Should Australian Governments use the NEC contract suite for construction projects?
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The construction industry has long called on Australian governments to improve the efficiency with which construction projects are delivered by using standard form contracts. Whilst most Australian governments use standard form contracts, at least as a starting point for their construction projects, there are now a plethora of different forms available, even for same delivery model. And the standard forms used by some governments are heavily amended.

For example, in New South Wales alone, each of Roads & Maritime Services, Sydney Motorway Company, Sydney Trains and Transport for New South Wales has been using its own preferred form of D&C (Design & Construct) Contract, despite each of these entities being members of the Transport Cluster. Moreover, each entity's preferred form of D&C Contract differs significantly from the NSW Government's mandated standard form D&C Contract (GC21) for capital works over $1m. And no two States use the same form of D&C Contract for their road projects.

More recently, the Australian construction industry has called for a shift to more collaborative forms of contract. Governments have responded, first with the NSW Government's 10 point action plan for the construction industry and, more recently, with the November 2018 Communique of the Transport and Infrastructure Council which committed Transport, Infrastructure and Planning ministers from the Commonwealth, States and Territories, New Zealand and the Australian Local Government Association to using more collaborative-based approaches to procurement, project management and risk allocation..

This has led many within the industry to suggest that Australian Governments should move to the NEC suite of contracts - a suite which is yet to take-off in Australia. So why would Australian Governments consider adopting yet another form of contract for their construction projects? Won't that just exacerbate the current issue?

Perhaps not, if the NEC4 suite is embraced by key government agencies in preference to the plethora of standard forms that they presently use. This article briefly explains how the suite works, and why it is worthy of consideration.

The NEC4 suite

The NEC4 suite is the fourth generation of a suite of contracts developed by the UK Institution of Civil Engineers (ICE). The suite is designed as an international contract, capable of being used in any location worldwide, on a wide variety of types of work and commercial situations.[1] It was first published in 1993 and has progressively evolved over its three decades of use. It has been endorsed by the Governments of the United Kingdom and South Africa and mandated for government construction contracts in Hong Kong. It has also been used in New Zealand for construction and facilities management contracts. Its use in

[1] 'Use of NEC in legal jurisdictions other than English law', Richard Patterson, Mott MacDonald, NEC Newsletter, No,47, July 2009, http://www.neccontract.com/NEC/media/NEC/Newsletters/Patterson-on-NEC-outside-the-UK-in-NEC-Newsletter-Issue-47.pdf

Australia so far has been very limited, but it was used to successfully deliver the A$260 million Mt Mercer wind farm in Western Australia[2] and is currently being used by Main Roads in Western Australia for one of its road projects.

The suite is unique because of the high degree of optionality that exists within contract at the heart of the suite - the Engineering and Construction Contract (ECC). These options include six alternative remuneration models which provide clients with considerable flexibility regarding the allocation of estimating and efficiency risk. The contractor can also be responsible for none, some, or all of the design.

The suite also includes contracts for alternative delivery models, including:

- a Design, Build and Operate (DBO) contract, for clients wanting their contractors to adopt a more whole-of-life approach to design and build decisions, and to transfer risks associated with the interface between the design and build phase on the one hand, and the operation and maintenance phase on the other hand;

- a multiparty Alliance Contract, for those clients wanting the benefits that can be obtained by fully integrating the key organisations involved in the delivery of the works under a single collaborative contract that shares project risks and rewards;

- a Term Services Contract, for clients wishing to procure facilities management and/or other services for a fixed term; and

- a Framework Contract, for clients wishing to engage contractors to carry out works, provide services or supply goods on an "as instructed" basis over a fixed term (usually more than 3 years).

The suite has been designed to improve supply chain integration by providing back-to-back subcontracts, supply contracts and professional services contracts (each in long form and short form), and a dispute resolution services contract which is suitable for all of the dispute resolution options under the ECC. Usefully, the subcontracts include a mechanism by which disputes arising under the subcontract can be heard jointly with any related dispute under the main contract - something which is often lacking in subcontracts.

