

ne users' group NEWSLETTER

UK public sector set to award up to £4 billion FM framework contracts under TSC

SIMON FULLALOVE EDITOR

Crown Commercial Service (CCS), the UK government agency providing buying services to the public sector, is due to let an NEC-based facilities management framework this month worth up to £4.1 billion.

A total of up to 30 facilities management contractors will be appointed to the four-year 'pan government collaborative framework agreement', which is based on the NEC3 Term Service Contract (TSC).

Total, hard and soft FM

The work will be divided into three lots, with up to £3.1 billion of 'total' facilities management and up to £0.5 billion each of 'hard' and 'soft' facilities management.

Clients for the framework include central government departments and agencies, non-departmental public bodies, National Health Service bodies and local authorities.

NEC has collaborated extensively with CCS on the framework, including training CCS staff, helping with tender documentation and signing a memorandum of understanding to provide a variety of services to CCS over the life of the framework.

PM and traffic frameworks

NEC has also helped CCS put together a similar framework for re-procuring project management and full design team services using the NEC3 Professional Service Contract (PSC) and possibly the Professional Service Short Contract (PSSC). The invitation to tender is due to appear in September 2015 with a view to a new agreement being live in December 2015.

A further framework for traffic management technology, possibly using the NEC3 Engineering and Construction Contract (ECC), Supply Contract (SC) and TSC, is due to be invited shortly. It is estimated to be worth up to £150 million.

NEC as trusted advisor

NEC general manager Rehka Thawrani says, 'We are delighted CCS is planning to use the TSC for its pan-government collaborative framework agreement for facilities management as well as adopting NEC contracts for other new public-sector frameworks.

'We are confident CCS's adoption of NEC contracts will help it to deliver its policy of buying and managing government goods and services more efficiently and effectively.

'We are also honoured to have been given the role of trusted provider to help CCS develop the NEC content in its frameworks'.

New procurement website

All CCS contracts over £10,000 are now posted on its new Contracts Finder website at www.contractsfinder.com.

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View from the top of one of Meridian's 64 new wind turbines at Mt Mercer wind farm in Australia, which has just been completed on time and budget using the NEC3 Engineering and Construction Contract. It is Australia's first NEC project (see page 2) ▶

Annual seminar set to showcase NEC's role in collaboration



STEVE ROWSELL NEC USERS' GROUP CHAIRMAN

The 2015 NEC Users' Group annual UK seminar on 20 April 2015 is rapidly approaching and I hope you have secured your place. The programme looks sure to provide us with another informative and successful seminar.

You may notice some common themes running through the presentations. The one that strikes me is the theme of collaboration, although different speakers – many from UK government bodies – refer to it using different terms.

Government speakers

Our keynote speaker, David Hancock of the UK Cabinet Office, will explain how a partnering environment promotes best practice in government procurement, after which Simon Rawlinson of the UK BIM Task Group will talk about government requirements for collaborative three-dimensional building information models.

John Kenny from the Crown Commercial Service will next describe delivery of efficiencies across the public sector using the NEC3 Term Service Contract (TSC), followed by Phil Bennett of Network Rail, who will tell us about the railway's journey towards NEC and adoption of collaborative work practices.

The morning session will conclude with Matthew Lugg of Mouchel and Peter Higgins of the NEC board talking about the UK Highways Maintenance Efficiency Programme's successful use of partnering and a standard contract

based on the TSC and NEC3 Engineering and Construction Contract (ECC). The afternoon session will include an expert panel session on the benefits and challenges to collaborative partnering.

Inconsistent terminology

So, while there is a strong focus on collaboration, there is perhaps an inconsistent use of terminology. Indeed it is one of the difficulties faced by the construction sector that different terms are used and different interpretations made of those terms. Our speakers use a mixture of 'partnering' and 'collaboration', as well as 'collaborative partnering'. Other terms used in industry include 'alliancing' and 'integrated working'.

But is all this a problem? It may well be, because the terms mean different things to different people. The use of 'partnering' developed during the 1990s but some projects acquired a bad reputation, which was due to perceived soft and cuddly relationships without robust leadership and procedures required to deliver commercial objectives.

Similarly, 'alliancing' has been applied in a range of ways with some considerable success but also with some failures, where value for money has not been adequately measured. 'Collaboration' is now the term generally being used by major clients to describe their approach and their desired way of working.

Collaborative foundation

NEC3 contracts require the parties to work in a, 'spirit of mutual trust and cooperation', so does that make them collaborative? I think it undoubtedly does, but collaboration requires much more than a contractual clause to make it work. NEC provides the foundation to collaboration in the form of embedded project management procedures, including early warnings, programming, compensation events and incentivisation mechanisms.

As NEC users however we also need to remember that successful collaboration relies on more than the contract provisions. The procurement procedure is critical is selecting the suppliers which are best able to support the desired approach, and which provide the most confidence that they will deliver successful outcomes.

In addition, collaboration must be driven by strong and committed leaders from all of the contractual parties; leaders who will establish the right culture and the supporting behaviours that result in successful project outcomes.

