



BAA chooses NEC3 for Heathrow Terminal 2

SIMON FULLALOVE EDITOR

UK airport operator BAA has just signed an £812 million NEC3 contract for design and construction of the new 'green' Terminal 2 building at Heathrow airport in London.

The NEC3 Engineering and Construction Contract (ECC) option C (target contract with activity schedule) was awarded to Hetco, a joint venture between Ferrovia Agroman and Laing O'Rourke. It is BAA's largest single construction contract to date.

The contract covers detailed design and construction of the main 180 000 m² Terminal 2A building and 10 aircraft stands on the site of the now-demolished 1950s Terminal 2 and Queen's Building. Hetco will also be responsible for coordination and integration of baggage systems and the building's climate and information control systems.

Completion in 2014

Work is due to start on site next month and should be completed by mid 2014, boosting passenger capacity from 2 to 20 million passengers

a year. A second phase, due for completion in 2019, will extend Terminal 2 into the existing Terminal 1 site, raising passenger capacity to 30 million.

Steven Morgan, Heathrow's capital director said, 'This is BAA's largest ever single construction contract, and I am confident that it represents great value for our airlines and for the millions of passengers that will benefit from its modern, new facilities. The Hetco team has demonstrated to us that they will deliver this project in a timely and efficient way, and to a high standard.'

Hetco's Steve Hollingshead commented, 'We are delighted to have won this prestigious project and look forward to working in partnership with BAA to deliver a world-class facility.' Hetco was appointed in 2008 as one of BAA's nine construction suppliers

Energy-efficient design

Initial designs for the highly energy efficient new terminal were devised by Foster and Partners and subsequently developed by Hetco.

The new building will produce 40% less carbon than the buildings it is replacing. Large north-

facing windows in the roof will reduce the need for artificial light and avoid generating uncomfortable levels of heat.

In addition, solar panels on the roof will reduce dependency on energy supplies and a new energy centre, partially fuelled by renewable resources, will provide heating and cooling.

New Terminal 5 satellite

Elsewhere at the airport Carillion is building a £230 million third satellite for Terminal 5 under an NEC3 ECC option A (priced contract with activity schedule). Work on Terminal 5C started in 2008 and is due for completion next year.

Around 10% of the main £4.3 billion Terminal 5 project was procured directly under NEC contracts and BAA's version of NEC was the only recommended form for thousands of second-tier contracts.

BAA commercial director David Ferroussat will be giving the keynote speech at the NEC Users' Group annual seminar on 19 April 2010 (see page 8).

LEFT Heathrow airport's new Terminal 2 building is being designed and built under an £812 million NEC Engineering and Construction Contract option C



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NEC PANEL update



NIGEL SHAW
NEC PANEL CHAIRMAN

Key to the work of the NEC panel is the design and development of the NEC model conditions of contract, with the most recent activity culminating in the launch of the new NEC3 Supply Contract and Supply Short Contract in London on 11 February 2010.

However, members of the panel are involved in working with real procurement projects in their day jobs and are well aware that a contract consists of more than its conditions.

Works information model document

The NEC3 Engineering and Construction (ECC) contract requires that the parties complete 'works information' and, although guidance on how to do this is available, it is clear NEC users would find it helpful for the panel to publish an example of a format for works information that is compatible with the model contract.

A project to produce a works information model format is now a high priority, and the panel has approved in principle that the document will include

- an explanation of the role of works information and how it relates to other parts of the contract document, in particular contract data and site information
- guidance on drafting style, explanation of NEC drafting principles and key points on avoiding ambiguity and discrepancies within the contract documents
- a table outlining references to works information within ECC
- a 'skeleton' works information format with guidance as to content and purpose of the sections.

The document will also deal with common misconceptions and provide guidance as to the structure of the contract as a whole.

While a substantial amount of development has been completed, we know from experience that it is often the last stages of integrating chapters and clauses are the hardest part of developing an NEC3 publication. There is still a lot of hard work to be done by the working group and the panel over the next few months.

New Zealand secondary option clauses

NEC3 contracts have been written to be neutral with respect to the legal system that they are used in but, if local legislation requires the contract to conform to specific requirements that will not be generally applicable in all jurisdictions, then some special secondary clauses may be required. In the UK this has led to option W2 and the secondary option clauses Y(UK)2 and Y(UK)3.

