

newslatter

nec users' group

NEC Users' Group approaches 500 members

REKHA THAWRANI NEC MANAGER

The NEC Users' Group is fast approaching a record 500 members, a five-fold increase in the past seven years.

In January 2000 the membership stood at just 92 and had reached 270 by the time NEC3 was launched in July 2005. However, a further 200 organisations have since joined and new applications arrive every day, such that the total is likely to pass the 500 mark early in 2008.

International growth

Users' Group secretary Robert Gerrard says he is particularly encouraged by the international growth of the membership.

'Since we introduced the new international member category in September 2005, we have been joined by 66 organisations from outside the UK,' he says. 'This reflects the significant take up of NEC3 in countries such as South Africa,

Australia, New Zealand and, more recently, in mainland Europe and the Middle East.'

All types of organisations

'What is also encouraging is that the Users' Group member organisations reflect the collaborative nature of the NEC, with all types and sizes being represented,' says Gerrard.

'In addition to most of the leading UK and international construction consultancies and contractors we also have a wide range of public and private-sector clients, including government departments, local authorities, transport, power and water utilities, and commercial, retail and residential developers,' he says.

The Users' Group has been chaired since April 2006 by Professor Rudi Klein, chief executive of the UK Specialist Engineering Contractors Group, and is administered by the NEC office in London.

Key role in NEC development

Members of the Users' Group play a key role in the development of NEC and its markets. They are encouraged to share their experience and knowledge with other users through the newsletter, workshops and the annual seminars.

The 2008 Users' Group annual seminar has now been arranged for Monday 14 April in London. A programme is currently being put together and all members are invited to participate.

NEC has also recently appointed Raquel Surally as Users' Group co-ordinator. She will be pleased to hear your views and ideas on how Users' Group services can be further enhanced. ○

For further information please contact Raquel Surally on +44 20 7665 2443 or email raquel.surally@neccontract.com



LEFT Artist's impression of how the Liverpool waterfront will look at the end of this year following completion of British Waterways' £20 million NEC-procured Liverpool Canal Link

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NEC takes lead on payment

RUDI KLEIN
NEC USERS' GROUP CHAIRMAN



The UK Office of Government Commerce (OGC) launched its *Guide to best 'Fair Payment' practices* in July 2007. It was subsequently endorsed by the Public Sector Construction Clients' Forum and bodies representing the construction industry.

From the beginning of 1 January 2008, every public sector construction procurer and all members of the delivery team are now expected to sign a 'fair-payment charter'. This states, 'Fair and transparent payment practices are an essential underpinning to achieving successful integrated working on construction projects.'

The charter applies to all public-sector projects coming on stream in the UK.

Project bank accounts

Most of the OGC's new guide is devoted to project bank accounts, on which it states, 'There is very good alignment between the mechanism of Project Bank Accounts and the principles of 'Fair Payment', and it is recommended that public sector clients should progressively specify use of

project bank accounts where practicable and cost effective.'

The guide identifies a number of advantages of having project bank accounts, including

- transparent measurement of cash flow
- reduction in financing charges across the supply chain
- reduction in payment abuse
- elimination of disruption caused by insolvency of a supply chain member
- reinforcement of team working.

Most importantly, the guide indicates that at least £750 million savings to the taxpayer could be achieved if project bank accounts and fair-payment practices were applied.

Interest from private sector

Although the OGC guide is directed at the public sector, private-sector client organisations were involved in producing it and many of these have already indicated interest in setting up project bank accounts.

Indeed, Barclays Bank and Bank of Scotland have now produced standard documentation for setting up such accounts, including bank mandates and instructions.

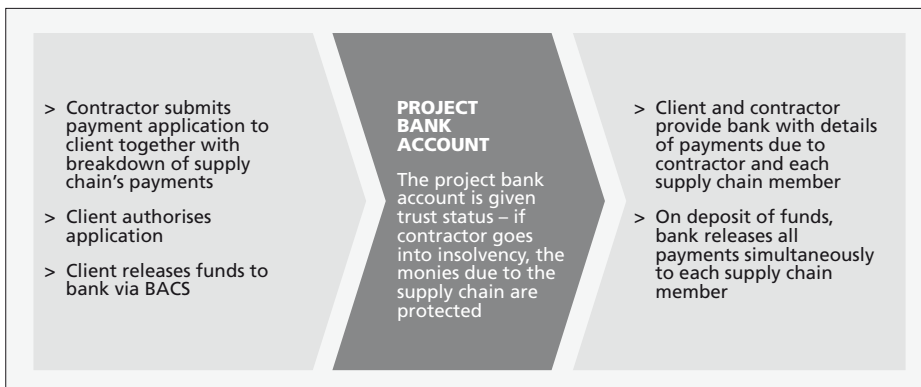
NEC project bank option

The NEC panel has supported these developments by agreeing to publish a project bank account option based on the client's guide to project bank accounts included in the OGC's guidance. This will help re-enforce and spread the use of the NEC across public-sector procurement.

The project bank account concept fits in very well with the NEC philosophy. Like all other aspects of managing the construction process, the payment process needs to be managed effectively. The collaborative intent of the NEC forms of contract can be frustrated by poor payment performance. In taking a lead on this, the NEC has demonstrated its flexibility in accommodating best practice in procurement and delivery.

Guide to best 'Fair Payment' practices can be downloaded from the OGC's website at www.ogc.gov.uk/ppm_documents_construction.asp#Fairpayment. OGC is also supporting an afternoon conference on project bank accounts in early 2008, contact Victoria Back at Rider Levett Bucknall at victoria.back@uk.rlb.com

For further information please contact the author on +44 20 7313 4920 or email ahewitt@hvca.org.uk



LEFT How project bank accounts work - there will soon be an NEC option for this

ABOVE Most of OGC's new guide is devoted to project bank accounts

Cambridge NEC contract managed online

PAUL WILKINSON
BIW TECHNOLOGIES

Davis Langdon recently worked with BIW Technologies to develop an online solution to support its NEC contract administration role on a £9.75 million city centre redevelopment in Cambridge.

