

Webinar: Revealing NEC4

5th April 2017

Q&A session

Q: ALC - you say that it is 'suited for large complex projects'. What about smaller projects. Alliancing works very well across a wide range of project scales. Are there any reasons why ALC would not be suitable for smaller projects?

A: The cost of setting up and managing an Alliance contract can be disproportionate on small contracts.

Q: Are there different Options A,B,C etc. for the Alliance contract?

A: No – payment will be based on cost, with bonus share arrangement based on savings achieved.

Q: How does NEC4 ALC align with alliancing frameworks, and how do we see that happening in the future?

A: This depends on how the framework is set up and how suppliers are to be selected from the framework for individual tasks; it may be that implementing the ICG code of practice for alliancing – separate guidance given for using this under NEC – would be better suited for a framework. The NEC Alliance Contract can be used for a programme of work, but would be difficult to operate where competition is to be used in selecting suppliers from the framework to carry out elements of that programme.

Q: On the alliance contract does the PM retain their status to run the contract? If so how is the balance of fairness / equity in the alliance maintained?

A: A Project Manager will be appointed under the Alliance contract, but their role will be different from that under the ECC. The Project Manager's role will be closely aligned with the objectives of the Alliance, as will all Participants.

Q: Particularly in the alliance contract, but also more generally, have any measures been incorporated into NEC4 to discourage the typical raft of Z clauses added by clients?

A: We have identified a number of standard provisions that people add to their contracts, and have created appropriate additional clauses to cover those matters. We have also provided guidance within the volumes dealing with preparation of contract as to how additional clauses should be prepared when they are needed, and how to avoid the need for them.

Q: Can you give us more information on the new information modelling option and the additional clauses this will bring?

A: This option introduces the clauses necessary to define ownership of material produced, and allocation of risk of defects in the model. It is intended to be used with a protocol setting out how the model is to be created, which in turn will form part of the Scope.

Q: Could you elaborate a bit further on the liability bit under the BIM option?

A: Each supplier providing information to go in the model will be liable for the accuracy of what they create, but once incorporated into the model the Client takes responsibility for any further problems due to inconsistency and the like.

Q: Does the BIM Option mandate the use of a CDE?

A: The Information modelling (BIM) option allows the Client to decide how it wants information to be created and specify that as part of the scope

Q: Have you updated the guidance on working to BIM level 2, ie CIC BIM protocol clauses which change the Scope, and clauses which would be additional conditions?

A: This guidance is being reviewed in conjunction with the CIC.

Q: More of a clarification rather than a question - The BIM option is protocol independent - so can stand without a protocol such as the CIC BIM Protocol?

A: The option is intended to work independently of any protocol – the documentation and information procedures within the CIC protocol could be used with these clauses, but not the protocol itself as that advocates liability and ownership in a different manner.

Q: Safety recently in Hong Kong becomes a hot topic. Is there any strengthening of the NEC core clauses for requiring the contractor to participate or invest more in safety aspect? BIM is also intended to be blended with safety in current trend. Has the NEC4 BIM option cater for this?

A: We have not added any further safety critical issues into the contract – we consider these should be dealt with on a project specific basis as part of Scope.

Q: Can you clarify the revised requirements for adding implemented and unimplemented Compensation Events to the Contract Programme?

A: The Accepted Programme must show what has been completed at the time the programme is produced and how the Contractor intends to complete the remaining work. In so far as this is affected by any notified compensation events that would have to be recognized in the programme.

Q: Did I understand correctly that Task Orders are not a feature of the new DBO contract? If so, why is this? For background, I have a contract which has stage 1 as ECC for design and execute refurbishment works on piece of mechanical plant and stage 2 as TSC to maintain it, but I wanted the option to issue Task Orders as well.

A: For the kind of project which has the two stages described, Task Orders are available under the TSC contract.

Q: Fidic Goldbook is also renowned form of Contract for DBO as well. What is the key difference between the NEC 4 and the Fidic Goldbook?