Following co-operation with advisers in New Zealand, we shall shortly be publishing some secondary option clauses that will allow NEC3 contracts to work with the New Zealand Construction Contracts Act 2002 and, if required, to limit the application of the New Zealand Contracts (Privity) Act 1982. ○

NEC3 and partnering



RUDI KLEIN NEC USERS' GROUP CHAIRMAN

There is a recurring misconception about the NEC3 family of contracts. It is often said they are partnering contracts. I am not aware of the provenance of this statement, but it is wholly inaccurate.

Although NEC3 contracts require parties to collaborate so that – together – they actively manage the delivery process, this is no more than one would (or should) expect in the carrying out of any construction contract. This has a resonance in law.

In a nineteenth century case, *Mackay v. Dick*, Lord Blackburn said, 'I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing'.

The key phrase here is, 'each agrees to do all that is necessary to be done on his part for the carrying out of that thing.'

Transparency is not partnering

My point is that NEC is about pragmatism. Effective and efficient management of projects can only be achieved where there is transparency in the relationship between the parties and a preparedness to work together to achieve mutual objectives. The use of the word 'partnering' in this context does not add anything and is liable to confuse.

It is possible that some people have construed core clause 10 in the NEC3 Engineering and Construction Contract (ECC) requiring the parties to work together, 'in a spirit of mutual trust and co-operation' as indicating that NEC is a partnering contract. This requirement simply means that the parties should be open and transparent in their dealings with each other.

Sometimes the requirement is referred to as 'acting in good faith'. In English law there are certain types of contracts known as 'contracts of the utmost good faith'. An example is insurance contracts, but they can hardly be described as partnering contracts. Certain common law jurisdictions such as Australia and Canada have implied the notion of good faith in all construction contracts.

Adding partnering with option X12

There is, of course, ECC partnering option X12. This is a secondary option and the aim is to encourage those parties who have agreed the option to work together as a team to deliver the client's objectives – even though such parties are not necessarily in contract with each other.

As is made clear in the latest version of the NEC3 guide to procurement and contract

strategies,¹ 'An important distinction between the partnering option and other forms of partnering contract is that the option does not create a multi-party contract, only an arrangement.'

Option X12 does not override the extant contracts. It sets out how the partnering arrangement is held together by a 'core group', which will seek to resolve disputes between those parties not in contract with each other. However the integrity of the existing contracts is preserved since any remedies must be pursued through those contracts.

So, within the NEC3 structure, partnering is an add-on to the extent that it promotes teamwork between the participants on the project where they are not in contract with each other.

Collaboration is essential

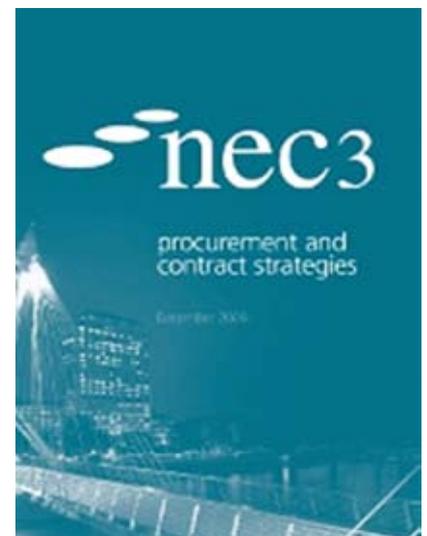
But, as far as the contracting parties are concerned, teamwork and collaboration are not add-ons. They are absolutely essential if project risks are to be properly managed and, moreover, in a way that ensures delivery within time and cost and in according to the requisite quality.

If a construction contract is not about proactive management and collaboration in the delivery process, it can have no value.

Reference

1. NEC Panel, *NEC3: Procurement and Contract Strategies* – rev. ed. Thomas Telford, December 2009. ○

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



The NEC3 procurement and contract strategies guide – the latest revision of which has just been published – makes it clear the X12 partnering option does not create a multi-party partnering contract

Highways Agency awards £2 billion NEC3 Framework Contract

SIMON FULLALOVE EDITOR

The UK Highways Agency has recently awarded a national framework contract for up to £2 billion of 'managed motorways' schemes. It is believed to be the largest use to date of the NEC3 Framework Contract.

Balfour Beatty, a BAM Nuttall–Morgan Est joint venture, Carillion and a Costain–Serco joint venture have been appointed to deliver the first set of schemes, which involve installing variable speed limits and hard-shoulder running on sections of the M1, M4, M6, M60 and M62 to improve traffic flow during busy periods.

Each scheme will be delivered as a package order using an NEC3 Engineering and Construction Contract.

According to the Highways Agency's major projects director Nirmal Kotecha, 'This national framework contract is about getting the best out of this government investment. This will be achieved by the four contractors our delivery partners working in partnership to standardise processes and solutions, and maximising economies of scale in procurement.'