In 2004, Davis Langdon was appointed to provide project and cost management, including contract administration services, on a project for St John's College, Cambridge. The 'Triangle Site' project involved conversion of two properties into

a medical centre and refurbishment of 12 listed buildings to provide ground-floor commercial space with residential accommodation for students in the floors above.

The client was happy to use the NEC despite a lack of familiarity with the contract among the project team. Davis Langdon was also keen to find an alternative to the paper-based system and email as a communication medium but, wary of adopting a 'one-size-fits-all' approach due to previous experience of similar systems, was looking for a solution that was flexible enough to meet the specific project requirements.

The firm therefore collaborated with BIW

Technologies to develop a comprehensive suite of standard forms and documented procedures which met all of the NEC process requirements. Approximately six months after works started on site, BIW's contract administration module was adopted and trialled alongside the current processes.

Over 100 compensation events

In the first four months, over 100 compensation events were issued. Since each of these then generated further processes (for example contractor's quotations and project manager's assessments), strong management procedures were needed

Contract at core of ICE policy

SIMON FULLALOVE
EDITOR

David Orr, who became 143rd president of the Institution of Civil Engineers (ICE) on 6 November 2007, has put NEC and procurement at the heart of ICE's policy for 2008.

He said in his presidential address that excellence in procurement was going to be one of the four key themes of his presidential year, along with delivering public works of real value, protecting the public and promoting the profession.

NEC makes strongest contribution

'ICE's strongest contribution to excellence in procurement is in the NEC contract, the third edition of which (NEC3) has been endorsed by the Office of Government Commerce as upholding the principles of 'achieving excellence', he said.

'It is widely used in the UK and across the world. NEC3 is helping the construction industry to deliver on time and on budget, and with closer cooperation – integrated working across the construction team. It provides transparency and incentives for innovation and good performance. When things do go wrong, its 'no surprises' culture provides an early-warning process, allowing everyone to focus on getting things back on course.

Northern Ireland projects

Orr is also an experienced NEC user in his current role of director of central procurement in the Northern Ireland Civil Service. 'The Toome Bypass on the strategic route between Belfast and the north west of Ireland was my first experience of using NEC. When it was opened in 2004, it was six weeks early and some 5% under the target cost.'

He has since used NEC3 on the new 14 km, £86 million A1/N1 between Newry in Northern Ireland and Dundalk in the Republic of Ireland, which opened in August 2007, four months ahead of schedule.

Principles for successful procurement

Orr said that from a client's perspective there were six key principles for the successful procurement and delivery of civil engineering projects

- the informed client
- crucial first steps
- consider the impacts
- long-term financial planning
- good design
- managing risk.

RIGHT The NEC-procured 14 km, £86 million A1/N1 between Newry in Northern Ireland and Dundalk in the Republic of Ireland opened in August 2007, four months ahead of schedule

BELOW David Orr, 143rd president of the Institution of Civil Engineers



to maintain control of the project. In addition to the NEC processes, the contractor's request-for-information process was also added to the BIW module.

Having a single repository for all project communications proved invaluable, said project manager Chris Akers. 'The BIW system allows you quickly to search any type of communication and identify, say, all of the compensation events for which a quotation has not yet been received, or identify all of the early warnings which are open at that time. The system also allows you to explore the history of an issue quickly and easily due to the in-built audit trail and links to associated documents. A further benefit is being able to bring information to team meetings, by filtering and exporting the information into spreadsheets and reports.'

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Architect's view of £9.75 million Triangle Site development in Cambridge, in which NEC processes were managed online (courtesy van Heyningen and Haward)

NEC completes High Speed 1

MIKE ATTRIDGE AND HARPAL TAMBER
RAIL LINK ENGINEERING

High Speed 1, Britain's first 300 km/h railway, opened on time and to budget on 14 November 2007. Formerly known as the Channel Tunnel Rail Link, the 109 km NEC-procured route links London to Europe's 3750 km high-speed rail network via the Channel Tunnel and cuts the London-Paris trip to two hours and 15 minutes.

The £5.8 billion project has also regenerated large tracts of derelict land at Kings Cross and Stratford in London, including creating foundations for the London 2012 Olympics Park. In addition it provided the core road and rail infrastructure for the vast Thames Gateway development.

The first 70 km, mostly over-ground, section through Kent opened in 2003. The procurement and contract strategy for of the challenging second section into London, most of which is underground, largely adhered to the NEC-based approach adopted for section 1 that had contributed to the successful procurement of approximately £1.2 billion of construction (see Issue 25). Section 2 involved the procurement of a further £2.5 billion of heavy civil and railway construction.

The choice of contract form followed the path previously trodden by section 1, namely a project-specific version of the NEC Engineering and Construction Contract (ECC) option C (target contract with activity schedule). This had been chosen to reflect the emphasis the client and RLE placed on timely completion, certainty of out-turn cost (as opposed to lowest award price) and desire for the client's project team and the contractor's team to work in a collaborative manner with the predominant focus on successful delivery of the contract.

Advantages of NEC

NEC provides visibility for the client of the contractor's accounts and records (so the client knows where its money is being spent), financially rewards strong contractor performance, and shares the financial risk between client and contractor, promoting a 'we are in this together' philosophy and giving both parties an interest in the outcome of any decisions made.

The flipside is that since the contract is to a point cost-reimbursable, the client has greater commercial risk than under a more conventional price-based contract. Consequently the client's team had to be much more aware of any deviations by the contractor from its planned budget and programme. As a result contracts demanded sophisticated levels of project control to identify at the earliest opportunity any deviations from the contractor's original plan.

