NEC again dominates British Construction Industry Awards

NEC3 contracts have again dominated the prestigious British Construction Industry Awards, being used on over half of last year’s prize-winning and highly commended projects.

Categories featuring outright NEC winners at the London awards ceremony last October included the Major Building Project of the Year, the Programme Management Award, the Best Practice Award and the Outstanding Contribution Award.

NEC3 contracts delivered a total of 13 of the 23 winning and highly commended projects in the 2014 competition. Of the remainder, four used JCT, two were bespoke and the others used Fidic, PPC2000, IChemE and GC Works.

Major building prize

NEC winners included the £269 million Zaha Hadid designed London Aquatics Centre, which was procured using the NEC3 Engineering and Construction Contract (ECC) option C (target contract with activity schedule) and won the Major Building Project of the Year prize.

The £14.8 billion Crossrail project, which is also being delivered with ECC option C, won the Programme Management Award and was highly commended for the BIM Project Application Award and two temporary works prizes.

Prime Minister’s award

The Environment Agency’s £28 million Medmerry Managed Realignment scheme in West Sussex, another ECC option C scheme, won both the Prime Minister’s Better Public Building Award and the Civil Engineering Project of the Year in the £10–50 million category.

Other NEC winners included Surrey County Council’s £52 million A244 Walton Bridge, which won the Best Practice Award, and the Environment Agency’s £9 million Godmanchester Flood Risk Management scheme, which won the Outstanding Contribution Award for ‘setting a standard to follow in the future’.

Major clients


‘It was also particularly good to see Crossrail – Europe’s largest construction project and the biggest ever to be procured by NEC3 contracts – win four of the awards.

Details of the new NEC Users’ Group awards are on page 8.
NEC: pioneering fair payment

RUDI KLEIN  | NEC USERS’ GROUP PRESIDENT

Last April the UK government’s Business Department launched the Construction Supply Chain Payment Charter as part of its Construction 2025 initiative. The new charter allows for 60 day payments reducing to 45 days by June 2015 and to 30 days by January 2018. But those of us with half-decent memories will recall the launch of the Guide to Best ‘Fair Payment’ Practices by the (then) Office of Government Commerce (OGC) in 2007 (see issue 4). This included a non-contractual fair payment charter providing for 30 day payments and recommended that central government clients use project bank accounts.

However, the Cabinet Office (which took over the OGC) eventually abandoned the charter and, instead, requested all government procurers to use project bank accounts, ‘unless there were compelling reasons not to do so’. So, it appears to be another case of, ‘two steps backwards, one step forwards.’ Furthermore it seems unlikely any steps will be taken to enforce compliance with the new charter. Its provenance is unclear and prospects are far from rosy.

NEC leading the way

In the absence of clear government guidelines, employers wishing to commit to and demonstrate best fair payment practices need look no further than NEC3 contracts.

NEC responded very quickly to the 2007 fair-payment charter. The charter was referenced into NEC documentation and a project bank account Z clause was introduced (now option Y(UK)) in the NEC3 Engineering and Construction Contract (ECC).

The project bank account option has already found favour with most public-sector clients because of its simplicity and ease of use. The auditing of payment performance in the supply chain can be facilitated by reliance on ECC core clause 25.3, under which the project manager must accept proposed subcontract conditions before the contractor can appoint the subcontractor.

If, for example, there are amendments diluting the payment provisions in the NEC3 Engineering and Construction Subcontract or such provisions in a bespoke subcontract are unfair, the project manager has some leverage in refusing to accept them.

New public sector regulations

Fortunately matters are more clear-cut in the public sector, with the new Public Contracts Regulations 2015 due to come into force later this year. These will provide for 30 day payments along the whole of the public-sector supply chain and enable public bodies to have a discretion to make direct payments in the event of non-payment in the supply chain.

Insistence on the use of NEC contracts throughout the supply chain – and without amendment to the payment provisions – will help public-sector employers ensure compliance with the new Regulations.

As for the private sector, the Construction Supply Chain Payment Charter will probably limp along but it is unlikely to change anything dramatically. Only by adopting un-amended NEC contracts will private-sector employers really be able to show they are committed to treating their supply chains fairly.

