *Contractor* is obliged to Provide the Works in accordance with the Scope (20.1).	[2 marks]
	A Defect includes something not in accordance with the applicable law (11.2(6)).	[2 marks]
	The Defects which has prevented the client from using the works must be corrected before Completion (11.2(2)).	[2 marks]
	Total	**[6 marks]**
c)	The amount of Delayed damages (DD's) is identified in the Contract Data and cannot be changed except by mutual consent (12.3). See X7.	[2 marks]
	Law of contract prevents a unilateral change of the quantum of Delayed damages after the Contract Date. Amount stated is the exclusive remedy for late Completion.	[2 marks]
	Total	**[4 marks]**
d)	The *Contractor* is correct, retention provisions have not been included so no such deductions can be made. See clause X16.	[4 marks]
	Total	**[4 marks]**
e)	See W2. If negotiation fails then S*enior Representatives* then adjudication then *tribunal.*	[3 marks]
	Total	**[3 marks]**
		[25 marks]

Section 1

Question 3 – Points for Answer

a)	Amendments to allow for recovery of costs incurred as a result of the protests. 1 mark for each of the following up to a maximum of marks;	
	Additional *Client*'s liability(ies) stated in the Contract Data (clause 80.1)	[1 mark]
	Additional compensation event(s) stated in Contract data part one (clause 60.1(21))	[1 mark]
	Amend provisions of contract to allow CE's that occur away from the Site.	[1 mark]
	Consider using option E	[1 mark]
	Total	**[4 marks]**
b)	It is a Defect. Failure to comply with the applicable law. 60.1(6).	[2 marks]
	Supervisor to notify *Contractor* of the Defect (43.2).	[2 marks]
	Total	**[4 marks]**
c)	It is a Defect. Failure to comply with the Scope. 60.1(6).	[2 marks]
	Supervisor to notify *Contractor* of the Defect (43.2).	[2 marks]
	Total	**[4 marks]**
d)	Probably a Defect. *Supervisor* to instruct *Contractor* to search for a Defect (43.1).	[3 marks]
	See also 60.1(10). If no defect is found, this would be a compensation effect under 60.1(10). **What would the position be if no defect is found?**	[2 marks]
	Total	**[5 marks]**
e)	It is not a Defect. See clause 80.1.	[4 marks]
	Total	**[4 marks]**
f)	It is a Defect. See 11.2(6).	[2 marks]

	Supervisor to notify *Contractor* of the Defect (43.2).	[2 marks]
	Total	**[4 marks]**
	Total	**[25 marks]**

Section 1

Question 4 – Points for Answer

a)	Yes there is a CE.	[1 mark]
	Clause 60.1(4).	[1 mark]
	Instruction needed from PM first – clause 34.1.	[2 marks]
	Total	**[4 marks]**
b)	This is a further CE. Clause 60.1(7) or 60.1(1). PM using authority under 14.3.	[4 marks]
	Total	**[4 marks]**
c)	*Project Manager* can instruct the re-start via clause 34.1.	[3 marks]
	Total	**[3 marks]**
d)	Contractor to notify CE to Project Manager under 61.3 if it hasn't been done already.	[3 marks]
	Project Manager to reply within one week (61.4)	[2 marks]
	Total	**[5 marks]**
e)	CE assessment via 63.1. Defined Cost + Fee. Clause 11.2(23). Change to the BoQ (63.15).	
	Total	**[5 marks]**
f)	Relevant clause is 73.2.	[2 marks]
	The *Project Manager* should check to see what, if anything, the Scope says about title to excavation and demolition materials.	[2 marks]
	Total	**[4 marks]**
	Total	**[25 marks]**

Section 2

Question 5 – Points for Answer

a)		
	The default method of assessing compensation events for all main Options is clause 63.1.	[1 mark]
	Clause 63.1 provides a dividing date that allows the parties to split the assessment for actual/forecast Defined Cost.	[1 mark]
	The dividing date in this case is the date of the *Project Manager's* instruction.	[1 mark]
	As this is main Option B, Defined Cost is stated in clause 11.2(23) as being the cost of the components in the Short Schedule of Cost Components.	[1 mark]
	An alternative to 63.1 is clause 63.2, where the *Project Manager* and *Contractor* may agree rates or lump sums to assess the change to the Prices.	[1 mark]
	Total	**[5 marks]**
b)		marks
	Clause 62.3 gives the *Contractor* up to 3 weeks to submit a quotation for a compensation event from when they were instructed to do so by the *Project Manager.*	[1 mark]
	This period can be extended by agreement if this is done before the submission is due (clause 62.5).	[1 mark]
	The first bullet of clause 64.1 provides that the *Project Manager* assesses a compensation event if the *Contractor* has not submitted the quotation and details of its assessment within the time allowed.	[1 mark]
	All of the assessment provisions in clause 63 apply, such as 63.8 (allowances for cost and time).	[1 mark]
	Clause 64.3 requires the *Project Manager* to notify the *Contractor* of the assessment of the compensation event and give details of the assessment within the 3 weeks that the *Contractor* had.	[1 mark]
	The compensation event is implemented when the *Project Manager* notifies the *Contractor* of an assessment made by the *Project Manager* (66.1).	[1 mark]
	Total	**[6 marks]**

