How to avoid and resolve disputes under NEC4 webinar

21 February 2018

Q&A session

Here are the questions that were not answered during the webinar session.

You can find the full recording here: https://www.neccontract.com/disputewebinar

Q: What were the timescales for the DAB (Dispute Avoidance Board) decision?
A: The DAB does not make decisions but instead provides recommendations. There are no fixed timescales for the recommendation and this is reflective of the consensual nature of the DAB process. The expectation is that the DAB will work with the Parties to provide their recommendation in a timescale that best helps to resolve a potential dispute and to suit the Parties and the DAB.

Q: Applying DAB under (5) it states they provide a recommendation by the end of the site meeting. Does that mean the site meeting can last for several days. Can one or both parties prevent DAB members from leaving the site?
A: The timescale for the Site meeting is determined by the Parties and the DAB (Cl W3.1(6)) and could take several days, if for example the Site was some distance away from where the DAB were based and there were a number of issues to work through or conversely if the Site was close to where the DAB members are based and there were limited issues to discuss the site meeting could take just a few hours. The Parties cannot force the DAB members to stay on Site but the DAB members would be breach of their duties under the DRSC (Dispute Resolution Services Contract) if they were to leave without the agreement of the Parties and this could result in them not being paid for their time and they could be replaced by agreement of the Parties.

Q: Are all projects covered by the HGCRA? Such as major highways projects.
A: The type of construction work covered by the Act is defined in the Act at Section 104. The Act is available for free download for www.legislation.gov.uk. Generally speaking major highways works would be covered by the Act.

Q: Are the DAB members of independent appointment or related to the client/contractor organisations?
A: The intention is that the DAB members are independent of the Parties.

Q: Are there any examples of DAB decisions not being agreed by Tribunals or do Tribunals usually agree with the DAB?
A: There is as yet no case law concerning the review of DAB decisions made under W3 by a subsequent tribunal. It would be for the tribunal to hear the argument a fresh and decide on the merits of the case. They may be guided by the recommendations made by the DAB but would not be bound by this.
Q: Can a bespoke clause be added in the contract to make the decisions by the DAB binding and final?
A: There is no limit to what can be changed or added to the contract conditions via Z clauses - subject to any restrictions under the law of the contact - however, this would make the DAB process more like adjudication and so it would better to select W1 rather amend W3 to create a binding decision. Under both W1 and W3 the final decision is taken by the tribunal as they will generally have the power to finally agree the matter in accordance with the law of the contract.

Q: Can the panel briefly reiterate the dispute resolution between NEC3 and NEC4?
A: NEC3 and NEC4 both had dispute options W1 and W2. W3 is new to NEC4. W1 and W2 have been updated slightly for NEC4 but the principle content remains the same in both NEC3 and NEC4.

Q: Do you advise adopting NEC4 on new contracts at this time and if not when would you advise making the change?
A: We would recommend moving to NEC4 for new projects / contracts; however, NEC3 will continue to be supported by the NEC.

Q: Does the Contractor have to remind the PM that no response has been received?
A: Under Clause 53 the Contractor does not have to remind the Project Manager that it has failed to make a final assessment and instead should make its own assessment and issue it to the Client. However, there is nothing stopping the Contractor giving a reminder to the Project Manager, but this is not necessary.

Q: Does the final assessment process on page 9 of the slide apply to all options?
A: Yes this works will all Options.

Q: Why W3 is not covered under the Housing Grant Construction and Regeneration Act 1996?
A: W3 does not comply with the Act as the Act requires the Parties to have the ability to take a disputed matter to adjudication at any time. W3 does not allow for adjudication only the use of the DAB.

Q: How is the decision to choose the number of DAB members made?
If client decides, could it not be seen as biased against the Contractor?
A: The Client makes the choice of the number of DAB members. The Client could choose a single DAB member who they appoint, but if this person was biased and / or not respected by the Contractor then the process would not work as W3 relies on the Parties working with and taking on board the recommendations of the DAB.

Q: If DAB doesn't work do they then go to adjudication level or straight to tribunal?
A: If a Party does not agree with a recommendation of the DAB they refer the matter straight to the tribunal and not to adjudication. Adjudication would be an unnecessary step as an independent third party - the DAB - has already given a view on the matter and the decision of an adjudicator can still be challenged via a tribunal.
Q: I’m not familiar with NEC4, so can you tell me who the Senior Representatives are? (or who are they normally?)
A: The Senior Representatives are named in the Contract Data by the Client and the Contractor. They should be senior members of their organisations with the ability to negotiate and make agreements to resolve disputes and should be sufficiently removed from the day to day operation of the contract so as to enable them to take a fresh and unfettered view of the matter in dispute.

Q: In the event that W3 is used; which party will cover the costs of the members of the DAB?
A: The cost of the members of the DAB are shared between the Parties.