Asia-Pacific conference attracts over 170 delegates

IVAN CHEUNG  | NEC ASIA-PACIFIC USERS’ GROUP SECRETARY

The NEC Asia-Pacific Users’ Group held its third annual conference in October in Hong Kong. It was again a sell-out event, with over 170 delegates attending.

Key speakers included Chew Tai-chong, outgoing projects director of MTR Corporation and chairman of the NEC Asia-Pacific Users’ Group, and Hon Chi-keung, director of the Hong Kong government Civil Engineering and Development Department.

Hon said his department’s experiences of using NEC had all been positive and urged the Hong Kong construction industry as a whole to take full advantage of NEC’s benefits.

NEC3 FAQs

Vincent Connor, partner of Pinsent Masons and a member of the Construction Industry Council NEC3 task force, told delegates that a booklet of NEC3 FAQs would be available from the Council in early 2015. He also announced that the Council will be the official re-seller of NEC contracts in Hong Kong and regulate NEC-accredited training.

Other speakers at the event included Rex Wong of Kum Shing Group, Peter Clayton of Pinsent Masons, Ronnie Thomson of URS and Luk Wai-hung and Ricky Li of the Drainage Services Department.

The afternoon consisted of a series of expert-led workshops on compensation events, contract responsibilities, target-cost contracts and communications. The event concluded with an expert panel discussion on risk management in the supply chain.

Z clause briefing

The conference was followed in November by the second NEC Asia-Pacific Users’ Group breakfast briefing hosted by Hogan Lovells, this time focusing on Z clauses.

The again well-attended event discussed the current heavy reliance on Z clauses in Hong Kong government contracts and discussed how their use can be refined in the future.

A further breakfast briefing will take place next month, which also sees the launch of the ECC project manager accreditation programme in Hong Kong. See the NEC website for further details.
Australasian workshops deliver hands-on learning

NEC Australasia Users’ Group members benefited from ‘hands-on’ learning in November at a couple of one-day workshops in New Zealand. The events in Auckland and Christchurch were a response to regional NEC users, who said they wanted to be walked through practical application of NEC in the workplace.

Both workshops focused on defined cost and use of the programme, which Australasian users have flagged as needing further clarification.

Auckland super city

Auckland provided an apt backdrop for the first workshop, given that infrastructure investment is at unprecedented levels as this new ‘super city’ strives to meet the needs of a growing population. It is also the home of Watercare, one of NEC’s biggest supporters in the region. The organisation is currently delivering the NZ$400 million (£200 million) Hunua 4 watermain project using the NEC3 Engineering and Construction Contract.

Christchurch too was a fitting venue, with many of the post-earthquake reconstruction projects being delivered by Christchurch City Council using NEC.

Sharing experiences

Once again, the workshops proved a great opportunity for the NEC community in the region to learn together and share experiences of using NEC contracts in various local sectors and disciplines.

The presentations, discussions and networking ensured two enjoyable days of learning and a valuable contribution to the NEC Australasia Users’ Group as a whole.

Over 140 ECC project managers accredited in first year

A total of 141 UK construction professionals have qualified as Accredited NEC3 Engineering and Construction Contract (ECC) Project Managers in the 12 months since the popular accreditation programme was launched in November 2013.

By successfully completing a blended learning syllabus of online training, interactive classroom training and post-teaching assessment, the newly qualified individuals have proved they have the necessary skills and competencies to fulfill the vital role of project managers on ECC projects.

Gold standard

According to NEC general manager Rekha Thawrani, ‘We congratulate all those who have achieved what is now internationally recognised as the gold standard for ECC project managers.’

‘By taking this bold step in their careers they will significantly benefit both themselves and the international construction industry, having the skills and tools to drive every NEC project they work on to a successful outcome.

‘Judging by the programme’s popularity I am confident that both public and private sector NEC employers will continue to seek and appoint our Accredited ECC Project Managers on their future NEC projects.’

ICE register

The Institution of Civil Engineers (ICE) formally recognises the new qualification and there is now an online register of Accredited NEC3 ECC Project Managers on the ICE website. The register provides full contact and experience details for successfully qualified managers.