c)	The *Supervisor* may instruct the *Contractor* to search for a Defect under clause 43.1	[1 mark]
	The *Supervisor* gives reasons for the search with the instruction (43.1)	[1 mark]
	The *Contractor* obeys an instruction which is in accordance with the contract and is given by the *Supervisor*.	[1 mark]
	Total	**[3 marks]**
d)		marks
	Clause 45 allows the parties to discuss whether or not it is possible to accept the Defect, such that the Defect does not have to be corrected.	[1 mark]
	Under clause 45.1 the *Contractor* and the *Project Manager* may propose to the other that the Scope is changed so that a Defect does not have to be corrected.	[1 mark]
	If this is of interest, the *Contractor* submits a quotation for reduced Prices and/or an earlier Completion Date to the *Project Manager* for acceptance.	[1 mark]
	The *Project Manager* will have to consider the whole life implications to the *Client* of accepting the Defect and factor that into the discussions. The quotation is negotiable.	[1 mark]
	If the quotation is accepted, the *Project Manager* changes the Scope, the Prices and the Completion Date accordingly and accepts the revised programme (clause 45.2).	[1 mark]
	Total	**[5 marks]**
e)		marks
	If the quotation is not accepted, then the process is abandoned for that particular Defect and the *Contractor* will be obliged to correct it under clause 44.	[1 mark]
	The *Contractor* is obliged to correct this notified Defect before the end of the *defect correction period* which begins at Completion for Defects notified before Completion and when the Defect is notified for other Defects.	[2 marks]
	If the *Contractor* does not correct the Defect within its *defect correction period*, then monies will be retained from the *Contractor* (50.2) depending on whether access was given	[3 marks]

	(46.1) or not (46.2). The Scope is then treated as having been changed to accept the Defect (46.1 and 46.2).	
	Total	**[6 marks]**
	Total	**[25 marks]**

Section 2

Question 6 – Points for Answer

a)		marks
	The statements are required in the penultimate bullet of clause 31.2.	[1 mark]
	Within 2 weeks of the *Contractor* submitting the programme for acceptance, the *Project Manager* should notify the *Contractor* of the reason for not accepting the programme (31.2). The reason is the programme does not show the information the contract requires (31.3 and 31.2).	[3 marks]
	Clause 50.5 provides that one quarter of the Price for Work Done to Date is retained in assessments of the amount due until the *Contractor* has submitted a first programme to the *Project Manager* for acceptance showing the information the contract requires.	[2 marks]
	There is still time for the *Contractor* to resubmit the programme to make sure the *Project Manager* does not apply clause 50.5.	[1 mark]
	Clause 13.4 requires the *Contractor* to resubmit the communication within the period for reply taking account of these reasons.	[1 mark]
	Total	**[8 marks]**
b)		marks
	Clause 32.2 allows the *Contractor* to submit a revised programme to the *Project Manager* for acceptance when the *Contractor* chooses.	[1 mark]
	The revised programme will need to comply with both clause 31.2 and 32.1.	[2 marks]
	Total	**[3 marks]**
c)		marks
	Clause 31.3 gives the *Project Manager* 2 weeks from the *Contractor* submitting a programme for acceptance to notify the *Contractor* of the acceptance of the programme or the reasons for not accepting it.	[1 mark]
	There are 4 reasons available to the *Project Manager* in clause 31.3 to not accept the revised programme. Showing planned	[2 marks]

	Completion being earlier than the Completion Date is not a reason stated in clause 31.3	
	The notification should comply with clause 13, clause 13.1 and 13.7 in particular.	[1 mark]
	Total	**[4 marks]**
d)		marks
	The *Project Manager* still has to act in accordance with clause 31.3.	[1 mark]
	As the *Project Manager* has not replied to the communication within the time allowed, a compensation event occurs under 60.1(6).	[1 mark]
	The *Contractor* should notify an early warning under clause 15.1. The ongoing lack of response by the *Project Manager* has the possibility of delaying Completion or increasing the Prices.	[1 mark]
	The *Contractor* should instruct the *Project Manager* to attend an early warning meeting to find out what the problem is and then set about trying to solve this (15.3).	[1 mark]
	At the *Contractor's* discretion, it may notify the *Project Manager* of the lack of acceptance or non-acceptance within the time allowed. If this failure continues for a week after the *Contractor's* notification, it is treated as acceptance by the *Project Manager* of the programme (31.3).	[1 mark]
	Total	**[5 marks]**
e)		marks
	The Client is obliged to take over the work within two weeks of completion under clause 35.1	
	The *Project Manager* still has to act in accordance with clause 31.3.	[1 mark]
	As the *Project Manager* has not replied to the communication within the time allowed, a compensation event occurs under 60.1(6).	[1 mark]
	The *Contractor* should notify an early warning under clause 15.1. The ongoing lack of response by the *Project Manager* has the possibility of delaying Completion or increasing the Prices.	[1 mark]
	The *Contractor* should instruct the *Project Manager* to attend an early warning meeting to find out what the problem is and then set about trying to solve this (15.3).	[1 mark]

