A COMPARISON OF NEC AND FIDIC

Introduction

This is an overview of the comparison of NEC[1] and FIDIC[2]. Both NEC and FIDIC contracts are standard forms of contract that are part of standard families for procuring works or consultancy services (FIDIC) and goods, works or services (NEC). NEC was launched in 1991 and its contracts are specifically designed for clarity, flexibility and to stimulate good management. FIDIC may be described as a 'traditional' contract and has for many years been seen as the standard contract for use internationally, not least because of its use by the international financing institutions. Perhaps some expected thoughts on FIDIC (which would apply to similar style standard forms) can be found in the following quotes:

> *"Clause 20: Claims Disputes and Arbitration will probably be the most frequently used clause in the whole conditions of contract[3]"* and
>
> *"'Due to the complexity of the General Conditions it is impossible to follow a logical sequence for all the sub-clauses. Many Sub-clauses will be found in unexpected places and some essential information is difficult to locate[4]"*

The features of time, cost and quality are considered in turn below to help users understand some of the principle differences of how these are covered by these contracts. Both contracts provide for a person to act on behalf of the employer should the employer not have appropriate people in-house in terms of capacity or capability; the project manager acts on behalf the employer in NEC, the engineer in FIDIC. This paper covers the principles of the main features of each.

NEC and FIDIC forms 'have both been designed for international use with a choice of governing law and language and whilst both have their roots in common law jurisdictions they have both been used successfully in civil law jurisdictions[5].'

The particular requirements of multilateral development banks (such as forced labour and child labour) are not currently contained in the standard NEC contracts. Some of these provisions have been drafted for use by Multilateral Development Banks[6] as a mix of additional conditions of contract and provisions, some of which better suited to inclusion in the works information[7].

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[1] The contract from the NEC3 family principally used here is the NEC3 Engineering and Construction Contract, April 2013. More details can be found at www.necontract.com

[2] The contract from the FIDIC family principally used here is the Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, Multilateral Development Bank Harmonised Edition, June 2010. More details can be found at http://fidic.org/

[3] 'FIDIC Users' Guide: A Practical Guide to the 1999 Red and Yellow Books', Brian W. Totterdill, 2006

[4] FIDIC Users' Guide: A Practical Guide to the 1999 Red and Yellow Books', Brian W. Totterdill, 2006

[5] NEC V FIDIC, Society of Construction Law Hong Kong, International Construction Law Conference 2010, Ian Heaphy

[6] The Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, Multilateral Development Bank Harmonised Edition, June 2010

[7] The part of an ECC contract that describes what the contractor is to design, build and the constraints acting upon him.

It is probably fair to say that FIDIC focuses on liabilities and risk in the manner of traditional contracts whereas NEC requires and enables a more proactive and collaborative approach to managing the contract (such as found in the early warning and programme provisions). Over time, FIDIC is changing its drafting style to become clearer; a feature of NEC is the drafting in plain English and providing for clarity and flexibility. NEC attempts to eliminate the use of legal terms and instead provides for simple language, and gives words their natural meaning.

Time

Although both contracts have slightly different terminology, they each provide for an employer to state a starting date, a completion date, access dates and any sectional completion (if required). Both contracts allow for damages to be included for late completion by the contractor.

FIDIC requires the contractor to submit an initial detailed time programme and to update this when this programme becomes inconsistent with actual progress or contractor's obligations. This programme is not used in any other provision of FIDIC. NEC demands a more detailed set of documents that make up the programme to be submitted at the regular basis prescribed by the employer. When accepted by the project manager, this becomes the tool by which change is assessed, progress is monitored and assists the management of early warnings and compensation events (see later). Such is the importance of having an up-to-date accepted programme in place at all times, there are deductions from payments to the contractor for failure to submit the first programme and sanctions thereafter upon continued failure (the project manager assesses change on behalf of the contractor). This programme will also provide an as-built record as the job progresses.

NEC also provides for key dates to be provided in the event it is necessary to have stated deliverables or outcomes by stated dates, where sectional completion is not appropriate. NEC further allows for incentivising the contractor to finish early through an option for a bonus for early completion provision.