Barry Drewett, technical director of Mouchel in Birmingham, is one of the first to be accredited and registered.

‘The accreditation programme really opened my eyes to the thinking behind ECC and how it is meant to work. The things I learned on the programme have proved invaluable, for both me and others, in helping successfully manage our present contracts.’

First class

Robert Meaney of P Meaney Management in Kent, who has so far achieved the highest pass mark in the programme, says, ‘I think it is aptly named the gold standard — everything about it was first class. I truly believe that all key people in the future should be strongly encouraged to enrol on it.’

A further six classroom-style programmes for 16 delegates each have been run since the first was held in Birmingham in November 2013. In addition there have been 18 bespoke in-house programmes for employers such as Magnon, Sellafiel, Network Rail, United Utilities, States of Jersey and Severn Trent Water.

A total of 305 people have now sat the accreditation, with the pass rate for the written assessments currently standing at 78%.

Going international

‘The success of the UK accreditation programmes has attracted significant international interest,’ says Thawrani. ‘We will be launching our first event in Hong Kong in February 2015 with New Zealand likely to follow later in the year’.

The next two UK classroom sessions are scheduled for 23 March in London and 18 May in Birmingham.

For further information please call +44 20 7665 2446, email info@enecontract.com or visit www.enecontract.com/pma

UK Highways Agency to spend £5 billion via ECC

The UK Highways Agency is using the NEC3 Engineering and Construction Contract (ECC) to deliver up to £5 billion of improvements to England’s motorways and major A roads over the next 5 years.

In November last year the Agency appointed 26 consultants and contractors across four lots to the new ECC-based ‘collaborative delivery framework’ — its largest ever framework.

Large collaborative team

Chief executive Graham Dalton said, ‘It is not just the scale of this framework that is important, but the way it is designed to bring the Agency, designers and contractors together in one large collaborative team.

‘We expect to deliver this major investment programme efficiently, speedily, and with real effort to minimise disruption to road users while we build.’

Major schemes will include the A14 upgrade in Cambridgeshire and the ‘smart motorways’ programme across the country.

Smart motorways will be delivered by the new £5 billion ECC-based collaborative programme
Hong Kong landslip consultancy trial for PSC option

KEN HO AND Y LAM CIVIL ENGINEERING AND DEVELOPMENT DEPARTMENT

The Hong Kong government’s Civil Engineering and Development Department (CEDD) is trialling the NEC3 Professional Services Contract (PSC) for one of its landslip prevention and mitigation programme consultancy contracts.

It is the first use of the PSC option C, a target contract, for public works projects in Hong Kong. CEDD’s geotechnical engineering office awarded the 5-year, HK$16 million (£1.3 million) contract to Aecom Asia in April 2014.

Consultancy scope

The rolling landslip prevention and mitigation programme deals systematically with landslide risks arising from both substandard man-made slopes and vulnerable natural hillside catchments.

Under the pilot PSC contract, Aecom is required to carry out natural terrain hazard studies for one hillside study area.

It will then undertake detailed design, supervision and contract administration of landslip prevention and mitigation works for the hillside catchments and 25 substandard man-made slopes and retaining walls.

The landslip prevention and mitigation works will be procured under an NEC3 Term Service Contract, tentatively scheduled for mid-2015.

Pain/gain share

Under PSC option C the consultant is generally paid based on a time charge. This option provides a mechanism for pain/gain share in respect of the consultancy fee, under which the employer and the consultant share the difference between the actual price and the final target price.

For the pilot project, a pain cap corresponding to 110% of the target price has been adopted for CEDD; that is the pain/gain is equally shared between the employer and Aecom unless the actual price is higher than the above pain cap, in which case the consultant bears all the pain beyond the pain cap.

Special provisions for interim assessment of Aecom’s pain share have also been incorporated in the contract to avoid over-payment and undue front-loading.

The pain/gain share mechanism should, in principle, drive the contracting parties to a common goal of completing the services more efficiently in terms of cost and time — this will be carefully reviewed at the end of the pilot scheme.

Good progress

So far, the contract is proceeding smoothly and the consultant is able to achieve all key dates stipulated in the scope. CEDD is partnering with Aecom as a team and the working relationship has been very good.