Q: Is there any mechanism for the use of W3 (in conjunction with W2) on UK construction contracts?
A: No, as W3 is not compliant with the Act and so cannot be used in the UK when the Act applies.

Q: Is W3 option a NEC4 dispute resolution only? Or is it covered under NEC3 too?
A: W3 is new to NEC4 and was not present in NEC3.

Q: Please advise whether DAB decisions can be challenged. If yes, under what grounds?
A: The DAB makes a recommendation and not a decision. The Parties choose whether to accept or not accept the recommendation and so there is no requirement to challenge the recommendation as it is not binding on the Parties. There is of course no issue with a Party or the Parties entering into discussion with the DAB about why they made a particular recommendation.

Q: Previously I’ve experienced situations where the PM/Commercial Manager would not refer anything to the Senior Representatives as they were also their line managers, and the concern was referring a dispute to them would reflect badly on the PM/Commercial Manager. In appointing Senior Representatives, have the panel any experience of methods used to avoid such a scenario which could be utilised with NEC4?
A: The final assessment process will force the Site team to raise matters to Senior Representatives, however, this will only occur at the end of the contract. During the contract either Party can raise matters to the Senior Representatives even if the other does not want to. The management teams of the Parties should also take a role in tracking the close out of contractual issues such as compensation events and should be able to recognise when the Site team are not resolving them in timely manner. The Site team also needs to be educated that raising issues to the Senior Representatives is not a negative.

Q: The NEC4 seems not have addressed on the weaknesses (if I may say) for the NEC suite; there is no penalty for the parties failing on their obligations.
A: The NEC has a whole host of processes in the contract to address a failure by a Party to fulfil their contractual obligations. Some failures by the Client or Project Manager will result in compensation events while others will lead to the Contractor being time barred from claiming compensation events or lead to a reduced entitlement to the effects of a compensation event. Ultimately, a breach of contract by a party will lead to a dispute under the contact to be dealt with under W1, 2 or 3.
Q: What happens when one party (Employer) refuses to engage with DAB process?
A: Then the process will not work effectively as W3 relies on the Parties working with and accepting the recommendations of the DAB. If one Party does not engage with the DAB the recourse for the other Party is to take the matter to the tribunal.

Q: Who pays for the dispute resolution process?
A: W1 costs are shared between the Parties unless the Parties agree otherwise. W2 the adjudicator can allocate its fees between the Parties. W3 the costs are shared between the Parties.

Q: Why do the parties not have the option of a DAB if the Construction Act applies?
A: W3 does not comply with the Act as this requires the Parties to have the ability to take a disputed matter to adjudication at any time. W3 does not allow for adjudication only the use of the DAB.

Q: Could option W3 be used where Part 2 of the HGCRA does not apply; e.g. c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is—
(I) nuclear processing, power generation ...”
A: Yes.

Q: Do you believe that a failure to respond to a contractor's final assessment within the 4 weeks (by the client) would be immediately enforceable by an Adjudicator under the 2011 Construction Act amendments, as is the case with an interim application that is not challenged?
A: This is a complex question. It will no doubt be addressed by the courts in due course should this happen. Our initial thinking is that such a failure would not be immediately enforceable because the logic of the Construction Act payment provisions, and the possibility of obtaining immediate enforcement, is based on the interim nature of the payment applications. The same logic does not apply to a final account or final assessment process. There are cases in which the two scenarios are treated differently by the courts. Ultimately, it will be a question of interpretation of the provisions, and whether the final assessment provisions are held to fall within the scope of the enforcement procedure.

Q: Is it anticipated that this board would have senior representation from each of the mains parties in the contract. How is this board incorporated within the contract itself?
A: The members of the DAB should be independent of the Parties and are either named in the Contract Data, agreed by the Parties or appointed by a DAB nominating body.

Q: Who pays for the independent or nominated third party?
A: If engaged by the Adjudicator or DAB member the costs will be allocated in the same way as the costs of the Adjudicator or DAB member. If they are appointed by a Party or the Parties jointly, then the Parties would need to agree how the costs will be dealt with.
Q: Why isn’t the DAB recommendation binding in the same way as an adjudicator’s decision?
A: The DAB process is intended to be consensual with the DAB working together with the Parties to avoid or resolve potential disputes. If the decision of the DAB was binding this would lead to winners and losers in the process and the Parties would not be as open with the DAB, sharing their issues and problems. Also the Parties could start to engage external consultants to help them convince the DAB that their position is correct aping the process in W1. Also if the DAB decision was binding then the DAB may feel constrained from acting as they see appropriate as a Party may start to raise challenges to the processes they adopt. Ultimately, if the Parties want a process for a binding decision they should chose W1.

Answers by Ian Heaphy, NEC4 Contract Board & Director at IN Construction Consulting, and Marcus Birch, Associate Director, Contentious Construction & Engineering at Berwin Leighton Paisner LLP.