

NEC4 – still at the edge of collaborative contracting

The launch of the new (fourth) edition of the New Engineering Contract (NEC), which occurred in June 2017, has been one of the most eagerly anticipated events of 2017 in the construction and engineering sector. The previous edition, NEC3, has been the contract of choice for public sector projects in the UK for many years, and has been used on many of the biggest projects in recent years, including the 2012 Olympics, Crossrail and High Speed 2.



The influence of NEC is also growing internationally, particularly in Hong Kong, Australasia and Africa. For example, and following the success of a series of NEC3 pilot projects in the region (including the HK \$2 billion community hospital at Tin Shui Wai), the Hong Kong government decided to use NEC3 contracts generally for all government projects tendered in 2015/16.

NEC and collaborative contracting

NEC was first published by the Institute of Civil Engineers (ICE) in the early 1990s as an alternative to the ICE standard form of contract. It has now taken over from it. NEC is best known for its collaborative nature and the pioneering ways in which it seeks to avoid disputes, including the prospective and binding assessment of claims and the absence of a final account at which claims made during the course of the works can be re-opened.

NEC's stated aim for NEC4 is "evolution not revolution". The phrase is apt since there are no fundamental changes, however:

- the contract has been clarified in certain respects (for example, the programme to be used for assessing extensions of time is now defined);
- certain provisions have been enhanced (for example, through provision for a quality management system); and

- the overall approach is more international (for example, through the option to refer disputes to a standing dispute board).

NEC4 builds on the success of its predecessors, and there is little doubt that it remains at the forefront of collaborative contracting. Some of the key features of the new NEC4 contract are:

- **Early Warning Procedure:** The early warning procedure in clause 15 has long been a key component of NEC. Early warning of any matter which could increase the prices, delay completion, delay a key date or impair the performance of the works in use must be given by either the Contractor or Project Manager as soon as they become aware of such matter. Failure to give such notice will be prejudicial to the Contractor by reason of the provisions of clauses 61.5 and 63.7, which provide that a compensation event is assessed as if the Contractor had given the early warning.

At clause 15.2 there is a new requirement in NEC4 for the Project Manager to prepare a first Early Warning (formerly Risk) Register and issue it to the Contractor within one week of the starting date. A First Early Warning meeting must be instructed by the Project Manager within two weeks of the starting date. The emphasis is very much on flushing out problems at an early stage so that the parties have the fullest possible opportunity to deal with them.

- **Value Engineering:** New clause 16 makes provision for the Contractor to propose to the Project Manager changes in the Client's Scope in order to reduce the amount paid by the Client to the Contractor for providing the works. The Project Manager must respond within four weeks of the proposals either by: accepting them and issuing an instruction changing the Scope, requesting a quotation, or informing the Contractor that the proposal is not accepted. This is intended to facilitate an exchange on value engineering initiatives, such as revised methods of working or the use of different types of materials. There is, though, no compulsion on the Client to accept a value engineering proposal – unacceptable proposals can be rejected by the Project Manager for any reason.
- **Quality Management:** Under new clause 40, a quality management system is to be operated by the Contractor pursuant to a policy statement and plan which it provides to the Project Manager for acceptance. Making quality management part of the core terms, rather than leaving it to be addressed in the technical appendices, is a welcome and positive step forward.
- **Assignment:** NEC4 contains a new clause 28, which provides that the Client cannot assign the contract to a party who "does not intend to act in a spirit of mutual trust and co-operation". It is unclear what effect this provision will have in practice, as any party to whom the contract is



assigned would, in any event, be bound by clause 10, which requires the parties to act in a spirit of mutual trust and co-operation.

- **Defined Cost:** In the cost reimbursable versions of NEC3 (Options C to F), a new clause 50.9 is inserted which requires the Contractor to make available for inspection records necessary to demonstrate that a part of Defined Cost has been correctly assessed. The intention behind this clause is stated by NEC to be the finalisation of Defined Cost in a proactive and timely manner.
- **Final Assessment:** The concept of a “final assessment” is new to the NEC Suite. One of the basic principles of NEC to date has been that payments are assessed as the project proceeds and there is no provision for a retrospective final account process. NEC has stated that new clause 53 is not intended to be a traditional final account, but rather to ensure that the final amount due is properly calculated in the light of what has gone before. Therefore, it may only be an arithmetical check on earlier payments.
- **Compensation Events:** Compensation events, which are the mechanism by which the Contractor recovers additional money and extensions of time, are addressed in clauses 60 to 66. Unlike certain other standard form contracts which draw a distinction between the events which provide for time relief only and other events which provide for time and cost