A problem with many construction contracts is the inherent subjectivity in judging to what extent a weather event is ‘exceptionally adverse’ or ‘exceptionally inclement’ to justify additional time and money for contractors and subcontractors.

Clause 60.1(13) of the NEC3 Engineering and Construction Contract (ECC) removes this uncertainty by stating that a compensation event is only due if an agreed locally recorded weather measurement exceeds an agreed 1-in-10 year value for that month based on local weather data.

CEDD has teamed up with the Met Office to ensure accurate monthly 1-in-10 year weather values are available to NEC users throughout the UK. By specifying Met Office weather stations and data in their NEC contract data, users can be assured of the most precise definition of when an exceptional weather event has occurred in any given month.

Over 160 years of data

The Met Office has over 160 years’ experience in observing and recording weather, both in Britain and internationally. In the UK it runs a network of more than 300 weather stations, with 1-in-10 year data now available for over 100 stations for NEC users.

In addition, the Met Office maintains and operates the UK’s radar network and is party to international agreements to operate meteorological satellites. The organisation is thus ideally placed to deliver, and make comparisons between, historical and current weather data.

There are rigorous global standards for all weather observations and the Met Office is diligent in checking its measurements and calibrating its instruments. For instance, cup anemometers are calibrated in wind tunnels at least every 5 years and rain gauges are routinely cleaned and checked by network managers.

Most of the UK’s extensive network of land surface weather observation stations are long-established and provide automatic, frequent and accurate readings for weather elements such as rainfall and temperature.

Long-term averages

When the Met Office builds up a long record of observations from a location it is able to analyse them and generate long-term averages (LTAs). These LTAs are the best measure of what the average or normal climate looks like and are generated using observations for a 30 year period, spanning 1981 to 2010.

Crucially, the baseline is periodically updated to ensure that the averages that are generated from it are representative of the changing climate. It can be quickly seen if conditions were above, below or as expected by comparing the recorded monthly observations against the LTA.

1-in-10 year values

In association with NEC, the Met Office has also devised a system of 1-in-10 year values to determine the rarity or exceptionality of particular weather events, especially rain, frost, snow and wind speed. The values are calculated on the basis of 30 years of monthly data for all the main weather stations.

The totals for a particular month, for every year from 1981 to 2010, are laid out in order from the most extreme to the least extreme — either in terms of recorded value (e.g. daily rainfall total) or days of occurrence (e.g. snow lying at 9 a.m.). In the third most-extreme value is then used as the 1-in-10 year value. Although the value is really the third most extreme in 30 years, it is simpler to consider it the highest in 10 years.

Should the readings for a particular weather element in one month be more exceptional than the highest value in a 10 year period, then an NEC contractor will have a case for a compensation event should the weather event impinge on the contractor’s ability to carry out the work. In this way a clear-cut standard for NEC compensation events related to weather events can be agreed to by both the client and contractor.

Contract weather station

NEC contracts should include reference to a suitable weather station in their contract data to be used for current observations and as a source for LTAs and 1-in-10 year values. If this station closes, or becomes inoperative for some reason, both parties need to agree on the next nearest suitable station.

Met Office LTAs and monthly 1-in-10 values are vital tools for creating and managing successful NEC contracts.

For further information including costs of LTAs and monthly 1-in-10 year values please call +44 1392 885080, email construction@metoffice.gov.uk or visit www.metoffice.gov.uk/construction/projectplanning
Getting your project set up for ECC

**BARRY TREBES AND RICHARD PATTERSON**

Getting your NEC3 Engineering and Construction Contract (ECC) off on the right foot is critical and requires the ECC project manager to show leadership from the start. This is a focus of the NEC course prior to ECC project manager accreditation, which both authors deliver.

**Project-specific requirements**

The works information may contain numerous project-specific requirements and obligations on the parties, often scattered throughout the works information. When setting up a project it is useful to identify and schedule out these key processes and actions required by the parties. There may be requirements on or before the starting date, on a routine basis throughout the contract, or at or prior to completion. However, the standard ECC itself is a series of processes that you need to be ready for.

