Using the NEC3 contracts effectively

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Objectives:

• Understand the background & philosophy of the contract
• Understand the key procedures:
  ➢ Early Warnings
  ➢ Programme
  ➢ Compensation Events
• Develop a practical approach

Problems with Existing Standard Forms

• Based on disputes and case law
• Reactive as opposed to pro-active
• Not focussed on management procedures
• Little focus on the programme
• Inflexible
• Conflict of interest in the role of the Engineer/Architect
10.1 The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and cooperation.

Recognised Best Practice


The NAO recommended the use of contracts that support collaborative working for “the client and the entire integrated team”. The NAO added: “The Engineering and Construction Contract is one example of a contract written in plain English that embeds the principles of good project management in its procedures, and promotes role clarity. It encourages early issue resolution, and contains options as to the choice of procurement route. It is non-adversarial in its tone and spirit, and as such, many clients have adopted it for use in long-term collaborative working arrangements.”

Project Management procedures now part of the contract!

Traditional contracts:

- Contract conditions
- Separate

ECC:

- Contractualised Project Management
- Combined
Key benefits of the NEC

1. Flexibility
2. Clarity & simplicity
3. Stimulus to good management

Flexibility

- Multi-disciplinary
- Design
- Pricing

Clarity & simplicity

- Plain English
- Present tense
- Simple structure
- Short sentences
- Procedures are not open-ended and conflicting
- No reference to law
- Set of common clauses (irrespective of the main contract chosen)
Stimulus to good management

- Collaborative foresight
- Clear allocation of responsibility
- Early warning procedure
- Detailed procedure for dealing with change
- Programming facility

Control mechanisms

Time, quality, cost triangle:

- Mutual trust & cooperation / EW’s
- Cost
- WI/ Defects management
- Quality
Key roles:

- Project Manager role
- Supervisor role

Use of the NEC - be prepared for more admin during the project!!

Structure
NEC structure:

Core Clauses
(common to ALL main options)
1) General
2) The Contractor’s main responsibilities
3) Time
4) Testing & Defects
5) Payment
6) Compensation events
7) Title
8) Risks & insurance
9) Disputes & termination

Main Options A to F

Secondary Options

Family of contract documents:

MAIN OPTIONS
MAIN OPTIONS

- Option A – Priced Contract With Activity Schedule
- Option B – Priced Contract With Bill of Quantities
- Option C – Target Contract With Activity Schedule
- Option D – Target Contract With Bill of Quantities
- Option E – Cost Reimbursable Contract
- Option F - Management Contract

MAIN OPTIONS EXPLAINED

- Option A – Plan & Specification
- Option B – Bill of Quantities
- Option C – GMP then open-book
- Option D – Bill of Quantities then open-book
- Option E – Cost Plus
- Option F - Management Contract

Professional Services Contract:

Consultancy
Term Services Contract:

A contract for a contractor to provide a service (not limited to a professional or construction service) to an Employer from a starting date and throughout a service period.

Not a contract for a project.

ECC Short Contract:

- Low risk
- Low in complexity
- Value not relevant
- Programme less critical

ECC Subcontract:

- Complex trades
- Medium – high risk
- Programme critical
Short subcontract:

- Low risk
- Low in complexity
- Value not relevant
- Programme less critical

CONTRACT DATA

- Part 1 – Data provided by the Employer
- Part 2 – Data provided by the Contractor

Source: Managing Reality, Book 2
Role of the WI: Some key principles:

"60.1 The following are compensation events.
(1) The Project Manager gives an instruction changing the Works Information except

- a change made in order to accept a Defect
- a change to the Works Information provided by the Contractor for his design which is made either at his request or to comply with other Works Information provided by the Employer"
### Early Warning clauses:

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
</tr>
</thead>
</table>
| 16.1   | Both parties give an early warning as soon as they become aware of any event that could affect:  
1. Time  
2. Quality  
3. Cost  
4. Key Date (NEC3)  
- Contractor can raise if his cost may increase (NEC3)  
- PM enters into a Risk Register (NEC3) |
| 16.2   | Either party may instruct the other to attend a 'risk reduction' meeting.  
Each may instruct other people to attend e.g. subcontractors, client stakeholders. |