NEC3 'fit for purpose'

An Agency spokesperson said, 'The NEC3 Framework Contract was chosen because it was fit for purpose and designed to overlay NEC3 contracts for individual schemes. NEC3 contracts are also recommended by the Office of Government Commerce for public sector procurement.'

An existing trial of hard-shoulder running on the M42 near Birmingham is proving popular with road users, with 60% of drivers wanting to see the



The NEC3 Framework Contract has been chosen to deliver £2 billion of hard-shoulder running schemes on UK motorways

scheme implemented elsewhere. The benefits include an increase of 22% in journey time reliability, reduction of personal injury accidents from 5.1 per month to 1.8 and a cut in vehicle emissions of 10% due to traffic flowing more smoothly.

According to the Highways Agency, hard shoulder running delivers improvements more quickly than motorway widening. As well as providing more reliable journey times it adds capacity at a lower cost than a more conventional road widening scheme, and with fewer environmental impacts.

The work requires provision of emergency refuge areas at regular intervals and installation of variable speed limit systems to allow close traffic monitoring and control by the Highways Agency regional control centre. ○

Raising awareness of NEC3 outside construction

RAQUEL SURALLY NEC EVENTS

apm

The Association of Project Management (APM) is running three courses for its members in the UK this year to promote NEC3 contracts to non-construction project managers.

Sponsored by NEC, the events are being run in conjunction with APM's contracts and procurement specific interest group. They will be presented by the group's chairman, Jon Broome, an experienced NEC3 user and trainer.

According to Broome, 'Now that the NEC3 family can be used to procure the whole spectrum of works, services and goods, and as it is the only form of contract with the explicit objective of stimulating good project management, it is only right that non-construction project managers and procurement professionals are made aware of its advantages and potential benefits.'

The first of the three evening sessions, which are entitled 'What is the NEC3', will be held in Edinburgh on 13 April 2010.

Rekha Thawrani, NEC manager said, 'We are delighted to be partnering with APM to help bring the benefits of using NEC contracts to project managers working across industry sectors. NEC3 is the only contract endorsed by the Office of Government Commerce so these sessions will provide invaluable insight for those working in both the public and private sectors.' ○

For further information please visit the events section of the APM website at www.apm.org.uk/APMEvents.asp.

Universities offered support

KATE MARTIN NEC

NEC has launched a support service called 'NEC in Academia' to help ensure better understanding of NEC3 contracts among academics and undergraduates worldwide. For £1,250 a year, universities and colleges get the following benefits

- eStudent Digital Option – access to the full set of digital NEC3 contracts, contract data and communication forms
- a hard copy of the complete NEC3 box set
- 2 hr lecture from an NEC expert at the academic institution (UK, New Zealand, Hong Kong and UAE only)
- access to the NEC helpline for lecturers of the institution (10 questions a year)
- free NEC Users' Group membership

- two free places at each NEC workshop
- free online participation at the NEC annual seminar (usually March or April each year).

For UK institutions, grants may be available for the cost of the service from the Society of Construction Law – see www.scl.org.uk/grants.

Promoting research and courses

NEC is also encouraging students to consider some aspect of NEC3 procurement as the basis for their dissertations. To support this work, student research questionnaires or interview requests can be forwarded to NEC Users' Group members, and completed dissertations can be posted on the NEC website.

Any public NEC courses run by universities can also be promoted via the NEC website. ○

For further information contact Kate Martin on +44 20 7665 2484 or email kate.martin@neccontract.com.



Universities can provide their students with full access to NEC3 contracts and support resources with the new 'NEC in Academia' package

Incentivisation under NEC3



JON BROOME LEADING EDGE PROJECTS CONSULTING

Some commentators have said a standard NEC3 Engineering and Construction Contract (ECC) option C (target contract with activity schedule) is not enough to procure all the objectives they want from a contract – including ‘hard’ objective factors such as schedule, safety and quality as well as ‘soft’ subjective factors such as cooperation and innovation.

This article is a ‘how to’ response. It firstly identifies some key principles and considerations for incentivisation before discussing how they are put into effect under the NEC3 secondary options.

Some incentivisation principles

Construction incentivisation principles are based upon substantial research¹ from the USA, where what are sometimes known as ‘award fee’ contracts are more widely used. The principles can be applied whatever member of the NEC3 family and main option are chosen.