Separately, and recognising contractors' desire both to protect (and possibly better) their 'tendered margin' and to avoid liquidated damages for delay, both parties were still heavily involved in the contract administration processes that dealt with the establishment of monetary and time entitlement.

The administrative effort necessary to stay on top of the contracts, further increased by the NEC philosophy of dealing with contractual issues to a tight timescale, resulted in a relatively high input by contract administration/project controls staff from both sides. The pay-back for this higher level of staff



input has been the settling of final accounts within a relatively short period of contract completion, with its obvious advantages of early certainty for both client and contractors.

The majority of contracts awarded on section 2 were complex, multi-disciplinary, high-risk multi-million pound contracts let to a single contractor assuming the role of principal contractor for the site within which the works are carried out. With one or two exceptions, these contracts were let on the standard conditions of contract based upon ECC option C.

Options A, B, C and E used

However, a different strategy was adopted for Eurostar's new depot at Temple Mills and Stratford and Ebbsfleet International stations' buildings and car parks. This was due to the challenging timescales of these works and the fact that designs were running in parallel with the procurement programme. It was also due to the availability and ability of client Rail Link Engineering to undertake the role of principal contractor and construction manager on these projects.

The packaging strategy for the depot and station works entailed contracts of relatively low risk and of a value between £100 000 and £10 million. This led to a pre-disposition towards the price-based options (A and B) and away from the cost-based options (C, D and E) of ECC. This inclination was borne out of the following.

- Price risk transferred to contractor so that the contractor was motivated to carry out work efficiently.
- Greater certainty of out-turn cost due to the design being sufficiently progressed in order to form the foundations of a robust definition of scope.
- The size of the contracts, being generally smaller and of lower risk, made a lump sum price more viable.
- Smaller contracts opened up opportunities for small- to medium-size contractors which may not be familiar with the more sophisticated workings of a cost-based target contract.
- Reduction in non-value administrative burden associated with the cost-based contracts.

The vast majority of Temple Mills, Stratford and Ebbsfleet building contracts awarded were thus option A (priced contract with activity schedule),

ABOVE The refurbished and enlarged St Pancras station is the new terminal for the NEC-procured £5.8 billion High Speed 1 railway between London and the Channel Tunnel

which were in essence fixed-price lump-sum contracts with the financial effect of variations being cost-based as distinct from tendered-rate-based. These contracts required clear, concise and unambiguous works information that was complete in all respects in describing what the contractor was to do and any constraints under which it was to operate. Where this level of detail was not possible, other options were used.

- Option B (priced contract with bill of quantities) contracts were awarded where uncertainty existed on the actual quantity of work to be done such as contracts involving ground works.
- Option E (cost reimbursable) contracts were awarded for the common services contractor that acted as the construction manager's 'extended arm' by setting up and running the site facilities as well as performing other ad-hoc duties at the direction of the construction manager. This option was deemed most appropriate due to it being difficult to identify exactly what the scope of this package would entail and the constraints within which the contractor would have to operate.

Conclusions

The NEC-based procurement and contracting strategies adopted on High Speed 1 have been a critical success factor in delivering the £5.8 billion project. Best practice has been used wherever possible and strategies refined and adapted as the project has progressed. Even the best-laid procurement strategies for large complex projects inevitably require some modification.

The adaptability of the procurement process has been crucial in delivering the project to time and budget, an almost unique achievement for major UK infrastructure projects of the size and complexity of High Speed 1 and its component parts.

This article is based on a paper by the authors in a special issue (CE6, 160) of the ICE Civil Engineering journal published in November 2007.

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NEC3: operating compensation event procedures

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HILL INTERNATIONAL

Users of NEC3 will be aware that it contains a comprehensive set of provisions for dealing with compensation events. Amongst the actions required by the project manager and contractor are

- the project manager notifies the contractor of a compensation event and instructs it to submit quotations (clause 61.1)
- the contractor notifies the project manager of a compensation event (clause 61.3) and the project manager instructs the submission of quotations (clause 61.4)
- the contractor submits quotations for compensation events and the project manager accepts the quotation or gives notice that they will be making their own assessment (clause 62.3)
- the project manager makes their own assessment of compensation events in certain specified circumstances (clause 64) and notifies the contractor of their assessment (clause 64.3).

A frequently encountered situation under NEC2 and more recently with NEC3 was that the contract mechanisms for dealing with compensation events had broken down. This was usually as a result of the parties having failed to operate the contract correctly or, in extreme situations, having disregarded the contract requirements entirely. The result of this would normally be that hundreds of claims for compensation events would remain unresolved at the end of the contract.

Meetings would be convened, but no resolution would be forthcoming. The contractor would make multiple references to adjudication, or more likely a single large reference to adjudication. This is the very situation which, it was hoped, NEC procedures would help to avoid.

Improvements in NEC3

NEC3 procedures are designed to avoid the problem of unresolved compensation events and to improve the operation of the compensation event mechanisms. In addition they introduce measures which are clearly intended to encourage the parties to operate the contractual provisions. They do this by imposing what some may regard as fitting punishment for non-compliance.

To discourage the practice of late notification of

compensation events by the contractor, the following words have been added to clause 61.3. 'If the Contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the prices, the completion date or a key date unless the Project Manager should have notified the event to the Contractor but did not.'

The additional words have given rise to a great deal of legal debate as to whether or not they constitute a condition precedent to the contractor's entitlement. There is also a problem with the starting point for the eight-week period being the state of the contractor's awareness of the event. This is a somewhat vague concept by from which to measure a period of such contractual importance. However, setting aside these difficulties, the intention of the words are clear and a contractor that chooses to disregard the time limit for notification will, at best, create hurdles that will have to be overcome and will, at worst, lose its entitlement to time and money.