		[1 mark]
	Total	**[5 marks]**
	Total	**[25 marks]**

Section 2

Question 7 – Points for Answer

a)		marks
	Speak with the *Client* first to make sure they understand the implications of operating a project bank account.	[1 mark]
	If the *Client* would like to find out more about the implications, notify an early warning under clause 15.1. This could increase the *Contractor's* total cost (15.1).	[1 mark]
	The *Project Manager* should enter the early warning matter on the Early Warning Register (15.1).	[1 mark]
	The Early Warning Register is defined in clause 11.2(8) and at this stage only the matter as notified is added to the register (11.2(8)).	[1 mark]
	The *Project Manager* should instruct the *Contractor* to attend an early warning meeting (15.2).	[1 mark]
	The *Project Manager* should speak with the *Contractor* about instructing the *Client* to also attend this meeting (15.2).	[1 mark]
	Assuming the *Client* is at the meeting, those attending can seek solutions that will bring advantage to all those who will be affected (15.3).	[1 mark]
	If a solution is found and the project bank account is to be incorporated, the Parties would need to be put the change into effect (12.3).	[1 mark]
	Total	**[8 marks]**
b)		marks
	The *Contractor* should notify an early warning to the *Project Manager* in the ECC (15.1) and the Subcontractor in the ECS (15.1).	[1 mark]
	The *Project Manager* should enter the early warning matter on the Early Warning Register in the ECC (15.1) and the *Contractor* does the same in the ECS (15.1).	[1 mark]
	The Early Warning Register is defined in clause 11.2(8) in both the ECC and the ECS, and at this stage only the matter as notified is added to the register (11.2(8)).	[1 mark]
	The *Contractor* should instruct the *Project Manager* to attend an early warning meeting in the ECC (15.2) and the Subcontractor in the ECS (ECS).	[1 mark]

	The ECC provides for the Subcontractor to attend an early warning meeting if its attendance would assist in deciding the actions to be taken.	[1 mark]
	Assuming there is a single meeting, those attending can seek solutions that will bring advantage to all those who will be affected (15.3).	[1 mark]
	Those who attend the meeting decide on the actions to be taken (15.3) and the Early Warning Register is updated/issued (15.4).	[1 mark]
	Total	**[7 marks]**
c)		marks
	There is no clause that supports the argument of deemed acceptance because it has been applied for, certified and paid.	[1 mark]
	What the *Contractor* can do in Option C is to use clause 50.9 to finalise Defined Cost. For this to happen the *Contractor* has to notify the *Project Manager* when a part of Defined Cost has been finalised and make available for inspection the records necessary to demonstrate that it has been correctly assessed (50.9).	[1 mark]
	In the meantime, clause 50.6 provides that the *Project Manager* should correct any incorrectly assessed amount due in a later payment certificate.	[1 mark]
	If an amount due is corrected in a later certificate in relation to a mistake, then clause 51.3 provides that interest on the correcting amount is paid.	[1 mark]
	Interest is calculated on a daily basis at the *interest rate* and is compounded annually (51.4).	[1 mark]
	Total	**[5 marks]**
d)		marks
	Similar to the answer above, clause 50.6 provides that the *Project Manager* should correct any incorrectly assessed amount due in a later payment certificate.	[1 mark]
	If an amount due is corrected in a later certificate in relation to a mistake, then clause 51.3 provides that interest on the correcting amount is paid.	[1 mark]
	Interest is calculated on a daily basis at the *interest rate* and is compounded annually (51.4).	[1 mark]
	The *Project Manager* should discuss this with the *Client*, especially as it is a significant amount of money.	[1 mark]

	The *Contractor* should adjust future forecasts of the total Defined Cost accordingly under clause 20.4.	[1 mark]
	Total	[5 marks]
	Total	**[25 marks]**

Section 2

Question 8 – Points for Answer

a)		marks
	This is just a simple mistake made by the *Project Manager* and is put right in the next assessment.	[1 mark]
	As the mistake corrects the amount due then interest on the correcting amount is paid (clause 51.3).	[1 mark]
	Interest is assessed from the date the incorrect amount was certified until the date when the changed amount is certified and is included in the assessment which includes the changed amount (clause 51.3).	[1 mark]
	Interest is calculated on a daily basis at the *interest rate* (stated in the Contract Data) and is compounded annually (clause 51.4).	[1 mark]
	Total	**[4 marks]**
b)		marks
	The provisions in W1 allow that a dispute arising under or in connection with the contract is first referred to the *Senior Representatives* in accordance with the Dispute Reference Table (clause W1.1(1)).	[1 mark]
	W1.1(1) then provides that if the dispute is not resolved by the *Senior Representatives* it is referred to and decided by the *Adjudicator*.	[1 mark]
	The *Senior Representatives* are stated in the Contract Data and there is no process for changing them if perhaps one is off with a long-term illness, so this could be done under clause 12.3.	[1 mark]
	How the dispute is resolved is covered in clause W1.1(2) and (3).	[1 mark]
	The main difference between W1 and W2 is that this process is mandatory in W1 and is by agreement of the Parties in W2.	[2 marks]
	Total	**[6 marks]**
c)		marks
	Clause 50.9 in Option C that deals with assessing the amount due and allows the finalisation of Defined Cost.	[1 mark]
	This clause may be used by the *Contractor*, not the *Project Manager*, to finalise parts of Defined Cost.	[1 mark]

	Clause 50.9 provides that the *Contractor* starts the process by notifying the *Project Manager* when a part of Defined Cost has been finalised.	
	This could be monthly, quarterly, annually or any other period of the *Contractor's* choosing (clause 50.9). It could also be by topic such as Subcontractor's, people part of the Schedule of Cost Components etc (clause 50.9)	[2 marks]
	The *Contractor* makes the necessary records available for inspection (clause 50.9).	[1 mark]
	No later than 13 weeks after the *Contractor's* notification, the *Project Manager* takes 1 of 3 actions (clause 50.9)	[1 mark]
	There is a process for providing further records and also that no decisions within the time allowed leads to the *Contractor's* assessment being treated as correct (clause 50.9).	[1 mark]
	Total	**[7 marks]**
d)		marks
	In Option C, clause 52.4 just says that the *Contractor* allows the *Project Manager* to inspect the accounts and records the *Contractor* is required to keep, it does not oblige the *Project Manager* to inspect them.	[1 marks]
	It may be that the *Project Manager* has an agreement with the *Client* on the amount of inspection required.	[1 mark]
	Total	**[2 marks]**
e)		marks
	Clause 53 provides a process called final assessment.	[1 mark]
	The process starts with the *Project Manager* making an assessment of the final amount due and certifying a payment by a certain date (clause 53.1).	[1 mark]
	If the *Project Manager* does not make the assessment within the time allowed, the Contractor may issue its version of the final amount due (clause 53.2).	[1 mark]
	If the *Client* agrees with this assessment, then payment is made (clause 53.2).	[1 mark]
	An assessment of the final amount due is taken as conclusive evidence unless a Party takes an action as stated in clause 53.3, such as referring a dispute to the *Senior Representatives* under W1.	[1 mark]
	Clause 53.4 deals with changing the assessment of the final amount due in certain circumstances.	[1 mark]