The purpose of using incentives is to align more closely the motivations of the contractor, consultant or supplier to those of the client, so that by working for the success of their individual organisation, they are more directly working for the success of the project from the client’s perspective.

The principles require the setting of objectives, measures and targets, where

- an objective is what the client wants, for example completion achieved as far ahead of the completion date as possible
- a measure is the unit by which performance against this objective is measured, for example days completion is achieved before the completion date
- a target is the level of performance (against the objective and using the measure) which the parties are aiming for and, in the context of incentivisation, the contractor is rewarded for reaching. For example, the contractor is paid a sum for achieving completion *x* days before the completion date.

Clearly the base measure and targets have to be realistic and achievable: For incentivisation to work well, then

- average performance by the contractor means it earns average profit
- good performance means it earns good profits
- excellent performance means it earns excellent profits.

Consequently, it stands to reason – and research strongly supports this – that average or current performance needs to be benchmarked and that targets for good and excellent performance need to be perceived as realistic and achievable.

Equally, from the contractor’s point of view, it has got to be worthwhile for the contractor to reach the target level of performance, otherwise there is no motivation. If a target is not realistic and worthwhile, then the incentive mechanism

will fail from either or both parties’ perspectives. If achieving the desired high level of performance is, from the contractor’s point of view, too easy, then the client will feel cheated as the contractor has not ‘earned’ its extra profit.

On the other hand, if the contractor is over-incentivised to achieve a single objective, then it may focus exclusively on this one at the expense of other employer objectives, leading to a dissatisfied client. This is why ‘drop dead’ incentive payments as opposed to graduated incentives need to be thought through thoroughly. For example, for an incentivised ‘drop dead’ date, you get paid a large sum if you meet it or nothing at all if you do not. Consequently, once it is perceived as being unachievable, motivation disappears.

It is worth pointing out that, particularly in construction, with both contractor and consultant profits relatively low as a percentage of total project cost, the client has a high degree of financial leverage to produce superior performance. In other words a little bit of extra cost to the client can have a dramatic effect on contractors’ and consultants’ profit and hence strongly motivate them to improve performance.

Positive or negative, end or interim?

Positive incentives work better than negative incentives. There is quite strong evidence, despite the widespread use of damages, that negative incentives have a detrimental effect on contract performance. Once problems start happening, participants start blaming each other to transfer liability while the problem simply gets bigger.

On the other hand, because it should be in all parties’ interests for the contractor to achieve higher performance, positive incentives – that is bonuses – encourage participants to work together to overcome problems. Pragmatically, what works best is a combination, but with a greater emphasis on bonuses.

The client also needs to decide whether to use end contract targets or interim process targets. End targets are those which can only be confirmed at the end of the contract, for example time to complete, and overall health and safety performance. When using interim process targets, the contractor is rewarded as the project progresses. Interim process targets are actions and behaviours by the contractor which should increase the likelihood of end objectives being achieved, for example extent of innovation, or adherence to a project management process.

The pros and cons of each are briefly compared in Table 1.

Table 1. Comparison of end and interim process targets

End targets	Interim process targets
Only measured at end and potentially only focused on towards the end	Typically measured regularly (and rewarded) throughout the contract, so focused on throughout contract
Rewards what the employer really wants from the contract	Should (indirectly) lead to end contract objectives being achieved
Easier to define and measure	Harder to define, but can be done. May lead to dispute and/or ill feeling if contractor thinks it has achieved and the client does not
Can become irrelevant, once end project target perceived as being too hard to meet	Should lead to continuous improvement over course of contract

Constructing an incentive scheme

Much of the value of using incentives is actually achieved pre-contract. This is because it is better to have tightly described performance measures and targets against which the incentive is paid from the outset. Taking time to think about these, defining them specifically and asking why they are important can be hugely valuable to a client organisation. Communicating these to a contractor pre-contract is also hugely valuable in focusing the contractor on exactly what the client wants.

Equally, understanding the contractor’s cost drivers – and therefore how it makes profit – to construct an incentive scheme that works can be insightful for a client, helping the client to be more constructive in the relationship.

Simplicity is the key: if there are too many targets to focus on, then participants’ focus will be diffused. Additionally, there is a greater danger that the interaction of targets may over-motivate the contractor to perform against some targets and under-perform against others. For instance, in a target-cost contract, the contractor could be given a small share of any over-run pain and a large bonus for early completion. This could effectively result in the client paying a large share of the contractor’s costs as the programme is inefficiently ‘crashed’ to receive a large time bonus, which the client also pays for. The interactions between the incentives needs to be thought through.