There is also some encouragement to the project manager to respond promptly to an event notified by the contractor. Clause 61.4 contains the following additional provisions. 'If the Project Manager does not notify his decision to the Contractor within either one week of the Contractor's notification... the Contractor may notify the Project Manager to this effect. A failure by the Project Manager to reply within two weeks of this notification is treated as acceptance by the Project Manager that the event is a compensation event and an instruction to submit quotations.' A failure by the project manager in this regard would result in events being deemed compensation events and a deluge of quotations which had not been specifically requested would inevitably follow.

If the project manager has still not got the message and is inclined to be sluggish with their response to quotations, whether these were requested or not, there is another potential landmine at clause 62.6, which provides as follows. 'If the Project Manager does not reply to a quotation within the time allowed, the Contractor may notify the Project Manager to this effect ... If the Project Manager does not reply to the notification within two weeks ... the Contractor's notification as treated as acceptance of the quotation by the Project Manager.'

The message is clear. If the project manager disregards quotations, the outcome could be one

of deemed acceptance and an extremely unhappy employer.

Ensuring compliance

Whether these measures will have the desired effect of ensuring compliance with the contractual procedures remains to be seen. Is there anything that can be done to ensure compliance?

The obvious advice is that the procedures should be followed. However this is simplistic because there is a practical problem of operating the compensation event procedures at the heart of NEC conditions. This problem comes into sharp focus in circumstances where the scope of work is undefined or works information is incomplete and contains errors.

A huge number of instructions are necessary and a correspondingly large number of compensation events are notified. In this situation an awareness of the contractual requirements may not help. The project manager and the contractor may simply not have the resources to deal with the volume of early warnings, compensation event notices, quotation requests and assessments required.

It takes only a little imagination to envisage a situation where a blizzard of compensation events generates a requirement for a huge amount planning and estimating resources on site. If the resources are not available the system will break down regardless of penalties for failing to comply with contractual time scales.

There are no fail-safe remedies and there is no doubt that NEC3 requires a high standard of contract administration by both the contractor and the project manager. However, if both parties are able and willing to pay close attention to the contract requirements it can be made to work and the type of contractual chaos described above can be avoided. In this regard it is thought that busy construction professionals, who are responsible for running the project, would benefit from a well-devised set of operating procedures for use as part of the project quality plan.

If the operating procedures are followed it will mean that the routine matters of administration are attended to at the time the contract requires. This does not, of course, mean that there will be no problems to be resolved at the end of the contract. However, it will mean that answers to the problems can probably be found without recourse to a multitude of lawyers.

The choice is simple; follow the procedures in the contract and have a rolling resolution of compensation events, or face many months of chaos after the project has been completed. ○

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FAQs

ROBERT GERRARD
NEC USERS' GROUP SECRETARY

In this issue we look at some of the recent helpline questions asked, both for NEC2 and NEC3. In all cases it is assumed there are no amendments that materially affect the standard NEC contract referred to.

NEC2 **Defects certificate**

Question

What form should the NEC2 Engineering and Construction Contract (ECC) defects certificate take and is there a specimen available? The reason for the question is that, following our issue of a dissatisfaction notice concerning the failure to issue a defects certificate, the project manager has sent a long list of alleged defects (which is a list we have never seen before) and has called it the defects certificate referred to in clause 11.2(16). The end of the last defect correction period was six months ago.

Answer

Clause 11.2(16) defines what the defects certificate is. In its most basic form it is either a list of defects that the supervisor has notified before the

defects date which the contractor has not corrected or, if there are no such defects, a statement there are none. It does not have to be a pro-forma; a letter (for example) containing the stated information will suffice. There is not an NEC2 ECC example of this but there is one for NEC3 ECC – to obtain this you would have to be NEC Users' Group members or purchase a digital copy of NEC3 ECC. In all honesty, it would be a very basic and straightforward pro-forma or letter were you to produce this yourself.

Clause 43.2 requires the supervisor to issue the defects certificate at the later of the defects date and the end of the last defect correction period. It seems you are beyond this point and therefore the supervisor had not done what he is supposed to have done.

Practically, I would be honest and look at the list, separating those which are defects and those which are not. I would then, with those that are defects, ensure that these latent defects occurred before the later of the defects date and the end of the last defect correction period, as 43.2 states. If any can be proved to have come after such date then these should have been outside the jurisdiction of the supervisor as the defects certificate should have

been issued.

Saying all that, if genuinely they are defects for which you are responsible, then under the ECC or in general law, I would get on and fix them!

Materials on site

Question

We have worked for some time on the basis that under NEC2 ECC option C there is no payment for materials that have been delivered to site but not incorporated into the works, because the contract describes the amount to be paid as the price for work done to date, whereas materials do not constitute work. However, one of our contractors has pointed out that, under clause 70.2, title to plant and materials passes to the employer if it is brought into the working areas. The contractor is making the point that, if it has several hundred thousand pounds worth of expensive paving materials stored on site, how can the title pass to the employer before the contractor is paid for them?

Answer

Clause 11.2(23) states that the price for work done to date is the actual cost which the contractor has paid plus the fee. It is not therefore about work

Using NEC3 outside the UK

KEITH KEOWN
CYRIL SWEETT

The NEC3 Engineering and Construction Contract (ECC3) is designed to be as flexible as possible and this includes usage outside the UK.

This brief article identifies some key points to consider when either bidding for or preparing NEC3 contracts in other countries.

Core clauses

Check if the core clauses have been amended via Z clauses and assess how the contract risk profile has changed. Time bars and strict notification provisions are common on international work so it is important to see if the standard ECC3 provisions have been altered.

Main option clauses

Fixed-priced lump-sum contracts are popular on international projects. This suggests that main options A and B will be used or heavily amended versions of these options.