A more collaborative form of contract

The suite contains a number of core and options features that can put it at the more 'collaborative' end of the contracting spectrum. These include:

- remuneration models other than a lump sum price, such as a target cost with a sharing of savings and overruns, or cost reimbursement;
- an express obligation on all parties to act in a spirit of mutual trust and cooperation;
- processes and procedures which require the parties to collaborate, including sanctions if they do not;

[2] https://www.neccontract.com/NEC-in-Action/Case-Studies/Mt-Mercer-Wind-Farm

- a risk management process under which the parties must give each other early warning of any matter that could increase the cost of the works, delay completion, or impair the performance of the works in use. A register of the early warning matters is kept and regular early warning meetings are held to consider proposals for how the effects of each matter can be avoided or reduced, and deciding on the actions which will be taken and who, in accordance with the contract, will take them;
- provisions that mandate and incentivise the preparation and acceptance of regular updates of the programme';
- an option (in the ECC) for early contractor involvement;
- an option to support the use of Building Information Modelling (BIM);
- an option for the use of a Dispute Avoidance Board;
- an option for multiparty collaboration between the client and multiple contractors, subcontractors and suppliers appointed under separate contracts; and
- an option for Incentive Payments for achievement of Key Performance Indicators.

How does the risk allocation compare?

The risk allocation is more 'contractor friendly' than that commonly seen in government construction contracts in Australia. For example:

- If the Client requires the Contractor to design some or all of the works, and selects the associated option, the Contractor does not provide a fit for purpose warranty in respect of the works it designs. Rather, the Contractor only provides a due care and skill warranty for its design work.

- There is no distinction between events that entitle the Contractor to extra time, and events that entitle it to extra money. In many Australian contracts, the Contractor is only entitled to an extension of time (i.e an extension to the date by which the contractor must complete the works and, hence, relief from liquidated damages for late completion), and is not entitled to extra money, for many events that cause delay. In the NEC suite there is no such distinction - there are only "compensation events", and these are the only events that entitle the Contractor to be compensated for cost and/or time impacts.

  The compensation events include events that most Australian governments would expect, such as:

  - changes to the scope instructed by the Project Manager ('variations' in other standard contracts);
  - a failure by the Client to allow access to the site by the relevant access date;
  - a breach of the contract by the Client; and
  - the Contractor being directed to stop work.

  However, other compensation events under the NEC4 suite include:

  - the Contractor encounters unexpected site conditions, or an object of value or of historical or other interest found within the site;

- the Client does not provide something that it is required to provide by the date shown in the accepted programme (regardless of whether or not there is a specific obligation in the contract for the Client to do so);
- the Client or its other contractors do not work within the times shown on the accepted programme, or do not work within the conditions stated in the scope, or carry out work on the site that is not stated in the scope;
- the Project Manager withholds acceptance of a programme, or design documentation, or a management plan, for a reason not stated in the contract;
- the Project Manager or the Supervisor does not reply to a communication from the Contractor within the period required by the contract;
- the Project Manager or the Supervisor changes a decision which either has previously communicated to the Contractor;
- a test or inspection by the Supervisor causes unnecessary delay;
- the Project Manager instructs the Contractor to prepare a quotation for a proposed instruction (such as a proposed variation) and then does not accept the quotation;
- a weather event occurs which, based on past weather data, can be expected to occur on average less frequently than once in ten years;
- any other event which stops the Contractor completing the whole of the works by the date for planned completion shown on the accepted programme, which neither party could prevent and which an experienced contractor would have judged to have such a small chance of occurring that it would have been unreasonable to have allowed for it.

Under most government construction contracts, these events are at the Contractor's risk or only entitle the Contractor to extra time (but not extra money).

- The Contractor owns the 'float' between the date it planned to achieve completion and the contractual date for completion.

- There are optional clauses that limit the Contractor's liability.

Some controversial features

The suite contains some features that some government lawyers may consider problematic.

The first such feature is the express obligation on all parties to act in a spirit of mutual trust and cooperation. While this will concern some lawyers, it shouldn't overly concern those grounded in commercial reality. The obligation to cooperate simply reflects the obligation that is implied into commercial contracts under Australian law absent express provision to the contrary. The obligation to cooperate doesn't change the rights or obligations of the parties as set out in the contract. It does not require a party to put aside its own self interest. Nor does it preclude a party from relying on an express term of the contract, such as a time-bar, or from exercising an express right, such as a right to terminate for convenience. The NSW Government GC21 contract has a similar provision.

There is, however, some uncertainty as to what acting "in a spirit of mutual trust" actually entails. But most commercial people would accept that it at least involves acting honestly. Others would also accept that it involves acting reasonably, and not improperly exploiting or misleading the other party. It probably also requires the parties to act transparently, particularly when the Contractor is claiming payment or compensation on a cost reimbursement basis. But again, it doesn't require a party to put aside its own self interest. Despite this uncertainty, it's an obligation that most commercial parties entering into a construction contract are happy to accept.