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### Early Warning clauses (continued):

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
</tr>
</thead>
</table>
| 16.3   | At the 'risk reduction' (NEC3) meeting those who attend **co-operate** in:  
1. Considering how the matter can be avoided or reduced  
2. Seeking solutions that will bring advantage to all those effected  
3. Decide upon actions to take |
| 16.4   | The PM records the outcome and gives a record of this to the contractor.  
NEC3 requires this record to be in the form of a Risk Register. |

**Best Practice:**  
The PM maintains a risk register as a formal means of recording E.W.'s (now mandatory under the NEC3)
Programme clauses:

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>31.2</td>
<td>Each programme (which requires acceptance by the PM) should include:</td>
</tr>
<tr>
<td></td>
<td>• starting date, access dates, Key Dates and Completion Date</td>
</tr>
<tr>
<td></td>
<td>• planned Completion</td>
</tr>
<tr>
<td></td>
<td>• order &amp; timing of operations (includes statement of how &amp; resource utilised)</td>
</tr>
<tr>
<td></td>
<td>• planned Completion</td>
</tr>
<tr>
<td></td>
<td>• provisions for:</td>
</tr>
<tr>
<td></td>
<td>• Float</td>
</tr>
<tr>
<td></td>
<td>• Time risk allowance</td>
</tr>
<tr>
<td></td>
<td>• other information which the WI requires</td>
</tr>
</tbody>
</table>
Compensation Events

Reasons:

- 60.1 – 60.18 (19 NEC3)

Summary of Compensation Events

<table>
<thead>
<tr>
<th></th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>60.1(1)</td>
<td>Change to the Works Information</td>
</tr>
<tr>
<td>60.1(2)</td>
<td>Access</td>
</tr>
<tr>
<td>60.1(3)</td>
<td>Employer not providing something</td>
</tr>
<tr>
<td>60.1(4)</td>
<td>Stop or not start any work</td>
</tr>
<tr>
<td>60.1(5)</td>
<td>Employers &amp; Others working time/conditions</td>
</tr>
<tr>
<td>60.1(6)</td>
<td>Replying to communications</td>
</tr>
<tr>
<td>60.1(7)</td>
<td>Object of value</td>
</tr>
<tr>
<td>60.1(8)</td>
<td>Changing decisions</td>
</tr>
<tr>
<td>60.1(9)</td>
<td>Withholding acceptance</td>
</tr>
<tr>
<td>60.1(10)</td>
<td>Instructions to search</td>
</tr>
</tbody>
</table>
Summary of Compensation Events

<table>
<thead>
<tr>
<th>Event Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>60.1(11)</td>
<td>Test or inspection causing delay</td>
</tr>
<tr>
<td>60.1(12)</td>
<td>Physical conditions</td>
</tr>
<tr>
<td>60.1(13)</td>
<td>Weather</td>
</tr>
<tr>
<td>60.1(14)</td>
<td>Employer’s risk</td>
</tr>
<tr>
<td>60.1(15)</td>
<td>Take over</td>
</tr>
<tr>
<td>60.1(16)</td>
<td>Employer provides materials, facilities and samples</td>
</tr>
<tr>
<td>60.1(17)</td>
<td>Correction of an assumption</td>
</tr>
<tr>
<td>60.1(18)</td>
<td>Breach of contract</td>
</tr>
<tr>
<td>60.1(19)</td>
<td>Unforeseen event</td>
</tr>
</tbody>
</table>

Compensation Events:

4 stage process:

1. Notifying
2. Quoting
3. Assessing
4. Implementing

Clear timescales

CE’s - PM review in principle:

1 Week (in principle)
CE’s - Contractor to quantify:

- Project Manager: 1 Week (in principle)
- Contractor: 3 Weeks (to quantify)
- Price up

CE’s - PM decide in quantum:

- Project Manager: 1 Week (in principle)
- Contractor: 3 Weeks (to quantify)
- 2 Weeks (to decide)
- Decide in quantum

CE’s - 1st element of time barred rule:

- Project Manager: 1 Week (in principle)
- Contractor: Automatic acceptance in principle
- Contractor notifies (that had no response)
- Further 2 weeks

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**CE’s - 2nd element of time barred rule:**