Be sure it is possible to work to a lump sum in that particular country. If a bill of quantities is provided, check to see it is accurate and reflects the works information. Also check to see if the re-measurement provisions have been altered so that the contractor takes the risk on the quantities.

Dispute resolution

Option W1 is the default option for work outside the UK. Check to see who the adjudicator is and where the adjudication will be held. Third-party adjudicators and neutral venues are the best but often employers will insist on domestic adjudicators with the adjudication held in the employer's country.

Secondary option clauses

Secondary options X1, X2, X3, X14 and X15 are all useful for work outside the UK. Establishing a clear cap on liability is vital for limiting risk. It is worth noting that the law on liquidated damages can be very different in other countries.

Exchange rates and inflation can be serious problems outside Europe and onerous bond requirements are common in many countries.

Note that the Y options are for the UK only and not applicable elsewhere.

Schedule of cost components

Although the schedule of cost components was designed with international work in mind, it is worth checking to see it covers the important cost items in the particular country. Taxation, visa and accommodation requirements can be expensive matters outside the UK.

Contract data

Always at the heart of ECC3, the contract data must be checked thoroughly. It is worth checking the definition of completion if any (some countries may require special statutory approvals), the boundaries of the working areas (may affect recovery under the schedule of cost components), deleterious material provisions, payment periods, security for payment and any Z clauses.

Insurance provisions should also be examined for unusual or exorbitant requirements.

Linking into dispute resolution, it is worth noting that parties can specify the law of the contract and who has the final say on a dispute (the tribunal). If the law of the contract is local law, then advice should be taken on operating in this jurisdiction.

The tribunal is inevitably arbitration on international construction projects. Again, tribunals at neutral venues are better. Check the nomination procedure to see it works. International arbitral tribunals are often three-person bodies which can be very expensive. If the project is small, then a one-person tribunal may be more appropriate. ○

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done, work about to be done, invoices received, accruals, materials on site, materials manufactured/stored off site and so on; it is all about payment. In NEC3 ECC option C, this is changed to payment that is forecast to be made before the next assessment. These are the payment particulars; title is another topic altogether.

The title aspects of equipment, plant and materials are dealt with in clause 70. Clause 70.2 says, 'whatever title the Contractor has to equipment, plant and materials, it passes to the Employer if it has been brought within the Working Areas'. Generally in the UK, title does not pass before the contractor has paid for goods. The clause says 'whatever title' so, if the contractor does not have title as it has not paid, then title does not and cannot pass under this clause. When the contractor has paid for the goods, then the title can pass and it can get paid for them. However, this is unless the goods have been incorporated before the supplier has been paid, at which point title has passed but you end up with a legal argument over payment.

Contractor's share

Question

What happens when an ECC2 option C contractor, with a share agreement with the employer, engages a subcontractor that also has a share agreement? Some main contractors seem to believe their share allocation is a straightforward three-way division (client / contractor / subcontractor), according to the agreed price ranges and percentages, of the difference between the outturn subcontract prices and price of work done to date, without the subcontractor's share first being allowed for as part of the contractor's defined costs. In this situation,

would it not be correct that the contractor has first to pay the subcontractor the subcontractor's share before the contractor's share can be calculated?

Answer

I could imagine the situation of going around in circles forever sharing each others' share! As far as an unamended NEC3 ECC main option C goes, I think it is quite clear. Defined cost is fed up from contractor to employer from the 'amount of payments due to Subcontractors for work which is subcontracted', in accordance with clause 11.2(23). This must mean you work out how much a subcontractor is due from the subcontract conditions, including any share between contractor and subcontractor as per their assumed main option C of the NEC3 Engineering and Construction Subcontract (ECS), and pass this up as defined cost, with any subsequent share only being between contractor and employer. Otherwise it would be unworkable.

You could of course have some sort of option X12 share using key performance indicators based on team performance, but I think that is different to the question you are asking.

NEC3 Form of agreement Question

Appendix 3 of the NEC3 ECC guidance notes details a very simple form of agreement document. One of our clients wants to create an agreement that is much more complicated and contains copy clauses that are a repeats of some the core clauses and also their Z clauses. We feel that this is unnecessary and can lead to potential conflict and ambiguity

if any errors occur. Our question is thus three-fold:

1. Should this be avoided?
2. Does it serve any practical purpose doing this?
3. Is there any automatic precedence to the agreement over the conditions of contract?

Answer

The sample form of agreement is deliberately uncluttered as it does not need to be anything other than a clear agreement as to the contract particulars. The danger with a complicated agreement is that there may be errors in it – for example it may not refer to the precise terms agreed, it misses matters out, and so on. My advice is, if you cannot convince them that the simple approach works, then you need to check every detail very carefully to ensure that this truly and accurately represents exactly what you have agreed as the basis for your contract.

So, in answer to your questions:

1. Ideally yes, but difficult if imposed by client legal department which is adamant with this approach – so you have to be realistic, go with it and check carefully if you cannot persuade otherwise.
2. Not really – on balance I always think the risk of errors outweighs the gain.
3. I cannot give legal advice, this is practitioners' advice, but my understanding is that the agreement may indeed affect the conditions of contract you thought you had. If for example they forget to include any secondary options in the agreement that are listed in contract data part one, it may be a court would say they are not included. There is no hierarchy in NEC documents; maybe this extends to the agreement also but it is not something I would want to rely on or find out to my misfortune in an expensive legal argument.

Being realistic, you are probably stuck with the client's approach, so check very thoroughly but do try to persuade them that it seems like overkill and potentially attracts new risks.

Attestation

Question

Can you tell me why there is no attestation in the NEC3 ECC form of contract, and that is why both parties do not have to sign it?

