

A COMPARISON OF NEC AND JCT

Introduction

This is an overview of the comparison of NEC¹ and JCT². Both NEC and JCT contracts are standard forms of contract that are part of standard families for procuring works or (more recently) consultancy services (JCT) and goods, works or services (NEC). Since 1931 The Joint Contracts Tribunal (JCT) has produced standard forms of construction contract, guidance notes and other standard forms of documentation for use by the construction industry.

JCT may be described as a 'traditional' contract and has for many years been seen as the standard building contract for use in the UK, not internationally.

*'JCT contracts are intended for' domestic' projects, i.e. essentially in England and Wales only, albeit with related conditions for use in Scotland.'*³

NEC has 'been designed for international use with a choice of governing law and language⁴' and the author of this quote goes on to comment that whilst NEC has its roots in common law jurisdictions it has 'been used successfully in civil law jurisdictions⁵'. An interesting thought on moving away from JCT contracts (which would apply to similar style standard forms) can be found in the following quote:

*"Successful projects are those that recognise that initial contract training is not enough. To move away from the JCT process you need a long-term cultural change programme focused on people. It's a bit like driving a car. After you've turned the steering wheel and pointed the car round a bend, you can't take your hands off the wheel and congratulate yourself on a job well done. But that is what a lot of people expect to do when they adopt a new contract"*⁶

NEC was launched in 1991 and its contracts are specifically designed for clarity, flexibility and to stimulate good management. The JCT mission does not refer to aspirational standards of the documents produced, instead only

*"To develop, publish, procure the publication, revise and disseminate in both paper and electronic form suites of standard forms of contract and tender documentation and practice notes....."*⁷

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 contract administrator in JCT. This paper covers the principles of the main features of each.

It is probably fair to say that JCT 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

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 JCT family principally used here is the Standard Building Contract with Quantities (SBC/Q) 2005. More details can be found at <http://www.jctltd.co.uk>

³ The NEC Compared and Contrasted, Edited by Frances Forward, 2002

⁴ NEC V FIDIC, Society of Construction Law Hong Kong, International Construction Law Conference 2010, Ian Heaphy

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

⁶ 'The NEC: A user's guide', Andrew Hemsley 2004 Issue 8 <http://www.building.co.uk/the-nec-a-users-guide/3032699.article>

⁷ <http://www.jctltd.co.uk/jct-mission.aspx>

contract (such as found in the early warning and programme provisions). Over time, JCT 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.

JCT requires the contractor to submit a master programme for execution of the works as soon as possible after the contract is executed. There are no details as to what sorts of things such programme should show and there are no requirements to submit revisions of this programme from time to time or when this programme becomes inconsistent with actual progress or contractor's obligations. This programme is not used in any other provision of JCT. 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 JCT approach for similar matters in which the contractor is only obliged to claim for more time and money after the risk event has occurred, which puts the employer in an extremely difficult management position.

Cost

NEC and JCT both provide for the price payable to the contractor to be based on bills of quantities. Other JCT contracts provide for lump sum or other arrangements. 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 JCT, compensation events in NEC). JCT 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 or the need for change has been identified. 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, JCT 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, JCT refers to 'exceptional adverse weather conditions'⁸, which is subjective, whereas NEC uses a worse than 1 in 10 year approach to weather⁹, 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.

JCT 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 JCT which relies upon a subjective judgement of practical completion determined at the time.

NEC provides for searching for defects, deal with the contractor's responsibility for correcting defects and the contractor's failure to correct any defects. JCT provides for instructions to open up works for inspection, makes the contractor responsible to provide workmanship in accordance with the contract but allows the contract administrator to issue instructions in respect of workmanship that are 'reasonably necessary'¹⁰, without defining what that means.

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 JCT.

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. JCT includes a similar provision, but this only addresses the cost effect of work, materials or goods to remain¹¹.

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 JCT contracts are standard forms of contract that are part of standard families for procuring works or consultancy services (JCT), goods, works or services (NEC). Each has an allotted person to act on behalf of the employer (contract administrator in JCT, project manager in NEC). They both include obligations relating to time, cost and quality, although the explicit requirements are quite different, NEC includes procedures providing for a more proactive and collaborative approach to managing the contract and requires the parties to follow these procedures. Key NEC drafting features centre around flexibility, clarity and simplicity, and a stimulus to good management.

⁸ Clause 2.29.8

⁹ Clause 60.1(13)

¹⁰ Clause 3.19

¹¹ Clause 3.18.2