

nec4 | **Improvement**
through collaboration

How to avoid and resolve disputes under NEC4 webinar

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Today's speakers



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NEC4 Contract Board
and Director at IN
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Construction disputes
specialist and Associate
Director at Berwin
Leighton Paisner

Send us your questions

or

What we will cover

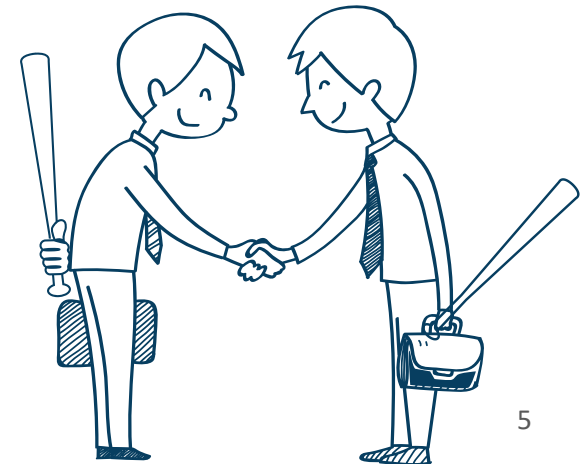
- Dispute avoidance in NEC4
- Final assessment process NEC4
- Dispute resolution
 - W1 & W2
 - W3
- Overview of Dispute Resolution Services Contract (DRSC)
- Q&A

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





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

neccontract.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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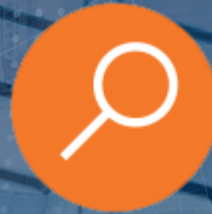
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