	Total	**[6 marks]**
	Total	**[25 marks]**

Institution of Civil Engineers

Examination for the ICE Certificate in Law and Contract Management (CLCM) 2019

Module 3: (English and Scots Law)

Monday 10th June 2019

Time permitted: 14:00 to 18.00 (4 hours)

Section 1 is based on "sample" contractual provisions from non-NEC contracts and Section 2 is based on NEC4.

Answer **Question 1** and **one other** from section 1 *and* answer **Question 5** and **one other** from Section 2.

Please answer questions in the blue books provided, answer section 1 and section 2 in **separate** books.

All questions carry equal marks.

References to cases and legislation should be quoted where possible.

Please indicate on the outside of the answer books if your answers will be based on Scots Law.

Reference to documents during the examinations
Only unmarked copies of Statutes, NEC4 Engineering and Construction Contract (ECC),

Section 1

Question 1 – COMPULSARY QUESTION

A Contractor is designing and constructing a pathology laboratory for the Employer, a medical testing company. The Employer originally appointed a designer under the Design Services Agreement to perform the outline design and assist with the tendering processes. After the Contractor was appointed, the Designer's appointment was novated from the Employer to the Contractor.

The Designer was required to, "*perform and complete all its obligations under the Design Services Agreement using all the reasonable skill and care expected of a professionally qualified and competent designer experienced in providing services of a similar size, scope and complexity to the Design Services, so that no act or omission in relation thereto shall constitute cause or contribute to any breach by the Contractor of any of its obligations under the Main Contract and the Designer shall save as aforesaid assume and perform hereunder all the obligations and liabilities of the Contractor under the Main Contract in relation to the Design Services.*"

The Designer hosted the project's data and correspondence systems on its electronic platform, 5Contracts, on behalf of the other project participants and was paid for this through the Design Services Agreement.

a) What does novation involve? Why would an employer such as this one use the novation process? (7 marks)

The project suffers delays and problems with the quality of the construction works. Relationships between the Designer and the Contractor start to deteriorate. The local water company visits the part-built laboratory and issues a report which concludes that the hot water supply to the laboratories isn't installed to the standards required by legislation. The Contractor has to spend £203k on retrofitting a backwash prevention system which stops any infection reaching the public water supply. This also adds seven weeks to the construction programme incurring the Contractor an additional £794k in liquidated damages.

The Contractor seeks to recover both sums from the Designer stating that the failure to include for statutory obligations is a breach of contract. The Designer responds by saying that the failure was merely an oversight and it should have been spotted by a competent contractor. It denies all liability.

b) **Is the Designer liable here? Explain how the Contractor might structure such a claim and how the Designer might rebut it?** **(10 marks)**

The Contractor suffers further delay having to re-install mechanical and electrical works in the building. It transpires that the Designer erroneously issued a set of electrical cabling drawings, intended to be for comment, marked 'for construction'. Without reviewing , the cabling designs and schedules the Contractor ordered the materials and started installation. The re-installation works cost £475k.

c) **Continuing with your answer in (b), does the incorrect labelling of drawings by the Designer lead to a claim for the recovery of the £475k costs?** **(5 marks)**

After completion, the Contractor and Designer remain in dispute and the Contractor issues a notice of adjudication starting a process to recover the sums it alleges are due. An adjudicator is appointed. The Designer immediately arranged to block the Contractor's access to 5 Contracts, effectively restricting the Contractor's ability to obtain documents to progress the adjudication.

d) **What might the adjudicator do about this action of the Consultant?** **(3 marks)**

Total **(25 marks)**

Section 1

Question 2

The Employer is a private aviation company that owns a small airport. It is adjacent to a major army base and consequently is used for military and civilian flights. Security is paramount during the works. The Employer has decided to upgrade facilities at the airport. One of the packages of work is for the upgrade of electrical supplies and this has been awarded to the Contractor, an electrical engineering company called Sparks.

Sparks subcontracted the civil works to Shovels, a local civil engineering company. The civil works included excavation of trenches for ducting, installation of new drains, fencing and transformer base slabs. They are forecast to take six months to complete.

The form of subcontract, if you can call it that, was a one-page purchase order which refers to the purchase of 'goods'. It was clearly not written with construction works in mind.

The civil works hit problems which include appalling wet weather, unforeseen ground conditions and delays in gaining access to site caused by security checks. Sparks and Shovels have exchanged some terse correspondence. Shovels wants to claim additional payments which Sparks won't agree to. The contract doesn't include any adjudication provisions and only contains the briefest of payment provisions.