- **Project Manager:**
  - 1 Week (in principle)
  - 3 Weeks (to quantify)
  - 2 Weeks (to decide)

- **Contractor:**
  - Further 2 weeks
  - Automatic acceptance in quantum!!
  - Contractor notifies (that had no response)

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**Notifying Compensation Events:**

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>61.1</td>
<td>PM notifies the C</td>
</tr>
<tr>
<td>61.2</td>
<td>‘Proposed’ instructions/ change decisions may be requested. These are not ‘put into effect’ until confirmed by the PM.</td>
</tr>
<tr>
<td>61.3</td>
<td>C notifies the PM</td>
</tr>
<tr>
<td>61.3</td>
<td>If the C does not notify the PM within 8 weeks of becoming aware of the event then he is not entitled to a change in the Prices, Completion Date or Key Date (unless the PM should have notified the event to the C but did not) – NEC3 only.</td>
</tr>
</tbody>
</table>

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**Notifying Compensation Events:**

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>61.4</td>
<td>‘Tests’ of the Compensation Event:</td>
</tr>
<tr>
<td></td>
<td>- Fault of the contractor?</td>
</tr>
<tr>
<td></td>
<td>- Not happened or not expected to?</td>
</tr>
<tr>
<td></td>
<td>- No effect on cost or Completion?</td>
</tr>
<tr>
<td></td>
<td>- Not a reason stated in the contract?</td>
</tr>
</tbody>
</table>

If PM agrees:
- **Within 1 week** instructs the C to submit a quote, or;
- Agrees a longer period to which the C has agreed
Quotations for Compensation Events:

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>62.1</td>
<td>PM may instruct the C to submit alternative quotes – different ways of dealing with the CE. C may also submit further alternatives.</td>
</tr>
<tr>
<td>62.2</td>
<td>Revised programme is submitted if remaining work is effected.</td>
</tr>
<tr>
<td>62.3</td>
<td>C submits his quote within 3 weeks.</td>
</tr>
<tr>
<td>62.3</td>
<td>PM replies within 2 weeks of this. Reply to state:</td>
</tr>
<tr>
<td></td>
<td>• If a revised quote is required (must state reasons – 62.4),</td>
</tr>
<tr>
<td></td>
<td>• Acceptance of the quote,</td>
</tr>
<tr>
<td></td>
<td>• Instruction will not be given, or;</td>
</tr>
<tr>
<td></td>
<td>• PM to make their own assessment</td>
</tr>
<tr>
<td>62.5</td>
<td>Extensions to the timescales may be agreed by both parties prior to the deadlines</td>
</tr>
</tbody>
</table>

SECONDARY OPTIONS

- Price adjustment for inflation (X1)
- Changes in the law (X2)
- Multiple currencies (X3)
- Parent company guarantee (X4)
- Sectional Completion (X5)
- Bonus for early Completion (X6)
- Delay damages (X7)
## SECONDARY OPTIONS (continued)

<table>
<thead>
<tr>
<th>X12</th>
<th>Partnering</th>
</tr>
</thead>
<tbody>
<tr>
<td>X13</td>
<td>Performance bond</td>
</tr>
<tr>
<td>X14</td>
<td>Advanced payment to the Contractor</td>
</tr>
<tr>
<td>X15</td>
<td>Limitation of the Contractor’s liability for his design to reasonable skill and care</td>
</tr>
<tr>
<td>X16</td>
<td>Retention</td>
</tr>
<tr>
<td>X17</td>
<td>Low performance damages</td>
</tr>
<tr>
<td>X18</td>
<td>Limitation of liability</td>
</tr>
</tbody>
</table>

## SECONDARY OPTIONS (continued)

<table>
<thead>
<tr>
<th>X20</th>
<th>Key Performance Indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td>Z</td>
<td>Additional conditions of contract</td>
</tr>
</tbody>
</table>

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**Final thought……managing the NEC:**

1 = Programme

2 = EW’s

3 = CE’s
Example contract admin. monthly management report

**'NEC Contract':**

**Re-cap:**

- Having the right team ethos is key.
- Agree as a team how you are going to communicate/ apply the NEC3.
- Ensure the ‘wider’ team appreciate the key mechanisms.
- Constantly review how effectively you are working as a team.