**ECC set up checklist**

The following is a checklist for the employer (E), ECC project manager (PM), ECC supervisor (S) and contractor (C) for getting set up to manage an ECC successfully. The actions are tabulated and based on the structure of the core and main option clauses. Many are best done jointly by the project manager and the contractor.

<table>
<thead>
<tr>
<th>Ref</th>
<th>ECC part</th>
<th>ECC clause</th>
<th>Responsibility</th>
<th>Action</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>INTRODUCTION AND GENERAL</td>
<td>- All</td>
<td>Review and understand requirements of the contract</td>
<td>All need to review all the documents that make up the contract including the all-important works information.</td>
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<td></td>
<td></td>
<td>- E</td>
<td>Identify training needs and arrange joint workshop with PM, S and C (and possibly key subcontractors on NEC terms)</td>
<td>Training can be an effective part of arrangements to promote collaborative working. It should aim to help the E, PM, S and C understand the requirements of the contract and how they will work together to meet them. Do it even if all think they know the ECC.</td>
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<td>- All</td>
<td>Collaborative working</td>
<td>Identify and implement appropriate interventions to support collaborative working.</td>
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<td>- PM</td>
<td>ECC “heath checks”</td>
<td>Establish simple set of measures to report monthly trends on how the contract is being managed.</td>
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<tr>
<td>1</td>
<td>GENERAL</td>
<td>11.2(14)</td>
<td>PM</td>
<td>Issue the ECC “Risk Register”</td>
<td>Suggest simple spreadsheet starting with the risks identified in the contract data. Note that this is not the same as any other project risk register that might be being used.</td>
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<td>13</td>
<td>E</td>
<td>Establish system for communications under contract</td>
<td>For example, profomas and tracking spreadsheets or ‘in the cloud’ proprietary system. Ideally this will have been set out in the works information.</td>
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<td></td>
<td></td>
<td>13.2</td>
<td>E</td>
<td>Confirm address for notices under contract</td>
<td>Needs an exchange of notices between the parties to the addresses in the contract data.</td>
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<td></td>
<td></td>
<td>14.2</td>
<td>PM and S</td>
<td>Appoint delegates (if required)</td>
<td>PM should also make clear where others (including S) are required to advise PM regarding PM’s actions.</td>
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<td>16</td>
<td>PM</td>
<td>Establish timing for routine risk reduction meetings</td>
<td>There is no prescriptive timescale for early warning or risk reduction meetings in the contract. However, it is useful to establish a regular routine. These may be weekly and may be carried out as part of what might otherwise be called a progress meeting.</td>
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<td>17</td>
<td>PM and C</td>
<td>Ambiguities and inconsistencies</td>
<td>Familiarise yourself with the contract and notify any ambiguities and inconsistencies as soon as you become aware.</td>
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<td>18</td>
<td>PM and C</td>
<td>Illegal or impossible requirements</td>
<td>Familiarise yourself with the contract and notify any illegal or impossible requirements as soon as you become aware.</td>
</tr>
<tr>
<td>2</td>
<td>THE CONTRACTOR’S MAIN RESPONSIBILITIES</td>
<td>21.2</td>
<td>PM</td>
<td>Establish C’s plan for submission of ‘particulars of his design’ taking note of 21.3, which requires that each part submitted can be assessed fully</td>
<td>Requirements should be set out in the works information and shown on C’s programme.</td>
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<td>23.1</td>
<td>PM</td>
<td>Review requirements for C’s submission of design of ‘Equipment’ method statements</td>
<td>Requirements should be set out in works information and shown on C’s programme. PM can request other items that are not in the works information.</td>
</tr>
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<td></td>
<td>24.1</td>
<td>PM</td>
<td>The key persons</td>
<td>C to provide key persons in contract data or propose replacements.</td>
</tr>
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<td></td>
<td></td>
<td>26.1</td>
<td>PM</td>
<td>Invite C to submit overall plan for subcontracting</td>
<td>This is not explicitly required by the conditions but makes sense for all. Requirements and constraints may be in the works information.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- C and PM</td>
<td>C advises PM on practical implications of the design of the works and on subcontracting arrangements</td>
<td>Link with action under clause 26.1, as above.</td>
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<td>- C and PM</td>
<td>Forecasts of total defined cost</td>
<td>Agree dates for meetings for consultation prior to C’s submission of forecasts of defined cost at the intervals stated in the contract data. Agree model reporting format.</td>
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<td>- PM</td>
<td>Audit</td>
<td>Establish audit plan for defined cost.</td>
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<td>Ref</td>
<td>ECC part</td>
<td>ECC clause</td>
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<td>3</td>
<td>TIME</td>
<td>11.2(2)</td>
<td>PM</td>
<td>Check and review the definition of completion in the works information</td>
<td>If not clear and sufficient, PM should change the works information as soon as possible to make it so.</td>
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<td></td>
<td>30.1</td>
<td>PM and C</td>
<td>The access dates</td>
<td>Familiarise yourself with this information in the contract data. Ensure E can make site available on the access date(s).</td>
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<td></td>
<td>30.3</td>