A: The NEC DBO contract is based on NEC principles and contract design, which is somewhat different to the FIDIC approach. In addition, the NEC model is capable of being used for construction work at any stage of the contract and for refurbishment of existing assets as part of the operational service.

Q: Is the DBO contract essentially a combination between a PSC/ECC and TSC contract?

A: It is, but they have been combined in a way which avoids the need for the Client to create a series of linking contract clauses.

Q: Where has the drive for the DBO option come from? Central Government?

A: DBO is widely used throughout the world and it was recognised that we needed to provide a single contract to deliver this, rather than relying on a two-stage approach using ECC and TSC.

Q: Please can you just advise / confirm that the choice to use the Dispute Avoidance Board option is an alternative to using adjudication?

A: Yes: if the Dispute Avoidance Board option is chosen, any issues not resolved by the board would be referred directly to the tribunal (arbitration or the courts).

Q: Is there a requirement for qualification/seniority for Dispute Avoidance Board memberships? Are there 'hard' requirements to keep the DAB at the table during the contract duration (to avoid interest fade?)

A: As yet, no specific requirements for the DAB member have been set out. The members should have experience in construction of the type of work being carried out, and experience in assisting in the resolution of disputes. The interest of the board is likely to be maintained through the payment mechanism – they would recover payment for each visit – and their obligation under the contract to continue to provide a service.

Q: Is there any time-barring provisions relating to the Dispute Avoidance Board?

A: The DAB will make recommendations which may be accepted or not by the Parties. If either Party is not prepared to accept the recommendation, they must refer the disputed matter to the tribunal within four weeks of the recommendation.

Q: What is the mechanism for multi-party disputes?

A: Provision is made for reference to a single adjudicator of disputes involving main contract and subcontractors.

Q: Who pays for dispute avoidance board members?

A: The parties pay the DAB members in equal shares.

Q: Who proposes the parties for the Dispute Avoidance Board?

A: For a single member board, the Client will propose for the Contractor's agreement the member. For a three member board, each Party will nominate one member, and the third will be agreed by the Parties.

Q: Are the Dispute Resolution Board named in the works information?

A: No, they are named in contract data.

Q: For an ECC contract, how do you now deal with the difference between the final assessments, vs. the Contract Value, would this still be via a Compensation Event?

A: The final assessment is intended to do no more than collect together the information previously used to assess the contract value, closing out any issues not finalized. It does not create any new issues – they will all be dealt with through the compensation event or other processes beforehand.

Q: Have any significant changes been made to the core clauses in the NEC3 version of the ECC?

A: Refer to the whitepaper: <https://www.neccontract.com/NEC4-Products/NEC4-Contracts/NEC4-Free-resources>

Q: Is the role of the Supervisor described in any more detail than it was in NEC3?

A: The role of the Supervisor is broadly the same as was under the third edition.

Q: Do you see the removing the Working Area Overhead provision being an administration nightmare?

A: No – had we done so we would not have made the change.

Q: Does NEC4 recognise provisional sums?

A: Provisional sums are not included in NEC4 – guidance is given (as was the case in NEC3) on how to implement Client requirements in respect.

Q: Does the Contractors instigation of a definition of defined cost box off the cost to that date (mini final account)?

A: Once an element of Defined Cost has been agreed, it can no longer be changed other than by referral through the contract dispute resolution procedures in accordance with the contract timescales.

Q: Does the guidance provide an example of the format and content of the Activity Schedule?

A: The contractor will normally create the activity schedule, the layout of which in an option a contract will be driven essentially by cash flow considerations. Some guidance is given on the activity schedule, but if the Client has specific requirements for this document, they will need to be spelt out in the tender documents.

Q: Does the new contract deal with the definition of "services" under Subcontractor Definition? I'm aware that the guidance notes define this as professional services, but clients tend to use it as a "catch all" for acceptance.