NEC is clearly the industry-leading contract suite to support collaboration, and I am confident we will hear many more examples of this at the annual seminar.

For further information please see the events page of the NEC website at neccontract.com/events

NEC delivers first project in Australia

SIMON FULLALOVE EDITOR

Successfully completed on time and on budget at the end of 2014, the A\$260 million (£140 million) Mt Mercer wind farm is the first NEC project undertaken in Australia. It is also the first wind farm to be built in Australia by Meridian Energy, New Zealand's largest renewable electricity generator and a major user of NEC contracts since the early 2000s.

The new 64 turbine, 131 MW renewable energy facility extends over a 2600 ha site near Ballarat in Western Victoria. Each turbine includes a 92.5 m diameter, three-bladed rotor mounted on top of an 80 m tall tower. They are linked to the grid via a 33 kV underground electrical collector network and a 22 km long, 132 kV overhead power line.

Two ECC contracts

Meridian engaged its main two construction partners on the project under NEC3 Engineering and Construction Contracts (ECC) in September 2012.

Downer EDI was awarded a A\$70 million (£38

million) ECC for the design and construction of the main electrical and civil works, including the substation, underground collector system, internal road network, crane hard standings and wind turbine foundations. Downer has extensive capabilities in the Australian renewable energy sector having previously delivered in excess of 1 GW generating capacity on 11 wind farm developments across the country.

Senvion Australia (formerly REpower) was contracted under a separate ECC to supply and install the German-designed 64 MM92 wind turbines. The first one started generating in November 2013 and the last was commissioned in May 2014.

At peak more than 250 people were working on the site.

Contract management system

Chief executive of Meridian Energy Australia Ben Burge said, 'With the cooperation of our partners, Senvion Australia and Downer, we were able to achieve full production within 24 months

of signing the construction contract, without the requirement for either external project finance or a power purchase agreement.'

To help manage the two main ECC contracts Meridian adopted a web-based contract change management application from NEC licenced content partner Conject. The system helped to integrate Meridian and its supply chain with all ECC project communications, ensuring that all parties were working within the specified timescales and adhering to the specific terms and conditions of the contracts.

Meridian has successfully used the Conject system on a number of its other NEC-procured schemes including the NZ\$169 million (£85 million) Mill Creek wind farm near Wellington, New Zealand and the company's asset management programme, which has an average annual value of NZ\$30 million (£15 million).

Meridian's new £140 million Mt Mercer wind farm is the first NEC project to be delivered in Australia ▼



ECC project manager accreditation launched in Hong Kong



IVAN CHEUNG NEC ASIA-PACIFIC USERS' GROUP SECRETARY

The NEC3 Engineering and Construction Contract (ECC) project manager accreditation programme was launched in Hong Kong last month in partnership with the Hong Kong Construction Industry Council (CIC) and supported by the NEC Asia-Pacific Users' Group.

The programme – which involves a mix of online training, interactive classroom training and post-teaching assessment – has become recognised as the 'gold standard' for ECC project managers since its UK launch in 2013. Over 140 construction professionals qualified as Accredited ECC Project Managers within the first year, nearly 50 of which are now listed in the Institution of Civil Engineers' register (see page 8).

Building capacity

The Hong Kong launch was endorsed by Wai Chi-Sing, permanent secretary for development (works) of the Hong Kong government's Development Bureau, who believes the programme, 'will help us build the capacity of our project managers on ECC contracts'. The government is using NEC3 contracts for all projects put out for tender in 2015/16 following a series of successful pilot projects (see page 4).

Ho Sing-mo, chairman of the CIC NEC3 task force, said, 'I am positive that the CIC-NEC partnership to deliver the programme to the Hong Kong community will continue to raise the bar for project delivery across Asia-Pacific.' The

first five-day classroom session for Hong Kong applicants took place on 9–13 February 2015 at the Zero Carbon Building, Kowloon with a full house of 26 delegates attending.

Breakfast briefing

Another successful Asia-Pacific Users' Group breakfast briefing session was held at Mott MacDonald's Hong Kong office on 6 February 2015. It aimed to provide an insight into what NEC users consider important to deliver a successful NEC project in Hong Kong.

The opening session was delivered by Hayman Choi, an active NEC advisor in Hong Kong since 2009. The panel discussion began with KW Mak, deputy director of the Drainage Services Department, providing practical suggestions on improving behaviours and mindsets among those managing an NEC contract.

Kam Mak of MTR Corporation then reported on MTR's trial ECC contract on the West Island Line project. He suggested that selection of the right contractor is crucial, with one of the main criteria being sufficiency of the contractor's management resources.

Behavioral changes

Stanley Lo, director and general manager of Paul Y Construction, MTR's contractor, then shared a contractor's perspective on how



▲ Launch of the ECC project manager accreditation programme in Hong Kong in February 2015

best to adapt to the unfamiliar processes and mechanisms of the NEC.