Answer

The offer is made by the contractor using the form of tender. An example of this is contained in the ECC guidance notes but parties are of course free to use their own version. Acceptance of the contract can then be made in one of two ways.

If the parties desire a simple contract to be executed, then either a letter of acceptance of the contractor's offer by the employer will achieve that, or alternatively both companies sign a form of agreement (but not the version intended to be a deed under English Law).

However, if the parties wish to enter into an agreement by deed, then a form of agreement by deed should be executed. Again, an example is contained in the ECC guidance notes. If it is to be a deed under English Law and both employer and contractor are companies, then this should be signed by the directors or company secretaries of both companies. ○

Metronet Rail chooses NEC3 for civils framework

SIMON FULLALOVE
EDITOR

Metronet Rail, the company responsible for upgrading, replacing and maintaining two thirds of London Underground's infrastructure under a 30-year public private partnership contract (currently under PPP administration) has chosen to use the NEC suite of contracts for completing all civil engineering projects and maintenance works.

Four contractors have been selected under the new NEC framework contract: Enterprise plc, Clancy Docwra Limited, J Murphy & Sons Limited and Cementation Foundations Skanska Limited. They will be engaged variously under the NEC3 Engineering and Construction Contract, Engineering and Construction Short Contract and Professional Service Contract.

All projects are also using the CCM web-based contract management system supplied by Management Process Systems. According to Keith Davis of Metronet Civils, 'I believe the CCM system will help our staff and partner contractors to achieve

the high standards of contract management discipline. This will help us manage risk and change effectively, thus providing a better service for our customer London Underground.'

PPP administrators are still aiming to transfer Metronet to a new owner and exit the administration process by mid-January 2008. London Underground's owner Transport for London has lodged a formal expression of interest.



ABOVE Metronet civils projects and maintenance are now being completed under an NEC framework (courtesy Metronet Rail)

NEC tutors required

Due to the increasing popularity of NEC contracts in the UK and internationally, NEC is looking to engage NEC experts to assist with the delivery of NEC3 training courses. NEC delivers a range of public course at venues around the UK as well as bespoke training to clients at their premises on the use of NEC in the UK and worldwide. For more information on the role please contact NEC training co-ordinator, Victoria Russell on +44 20 7665 2445 or email victoria.russell@necontract.com.

neCDIARY		
Date	Event	Venue
17 January	Introduction to the ECC	London
22 January	Preparing and managing ECC contracts	London
30 January	Introduction to the ECC	Bristol
07 February	Professional Services Contract	London
13 February	Introduction to the ECC	Manchester
22 February	ECC project managers' workshop	London
12 March	Introduction to the ECC	Nottingham
13 March	ECC programming workshop	London
13 March	Introduction to the Term Service Contract	Birmingham
20 March	ECC compensation events workshop	Birmingham
14 April	NEC Users' Group annual seminar	London
18 April	Introduction to the ECC	London
16 May	Introduction to the ECC	Birmingham
27 May	ECC project managers' workshop	Glasgow
29 May	Preparing and managing ECC contracts	Birmingham
12 June	Introduction to the ECC	Leeds
18 June	Engineering and Construction Short Contract	Birmingham
19 June	ECC programming workshop	Leeds
26 June	Introduction to the Term Service Contract	London
10 July	Introduction to the ECC	London
16 July	Term Service Contract pre- and post-contract workshop	London
27 August	Introduction to the ECC	Glasgow
10 September	Professional Services Contract	Manchester
11 September	ECC programming workshop	Manchester
17 September	Introduction to the ECC	Manchester
23 September	ECC project managers' workshop	Birmingham
25 September	Preparing and managing ECC contracts	Glasgow
09 October	ECC compensation events workshop	London
16 October	Introduction to the ECC	Ascot
29 October	Preparing and managing ECC contracts	Belfast
05 November	ECC project managers' workshop	Manchester
13 November	Introduction to the ECC	Bristol
13 November	Introduction to the Term Service Contract	Manchester
20 November	Preparing and managing ECC contracts	Ascot
04 December	Introduction to the ECC	London

Key: **BOLD** – NEC Users' Group event, ECC – NEC3 Engineering and Construction Contract. For further details of courses and events please visit the NEC website at www.necontract.com

All articles in this newsletter are the opinions of the authors and do not necessarily reflect the views of the NEC User's Group, NEC office or NEC panel.

Constructive contributions to the newsletter are always welcomed and should be emailed to the editor Simon Fullalove at simon@fullalove.com (telephone +44 20 8744 2028, fax +44 20 8891 2462).

Current and past issues of the newsletter are also available on the NEC website at www.necontract.com. All other enquires should be made to the NEC manager Rekha Thawrani, NEC, 1 Heron Quay, London, E14 4JD, telephone +44 20 7665 2446, fax +44 20 7538 2847, email nec@necontract.com.