A further feature of NEC is its early warning process where both the project manager and contractor are required to notify each other of any matter which could affect time, cost or quality. The earliest indication of such a problem followed by a risk reduction meeting allows the contractor and project manager to focus on avoiding/reducing the problem as best they can, this being in the interest of both parties to the contract. This simple risk management tool is designed to encourage a 'no-surprise' approach by both parties to the contract and has considerable benefits to the parties in relation to time, cost and quality. This can perhaps be compared with the FIDIC approach for similar matters in which the contractor is only obliged to claim for more time and money after the risk has occurred, which puts the employer in an extremely difficult management position.

Cost

NEC and FIDIC both provide for the price payable to the contractor to be based on bills of quantities, and both allow for stage payments. NEC adds further options of lump sum or cost based open-book contracts such as cost reimbursable, management contracting or the increasingly common target cost contract.

Both contracts provide for change control (variations/claims in FIDIC, compensation events in NEC). FIDIC splits up the components of time and cost, dealing with them and their sub-parts independently at various stages after the change arises. NEC deals with the effects of time and cost together, providing for a quotation to be prepared by the contractor and accepted by the project manager in a timely manner shortly after the change occurs. Multiple quotations can be requested to deal with the change in terms of different time and/or cost provisions, allowing the project manager to select whichever quotation best suits the employer's business requirements. This provides the project manager with the ability to control the balance of time and cost, and the employer with a better forecast of the final completion date and final cost payable, enabling actions to be taken early where perhaps budget/time constraints are crucial.

At a greater level of detail, FIDIC provides a number of subjective tests for determining if certain events give grounds for recompense to the contractor, whereas NEC generally relies on more objective tests. An example of this is weather, FIDIC refers to 'exceptional adverse climatic conditions[8]', which is subjective, whereas NEC uses a worse than 1 in 10 year approach to weather[9], which is objective.

Quality

Both contracts anticipate that the precise employer quality requirements are stated in a separate technical document, with the conditions of contract identifying this document as determining the contracted level of quality. This includes for requirements relating to materials and workmanship and, if the works are designed by the contractor, the required outcome or performance.

FIDIC provides separate contracts for employer-design or contractor-design. NEC allows for employer-design, contractor-design or part and part, simply by expressing in the works information what design the contractor is obliged to carry out. NEC identifies a state at completion which is defined within the works information, unlike FIDIC which relies upon a subjective judgement of completion determined at the time.

NEC and FIDIC both provide for searching for defects, deal with the contractor's responsibility for correcting defects and the contractor's failure to correct any defects.

With NEC, there is an obligation on both contractor and supervisor to notify each another of defects as soon as they are aware of them, providing a more open process for highlighting and dealing with defects. This same obligation is not found in FIDIC.

NEC also provides a process for accepting any contractor's defects, if this is sensible for both parties and a proposal from the contractor reflecting time and/or cost savings can be accepted by the project manager.

NEC allows key performance indicators to be included which could deal with an array of matters such as incentivising the contractor to out-perform the operational cost of an asset in use from the basic standard prescribed, or target any number of sustainable aspects.

Summary

Both NEC and FIDIC contracts are standard forms of contract that are part of standard families for procuring works or consultancy services (FIDIC), goods, works or services (NEC). Each has an allotted person to act on behalf of the employer (engineer in FIDIC, project manager in NEC). They both obligations relating to time, cost and quality, although the explicit requirements are quite different, NEC allows more extensive provisions

[8] Clause 8.4(c)
[9] Clause 60.1(13)

and choice requiring and enabling a more proactive and collaborative approach to managing the contract. Key NEC drafting features centre around flexibility, clarity and simplicity, and a stimulus to good management; no such aims exist within FIDIC.

To conclude this note in the eyes of a researcher, 'NEC has probably many advantages over FIDIC particularly in clarity, flexibility, explicit project management procedures, partnering and teamwork, risk management, objective measurements of weather and ground conditions risks, and variations[10]'.

[10] Comparing the Suitability of FIDIC and NEC Conditions of Contract in Palestine, Haytham Besaiso, University of Manchester, 2012