The panel discussion was concluded by Lillian Chan of JCP Consultancy, who discussed the requisite 'soft skills' to enhance collaboration between parties. From her experience with NEC projects in Hong Kong, she suggested that joint problem-solving initiatives working towards mutual objectives were important to success.

The next breakfast briefing session is scheduled for April/May 2015.

For further information please email info@necontract.com or visit the NEC website necontract.com/events

New online training course for ECC supervisors

JESSICA NECCHI NEC MARKETING

The supervisor plays a vital quality control role in the NEC3 Engineering and Construction Contract (ECC), checking that the works are carried out by the contractor in accordance with the works information.

NEC Training has developed a new online training course for practicing and would-be supervisors, focusing on their role and responsibilities under the ECC, and explaining the importance and consequences of their actions throughout the project.

Entitled 'Role of the ECC supervisor' the programme consists of eight sessions. These include an interactive case study that guides users through a scenario where they are challenged to make decisions on a number of problems. The final session comprises a short assessment that verifies participants' knowledge and ensures they can apply what they have learnt in practice.

Making an effective contribution

After successful completion of the programme, participants will have the confidence to make an effective contribution as the supervisor of an ECC project, understanding the key clauses, challenges and solutions involved in the role.

The online format of the training course ensures it is readily accessible from workstations or mobile devices, and can be taken at any time that suits over a six-month period. There are also pause, skip and reset options, so it can be tailored to the learning speed and preferences of the individual.

The programme cost is £85 plus VAT.

For further information and online bookings visit necontract.com/roleofeccsupervisor.

NEC golf

MARIANA TASHEVA NEC MARKETING

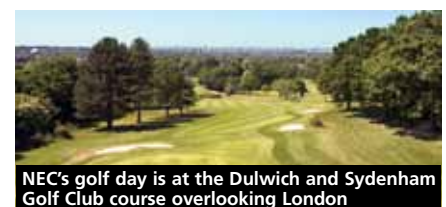
NEC is inviting golf enthusiasts to dust off their clubs and take part in our first ever golf competition on 1 July 2015.

We have secured exclusive use of the members-only Dulwich and Sydenham Golf Club in south-east London, which boasts spectacular panoramic views over the capital.

After a day spent among mature oaks on the slopes of Sydenham Hill, participants will enjoy a drinks reception and barbeque dinner, where we will also be awarding prizes.

The price is £425 per team of four people. There are only 12 more team spaces left so we recommend you register as early as possible to secure your place.

For further information visit necontract.com/golf15



NEC's golf day is at the Dulwich and Sydenham Golf Club course overlooking London

ECC procuring major water main in New Zealand

DAVID MOORE WATERCARE

Watercare, which provides water and wastewater services to around 1.5 million people in the Auckland region of North Island, New Zealand, is using NEC to procure the first stage of a major water main for the city.

The company commissioned the Hunua 4 water main project as part of its long-term supply strategy to cater for the region's future growth, including improving water supplies to the southern suburb of Manakau and providing system redundancy.

It involves constructing a 28 km pipeline between Watercare's existing reservoirs at Redoubt Road in Manakau Heights and Khyber Pass Road in the city centre. Stage 1 extends from Manakau to the inner suburb of Epsom and comprises over 22 km of 1.6–1.9 m diameter pipeline.

ECC option A

Watercare awarded the NZ\$120 million (£59 million) NEC3 Engineering and Construction Contract (ECC) option A (priced contract with activity schedule) for stage 1 to a joint venture of contractors Fulton Hogan and John Holland.

It is being constructed predominately by open-cut methods through variable ground conditions,

ranging from soft peats through to hard basalts. There is also a tunnelled section under motorway SH1 and pipe bridges over motorway SH20 and several streams.

Work started in May 2012 and is due for completion in June 2016. By the end of 2014, over 14 km of 1.9 m diameter pipeline had been installed, with 7.5 km already commissioned and in service.

Co-located project team

To help foster 'spirit of mutual trust and cooperation' between the parties, Watercare, the joint venture contractors and the consultants CH2M Beca and GHD are co-located in a single project office.

The success of the NEC has been the way it encourages a proactive approach between the parties to overcome problems faced during construction – such as stakeholder issues, contaminated land, unknown utilities and traffic.

Through weekly meetings and collaborative working practices, all issues have been effectively monitored and managed through the NEC compensation-event process. The approach has resulted in a very strong and positive working relationship developing between all of the parties.

To assist in administering the project, Watercare is using a web-based contract change management application from NEC licenced content partner Conject.



▲ The NEC-procured first stage of the Hunua 4 water main is being constructed predominately in open-cut methods

TSC trialled for plant maintenance in Hong Kong

SIMON FULLALOVE EDITOR

The Hong Kong government's Drainage Services Department (DSD) is trialling the NEC3 Term Service Contract (TSC) for maintaining its extensive portfolio of plant buildings and specialist infrastructure.

DSD is responsible for managing and maintaining over 350 water and waste water treatment plants, pumping stations, flood storage schemes, tunnels and other special facilities.