NEC Users' Group members New members shown in bold

PLATINUM			
Linkforce	Northern Ireland Housing Executive	Highways Agency	Welsh Health Estates
Metronet Alliance			
GOLD			
Alfred McAlpine Civil Engineering	Cheshire County Council	Hajvalry Group	Parsons Brinckerhoff Limited
AMEC Group Ltd – Industrial	Circle Anglia Housing Trust Limited	Hull Property	Poware Company
AMEC Utilities Ltd	City of Westminster	Hyder Consulting Engineers	Rowecore Engineering Ltd
Architecture MK	Civil Engineering	Interserve Project Services Limited	RPS Consulting Engineers
Arup	CLM Delivery Partner	Jackson Civil Engineering Limited	RWE Innogy plc
Atkins	Costain Limited	Lagan Construction Ltd	Samsung Corporation
Balfour Beatty Construction Ltd	Darlington Borough Council	Laing O'Rourke	Sheffield Design and Project Management
Balfour Beatty Major Projects	Davis Langdon LLP	Leicester City Council	Siemka Construction UK
Balfour Beatty Regional Civil Eng.	Deane Public Works Limited	Lend Lease Projects Ltd	South Lanarkshire Council
Bechtel Ltd	Doncaster Metropolitan Borough Council	Lincolnshire County Council	Surrey County Council
Birse Civils Limited	Dundee City Council	London Area Procurement Network	Taylor Woodrow Construction Ltd
Birse Metro Limited	Farrans (Construction) Ltd	May Gurney	Telecel Services Ltd
Bolton Metro Borough Council	Fitzpatrick Contractors Ltd	Metronet S&L Ltd	Transport for London RNM Major Project
Bridgeway County Borough Council	Framatome ANP	Morgan Est Plc	Tube Lines Ltd
Capita Symonds Ltd	Galifford Trr	Newcastle City Council	UK Research Councils UKAEA
CCS Group PLC	Galgomang Engineering Consultancy	Engineering Services	
Central Procurement Directorate	Glasgow City Council	NHS Estates	
	Gwynedd Consultancy	Osborne Clarke	
SILVER			
AMEC Group Ltd	Edmund Nuttall Ltd	Metronet Rail BCV Ltd	Shepherd Construction Ltd
Anglian Water Services Ltd	Environment Agency	Miles Miles Ltd	Siemens Water Technologies
Ashford Borough Council	EPS Group Limited	Ministry of Works and Transport	Memcor Ltd
BAA plc	Eversheds	Morgan Estate Rail Ltd	Sokhela Syabanga Construction
Ballast Nedam Engineering	Faber Maunsel Ltd	Morrison Construction Services Limited	Staffordshire Engineering Services
Bevan Brittan	Faithful & Gould	Mott MacDonald	Suffolk County Council
Birse Build Limited	Franklin & Andrews Limited	Mouchel Parkman Services Ltd	Swansea Housing Association Ltd
Black & Veatch	Gleeds	MWH	Thames Water
British Nuclear Group Ltd	Gloucestershire County Council	National Roads Authority	The National Assembly for Wales
Carillion Plc	GrantRail Limited	Neath Port Talbot County Borough Council	The Villages Housing Association Ltd
Carl Bro Group Ltd	GVE Commercial Solutions	Needleman Ltd	TPS Sch
CLRC	Halcrow Group Limited	Norfolk County Council	Tulloch Prime Contracting Ltd
Commercial Management Consultants Ltd	Hammonds	Northumbrian Water Limited	Turner & Townsend
Corderoy	Hampshire County Council	Northwest Holst Construction Ltd	The Railways (North) Limited
Cornwall County Council	Hanson Construction Projects	Office of Government Commerce	Volker Stevin Ltd
Clori Construction Consultants Limited	HGB UK Ltd	Oxfordshire County Council	Walter Thompson (Contractors) Limited
Dean and Dyball Construction Limited	Hill International UK Ltd	Pinsent Masons	Warwickshire County Council
Dearle & Henderson Ltd	Hunter & Partners	Raynesway Construction	Westlake Bell
Department for Regional Development	Jacobs Babbie Group	Rever Construction	West Sussex County Council
Department for Regional Development (NI) – Water Service	John McCall Architects	RJ McLeod Contractors Ltd	Westminster Dredging Co. Ltd.
Devonport Royal Dockyard Ltd	Kensington & Chelsea TMO	Rotherham Metropolitan Borough Council	Wheler Group Consultancy
DLA Piper UK LLP	Lancashire County Council/Environment Directorate	Royal Borough of Kingston	Worcestershire County Council
Dudley Smith Partnership	Lancaster City Council	RWE Nukem Limited	Worship Construction Company Limited
East Riding of Yorkshire Council	Land Engineering (Scotland) Ltd	Scott Wilson	Yorkshire Water Services Ltd
EC Harris	London Borough of Merton		
	London Bridge Associates Ltd		
	M J Gleeson Group Plc		
	Mansell plc		
BRONZE			
A B Rhead & Associates Limited	Denton Wilde Sapte	Keppie Design Ltd	S&P Ltd
A D Architects Ltd	Devon County Council	Killohgan Construction Ltd	Scottish Water
A E Consulting	Doig & Smith	Kirkham Board Associates	Security Fencing Contractors (Pty) Ltd
Advent Project Management Ltd.	DP Commercial Ltd	Knowles	Selman Developments Limited
Aggregate Industries UK Ltd	Duffy Civil Engineering	Koop Pipeline Division / NACAP	Shainwood Contracts Ltd
Alexander Bruce Consultancy Ltd	Dundas & Wilson	Lafarge Contracting	Sheffield City Council
Allen Construction Consultancy	Earth Tech Engineering Ltd	Land and Water Group	Siemens Security Systems Ltd
Alstom Power	East Lothian Council	Laser Civil Engineering Limited	Simmons & Simmons
Always Associates (London) Limited	EMCOR Rail Limited	London Borough of Harrow	Somersat Consult
AM Moran Ltd	Endress + Hauser Ltd	London Development Agency	South African NEC Users Group
AMEC	Engineering Consultants Group	Lovells International Law Firm	South Gloucestershire Council