adjustment, under NEC all compensation events carry with them an entitlement in principle to an extension of time and additional cost – subject, of course, to establishing that delay will result or that additional costs will be incurred. Additional clarity has been provided in NEC4. There was scope for debate under NEC3 as to which Accepted Programme should be used for the purpose of assessing delay – the various choices included the Accepted Programme current when the event arose, when a quotation was submitted or when the Project Manager made an assessment. NEC4 confirms that delay is assessed by reference to the “Accepted Programme current at the dividing date” (see clause 63.5), with the dividing date being either: (1) for compensation events arising from an instruction or notification from the Project Manager, the date of the communication, or (2) for other compensation events, the date of the notification

- **Revisiting Compensation Events:** Clause 65.2 of NEC3, which prevented the assessment of a compensation event from being revised “if a forecast upon which it is based is shown by later recorded information to have been wrong”, has been replaced by clause 66.3 in NEC4. Clause 66.3 is of broader application and provides that “the assessment of an implemented compensation event is not revised except as stated in these conditions of contract”. As such, an assessment cannot be

revisited, for any reason, unless there is an express entitlement under the contract (for example, by an adjudicator under clause W2.3(4)).

- **Dispute Resolution:** There are now three options, of which Option W3 is new:
 1. Option W1 is adopted when the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009 (**UK Construction Act**) does not apply. In Option W1, there is now provision for disputes to be referred to Senior Representatives as a precursor to referral to, and decision by, an adjudicator.
 2. Option W2 is adopted where the UK Construction Act does apply. It follows a similar pattern to Option W1. However, in this Option the parties may only refer a matter to Senior Representatives if they agree. In accordance with statutory requirements in the UK, a party may refer a dispute to adjudication whether or not it has been referred to Senior Representatives.
 3. Option W3 introduces, for the first time in the NEC suite of contracts, a Dispute Avoidance Board as an alternative to either Options W1 or W2. The function of the Board is not to resolve disputes between the parties but, rather, to make recommendations for resolving them. The Board is a standing body whose

members are identified in the Contract Data. It is intended that the Board should familiarise itself with the project by regular site visits. Potential disputes can be referred to the Board by either party, and it can review potential disputes with a view to helping the parties to settle them without the need for disputes to be formally referred. In the UK, Option W3 can only be used where the UK Construction Act does not apply. That said, some UK projects have (by bespoke amendments to the NEC standard form) provided for a form of dispute board in parallel to adjudication – the idea being to give the parties recourse to a non-binding and less adversarial alternative to adjudication.

Collaborative contracting in other standard forms

There has been a gradual move across the industry generally towards more effective project management and the promotion of a more collaborative environment in standard form contracts.

For example, the JCT's Constructing Excellence form 2016 provides at clause 2.1 that "[t]he Overriding Principle...in the operation of this Contract is that of collaboration" and the IChemE Red Book (2013) provides at clause 2.1 that "[t]he parties and the Project Manager shall co-operate with each other in the discharge of their respective obligations under the Contract with the aim of satisfactorily completing the Plant and the Works in accordance with the Contract" and at clause

2.2 that "[t]he parties shall deal fairly, openly and in good faith with each other."

Common features of a collaborative environment include enhanced provisions for passing of information and a shared approach to risk management.

It is interesting to note that the current draft of FIDIC's Yellow Book suggests that FIDIC is moving towards a more collaborative approach, albeit cautiously. Some of the latest proposals are:

- the requirement for the engineer to consult with the parties when a determination is sought from it;
- the programme must now contain more detail and record-keeping requirements are enhanced;
- advance warning provisions are now included, but without a sanction;
- both contractor and employer are now subject to time bars in respect of their claims; and
- the Dispute Adjudication Board can now waive the time bar provision for notice of claims, although applications to it are themselves subject to a time bar.

Conclusions

NEC has for some time been at the forefront of a trend in the construction industry towards more collaborative contracting, with a particular focus on mutual trust and co-operation, the early identification of risk and the resolution of claims on a "look forward" basis.

While NEC4 is not, by its own admission, revolutionary, it continues this trend. It has introduced new provisions to reflect current market practice and has helpfully clarified certain matters.

NEC4 is likely to be adopted over time by the public sector in the UK as a natural evolution of NEC3. It will be interesting to see how widely it is adopted outside the UK, in particular in jurisdictions that have not experimented with NEC to date. The UK experience certainly shows that, adopted and properly implemented, it is capable of successfully delivering even the most substantial projects.

This article is a shortened version of an article to be published in the ICLR in December 2017

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