In December 2012 it let a HK\$160 million (£12

million), four-year NEC3 Term Service Contract (TSC) option A (priced contract with price list) for building and infrastructure maintenance and minor works.

As TSC was new to DSD and its established maintenance contractors, DSD invited all interested and eligible contractors to attend an open forum to enable them to be better prepared for tender preparation and submission.

Partnering workshops

The contract was awarded to Shun Yuen Construction Company Limited, immediately after which DSD organised a three-day workshop for both the contractor's and DSD's staff to allow them to learn the more technical aspects of NEC and to inject momentum into the partnering behaviour through a 'learn-and-fun' environment.

As soon as work started, a one-day partnering workshop was also organised to establish partnering goals and to promote a cultural change in mindset for collaborative risk management in project delivery.

Mott MacDonald Hong Kong Limited has been engaged as an NEC advisor. The firm facilitates a partnering review committee co-chaired by the contractor's director and the DSD chief engineer to oversee the partnering development throughout the contract.

Senior-level involvement

To help develop a collaboration culture, the senior management of both DSD and the contractor attend the monthly progress meetings. It signifies the commitment of the contracting parties to this new form of collaborative working.

To date the maintenance programme is working well and the trial is proving to be a success.



Partnering workshops for DSD and contractor's staff have helped both parties adapt to collaborative working

Weather services for NEC construction projects



JOHN FARAGHER MET OFFICE

Weather can impact all stages of NEC construction projects.

During the planning phase, NEC project managers need to understand what weather conditions are expected on site as well as any ways in which the likely future weather and climate will influence the construction programme.

During the construction phase, recorded weather information compared against statistical measures can assist in assessing NEC3 Engineering and Construction Contract compensation events (see issue 70). Project managers also need to anticipate how imminent weather events might impact on day-to-day worker safety and comfort, equipment hire costs and progress.

Weather warning service

Construction site weather forecasting services are intended to provide contractors with relevant information about how weather may impact the build. They allow contractors to make critical decisions and reschedule their on-site activities accordingly, resulting in both time and money savings.

Strict health and safety regulations have to be met on all construction sites and acting on forecast alerts can also to help ensure the safety of site personnel. If weather conditions reach a critical threshold then operations need to stop. This of course applies not only to worker comfort and safety levels but also to equipment operation thresholds.

As well as providing monthly 1-in-10 year values to NEC users, the Met Office offers a bespoke weather warning service. Using relevant

contractor-supplied criteria, the service can provide timely critical information to project managers to inform their on-site activities.

Tower crane forecast

The drive to complete projects as quickly as possible means that year-round working has become the industry norm, with site activities continuing throughout autumn and winter. As such UK construction sites can be exposed to dangerously high winds, especially relevant to workers operating at height and where tower cranes are in use.

The Met Office can also offer NEC users a tower crane forecast service specifically designed to aid decisions on hiring tower cranes and other expensive plant susceptible to high winds. The site-specific, threshold-based service provides mean and gust wind speeds as well as direction at specific heights for up to 5 days.

The hire of tower cranes or extra staff can then be timed to avoid expected adverse weather conditions such as high winds, gales and sub-zero temperatures. Advance knowledge of such weather conditions also allows the right level of staff to be engaged or for existing staff to be deployed in other areas.

Weather planning tool

In addition, a task-based weather information tool has been developed. Called 'Weather Windows', it enables NEC users to plan tasks effectively and efficiently up to 15 days ahead. It can help identify windows of opportunity and timetable specific site tasks with confidence. The



▲ The Met Office Weather Windows tool uses a traffic-light system to identify the optimum time for defined site tasks over the next 14 days

tool can also help to reduce the frequency of weather-related compensation events on NEC projects and keep progress on schedule.

Users can set the weather parameters and thresholds tailored to their specific build. For example, for a heavy lifting task the thresholds might be set as wind below 9 m/s (18 knots) and visibility greater than 50 m. The system then displays the windows of opportunity over the next 14 days to carry out the defined tasks.

The product has a simple red, amber, green colour-coding system, so users can quickly and easily identify the optimum time to complete a task. It also provides users with an alert to ensure they remain up to date with the latest weather developments.

For further information please call +44 1392 885680, email construction@metoffice.gov.uk or visit www.metoffice.gov.uk/construction/project_delivery.

Data protection and NEC



SHY JACKSON PINSENT MASON'S

Since 2000, the collection and use of all personal data in the UK has been regulated by the Data Protection Act 1998, supplemented by secondary legislation. The act promotes 'data minimisation', which means limiting the amount of personal data processed to that which is strictly necessary. This is implemented through the eight data-protection principles set out in schedule 1 to the act.

Under the act, obligations are imposed on the party who decides the purposes for which, and the manner in which, any personal data is processed (the 'data controller'). The party that manages that information on behalf of the data controller (the 'data processor') has no obligations under the act.