Shovels demands £50,000 'on account' for the additional costs it has incurred. Sparks refuses to make any payment saying that nothing will be paid at all until all of the civil works are complete. Sparks points out that the payment clause makes no reference to interim payments.

a) **Shovels claims that it has a right to interim payments under statute law. Is it correct? If so, which provisions are relevant to this analysis?** **(7 marks)**

Shovels also threatens adjudication in an email to Sparks. The reply from Sparks says, "*I know we've messed things up a bit for you with our lack of site supervision (I intend to sack Jack Stephens at the end of this job – he's an idiot) but we have no money to pay you as we haven't claimed anything from the employer. Anyway you can't adjudicate as there aren't any adjudication clauses in our purchase order.*"

b)	**What adjudication provisions, if any, apply to the subcontract? Explain your answer with references to appropriate legislation.**	**(5 marks)**

The Parties eventually agree to adjudication to resolve the dispute about site access. Shovels includes the email quoted earlier in the referral bundle using it to demonstrate that Sparks' site management was poor. Sparks immediately protests and tells the adjudicator that the email was sent without prejudice even though it wasn't marked as such.

c)	**What does 'without prejudice' mean? Was the email sent without prejudice? What is the effect on this adjudication?**	**(4 marks)**

The bundle also includes a set of minutes of a pre-contract meeting where it is recorded that Jack Stephens of Sparks said that, "*all costs of bad weather and soil conditions would be paid in full*." Sparks now deny that he ever said such a thing and say that there is nothing in the contract to that effect.

d)	**What, if anything, is the relevance of this set of minutes?**	**(4 marks)**
e)	**The purchase order does not contain any provisions for the claimed payment of interest in respect of any late payments. If the adjudicator decides that a payment is due from one party to the other, how should any interest obligation be assessed?**	**(5 marks)**
	Total	**(25 marks)**

Section 1

Question 3

A Contractor has been working for a railway infrastructure owner (The Railway Company) using the ICC Target Form of Contract. A railway station has been extended to allow for the running of longer trains in a £4m project.

To facilitate longer platforms an embankment constructed of granular fill has been constructed. The granular fill includes naturally occurring materials mixed with Incinerator Bottom Ash Aggregate (IBAA). IBAA is a product of municipal waste incinerators. No code exists for its use in railway structure although a highway code of practice (HCOP) states that its use should be limited to a maximum of 9% by volume. The HCOP also says that IBAA should be weathered (ie exposed to open air & moisture) for at least 12 months before use.

18 months after completion, the new platforms started cracking, edging copings have been pushed out, access ramps and concrete staircases have cracked and moved. It is unsafe for trains to use the station and emergency works have been undertaken since.

Trains were unable to use the station for three weeks, compensation payments to train operators are likely to exceed £300,000. Two passengers have lodged claims against the Railway Company after claiming to have tripped on ridges in the platform surfacing.

Core tests by Employer showed IBAA content as high as 54% in places and that the original IBAA fill was unweathered. Once moistened a chemical reaction caused it to expand, hence the movement.

The contract specification doesn't mention anything about IBAA or indeed fill materials.

The Employer states that the material problems are a breach of contract. The Contractor denies all liability saying that as the specification contains no reference to fill material quality, anything could be used.

a) Is the Contractor correct? Explain your answer (6 marks)

The railway company blames the Contractor and its supply chain for all of the problems. It is keen to make someone else pay for the claims against it.

b) What is the basis of the passengers' claim against the Railway Company? What will they need to prove to be successful? (6 marks)

c) **Can the railway company require the Contractor to meet the various costs and claims it has incurred as a result of these problems? Explain your answer.** **(6 marks)**

After several months of exchanging acerbic correspondence through their respective legal representatives the Contractor introduces a new defence. It states that it has no liability for defects as the problems all arose after completion of the works and after the 12 months' defects period.

d) **Is this defence correct? Explain your answer** **(7 marks)**

Total **(25 marks)**

Section 1

Question 4

The Contractor is constructing a budget hotel in a city centre using the JCT Intermediate Building Contract 2016. The Employer is a property development company that will sell the hotel to the chain, Super Inn, on completion for a pre-determined price.

One day, when a subcontractor was lifting a bathroom pod into place, items fell from the pod and damaged cars parked on the street and broke windows in a nearby coffee shop.

Correspondence is subsequently received by the Employer from a local firm of solicitors stating that two pedestrians were injured during the incident and that they are claiming damages for their injuries although no one on site remembers seeing anyone at the time.

Once received, the claims from the car owners, the coffee shop and the pedestrians add up to over £800,000. The subcontractor has since ceased trading due to insolvency.

a) **Who might be liable to pay compensation to the various aggrieved third parties? Explain your answer.** **(8 marks)**

b) **How might the Party you have identified in part (a) defend the personal injury claims?** **(7 marks)**

The Contractor submits an application for payment on 31 May intending to seek a payment of £1,059,643.24. A typographical error leads to the application seeking £10,059,643.24, an increase of £9m over the intended sum. The narrative states, "*as discussed and agreed at the management meeting of 26 May.*" The contract contains a schedule of dates which, in respect of the May application, states;

- Application - no later than 31 May
- Due date for payment – 7 June
- Final date for payment – 15 July
- Payless notice – no later than 14 July

The Employer's contract administrator reads the application and laughs to herself intending to mention the error to the Contractor. But she forgets and the application goes un-responded. A

new manager at the Contractor spots the discrepancy on 16 July and writes to the Employer saying;

- The £10,059,643.24 is now the notified sum and should have been paid yesterday.
- Interest is now accruing.
- No further discussion or proceedings can now take place in respect of this number, that is now the valuation for the works done in May.

c) Is the Contractor correct? Explain your answer by reference to statute law and case law. (10 marks)

Section 2

Question 5 - COMPULSARY QUESTION

The contract is for the construction of a new bridge over an existing motorway under NEC4. It is an Option A and the *Client* is a property developer. During the stripping of topsoil to form the piling platform the *Contractor* uncovers a stone circle. He issues an early warning that he may have uncovered a Bronze Age stone circle.