The second controversial feature is the Project Manager having both:

- functions that it exercises as the agent of the Client; and
- independent certification functions, which it must exercise impartially - for example certifying the Contractor's claims for payment and for extra time and extra money.

This dual role is a concept that has given rise to much litigation,[3] as the potential for the Project Manager to align itself with the Client's interests when exercising certification functions (or be seen to do so) is very real, especially if the Project Manager has also been involved in developing the scope or early design work. Questions can also arise as to the Client's ability to dispute decisions of the Project Manager that can be exercised partially, in the Client's interests.

In recognition of these difficulties, many standard form contracts have abandoned the dual role concept. For example, the FIDIC suite expressly states that the equivalent person - the engineer - performs all functions as the agent of the Client. The NSW Government GC21 contract does likewise, as does the Property Council of Australia's project contract.

It's surprising that ICE didn't take the opportunity with NEC 4 to address this issue in the same manner, especially given the Guidance Notes to NEC3 suggest ICE's original intention was that "at all times the Project Manager [is] acting on behalf of the [Client]". Instead, the NEC4 suite seeks to address the difficulties by being prescriptive on the certification functions and thereby giving the Project Manager less discretion, and by giving the Client a clear right to dispute any action or inaction of the Project Manager, including those performed as agent of the Client.

Project bank accounts

Conveniently, for those governments looking to address the issue of subcontractors not being paid due to the insolvency of a head contractor, the suite includes an option for payments to be made to the Contractor and its subcontractors and suppliers via a Project Bank Account, and for all sums paid into this account to held by the Contractor on trust for distribution to the Contractor and named subcontractors and suppliers.

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[3] See, for example, *Sutcliffe v Thackrah* [1974] AC 727; *Perini Corporation v Commonwealth of Australia* [1969] 2 NSWLR 530; *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211; *Pacific Associates Ltd v Baxter Co* [1990] 1 QB 993; *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd and Bruce Henderson Pty Ltd* (1997) 13 BCL 235.

Should Australian Governments use the suite?

Australian governments are the most significant purchasers of construction services in Australia. Together, they would spend more on construction services each year than any company or other entity in Australia. As a consequence, Australian government agencies have considerable market power when it comes to setting and negotiating the risk allocation and commercial terms in their construction contracts. This has driven their use of 'client friendly' forms of contract for construction and infrastructure projects.

At most times in the economic cycle, and on most occasions, this approach delivers good value to Australian governments, as the competitive bidding process causes construction companies to price the risks that are allocated to them keenly, to win the work. In other words, the extra risks that are allocated to the contractor under client friendly contracts are often not "fully priced", and taxpayers receives the benefit of the discounted pricing.

But when competition between contractors for the work is not as fierce, and risks are more fully priced, governments can receive better value for money by taking or sharing responsibility for more risks, in return for a reduction in the construction price.

The market for civil engineering and construction services on the east coast is currently over heated, as a consequence of the once-in-a-generation infrastructure spend of the NSW Government and large spends by Commonwealth, Victorian and Queensland Governments on public infrastructure. The civil engineering and construction sector is being stretched, and is consequently pricing risks more fully, and demanding more collaborative and contractor friendly contracts. The recent upswing in the mining and resources sector will only add further heat, and place further pressure on clients to meet the market's demands regarding risk allocation.

This creates an opportune time for Australian governments, and other project owners, to trial the NEC suite, as doing so is likely to deliver lower construction prices and better value for money. The developers of the NEC suite of contracts have already committed to increasing its awareness in Australia by the appointment of a dedicated representative in Australia, Steven Evans[4]. When contacted for comment, Mr Evans said:

> I hope to build on the recent interest in the use of the NEC suite of contracts to encourage their widespread adoption on construction and engineering projects here in Australia to improve procurement and encourage collaborative working relationships to the benefit of all stakeholders

And who knows - the effective use[5] of a contract that promotes greater collaboration and better project management processes will probably lead to improved productivity, fewer disputes and better project outcomes - with the result that governments and other project owners continue using the suite even after the market cools.

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[4] https://www.neccontract.com/About-NEC/News-Media/NEC-announces-local-Australia-Representative

[5] While the NEC uses simple plain English language, it is not 'simple. To work effectively it needs a change in culture – to actively use the contract - and training and systems.