Now let us consider the use of negative incentives, or damages, and positive incentives – bonuses – under NEC3 contracts.

Incentivising with NEC3 damages

First of all, it is worth noting a couple of general points on NEC3 damages. Damages cannot be specified at more than a genuine pre-estimate of loss to the client organisation. If they are, then they would be construed as penalties and thrown out by a court.

From a contractor’s perspective, damages also serve a positive purpose in that they cap liabilities. So, for instance, if ECC3 option X7 delay damages are specified (and they usually are), then the contractor knows it will not be liable for more than this sum per day that completion or takeover is later than the completion date.

The other option which covers damages is X17, low performance damages. This would be used for a contract where the works and works information are described using a performance specification – for instance, deliver a power station that produces *x* MW of electricity at *y*% conversion efficiency.

However, performance damages are notoriously hard to apply as the contractor can often come up with reasons why they do not apply, such as things the client has or has not done that prevented the project reaching the required level of performance. This is a good reason to not use them as, if they are specified, they can become the focus if a problem occurs. Consequently, rather than protecting the client from poor performance, they may well encourage it.

It is far better to cap a contractor's downside by using option X18, limitation of liability. While not having X17 on low performance damages will make it harder for a client to recover damages, it reduces the focus on them. This allows

- less risk allowance in a contractor's prices
- participants to focus on achieving superior performance.

Incentivising with NEC3 bonuses

The most obvious ECC bonus to use is option X6, bonus for early completion, where the contractor is paid a bonus for each day that completion or take over occurs ahead of the contractual completion date.

As with option X7 on delay damages, X6 can apply to sections of the works. Note that if meeting a specific date is especially important to a client and it is willing to pay a 'drop dead' bonus, then the wording here is not applicable.

In addition, option X20 on key performance indicators can be used, whereby targets are specified in an incentive schedule. These can be interim targets – which 'indicate' that the contract is on or ahead of expected performance – or end contract targets, in which case they are not 'indicators' but results.

Summary

Using NEC3 secondary options to stimulate improved contractor performance is not hard: the wording is already there. What does require thought and dialogue by clients is

- being clear about what is important to the client (the objectives) and why
- deciding how objectives will be measured and what targets will be set
- using a combination of positive (bonuses) and negative (damages) incentives, but with a greater emphasis on the positive
- constructing an incentive plan that both reflects the value the client puts on achievement of each objective with the costs (and hence profit) the contractor will incur in delivering them – otherwise the contractor will be over- or under-incentivised for each objective in respect of the value the client puts on each.

The key is simplicity, so clients should focus on the few key objectives that are important to them rather than trying to incentivise everything. Lastly, never forget that the biggest incentive of all is repeat order profitable work.

Reference

1. Broome, J. *Procurement routes for partnering: a practical guide*, Thomas Telford, 2002, chapter 5, available online at www.icvirtuallibrary.com or free from the author. ○

For further information please contact the author on +44 7970 428929, email jon@leadingedgeprojects.co.uk.

Programming non-implemented compensation events



GLENN HIDE NEC CONSULTANT

It is not uncommon for people to take a literal, isolated meaning of the second bullet point of clause 32.1 of the NEC3 Engineering and Construction Contract (ECC), which states that

a revised programme should, 'show the effects of implemented compensation events'. Their response has been not to show 'non-implemented' compensation events, even though these can have a major impact on the programme.

The situation was perhaps further clouded by the June 2006 amendment to clause 32.1, which removed a requirement to include the effects of notified early warning matters in revised programmes. My article in Issue 39¹ dealt specifically with early warning matters – which should not simply be ignored by the programme – while this article considers what to do with compensation events prior to implementation.

Programme must show true picture

The other bullet points in ECC clause 32.1 remind users that the revised effect of all programme activities has to be shown on each revised programme. One of the prime functions of the programme is to show the true picture of the remaining works to be executed, and the contractor's planned completion date in relation to the completion date at that point in time.

It is also clear under ECC that a compensation event only becomes implemented when the time and cost effects have been agreed, the project manager has made a final assessment, or the quotation has been deemed accepted. As a result, in certain circumstances it is possible for the work to have been completed on site but the cost has not yet been agreed.

While the contractor may feel it has 'implemented' the work, contractually it has not.

Example of non-implemented event

Say a contractor installing some pipework finds a high voltage cable in the way of the pipe route. This is notified to the contractor as a compensation event by the project manager, and plans are put in place by the employer to have the cable rerouted with the relevant electricity company. This will delay the pipework by 2 weeks and, other than doing some preparatory work the other side of the cable, works largely cease on this activity. The activity happens to be on the critical path so despite, some mitigation measures by the contractor, the event will be affecting planned completion and thus completion date.