A: The definition of subcontractor has been changed: it retains "services" but provides qualification to that term.

Q: Employers, often in our experience, heavily amend NEC3 terms etc. some to the extent that the ethos of NEC use has moved significantly - is there a route to 'reporting' this to NEC?

A: The Client is free to make changes to the contract through Z clauses, and there is little that any organisation can do to prevent that. Our view is that education is the best solution, and for this the user group seminar is a helpful way of identifying abuses. The guidance notes explain the problems caused by inappropriate Z clauses and how to draft them if they are necessary.

Q: For UK contracts, have any changes been made to the payment clauses?

A: The payment clauses have been changed to require the Contractor to submit an application in order to recover interim payments. The payment provisions to deal with the Housing Grants etc. Act have only been modified to deal with the other changes we've made in the contract.

Q: Gentlemen, given that we have only one fee percentage now, does this mean you have also dealt with the disparity between Options A+B and the rest with respect to Defined Cost of Subcontracted Work (Clause 11.2(22) and 11.2(23)) so that we apply the fee percentage to the whole of Subcontract Costs?

A: Subcontractor's cost is now dealt with as part of the Schedule of Cost Components, and for all Options this will be the amount paid to the Subcontractor. The fee percentage would be added to this amount.

Q: If I am not using a NEC3 before, so do I require to take NEC3 aligned with NEC4 or NEC4 would be enough?

A: A user starting afresh would be best advised to start with NEC4. Those who are already using NEC3 will need a transition period.

Q: Great changes to the NEC - pick out weaknesses within NEC3 and address them. It is still dependent upon all parties collaborating; I hope that the tradition cl.10.1 has been updated to reinforce this. Well done and thanks

A: Clause 10.1 has been retained, but now split into two obligations; to act in a spirit of mutual trust and co-operation and to act as stated in the contract.

Q: How do you see NEC4 changing any issues that have been raised through the inception and use of NEC3, with miniscule changes is it more of just an elaboration of what NEC3 stands for?

A: The changes to the NEC3 take account of issues that were raised by users through various sources – journal articles, social networks, user group feedback and others.

Q: How do the payment provisions and completion and defect liabilities work in the alliance contract when having multi parties possibly at different times within the programme?

A: I fear you must wait a little while to see the consultative version. The liabilities issue is being dealt with in a rather different way to other NEC4 contracts. The Parties will be paid their cost, and they will all share in the consequences of defective work and the benefit of efficiency.

Q: I read that the Risk register is renamed as the EWN Register, is this true?

A: Yes – we found that some people were confusing the NEC risk register with an internal risk register kept for other purposes.

Q: How would you ever come to a final cost if the savings are anticipated over future years and would this increase the number of payments due each period until the end?

A: A change to make a saving in whole life cost will only be made if the parties are satisfied that the risk and reward was such as to make it a worthwhile change. If the Parties are satisfied, they must agree a commensurate allocation of that reward, taking into account the limited risk to the Contractor following Completion.

Q: Is it the intention that the information management clauses can replace the clients EIR?

A: The Client's information requirements will need to be spelt out within the Scope.

Q: Most projects have provision for Audit after completion. Will the Audit subcontractor be an integral part of the process and meetings, etc. What will be the expected outcome of the Auditors report as they would have been part of the process?

A: This is entirely dependent upon the terms of appointment of the auditor and what the Client is seeking to get out of their work. The contract does not mandate any such process, and through the interim agreement of Defined Costs, seeks to move away from a final cost audit.

Q: Once Defined Cost has been assessed at the Contractor's request in Option C, D or E, after a an assessment has been finalized, is that element of the Defined Cost immune from being classified as Disallowed Cost later on down the line?

Q1: Please can you explain how the Contractor will evaluate the whole life cost for any changes. Evaluating the benefits can be notoriously difficult to evaluate and parties may differ in their assessment. How is this issue addressed?

A: The Project Manager will either agree the Defined Cost or make an assessment of it. That can only be reopened by a referral through the dispute resolution process within the time constraints of the contract.