<td>PM and C</td>
<td>The key dates (if any)</td>
<td>Familiarise yourself with this information in the contract data.</td>
</tr>
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<td></td>
<td></td>
<td>31.1</td>
<td>PM and C</td>
<td>PM to work with C to get first programme submitted and accepted</td>
<td>Programme may be referenced from contract data part two or required to be submitted with a stated period from the contract data. Having an acceptable programme in place is critical for the successful management of ECC.</td>
</tr>
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<td></td>
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<td>32.2</td>
<td>PM</td>
<td>Establish routine (usually monthly) for programme meetings for C to explain revised programme prior to formal submission</td>
<td>Establish practices to keep the programme up to date and to agree progress.</td>
</tr>
<tr>
<td>4</td>
<td>TESTING AND DEFECTS</td>
<td>40.1, 40.3</td>
<td>S and C</td>
<td>Tests and inspections required by the works information</td>
<td>S should work with C’s quality control manager to develop regime to be compliant with requirements of contract and C’s own quality management system.</td>
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<td></td>
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<td>41.1</td>
<td>S and C</td>
<td>Tests and inspections before delivery to working areas</td>
<td>Develop testing plan for these items (if any).</td>
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<td></td>
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<td>42.2</td>
<td>S</td>
<td>Establish format for list of defects</td>
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<td>5</td>
<td>PAYMENT</td>
<td>50.1</td>
<td>PM</td>
<td>Decide first assessment date (to suit the procedures of the parties)</td>
<td>On an option C, D, E or F contract this will be a significant exercise requiring, for example, an audit plan from PM and developing an understanding of C’s cost management system. Seek guidance.</td>
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<td>50.2</td>
<td>PM</td>
<td>Set up process to determine the amount due</td>
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<td>51.1</td>
<td>PM</td>
<td>Develop form of payment certificate</td>
<td>This will be impacted by the options included in the contract.</td>
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<td>51.2</td>
<td>PM and C</td>
<td>Certified payment</td>
<td>Ensure E’s finance department is aware of the payment terms and dates for payment.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>52.1</td>
<td>PM and C</td>
<td>Defined cost</td>
<td>Decide how discounts, rebates and taxes are to be identified by C.</td>
</tr>
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<td><strong>Option A</strong></td>
<td></td>
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<td></td>
<td></td>
<td>52.2, 52.3</td>
<td>E, PM and C</td>
<td>Defined cost</td>
<td>C to develop systems for records of all defined cost. E to put in place plans for audit.</td>
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<td><strong>Options C, D, E, F</strong></td>
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<td></td>
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<td></td>
<td><strong>Options B and D</strong></td>
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<td></td>
<td></td>
<td>PM and C</td>
<td>Quantities</td>
</tr>
<tr>
<td>6</td>
<td>COMPENSATION EVENTS</td>
<td>6</td>
<td>PM</td>
<td>Develop process for managing compensation events</td>
<td>Seek detailed guidance on best practice for compensation event management.</td>
</tr>
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<td>6</td>
<td>PM</td>
<td>Establish routine for compensation event meetings to review compensation event process and acceptance</td>
<td>The appropriate frequency will depend on the project and will change but it is essential to start with routine meetings.</td>
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<td></td>
<td></td>
<td></td>
<td><strong>Options C, D, E, F</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>6</td>
<td>PM and C</td>
<td>Compensation events which arise from the use of bills of quantities</td>
<td>Processes to re-measure the works to be established.</td>
</tr>
<tr>
<td>7</td>
<td>TITLE</td>
<td>71.1</td>
<td>S</td>
<td>Establish any need for the S to mark plant and materials outside the working areas</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>72.1</td>
<td>S</td>
<td>Removing equipment from site</td>
<td>Establish appropriate procedures.</td>
</tr>
<tr>
<td>8</td>
<td>RISKS AND INSURANCE</td>
<td>85.1</td>
<td>PM and C</td>
<td>C to submit certificates confirming that insurances are in place</td>
<td>These are required to be submitted prior to the starting date.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>87.1</td>
<td>PM and C</td>
<td>Encourage E to submit certificates confirming that any insurances to be provided by E are in place</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>TERMINATION</td>
<td>-</td>
<td>-</td>
<td>No initial actions required</td>
<td></td>
</tr>
</tbody>
</table>
Complying with the law
Question
I have previously been advised by lawyers that a Z clause requiring the contractor to comply with the law is necessary. Have I been wrongly advised?
Answer
There is nothing that says you cannot do this, but it is hard to see the justification for it or how the parties might suffer if such a clause were not present.
As an example, say there is a Z clause stating that contractor’s staff shall not exceed highway speed limits. If one of the contractor’s operatives speeds on the way to work, what are you going to do within the contract given that the contractor has breached both the contract and the law?
The only justification for requiring compliance with the law as a contract term is that a breach of the law would also be a breach of contract. If some aspect of the law is so critical that you want to recover damages for the consequences of a failure to comply, that needs to be spelled out in the Z clause so people understand what is intended.