The normal compensation event process for quotation and assessment is rarely a quick or smooth process. It is highly likely that the compensation event will take 5–6 weeks to agree the quotation between the parties – and, practically speaking, very often significantly longer. Only when a quote is accepted or the project manager has assessed it directly will the event be 'implemented' under the contract.

It is frankly ridiculous therefore for anyone to think that the event should not be shown on a programme in the belief that it only needs to be shown it when it becomes implemented. The event is affecting the programmed works and changing the sequence and resource pattern that the contractor is executing. In this instance the critical path is also being delayed by the event, which has yet to have its cost agreed.

Therefore, if the event is not shown on the latest programme issued for acceptance, the programme would not be realistic or practicable – and indeed would be a reason for non-acceptance of the programme under clause 31.3.

Reflect all activities in programme

Any programme should be a real management tool that reflects all of the project programme activities and their relative effects upon each other. As soon as a compensation event is notified and a quotation requested under clause 61.1, it will more often than not be affecting the remaining works in some way and should therefore appear on the programme.

Early on in the process it may not be clear the extent of the impact or duration that this additional activity will have but, for each programme that is produced, the contractor should simply update that activity with the information it knows at that point.

The simple approach is for the contractor to show the minimum impact that it knows the activity will have at this point in time. This way the contractor is not putting in too many activities that could otherwise be artificially pushing out the planned completion date, only to come back at a later date as the activity does not have as bad an impact as envisaged.

The minimum periods for a given activity can be agreed by both parties, and even formalised as project manager's assumptions under clause 61.6, whereby the project manager confirms what assumptions to make for the purpose of the quotation and resultant programme.

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FAQS

ROBERT GERRARD NEC USERS' GROUP SECRETARY

This is a selection of recent questions to the NEC Users' Group helpline and answers given. In all cases it is assumed there are no amendments that materially affect the standard NEC3 contract referred to.

Spares in supply contracts

Question

How do I deal with the provision of spares in the NEC3 Supply Contract (SC)?

Answer

Any spares and replacement parts for the goods which the purchaser requires the supplier to provide should be stated in the goods information. The SC does not include for the supplier to provide spares after the last defects date. Unless they are very small amounts on money to provide such spares, they would usually be itemised on the price schedule.

Incoterms

Question

Can I use the SC in conjunction with the International Chamber of Commerce's Incoterms?

Answer

The SC requires the purchaser to prescribe its supply requirements separately within the documentation to ensure such matters are dealt with clearly. Users may, if necessary, make use of Incoterms 2000 (or Incoterms 2010, due to enter force on 1 January 2011) to do this.

The Incoterms are the internationally accepted official rules for the interpretation of trade terms that are most commonly used in international trade. Such terms are designed to overcome the uncertainties of different interpretations of trading terms in different countries. They are not a contract in themselves and only cover some of the obligations required by a supply contract.

For domestic procurement or international

procurement within common trading areas, users may prefer to make their own arrangements in the supply requirements as they are unlikely to involve freight forwarding agents and customs barriers. In this situation, Incoterms could at least be used as a guide for consideration by the parties

Revising compensation event quotations

Question

We are using the NEC3 Engineering and Construction Contract (ECC). Is a contractor allowed to revise a compensation event quotation after the 3 week deadline if they have missed something? Also, if they have been asked to substantiate a cost for something and in doing so realise they have made an error with a quantity in the quotation, are they entitled to change it after the 3 week deadline?

Answer

If the contractor has not submitted a quotation for a compensation event within the 3 week deadline, then the default falls to the project manager to assess under ECC clause 64.1. The project manager assesses this as if he or she were the contractor, using the exactly the same provisions of the contract, and have the same period of 3 weeks that the contractor had.

If the project manager had received the quotation and asked for further information (as provided for in clause 13.4), then strictly this all needs to be done within the 3 weeks, unless both the project manager and contractor agreed to the extension before the submission is due. An alternative is to reply within 2 weeks of receiving the submission, then ask for a revised quotation, the revisions possibly not relating to time or money but instead to details.

Whichever of the routes is taken, if an error in quantities in the quotation becomes apparent, then

this should be corrected by either the contractor when submitting a revised quotation, or by the project manager if he or she decides not to instruct the submission of a revised quotation but to assess it directly (due to one of the clause 64.1 reasons).

Either way, I do not see anywhere in ECC that says the contractor stands by an arithmetical or other error if it is spotted before implementation and all other timescales are adhered to.