The UK Information Commissioner's Office is responsible for enforcing the provisions of the act and it has the power to issue notices to aid compliance as well as inspection powers and the

power to issue fines. The breach of certain rules can also give rise to criminal offences.

It is now 15 years since the Data Protection Act was introduced, so all NEC users should have the necessary awareness and procedures in place to ensure they do not breach it. Often, however, not enough consideration is given to information provided by one party to another during the course of an NEC project.

Personal data in NEC contracts

The NEC3 Engineering and Construction Contract (ECC) is based on actual cost reporting and open-book accounting. This can be seen in the detailed provisions of the schedule of cost components, which determine defined cost under ECC options C, D and E.

Within section 1 (people) of the schedule of cost components there are references to wages,

salaries, bonuses and incentives but also to matters such as medical examinations, passports and visas and medical aid. Furthermore, the first six cost components also apply to employees' dependants. Such information may be required to support any costs due as part of the defined cost and it may be provided, for example, to the employer or project manager for their review.

Such data will generally be considered personal data and will therefore be subject to the Data Protection Act. In addition, data with regard to medical examinations could fall within the scope of 'sensitive personal data' (as defined in the act), which includes data relating to an individual's health. Such sensitive data is subject to additional stricter protective measures under the act.

Options for legal compliance

In practice it is common to add a Z clause to a standard NEC contract that reiterates the obligations under the Data Protection Act. This generally identifies the parties which will be regarded as the data controller and data processor as well as adding further obligations, often with regard to audit and inspection rights. These are separate from confidentiality obligations.

It is also worth noting that such Z clauses will

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Updating programmes for the effects of ECC compensation events



ALAN WILLIAMSON SCHOFIELD LOTHIAN

The procedure in the NEC3 Engineering and Construction Contract (ECC) for submission and agreement of revised programmes relies upon the project manager and contractor carrying out their respective roles within the timescales set out in core clause 3. There are no express sanctions or deeming provisions should either party fail in their respective obligations.

However, the situation is in direct contrast to the compensation event mechanism, for which core clause 6 has deeming provisions for

- bringing into existence a compensation event
- instructing a quotation to be submitted
- accepting a quotation should the project manager not respond within the various timescales laid down
- implementing the compensation event.

It could be argued that the lack of deeming provisions in the mechanism for revising the accepted programme leaves uncertainty and the potential for disputes between the parties.

Relevant contractual provisions

The relevant ECC clauses are clause 31.3, which sets out the reasons for the project manager not accepting a programme, and clause 32 'Revising the Programme', both provisions of which are considered in turn below.

Clause 31.3 does not expressly state what happens next when the project manager does not accept a revised programme submitted by the contractor. The guidance notes therefore have to be referred to for further assistance in this matter, with the caveat that the introduction to this document clearly states, 'Neither these guidance notes nor the flow charts published with the contract are contract documents, nor are they part of the ECC. They should not be used for legal interpretation of the meaning of the ECC.'

Bearing in mind the caveat, the guidance notes must, nonetheless, represent the intent of the contract. With regard to clause 31.3, the guidance notes state, 'This clause lists reasons why a Project Manager may decide not to accept a programme or a revised programme. Any failure by a Project Manager to accept a programme for reasons other than those noted is a compensation event (Clause 60.1(9)). The Project Manager is required to respond within two weeks, but if the reply is non-acceptance the Contractor is required to re-submit with the period for reply.'

Non-acceptance of programmes

In my own experience the most common reason for a project manager to not accept a revised programme is that it contains unimplemented compensation events that delay the completion date, (those not yet agreed or disputed in some way by the project manager). Although this is not an express reason stated for the project manager not to accept a

programme, this must be considered as a further valid reason not to do so, as clause 32.1 states that the contractor may only show on each revised programme, 'the effects of implemented compensation events'. This breach could then be said to link back to the second bullet point of clause 31.3, in that if the contractor displayed unimplemented compensation events upon the updated programme, it would not be showing information that the contract required.

If the project manager decides to not accept a revised programme on the above grounds, the relevant guidance note makes clear that the contractor should re-submit the programme within the period for reply. This leaves the contractor with two options. Firstly, it could re-submit the programme after taking out the time impacts of the unimplemented and un-agreed compensation events, showing an earlier date for completion than it can achieve.

The contractor's second option would be to maintain its position and decline to remove unimplemented compensation event time impacts from its revised programme. Clearly the project manager would again reject the contractor's submission and no revised accepted programme would be in place going forward. This would clearly not be of benefit to the project as a whole, as the accepted programme is an important document for administering the contract and for all parties to monitor actual progress compared to planned progress.

A third option could be for the contractor to remove the time impacts of the un-agreed compensation events from the programme, but to qualify this action with a suitable form of words. This would appear to be a risky strategy, however, as such a programme would not represent reality and the contract makes no provision for such qualified programme submissions.