a) Advise the *Project Manager* on what actions he should take (5 marks)

The *Client's* designer has specified precast concrete piles with a rock shoe to penetrate the rockhead. After the first ten piles have been driven the designer is concerned about significant hairline cracks in the piles. The *Project Manager* calls an early warning meeting. The meeting is attended by the designer and the piling subcontractor as well as the *Contractor.*

The subcontractor says the hairline cracks are normal. The designer is not convinced. He is unhappy and requests that the piling is stopped until the matter is resolved. The request to the Contractor to stop work notice is issued as part of the note of the early warning meeting.

b) Advise the *Contractor* on what action he should take (5 marks)

The piling issue is ultimately resolved but this has delayed the contract by 4 weeks. The bridge abutments are cast and the beams have arrived on site for the planned lift during an overnight closure of the motorway. The beams are landed and are sat on temporary concrete chocks. The method statement submitted by the *Contractor* was that steel chocks would be used until the bearings are grouted. The *Supervisor* raises this with the *Contractor's* foreman who shrugs his shoulders. No senior managers of the *Contractor* are on site. The *Project Manage*r is not on site either.

c) Advise the *Supervisor* on what options are available to him. (5 marks)

The motorway is about to be re-opened when two of the chocks burst and a beam rotates off the bearing shelf and falls onto the motorway. The motorway remains closed. The accident is reported to the Health and Safety Executive and they serve a Prohibition Notice on the *Contractor.* The motorway remains closed for 6 days. Under the developer's agreement with the motorway operator damages for closing the motorway is £250,000/day. The Prohibition Notice is rescinded after 5 days when the chocks are replaced with steel chocks.

d) **Advise the *Client* on how he can recover the damages from the Contractor** **(5 marks)**

It takes a further 8 weeks for a replacement beam to be cast and installed. The works proceed and the bridge is completed, the access roads are kerbed and ready for surfacing. The *Contractor's* Clause 32 programme submitted for acceptance shows a delay of 6 weeks. Over the weekend there is a heavy rainstorm and on the Monday morning a sinkhole has developed adjacent to the back of one of the abutments. Following investigations, the cause is found to be due to the incorrect installation of the back of wall drainage system. The *Client* has had enough and tells the *Project Manager* that he wishes to terminate the contract.

d) **Advise the *Project Manager* on the termination process** **(5 marks)**

Total **(25 marks)**

Section 2

Question 6

You are an independent consultant and are the *Project Manager* for the construction of a major bio mass facility in Scotland. The *Client* is the UK subsidiary of a Dutch energy company. There are two separate contracts. One for the boiler with a Finnish contractor, the other contact is the balance of plant and is being constructed by a UK contractor. Both contracts are Design and Build. The Principal Contractor is the UK *Contractor*.

The Contract Price at award is: **Balance of Plant (BoP)**

NEC4 Option C contract £190m. The share mechanism for the BoP contract is:

The Prices	**Contractor's share**
< 80%	10%
80% to 120%	50%
> 120%	0%

Boiler

NEC4 Option A contract £70m

There are many Compensation Events on the BoP mainly due to interface issues with the Boiler contract which is disputed by the Boiler contractor. This moved the BoP prices to £200m. There have been no CEs on the Boiler contract. The forecast Price for Work Done to Date for the BoP is £220m

There have been many disputes between the BoP contractor and his subcontractors. These have been decided by Adjudication. Most of the issues are due to poor design. You only became aware of the adjudications after the event.

Three months before planned completion you are called to a meeting with the *Client* in Holland. You are told there is no more money and you need to reduce the overall cost by at least £10m. You are told that you must report all financial matters to the Dutch Project Sponsor who has taken over from the UK Sponsor who has been sacked. You receive a memo from the Project Sponsor stating that your must get his approval before you issue a Certificate or agree any CE

quotations.

On your return to site you are told that there is a problem with over 80% of the pipe welds, these have failed the non-destructive tests. You check the welders' certification and find that the certificates have been forged and none of the welders are certified to European standards which is a requirement of the Scope.

Replacing the pipes will cost £5m and delay BoP completion by 6 months. There is secondary option X7 in the BoP contract, however the Contract Data Part one is blank. The connection to the Boiler contract is a Key Date.

The Boiler contract completes one month early and requires an instruction either to stand down and remobilise or to have a care and maintenance team left until the Boiler can be commissioned once the BoP is ready. The cheapest option is to stand down and remobilise at £1.0m but the Boiler contractor will not take responsibly for any deterioration of the boiler in this period. A care and maintenance team will cost a total of £2.5m.

a)	**Provide a commentary on the role of the *Project Manager* and their duties to the *Employer* and *Contractor.***	**(5 marks)**
b)	**Identify what costs can be disallowed on the Balance of Plant Contract. How would you ascertain the value?**	**(5 marks)**
c)	**What is the status of Delay Damages on the Balance of Plant Contract?**	**(5 marks)**
d)	**Advise the *Client* on the effect of the forged welder's papers.**	**(5 marks)**
e)	**How can the *Client* recover the cost of the failure to achieve the Key Date?**	**(5 marks)**
	Total	**(25 marks)**

Section 2

Question 7

The contract is the NEC4 Option C. The works are major regeneration works in the centre of a major city for the local authority. The boundaries of the site include an area of land for site offices. The *Contractor* is Spanish, and this is his first contract in the UK.