Completing agreement documents

Question

Consultants have prepared a contract using the ECC option B (priced contract with bill of quantities). In order to wrap the contract documents up, ready for sealing, our legal department demands that an original ECC contract itself is handwritten upon as being the basis of the contract. They do not just want the details written in the tender documents just to be signed by the parties. Can you tell me if there is actual need to enter details in a printed NEC3 form? I am confused here as the contract data states, 'completion of the data in full... is essential to create a complete contract'. So I do not see why we would not formally complete an actual ECC contract as part of the final contract.

Answer

ECC is a standard form of contract that is not itself completed (i.e. it is not necessary to write upon). Instead it is referred to and therefore implied into the contract (executed on the form of agreement). Historically, for other forms of contract, some parties have bought a new contract and handwritten the entries required so that it is a nice, neat contract duly executed.

ECC is different as it is effectively six contracts in one and has an array of secondary options available to choose from. It is basically a shopping list of available clauses. You make your choice of the main and secondary options in contract data part one and that effectively forms the terms and conditions for the contract. In turn, the form of agreement refers to the contract data part one and the contract is concluded.

For completeness of the entire contract package, you could include an unmarked ECC with the bundle, but it is not necessary. It could be possible to write on the contract data part one within an unmarked ECC but I do not see the point of this as it can better and more accurately be prepared on the templates available for the contract data.

The note in the contract data about completing it in full is a note to the document compilers when preparing the contract data to make sure they properly complete this document at tender stage.

> continued from page 5

If planning approval for a compensation event will be, say, a minimum 3 weeks but could be 6 weeks, the programme should show 3 weeks for now as it will definitely have that effect, and show any further delay as and when that becomes apparent. Any further delay will be reflected in future programmes, but in the meantime it is showing what is known now as to the effects on the project. In the example above with the cable, the event – whatever it is called – is affecting the programmed works and should be reflected

accordingly in the latest programme for acceptance.

Summary

All notified compensation events that are affecting remaining works should be shown as soon as the minimum known affects can be ascertained. Contractors should not wait for the event to become 'implemented' before it appears on a programme issued for acceptance.

The ongoing effects of the event, along with

every other programme activity, will be regularly updated and reflected in subsequent programme submissions.

Reference

1. Hide, G. Programme effects of early warnings, *NEC Users' Group Newsletter*, 39, July 2007, p5. ○

For further information please contact the author via email at gmhplanning@talktalk.net

Forecasting defined cost in quotations

Question

I am an engineer fulfilling the role of both project manager and supervisor on a number of projects on behalf of a local authority using NEC contracts. Please could you give some guidance and clarification on how you believe compensation events should be prepared and assessed. The contract talks significantly about forecast defined cost but, due to the timescales involved in the quotation procedure, some or all of the work arising from the compensation event is very often completed in advance of the submission date. In this scenario, it would make sense to use records. However, this can result in the contractor wholly relying on the method and basically looking for cost reimbursement. When this happens the employer usually ends up paying for the contractor's inefficiencies with no risk carried by the contractor.

I note that ECC guidance notes talk about a switch date, and that forecast defined cost should be from the point at which the compensation event is instructed. This is pretty much always in advance of the works and would then have the effect of the quotation being priced as intended. I assume the answer is that it is up to the project manager to encourage, persuade and influence the contractor to undertake quotations in the preferred method and then to assess them with this mindset, but I am interested to find out any alternate views and if this is a common challenge.

Answer

The contract does expect compensation events generally to be assessed on a forecast basis. There is nothing to stop the project manager sitting down with the contractor and working through the notification, quotation, assessment and implementation stages together in a very short period of time for the more straightforward compensation events. Those that need that bit more attention should follow the contract processes.

ECC clause 63.1 states that the date when the project manager instructed or should have instructed the contractor to submit quotations divides the work already done from the work not yet done. You mention that this point on your contracts is generally in advance of the works being carried out. This means that this point must be used in the quotation by the contractor; it cannot use records as a basis.

It is for the project manager to ensure that the contract is followed despite the contractor's efforts, which means that if no quotation is submitted by the contractor then an assessment is made by the project manager on exactly the same clause 63.1 basis as I describe.

Ultimately, if neither party nor the assessment is disputed, then adjudicators will put themselves back at this point. Basically, neither the project manager nor the contractor can wait and see what resources are actually used – the contract does not permit this except in the circumstances that project manager assumptions are used.