Effect on related compensation events

A similar conundrum must also arise in relation to compensation events that are in the process of being agreed or implemented, at the point in time when the contractor is required to submit a revised programme to the project manager for acceptance. Taking an interval period of 4 weeks for the submission of revised programmes, as is typically set out in the contract data, this time period is significantly less than the contractual time period between notification of a compensation event and its final implementation.

Thus, at each juncture a revised programme is required to be submitted in accordance with the contract data, there would be several compensation events in the process of being agreed or implemented on a typical-size construction project. Some of these compensation events could well have caused a time impact upon the programme, but the express conditions of contract would not permit the contractor to show these impacts upon the latest revised programme.

Turning to any failures by the project

manager to accept a programme for reasons other than those stated within clause 31.3, such failure is stated within the guidance notes to be a compensation event pursuant to clause 60.1(9). It is also noted that further grounds for a compensation event could arise pursuant to clause 60.1(6) through the project manager failing to reply to a communication from the contractor within the period required by the contract. It is difficult to envisage, however, what the assessments of such compensation events could be other than, perhaps, the acceptance of the revised programme in question.

Clearly, it would be highly unlikely for the project manager to accept or implement such compensation events if they had only arisen in the first instance through his or her own failures under clause 31.3. Thus the only recourse for the contractor in such circumstances to secure a revised accepted programme would be to refer the matter to adjudication. Such a recourse would not seem practical every time such a scenario arose, again leaving the project without a current accepted programme.

Lack of deeming provisions

As mentioned in the opening paragraph, no deeming provisions have been introduced to ECC core clause 3 on time as have been within core clause 6 on compensation events. If such a deeming provision had been included within clause 31.3, stating that if the project manager did not respond to a revised programme submitted by the contractor within the requisite 2 weeks then such failure would be treated as acceptance of the programme, such wording would overcome many of the potential difficulties set out above.

A possible reason for not including such deeming provisions, however, could be the very fact that they do exist within the compensation event mechanism. Thus all of the time effects of compensation events implemented due to the project manager's tardiness can in fact be included within revised programmes, pursuant to clause 32.1. This, however, could still leave some uncertainty as to the treatment of notified but yet-to-be-implemented compensation events within revised programmes that cause any delay to the completion date.

Conclusion

In conclusion, it could be argued that there is a degree of uncertainty in the ECC procedure for updating the accepted programme to reflect the effects of compensation events in a number of scenarios. The contractor cannot risk submitting an unrealistic programme showing a date for completion it cannot meet, merely to gain acceptance of the programme from the project manager.

Furthermore, should the project manager fail to respond to a submitted programme within the requisite 2 weeks, the contractor's only recourse would appear to be notification of a compensation event and subsequent adjudication if the event cannot be agreed. In either scenario the project would be in the undesirable position of having no current accepted programme to assist in monitoring the project.

In my own experience, parties to an ECC often find they cannot agree a revised programme quite early on in the construction period for one or more of the scenarios outlined above, and inevitably a dispute ensues regarding the correct revised date for completion. Such an outcome is clearly not the intent of the ECC programming mechanisms. I believe the situation could be considerably mitigated if deeming provisions could be included in clause 3 in a future revision of ECC. ○

FAQs



ROBERT GERRARD
NEC USERS' GROUP
SECRETARY

This is a selection of recent questions to the NEC Users' Group helpline and answers given. In all cases it is assumed there are no amendments that materially affect the standard NEC3 contract referred to.

Validity of flow charts

Question

Have the NEC flow charts been subject to any judicial scrutiny, or are they simply the interpretation of the publisher?

Answer

To the best of our knowledge there has been no judicial scrutiny of the flow charts. The flow charts may indeed offer some assistance in the intended logic and flow of the processes in the contract. It should be noted they are not something the publisher demands, they are simply a part of the drafting process where the intended logic is tested in a number of ways, one of which is via the flow charts.

Revisiting compensation events

Question

We are using the NEC3 Engineering and Construction Contract (ECC) main option A (priced contract with activity schedule). We appreciate that compensation events are assessed individually. As we work through the contract though, if there is a later compensation event which affects an earlier compensation event, can the earlier one be revisited?

Answer

It is difficult to see how one compensation event can affect an earlier one. It may affect what you now have to do because of the earlier one, but that will be taken into account when assessing the new one.

Let me give you an example. You issue a new drawing which adds some more work. That will be a compensation event that is assessed based upon what effect it has upon defined cost. So you end up with a new price for the works, by adding the value of that compensation event for this new work to the activity schedule. You decide that the

work is valued at, say, £5000, so you add a new item headed compensation event 3 with a value of £5000.

You later issue a drawing changing that new work. Again, this will be a compensation event that will be assessed based upon its effect on the defined cost to carry out the work. So you take the previously added work as your baseline and find out how much more or less the defined cost will be because of the new changes. That will be the value of the second compensation event, and again the activity schedule will be changed.

Let us say that the changes will result in a reduction of £1000 in the defined cost. So, your entry in the activity schedule may have a new item headed compensation event 7 with a value of -£1000.