Adding other contract terms
Question
I have noticed a tendency among employer’s lawyers to cut and paste JCT contract wording into NEC Z clauses, which do not really work. Has anyone else?
Answer
We have seen examples of this: suddenly in a contract you are using different words and terms to that within the particular NEC3 contract you are using and there will at least be ambiguity or inconsistency. It is also quite likely that the JCT requirements will be in conflict with the NEC requirements. This is not a well-thought-through approach and such clauses should not be accepted.

Stepping down Z clauses
Question
Are Z clauses the correct location for ‘step down’ clauses from a main contract (e.g. NEC3) to a subcontract (e.g. NEC3 Professional Services Contract)?
Answer
Yes, that would be the correct location. However, for the examples given, you would need to decide carefully which process-related clauses from the main contract would be appropriate for the professional services appointment. You can potentially mix and match NEC contracts with others but you will need to take great care they fit together as intended. The simplest approach would be to use, say, the NEC3 Engineering and Construction (ECC) as the head contract (which of course can be used for all process contracts).
Even after your best efforts when using a mix of contracts, you may still end up with one part of the supply chain using NEC language and processes (early warnings, compensation events, accepted programme) and another using entirely different language covering entirely different matters.

Combating Z clauses
Question
We see many badly drafted Z clauses that are affecting the administration and operation of NEC3 contracts and that also go against many of the contract principles. Is NEC contemplating a way of combating this other than through education and training?
Answer
People are entitled to change standard contracts if they so wish — that has been and likely always will be the case. We consider much of this is done through ignorance and bad practice so education and training is just one of the ways we are tackling this.
We endeavour to explain to users the significant risks of introducing ill-thought-out Z clauses. We appreciate that on many projects there will be a good case for a Z clause, which is why the secondary option is available in the first place. If we removed the option people would just amend the conditions in some other way. We could indeed look at helping people draft good quality Z clauses in time.
Some organisations purchase a copyright licence for NEC3 contracts as they wish to add Z clauses within the standard conditions. The copyright comes with a condition that demands the organisation clearly shows the changes to the standard contract. The tenderer at least then can see the changes and can act accordingly at bid stage.