Q: What is the consequence of a PM not issuing the Final Assessment in the 4 Week period and no extension of duration has been sought?

A: The contractor is able to make the assessment and issue that; unless challenged within a stated time scale it has the same status as the Project Manager's assessment and will be final and conclusive.

Q: Where WLC VE is proposed by the Contractor, when does the Client pay this saving to the Contractor? Upfront or over the lifetime as the savings are realised?

A: Any payment being made to the Contractor for the whole life cost savings must be agreed at the time the change is accepted. This must include the timing of the payment – this cannot be dependent upon the savings being achieved but must be paid before the end of the contract period.

Q: Whose job the contract management?

A: The roles of Project Manager and Supervisor or Service Manager are being retained as in NEC3.

Q: As a part of the NCE3, if the contractor submits a programme for acceptance and the project manager exceeds the period for reply, are there any actions that the contractor can take to get the programme accepted (or receive a response)?

A: The Contractor must notify the Project Manager of the failure to respond, following which a response must be made within a stated time scale or the program will be treated as accepted.

Q: Is there any specific PSC that can be used between consultant and subconsultant?

A: It is intended to publish a document to be used as a subcontract by a consultant.

Q: In nec3 rates and lump sums can be used if agreed with the SCC - has this been revised in NEC4?

A: NEC4 provides that rates and prices may be used as agreed.

Q: Can you explain what the differences between TSC and TSC short are?

A: The differences remain fundamentally as they were under NEC3; some detailed procedures have been shortened or moved since the work is considered to be low risk and less complex.

Q: We are using the NEC3 TSC with 4 years remaining, would you recommend transitioning to NEC4, if so, please outline key reasons for transitioning.

A: You should only consider transitioning if you can see specific benefits in NEC4 that you wish to bring into your contract before it is complete. It would be necessary to discuss and agree with the Contractor any changes you wish to make and the impact of those changes on the Contractor's prices and plan.

Q: Accreditation of Project Managers/Service Managers - will existing need to re-qualify for NEC4?

Q1: I am an ICE registered, NEC accredited PM my training and experience is NEC3 centric. Does the NEC envisage a refresher training requirement?

Q2: How does this affect current NEC3 accredited users?

Q3: What is the transition process for NEC3 accredited holders to move to the NEC4. What will the training involve?

A: NEC will be offering an upgrade course for all those that have an NEC3 Accreditation. You won't need to do the full accreditation course again to receive your NEC4 Accreditation.

Q: Will you be publishing foreign language versions at the same time (22 June)?

A: The NEC4 suite will only be published in English. NEC4 contracts keep on using plain English and present tense to facilitate the celebration of contracts across the world.

Q: Is there any intention to adopt NEC4 in World Bank projects in the developing world? And the Gulf Regions?

A: NEC Contracts are available worldwide, and we are happy to support any projects across the globe.

Q: Are print licenses/documents going to be changed?

A: Once published on the 22nd of June 2017, NEC4 will be available in ePrint, eView and eCorporate formats, as per NEC3. If you have an NEC3 license but you want an NEC4, you will need to buy a new one.

Q: You will support customers using NEC3 but do you have any timescales at all for this? We have a commercial vehicle which uses NEC3 suite and has a 4 year term. Until when can we use NEC3 contracts?

A: Support to NEC3 will continue indefinitely. This will reflect our users' needs and requirements to deliver projects.

Some projects currently being undertaken under NEC3, such as HS2, have a large timescale for delivery. Therefore we will continue to support NEC3 while it is in use.

Q: What is the timing and process for the consultation on the ALC? How can one get involved?

A: The Alliance Contract (ALC) should be available for public consultation before June 2017. Keep an eye out for updates.

Answers by **Peter Higgins**, Chair of the NEC4 Contract Board, and **Ian Heaphy**, NEC Consultant and member of the NEC4 Contract Board.