Design acceptance periods

Question

Under ECC option C (target contract with activity schedule), the project manager has given an unqualified acceptance of a programme under clause 31.3. Is he deemed to have accepted the

information on that programme, even if the project manager subsequently realises that he should not have accepted it because it contained shorter design acceptance periods for the employer than those specified in the works information?

If the project manager and the employer are stuck with those shorter design acceptance periods, presumably the project manager's failure to complete the acceptances within the new periods on the accepted programme is a compensation event under clause 60.1(5)?

Answer

Acceptance of anything by the project manager does not change the contractor's responsibility to provide the works, as stated in clause 14.1. 'Provide the Works' is a defined term in clause 11.2(13) and basically means to do the work in accordance with the contract. Acceptance does not change any of the terms of the contract, including any acceptance procedures or times. These cannot be deemed to be changed by the project manager's acceptance of the programme.

Clause 13.3 requires the project manager and contractor to reply to any communication within the period for reply, which is set out in the contract data, unless otherwise stated in the contract. Design acceptance periods in the works information would qualify for this exception I have mentioned.

The second part of your question is therefore not relevant. The project manager's failure in time to accept a design will only become a compensation event if it exceeds the period stated in the works information – see clause 60.1(6).

What is a day?

Question

How does ECC define what constitutes a day?

Answer

NEC3 contracts define periods in weeks, that is calendar weeks, thus avoiding complications of rest days and statutory holidays in different countries in which these contracts are used.

However, if Y(UK)2 is incorporated to comply with UK legislation, then periods of time (for payment and adjudication) are stated in days in accordance with section 116 of the Housing Grants, Construction and Regeneration Act 1996. The Act goes on to state that Christmas Day, Good Friday and bank holidays are excluded from any period stated in the Act.

Contractor-design and collateral warranties

Question

In ECC option A, do activities have to be 100% complete before payment is allowed? In clause 11.2(27) it is clear that the price for work done to date is a completed activity, the clause that refers to payment itself is less clear. Clause 50.2 refers to the amount due as, 'the Price for Work Done to Date, plus other amounts to be paid to the Contractor, less amounts to be paid by or retained from the Contractor'. The key words are, 'plus other amounts to be paid to the contractor'. We think this can be a partial installation, materials on site or part of a provisional sum, as 'other amounts' is neither a defined or identified term.

Answer

ECC option A is quite clear: you only get paid for completed activities. You do not get paid for

activities which are not complete, nor do you get paid for materials on site (unless they form a completed activity in themselves). If you wish to get paid for these then you need to include in your activity schedule items for them, but again remembering that they will not be paid until they are complete – ECC guidance notes give some examples of how this may be done.

The term, 'plus other amounts to be paid to the contractor' can and does only refer to those other amounts allowed by and referred to in the contract. For example it would include payment of interest under clause 51.2, or for insurance the employer should have provided in 87.3.

To give it the interpretation you suggest is not correct. The right to have the, 'other amounts to be paid' has to be set out elsewhere in the contract, otherwise you could give it any interpretation you feel like! What you seem to be trying to do is bring in additional items that may be paid correctly in accordance with other contracts. They are though only paid in those other contracts because the contracts themselves say they should be, whereas ECC does not.

In addition, there are no provisions for provisional sums in ECC. They are items which may be included in other contracts, but not this one.

Accommodation costs in compensation events

Question

We are using ECC option A where I have a query in terms of inclusion of preliminary type items, such as site accommodation costs, within a compensation event. The particular compensation event work is complete and the programme activity has been delayed. The direct cost of the works is acceptable, however the contractor is claiming for additional accommodation costs. At this stage the completion date has not been shown to have been affected. No additional cost for accommodation has been incurred and it is not demonstrated at this stage that it will be.

Answer

Clause 63.1 requires that you value the compensation event based upon its effects upon the actual defined cost of work already done, plus a forecast of the defined cost for work not yet done plus the fee. It also tells you when you stop using actual defined cost and start using a forecast.

Therefore the question to ask is, did the compensation event cause an increase in the defined cost for accommodation? If it did not increase the time the contractor was on site, then the answer is probably no, in which case it is not included in assessment of the compensation event. However, it is important to realise when carrying out the assessment that you look at not the completion date but at the planned completion date, as shown on the accepted programme.

If the planned completion date shows the contractor has been on site longer, then the cost of accommodation is most likely included. It also means the completion date is extended by the same amount – see clause 63.3. The contractor is, by clause 30.1, required to achieve completion on or before the completion date.

Occasionally a compensation event may require special additional accommodation to be brought onto site. In that case the value of that accommodation is included. ○