Anderson Strathern	Enterprise Contract Strategies	Management Process Systems Limited	South Western Water
Anison Consulting	Entec UK Ltd	Manches LLP	Specialist Engineering Contractors Group
Anthony Collins Solicitors	Enterprise World Ltd (EWL)	Marina Developments Limited	Sreevatsa Stainless Steel Fabricators
Anthony G Barker	Environmental Resources Management	Mead (S) Ltd	Staffordshire County Council
Areva T & D NZ Ltd.	Erineasuse Property Maintenance plc	MJA Consulting	Sunbsha Services Contractors
Ascon Limited	Ernest J Bayton	Mooney Kelly Cost Consultants	Synergie Scotland Ltd
Atkins Transport Planning	Faculty of Engineering	Mouchel Parkman	System Logic Services Limited
Babbie Group	Fenwick Elliott LLP	MR Fire Solutions Limited	Telford Hard Associates
Barton Plant Ltd	Field Group plc	NEC Panel	The Clarkson Alliance Ltd
BAU Limited	Fone-Alarm Installations Ltd	NG Bailey & Co Ltd	The Gibson Hamilton Partnership
Beachcroft LLP	Forties Surveying Services	Norman Rourke Pryme LLP	The Orange Partnership Limited
Berkeley Consulting	Forward Consult Limited	Norton Rose	Thomas Telford Ltd
Bezuidenhout & Partners	Freedom Group	Novich Union	THSC
Bezzant Limited	Freshfields Bruckhaus Deringer	Nottinghamshire County Council	Thurlow Associates Ltd
Biffa Waste Services Limited	Fugro Seacore Limited	Northon Rose	Time to Plan Ltd
BMW Technologies	G F Tomlinson Building Limited	Novich Union	Transnet Projects
Blake Laphorn Tarlo Lyons	G J Taylor Consultancy	Nottinghamshire County Council	Trench Farrow – Mountbatten Project
Bluestone Surveying Limited	Gardiner & Theobald Management Services	Novich Union	Tubelines Projects Directorate
BMW (UK) Manufacturing Ltd	Gateley Wareing Solicitors	Nottinghamshire County Council	Tuffin Ferraby & Taylor
Bowdon Consulting Limited	Gekla Associate	Novich Union	Tweeds
Brealegreen	Gent Limited	Novich Union	UK Hires Ltd
Brent Housing Partnership	Glavo Smith Kline	Novich Union	University of Salford
Bristol International Airport	Gleeds Energy	Novich Union	Van Oord UK Ltd
British Waterways	Glendamer Services	Novich Union	VHE Construction plc
Brodies LLP	GMH Planning Ltd	Novich Union	Virdor Waste Management Ltd
Bryndia Limited	Goring Berry LLP	Novich Union	W B Simpson & Sons (Tilling) Ltd
Bunton Consulting	Granshaw Limited	Novich Union	Waston Burton
BWB Partnership	Greenstone Environmental Ltd	Novich Union	West Berkshire Council
C Le Masurier	Hammonds	Novich Union	West Yorkshire Police
Carillion Services Limited	Hannah Reed and Associates Ltd	Novich Union	Westinghouse Electric
Carillion Transport Projects	Handlax.co.uk	Novich Union	Westinghouse Rail Systems
Castle Hayes Pursey LLP	Haringey Council – Grants & Regeneration	Novich Union	White Young Green
CEM Associates	Highlands & Islands Airports Ltd	Novich Union	White Young Green – C&S
Censo Contract Consultants Ltd	Hobson & Porter Ltd.	Novich Union	White Young Green Environmental
Centrum S.A.	J Breghy Contractors Ltd	Novich Union	Windmill Demolition Co Ltd
Chandler KBS	James Frett & Assoc	Novich Union	Windsor Contract Management
Chelmer Housing Partnership	JBN	Novich Union	Woodson Drury Ltd
City of Worcester	JMP Consultants	Novich Union	Worship Community Housing
City University School of Law	John Newson & Co	Novich Union	Wragge & Co LLP
Comhairle Nan Eilean Siar	John Papworth Limited	Novich Union	WS Atkins
Commercial Solutions	JT Mackley & Co Ltd	Novich Union	WSP Civils Ltd
Construction Management Services	Kate Williams – Barrister	Novich Union	WSP Development
Consultancy	Keegans Ltd	Novich Union	WSP Group
Contracts Consultancy Ltd	Keepmoat Regeneration	Novich Union	
Costain (COGAP)	Kent County Council	Novich Union	
Cyril Sweett Limited		Novich Union	
INTERNATIONAL			
Acclaim Consultants Limited	Forstec Nigeria Limited	Masojabula Management Project	Project Resolution Associates ProOS
Auckland City Council	Fulton Hogan	MDA Consulting (Pty) Limited	Riversdale Mining
Binnington Copeland & Assoc	Gardner Denver Ltd	Melbourne Water Corporation	Savills (Australia) P/L
Boral Australian Construction Materials	Geodynamics Consultancy Ltd	Meridian Energy Ltd	Senior Engineer
Consult Maunell	Gigi Fenster	Ministry of Finance and Economic Affairs	Shedden UHDE (Aust) P/L
Capstone Design and Consulting	H&B International (Pty) Ltd	MWH NZ Ltd	Simon Grierson
Chapman Tripp	Hawkins Construction Ltd	National Bureau of Statistics	SKM – Sinclair Knight Merz
Civil Engineering	Hyundai Engineering & Const. Co. Ltd.	New Zealand Institute of Architects	SybaCity Concepts (PTY) Ltd
Clive Tibby Consulting	Jacobs UK Ltd	Nuclear Consultants International	Tameer Holding Investments
Coffey Projects	Josef Gartner GmbH (Dubai Branch)	Orica Australia Pty Ltd	Theiss Services Ltd
Connell Wagner	Kajima Corporation	Pacific Consultants International	Trior South Africa
Crown International Technology Limited	Kapiti Coast District Council	Pangaea Academy	Transfield Services
Davis Langdon	Kensington Swan	Pinsent Masons	Transit New Zealand
Electric Ltd	Larsen & Toubro (Oman) LLC	Project Construction Management	TransTech Airport Solutions Inc.
First Line Consultancy	LEB Process Automation & Consulting		Turner and Townsend – Australia
Fletcher Construction Ltd	Leighton Contracts Pty Ltd		Yogarapanan & Associates Pty. Ltd
Focus Project Management	Manawatu District Council		