Payments to suppliers after termination

Question

Can you confirm that NEC3 contracts do not include any clause which, following termination, enables compensation to be paid to suppliers based upon projected supplier profits to contract end?

Answer

In the ECC, the amount the contractor gets paid upon termination depends upon who terminates and for what reason. The same principles apply to all of the contracts (with the exception of the NEC3 Framework Contract and NEC3 Adjudicator's Contract) although the details may differ.

The termination table in ECC clause 90.2 links who terminates and for what reason with the amount the contractor will be paid. The reasons are listed and numbered R1 to R21 in ECC clause 91 and the amounts to be paid are defined and numbered A1 to A4 in clause 93.2.

In certain circumstances, such as when the employer is clearly at fault, or has terminated for a reason not in the contract, the amount A4 is paid to the contractor, the definition of which is set out in clause 93.2. The definition depends upon what main option the contract is under but, in simple terms, it allows the contractor to recover their direct fee percentage (set out in the contract data part two) applied to the difference between the value of the contract when it was entered into and the value of the work upon termination.

So, ECC does, in certain circumstances, allow for an additional payment in compensation for the cutting short of the contract, but it clearly defines what those circumstances are and how the amount is calculated.

Dealing with disallowed cost

Question

We are using ECC option C (target contract with activity schedule). The contractor has chosen to subcontract some of the work, but neither the project manager nor the contractor followed the

procedures set out in clause 26 regarding approval and agreement of proposed subcontractors and terms.

The contractor is now submitting defined cost as part of the assessment process, in which it appears the contractor has appointed its subcontractors on a mixture of lumps sums and re-measurable contracts. This is causing issues as the contractor's target cost is deemed to allow for all works stated in the works information but it is passing on a re-measured account from its subcontractors, which is increasing the defined costs even though the works information has not changed.

Is the contractor due this defined cost of its subcontractors, in accordance with the terms of their orders, or can the additional cost be disallowed due to the contractor not following the procedures set out in clause 26?

Answer

The simple answer to your question is no. This cannot be disallowed because it is not listed as a disallowed cost in ECC clause 11.2(25). If you look at the third bullet of 11.2(25) (first sub-bullet) you will see that it only covers acceptance or procurement procedures in the works information, not the contract conditions themselves. That was quite deliberate so as to exclude clause 26.

In any event clause 26 has only a very limited effect. It is not a case of 'approval and agreement' as you suggest. The only reason listed in the contract for rejection does not cover the problems you list and therefore if the project manager had not accepted the subcontractor it would have been a compensation event anyway, and the employer would have been in a worse position. Having said that the contractor and project manager should have followed the processes in clause 26 and this matter could have been discussed at the time. However, that is as much the project manager's fault as it is the contractor's.

But there is also another thing you should consider. It is not always possible to match main and subcontract options as many subcontractors simply do not have the facilities to take off and price lump-sum works and insist upon re-measurement. If the contractor had insisted upon lump sums, then they were likely to be much higher than the re-measured price it got, and the employer would have been in the same or worse position than it is now. Therefore it is not simply a case of saying that the defined cost has increased, because it may well not have done in the long run.

Contractors will generally take great care to appoint subcontractors on the best terms they can. They are willing to accept a 're-measured' lower price for certain trades in the knowledge that there is a risk that it will go up somewhat but will still end up cheaper than the 'lump sum' price they would have had to accept otherwise. That is where their commercial expertise lies. In ECC option C, the employer shares the risk if this strategy goes wrong and the reward if it goes right. ○

>> Continued from page 5

sometimes state that, even in respect of data collected by a contractor, it is the employer that will be the data controller and therefore subject to the obligations under the act.

An alternative approach is the use of anonymised categories of employees to avoid providing personal data. This is not however expressly provided for within standard NEC contracts, and they may require further amendments as it may not be possible to make an allowance for the full list of cost components.

Yet another approach is to obtain consent from employees in advance to the processing of their personal data. However, this is not always practical and can give rise to questions as to whether there is genuine consent, particularly in relation to sensitive personal data.

The Data Protection Act does recognise that commercial transactions need to take place and that it is not always practical to obtain consent in advance. As such, schedule 2 paragraph 6 of the act allows data controllers (and recipients of the data) to process personal data if doing so is necessary for their legitimate interests. The

legitimate interests must, however, be balanced against the rights of the data subjects.

Conclusion

In conclusion, parties to NEC contracts need to take account of their obligations under the UK Data Protection Act in relation to personal data. This will often require the addition of a suitable Z clause but any such clause should be drafted to ensure compliance with the act to avoid the risk of enforcement action and the financial and reputational damage that such action can entail. ○

ICE Register of Accredited NEC3 ECC Project Managers

The following individuals are listed on the Institution of Civil Engineers (ICE) Register of Accredited NEC3 ECC Project Managers at nec3eccprojectmanagers.ice.org.uk. The register has been set up to recognise the technical and practical skills required of a project manager using the NEC3 Engineering and Construction Contract (ECC). The individuals on the register have completed the ECC Project Manager Accreditation programme and have successfully passed the stage 1 and stage 2 assessments.