This is month 1 of the contract and the site offices are being installed. The *Project Manager* receives the first application for payment from the *Contractor* and it contains:-

1. The Defined Cost of staff who are not working in the working area. When challenged the *Contractor's* commercial manager explains that until the offices are operational, then key staff are working from their UK head office and visiting site occasionally. The *Contractor's* project manager is still in Spain and working in their Madrid office.

2. The offices are being installed by a subcontractor, but no request has been made to the *Project Manager* for acceptance. You are aware that the subcontract is based on a Spanish Purchase Order with no contract conditions.

a)	**Advise the *Project Manager* on whether he should authorise payment.**	**(5 marks)**
b)	**Advise the *Contractor* on the mechanisms in the contract to ensure staff are paid if not on site.**	**(5 marks)**
c)	**Advise the *Project Manager* on whether he should authorise payment of the Subcontractor Defined Cost.**	**(5 marks)**
d)	**Advise the *Contractor* on the procedure for gaining acceptance of subcontractors**	**(5 marks)**
e)	**If the main Option is A, describe how your advice would change if at all**	**(5 marks)**
	Total	**(25 marks)**

Section 2

Question 8

You are advising your client on how to conduct the tender process for a new highway improvement works. The contract will be an NEC4 Option C and is design and build. The *Client* intends to award the contract on the lowest price.

a) **Advise the *Client* on the operation of an Option C contract and how to model the tender to ensure parity between the Prices and Price for Work Done to Date.** **(8 marks)**

Tenders are invited and you receive a number of queries.

b) **How would the *Client* manage the process of tender queries?** **(5 marks)**

On receipt of the tenders one of the tenderers has provided his programme as required but it shows the Contract Completion Date at week 110 rather than week 100 as stated in Contract Data Part 1. There is no comment in the covering letter as to Completion Date.

c) **Advise the *Client* on what he should do** **(5 marks)**

One tenderer has inserted his design consultant's rates in Contract Data Part 2 under design outside of the working area. The other tenderers have left this blank.

d) **Advise the *Client* on how he should treat this matter** **(7 marks)**

Total **(25 marks)**

MODULE 3

Section 1

Question 1 - Points for Answer

a)	What is novation? Explain the process of novating the contract from Employer to Contractor	[1 mark]
	Must be set out in original tender between Employer and tenderers before Contractor is appointed and the terms of the design agreement.	[1 mark]
	Why do it? Explain pro's and cons. Any reasonable conclusion reached will earn marks provided it is reasoned.	[1 mark]
	Pro's – consistency of approach through project development lifecycle, ensuring Employer's needs are met in the detailed design.	[1 mark]
	Con's – two parties who didn't choose one another end up working together. Neither will be necessarily looking to work with the other.	[1 mark]
	No ability for contractor to bring established supply chain to the project.	[1 mark]
	Limited ability to draft contract to suit both Parties. Design and build?	[1 mark]
	Total	**[7 marks]**
b)	This question involves an analysis of the obligations of a designer, reasonable skill and care (RS&C). See Bolam v Friern Hospital.	[2 marks]
	Is a failure to design something in accordance with the applicable law a breach of the (RS&C) obligation? Almost certainly.	[2 marks]
	Contractor needs to establish the contractual duty (almost certainly RS&C) and show that the actual conduct of the designer was not of that standard.	[2 marks]
	What, if anything, was the relevance of the reference to the Contractor's failure to spot the problem. Easy to argue this one either way, so any well-argued answer will earn marks.	[2 marks]
	Then link the losses suffered to the breach (Hadley v Baxendale) to establish the damages due.	[1 mark]

	The Designer will rebut it by relying upon the Contractor's failure to spot the error. It will also refer to the lack of a reference to statutory compliance in the clause quoted. RS&C is subjective so an argument	[1 mark]
	Total	**[10 marks]**
c)	Follow on from (b) – is this mistake a failure to provide the services with RS&C? Probably, yes although an answer concluding the opposite and referring to the Contractor's omission will gain marks if well-argued.	[5 marks]
	Total	**(5 marks)**
d)	Might order disclosure and draw an adverse influence if not given	[3 marks]
	Total	**(3 marks)**
	Total	**(25 marks)**

Section 1

Question 2 - Points for Answer

a)	It is correct, yes. See HGCRA as amended by LDEDCA.	[1 mark]
	The contract is a construction contract – s104(1)	[1 mark]
	The works are construction operations – s105(1)	[1 mark]
	Entitlement to interim payments – s109(1)	[1 mark]
	Scheme applies here – s109(3)	[1 mark]
	Also Scheme Para's 2 and 3(a)	[1 mark]
	Scheme Part II para's 1 & 2 are implied into the contract.	[1 mark]
	Total	**[7 marks]**
b)	Already established in (a) that this is a construction contract	[4 marks]
	Scheme Para 3(b) – Part II of the Scheme to apply (in their entirety)	[3 marks]
	Total	**[7 marks]**
c)	WP isn't entirely reliant on the label. Was the email seeking to resolve the dispute? No, it wasn't. WP documents that are seeking to resolve a dispute are WP and then can't be put before an adjudicator, arbitrator or court. This email wasn't WP as it had neither the label nor the intent so can be considered by the adjudicator.	[4 marks]
	Total	**[4 marks]**
d)	The minutes are irrelevant – parol evidence rule. No effect at all. Discussion of exceptions required.	[4 marks]
	Total	**[4 marks]**
e)	Late Payment of Commercial Debts (Interest) Act (in England & Wales and NI) and primary.	[1 mark]
	8% above base rate	[1 mark]
	Reasonable costs of recovery. Discussion of late payments debt regulations 2013.	[2 marks]
	Does not apply to damages payments.	[1 mark]
	Total	**[5 marks]**
	Total	**(25 marks)**