Mutual trust and cooperation
Question
Surely some Z clauses are not compliant with ECC clause 10.1 requiring the parties to act in a spirit of mutual trust and cooperation?
Answer
Some badly drafted or inappropriate Z clauses may indeed compromise the mutual trust and co-operation requirement, such that an inconsistency or ambiguity might arise. However, not all Z clauses will introduce inconsistency or ambiguity, nor will they compromise clause 10.1. Z clauses should only be included by an employer if they are considered absolutely necessary, and then they should be thought out and well drafted to avoid compromising standard NEC terms.

Spirit of the contract
Question
What is the status of Z clauses that break the spirit of the contract? Can law be against a party that badly amends a contract. From the contractor’s point of view, is it a risk worth signing up to?
Answer
There is a point at which the spirit of the contract may indeed be broken by Z clauses. We would question why any employer would choose a standard form of contract and then decimate it. Tenderers should carefully consider whether Z clauses are acceptable to them and act accordingly. Ambiguities and inconsistencies may well be resolved by those who created them — it is far better to sort such matters out before rather than after bidding.

Accrediting Z clause drafting
Question
You have recently introduced ECC project manager accreditation — could you do the same for people drafting Z clauses?
Answer
If drafting Z clauses is a precious skill that employers think would be of benefit to them, then accreditation is definitely something worthy of consideration. It is actually on our list of possible initiatives and we would be interested to hear the demand for this.

Amending a core clause
Question
Would it be correct to say that an amendment of a core clause is actually a Z clause?
Answer
That would be correct. Any amendment, addition or deletion of any core clause should be contained in a Z clause.

When is NEC not NEC
Question
In 2005, the UK government’s Office of Government Commerce (OGC) endorsed unamended NEC3 contracts for use in the public sector. Since then it has been used by government bodies but amended by to transfer risk. At what point does NEC cease to be NEC because of the huge amount of Z clauses changing risk?
Answer
At some point the contract intent will be lost, then the clarity, and then it will be unrecognisable from a standard NEC3 contract. Creators of such documents should write their own bespoke conditions and not pretend to use NEC. OGC did indeed endorse unamended NEC3 contracts so that is the starting point and surely the expectation of the government. If there is a good justification then some risk re-allocation may be entirely proper on a project-by-project basis. If not, eventually you will have created your own bespoke conditions anyway as the only thing resembling NEC might be the reference to it.

Protecting clients
Question
For UK government contracts, project managers are prone to add Z clauses which are too protective for their clients. How do we balance such a tendency?
Answer
The best way for project managers to protect their clients is to use contracts with a balanced risk allocation, with each party retaining the risks they can manage and allow for. Project managers who tend to add Z clauses which result in an unbalanced risk allocation should be encouraged to focus instead on what is best for the project, which might help to balance such tendencies. The supply chain has a voice, and this should be used at the latest at tender stage to offer an alternative view where risk allocation appears to be unbalanced by Z clauses.
NEC Users’ Group members

A warm welcome is extended to all new NEC Users’ Group members, highlighted in bold in the membership category lists below.

NATIONAL

NEC Project Manager of the Year

NEC Contractor of the Year

NEC Manager of the Year

The theme for all the awards is collaboration using NEC3 contracts with particular emphasis on clause 10.11. For each award the judges are looking to identify those innovative projects and organisations which can demonstrate good practice through collaboration.

Applications are welcome from all NEC users worldwide.

More details of the NEC Users’ Group awards can be found at www.neccontract.com/awards.

Delegate registration is also open for the seminar, with places booking fast. Secure your place and find out more at www.neccontract.com/seminar15.

Key


All articles in this newsletter are the opinions of the authors and do not necessarily reflect the views of the NEC.

For ease of reading, all NEC contract terms are set in lower-case, non-italic type and their meanings (unless stated otherwise) are intended to be as defined and/or identified in the relevant NEC contract.

Contributions to the newsletter are always welcomed and should be emailed to the editor Simon Fulllove at fulllove.com (telephone +44 20 8744 2028).

Current and past issues of the newsletter are also available in the MyNEC area of the NEC website at neccontract.com.

All other enquiries should be made to the NEC Users’ Group manager Joseph Barry, NEC, 1 Great George Street, London, SW1P 3AA, telephone +44 20 7665 2305, email info@neccontract.com.