How to avoid and resolve disputes under NEC4 webinar

Ian Heaphy and Marcus Birch
Today’s speakers

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Send us your questions

or

How to avoid and resolve disputes under NEC4 webinar © 2018 NEC
What we will cover

• Dispute avoidance in NEC4
• Final assessment process NEC4
• Dispute resolution
  • W1 & W2
  • W3
• Overview of Dispute Resolution Services Contract (DRSC)
• Q&A
Dispute avoidance in NEC4

• Clause 10.2 – the Parties, Project Manager and Supervisor act in a spirit of mutual trust and co-operation

• Early warnings – proactive risk identification and mitigation, seeking solutions that will bring advantage to all those who will be affected

• Programme – up to date Accepted Programme used to manage the works and interfaces, identify issues and manage change

• Compensation events – to compensate the Contractor, based on Defined Cost plus Fee, entitlement to time and money. Management process to drive implementation on a prospective basis (ideally)
Reasons for disputes (1)

• Things can and do go wrong on projects
• Parties do not comply with their obligations, unexpected events occur, which can lead to increased costs and/or delay
• Contract is a commercial bargain between the Parties and will allocate risk between them – Parties may disagree on what was agreed
• Clause 10.1 the Parties, Project Manager and Supervisor act as stated in the contract
Reasons for disputes (2)

• Parties disagree about the meaning of the contract, including:
  • Poorly drafted Z Clauses which do not fit well with standard NEC
  • Lack of fit / conflict between conditions, Contract Data and Scope
  • In Option X5 / X7: definition of work included in different sections
• Parties disagree about the assessment of compensation events
  • Delay to Completion Date(s)
  • Changes to the Prices: actual and forecast Defined Cost
• Parties do not operate the contract mechanisms - updating the programme and “real-time” assessment of compensation events
Final agreement of Defined Cost – ECC as an example

• Clause 50.9 in main Options C, D, E & F covers acceptance of Defined Cost
• *Contractor* decides when Defined Cost is ready to be submitted
• Makes records available - does not necessarily submit them
• *Project Manager* takes the lead in reviewing them - 13 weeks
• Accept, request more detail or notify of errors
• *Contractor* resubmits - 4 weeks
• *Project Manager* reviews - 4 weeks accepts or corrects
• No *Project Manager* response in time stated, assessment treated as correct
Final assessment process – ECC as an example

• Clause 53 - Project Manager makes a final assessment 4 weeks after issue of Defects Certificate (or 13 weeks after termination)

• Project Manager gives details of the assessment and certifies payment

• If the Project Manager does not make assessment, the Contractor can – giving details of its assessment

• If Client and Contractor agree, the relevant Party makes payment
Final assessment process

• Final assessment is conclusive evidence of the final amount due unless one party starts the dispute process selected for the contract
  • W1 – Senior Representatives, adjudication, tribunal
  • W2 – Senior Representatives and / or adjudication, tribunal
  • W3 – Dispute Avoidance Board (DAB), tribunal
• Timescale for each stage
• Obligation to refer to tribunal within 4 weeks
Dispute resolution options - ECC

• 3 options, W1, W2 and W3
• Choice is entered by Client in Contract Data part one
• W1 or W3 may be used unless HGCRA applies
• W2 must be used if HGCRA applies
• W1 and W2 use adjudication as the primary means of dispute resolution
• W3 uses a Dispute Avoidance Board established at the start of the contract
W1 and W2

• Parties refer dispute to the Senior Representatives first – mandatory under W1, by agreement under W2 as in W2 a Party can go to adjudication “at any time”

• Senior Representatives should be people removed from the day to day operation of the contract and senior enough to be able to negotiate a settlement

• Parties submit statement of case, maximum 10 sides of A4 together with supporting evidence, unless otherwise agreed.

• Informal – no limit on format or process

• As many meetings and use any procedure they consider necessary, up to 3 weeks

• Meetings are on a without prejudice basis
W1 and W2

• Any matters not agreed by Senior Representatives referred to the adjudicator

• Adjudicator is an independent 3rd party who can be
  • named in the contract, or
  • agreed or appointed when the dispute arises

• Appointed under Dispute Resolution Service Contract (DRSC)

• Subcontract joinder possible by agreement
W1 and W2

• The Adjudicator can
  • Review and revise any action or inaction of the Project Manager or Supervisor
  • Takes the initiative in ascertaining the facts and law related to the dispute
  • Instruct a Party to provide further information and to take action necessary to enable the Adjudicator to make a decision

• Adjudicator has limited time in which to make decision (4 weeks / 28 days), which can be extended by agreement. Decision is binding but not necessarily final

• Parties can refer any decision, or failure to make a decision to the tribunal for final decision
Enforcement of Adjudication

• Statutory support for the enforcement of adjudication decisions
  • UK – Housing Grants Construction and Regeneration Act 1996 as amended
    • Can enforce adjudication decision by summary proceedings in the TCC
    • Will be enforced unless adjudicator lacked jurisdiction or lack of due process
  • Australia e.g. Victoria Building and Construction Industry Security of Payment Act 2002
  • Singapore Building and Construction Industry Security of Payment Act (Cap. 30B)
  • Hong Kong – pending security of payment legislation
W3 – Dispute Avoidance Board (DAB)

- Members of the DAB appointed at start of project, regularly visit Site and keep up to date with progress
- 1 or 3 person DAB – if 3, the Client and Contractor appoint a member each and jointly agree the third
- Role of the DAB is work with the Parties to anticipate and resolve potential disputes
- Provide recommendations for resolving disputes if required
- Recommendations are not binding
- Parties refer any dispute to the tribunal for a binding and final decision
The *tribunal*

- Disputes under the contract are finally determined by the tribunal
- Form of *tribunal* stated in the Contract Data - arbitration or litigation
- Arbitration
  - commonly used in cross-border cases, where local courts may not have expertise in the matter in dispute
  - Confidentiality
  - Flexibility of procedures (institutional rules)
  - One or three arbitrators
The tribunal

• Litigation – the courts
  • Single judge appointed (and paid) by the courts
  • Use of precedent in making decisions – recent court cases
  • Public judgment
  • Strict procedures
Dispute Resolution Services Contract (DRSC)

• Contract used to appoint an Adjudicator or a member of a DAB under an NEC4 contract or any contract
  • Covers obligations, communications, payment – rates, expenses and timescales - and termination
  • Detail of duties and actions covered under dispute process in the contract between the Parties
Q & A
Upcoming NEC webinar

Enhancing performance through collaboration

28 March 2018 | 13:00 BST

How can parties better collaborate? Are there any tools that enable collaboration? How can a project truly benefit from improved collaboration?

Robert Gerrard
NEC Consultant and NEC Users' Group Secretary

Simon Vaughan
Managing Director at JCP Consultancy Limited

necontract.com/CollaborationWebinar
NEC USERS’ GROUP ANNUAL SEMINAR 2018
20 June 2018 | County Hall, London

• Opening address by Dr. David Hancock, NEC Users’ Group Chair and Construction Director for IPA
• Keynote address by Lord Adonis
• NEC's 25th anniversary
• NEC4 early adopters feedback
• Workshop sessions
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