Section 1

Question 3 - Points for Answer

a)	Implied term from Sale of Goods and Services Act 1982 s13 that a business will carry out the service with reasonable skill and care unless expressly agreed to the contrary. Sale of Goods Act 1979 and common law require materials to be of good quality and reasonably fit for their intended purpose.	[6 marks]
	Total	**(6 marks)**
b)	Claim in tort or delict. They will need to prove that there was a duty of care and that it was breached. Is there a duty of care? Yes. Occupier Liability Act 1957 (passengers are legitimate visitors to the premises). Was the duty of care breached? Yes	[6 marks]
	Total	**(6 marks)**
c)	Yes. Breach of contract. Explain 2 limbs of Hadley v Baxendale and put them into the context of this scenario.	[6 marks]
	Total	**(6 marks)**
d)	No, it's not. Limitation Act 1980. Liability for breach extends much further than the end of the defects period written in the contract which is merely a mechanism for allowing defects to be corrected by the contractor shortly after completion when most tend to appear. Mention simple contracts and deeds and effect on limitation periods.	[7 marks]
	Total	**(7 marks)**
	Total	**(25 marks)**

Section 1

Question 4 - Points for Answer

a)	The claimants are likely to take action against the Employer as the occupier of the premises. It will look to pass on the claims to the Contractor. The insolvency of the subcontractor does not affect the liability of these two parties	**(4 marks)**
	Check if subcontractor had third party insurance on the day of the incident; that may assist if the subcontractor's breach or negligence can be shown to have caused the incident.	**(4 marks)**
	Total	**(8 marks)**
b)	There are several defences to a claim of negligence, as here. The claimant must prove, The main ones are contributory negligence, illegality, *Volenti non fit injuria.* These are unlikely to assist here unless the claimants entered a restricted area. The main area of defence here is for the claimants to prove that (i) a duty of care existed, (ii) it was breached and (iii) they suffered damage or injury. They will need to prove that they were actually there given others' doubts.	**(7 marks)**
	Total	**(7 marks)**
c)	Statute law is HGCRA 1996 as amended by LDEDCA 2009.	**(2 marks)**
	s110A	**(1 mark)**
	s110B	**(1 mark)**
	s111	**(1 mark)**
	Payment of the notified sum is due.	**(1 mark)**
	The assessment is not final – see True value can still be assessed.	**(2 marks)**
	Only way to avoid this payment would be if insolvency of the Contractor was likely.	**(2 marks)**
	Total	**(10 marks)**

Section 2

Question 5 – Points for Answer

a)	Issues to explore; Discussion on what to do on finding potential historical value	(5 marks)
	Total	**(5 marks)**
b)	Discussion on the clause to allow stop work Notice, Effect of Notice not issued correctly. Notice of CE including effect on programme;	(5 marks)
	Total	**(5 marks)**
c)	Discussion on powers of *Supervisor* under the contract and duties under Health and Safety legislation. Observation that *Project Manager* should have delegated his powers to Supervisor when he is not on site	(5 marks)
	Total	**(5 marks)**
d)	Discussion on the recovery of damages levied by motorway operator by issuing pay less notice or recovery of costs (Clause 82)	(5 marks)
	Total	**(5 marks)**
e)	Discussion on termination and payment.	(5 marks)
	Total	**(5 marks)**
	Total	**(25 marks)**

Section 2

Question 6 – Points for Answer

a)	Issues to explore Independence of the *Project Manager*;	(5 marks)
	Total	**(5 marks)**
b)	Disallowed costs and how they are applied;	(5 marks)
	Total	**(5 marks)**
c)	Legal status of Delay Damages;	(5 marks)
	Total	**(5 marks)**
d)	Defect notices;	(5 marks)
	Total	**(5 marks)**
e)	Recovery of costs. Corrupt Act in relation to forged welder's certification	(5 marks)
	Total	**(5 marks)**
	Total	**(25 marks)**

Section 2

Question 7 – Points for Answer

a)	Issues to explore Components and the relationship with the Working Area.	(5 marks)
	Total	**(5 marks)**
b)	The candidate can articulate the process for expanding the Working Area and which clauses of the contract apply.	(5 marks)
	Total	**(5 marks)**
c)	The candidate's opinion on whether an unaccepted sub-contractor should be paid, particularly around whether temporary site offices are providing the works.	(5 marks)
	Total	**(5 marks)**
d)	Detailed analysis of the subcontractor acceptance process.	(5 marks)
	Total	**(5 marks)**
e)	Marks if the candidate picks up on the exclusion of clause 10.1 in the subcontract. Discussion on difference between application for Option C based on Defined Cost and Option A completion of activities in the Activity Schedule.	(1 marks) (4 marks)
	Total	**(5 marks)**
	Total	**(25 marks)**

Section 2

Question 8 – Points for Answer

a)	Issues to explore Option C contracts have the Prices but the *Contractor* is paid Defined Cost. Candidates should explain the relationship between elements of Defined Cost and the various elements of the schedule of cost components.	(3 marks) (5 marks)
	Total	**(8 marks)**
b)	Establishment of process to ensure tender confidentiality; Differentiate between tender queries and tender amendments	(5 marks)
	Total	**(5 marks)**
c)	Advice on bringing to tenderer attention and confirmation that Contract period is 100 weeks as this will become the accepted programme.	(5 marks)
	Total	**(5 marks)**
d)	The use of *Contractor's* own design in the SoCC with the Consultant being a subcontractor.	(7 marks)
	Total	**(7 marks)**
	Total	**(25 marks)**