Ada Albert
Shazad Akram
Daniel Barnett
Kevin Bell
Christopher Benford
Jason Bibby
Kenneth Birch
Anthony Brady
Oliver Brewster
Stuart Brown
Robert Corbyn
Alan Doherty
Alex Dovey
Barry Drewett
Ian Drummond
Jeff Dutton
Neil Farmery
Nicola Gemmill
Paul Gibbs
Paul Gorge
Andrew Griffiths
Philip Harrison
Ian Hedley
Nicholas Hilder

Kerry Hutchings
Joel Jackson
Patrick Johnston
Mark Kitchingman
Tim Knee-Robinson
Edward Lax
Kerry Martin
Helen Matheson
Mark McLinden
Allen Murray
Teresa O'Sullivan
Rhodri Owen
Tina Parmar
Richard Patterson
George Reid
Jeremy Robinson
Paul Romanko
Ian Shaw
Andrew Stephenson
Barry Trebes
Peter Wilkinson
Geralt Williams
Simone Wyatt
Martin Young

NEC Users' Group members

A warm welcome is extended to all new members, highlighted in bold in the membership category lists below.

PLATINUM

Amey Inter Urban
AVE Plc
Dounreay Site Restoration Ltd
High Speed Two (HS2)
Highways Agency
Lafarge Tarmac
Pinsent Masons LLP
RVE Innogy UK Ltd
Sellafield Ltd
Southend Borough Council
Transport for London
West Yorkshire Councils

GOLD

AECOM Professional Services LLP
Aggregate Industries UK
AMEC Power & Process UK & Europe
Amey Local Government
Areva S.A
Atkins UK
Babcock International Group
Balfour Beatty Major Civil Engineering
Balfour Beatty Regional
Balfour Beatty Utility Solutions
BAM Nuttall Ltd
Bechtel UK
Belfast City Council
Bolton Metropolitan Borough Council
Bracknell Forest Borough Council
Bristol City Council
Carillion Plc
CCS Group PLC
Central Procurement Directorate
City of Edinburgh Council
CH2M Hill
Colas Ltd
Construction Efficiency & Reform Group, Cabinet Office
Costain Limited
Cumbria County Council
Defence Infrastructure Organisation
Department of Health ProCare21
Doncaster Metropolitan Borough Council
Driving Standards Agency
Dundee City Council
EDF Energy Nuclear Generation Limited
Eurovia Management Limited
Farrans (Construction) Ltd
Fife Council
Foreign and Commonwealth Office
Galliford Try
Government Procurement Services
Government Property Unit
Guys and St Thomas NHS Trust
Hanson Contracting
Horizon Nuclear Power Services Ltd
Hugh LS McConnell Ltd
Interseve (Facilities Management) Ltd
Interseve Construction Ltd
J Murphy & Sons Ltd
Jackson Civil Engineering Group Ltd
Kier Infrastructure and Overseas Ltd
Lagan Construction Ltd
Laing O'Rourke
Land Engineering (Scotland) Limited
Lend Lease Consulting (EMEA) Limited
Lincolnshire County Council
LLW Repository Ltd
London Legacy Development Corporation
Mace Limited (London)

Ministry of Justice
Moreton Hayward Limited
Morag Sirdall Group Plc
National Grid Plc
Natural History Museum
Network Rail
NG Bailey
Norfolk County Council
Northumbrian Water Limited
NWSSP Specialist Estates Services
Osborne Clarke
Ove Arup & Partners Ltd
Perth & Kinross Council
Plasticon UK Ltd
QinetiQ Ltd
Rider Levett Bucknall
RPS Consulting Engineers
Siemens
Skanska Construction Group
SLR Consulting Ltd
South London & Maudsley NHS Trust
Springfields Fuels Ltd
SSE Plc
States of Jersey
Suffolk County Council
Surrey County Council
The British Museum
The Capita Group PLC
The Coal Authority
UK Power Networks Ltd
United Utilities Water Ltd
University Of Cambridge
Vinci Construction UK Limited
Volker Wesels UK Ltd
VPI Immingham
Warwickshire County Council
WSP UK Ltd
YGC

SILVER

Aberdeenshire Council
Alan Auld Group Ltd
Anglian Water Services Ltd
Aquila Nuclear Engineering Ltd
Balfour Beatty
BAM Construct UK Ltd
Bezzant Ltd
Borough of Poole
Boskalis Westminster Ltd
Bournemouth Borough Council
Brink Management & Advies
Cambridge City Council
Canal and River Trust
Connect Plus (M25) Ltd
Currie & Brown
DarkStar Surveying Ltd
Deane Public Works Ltd
Dee Valley Water Plc
Defence Science & Technology Laboratory
DLA Piper UK LLP
Dyer & Butler Ltd
East Ayrshire Council
East Dunbartonshire Council
East Riding of Yorkshire Council
East Sussex County Council
Eastern Solent Coastal Partnership
Environment Agency
Eskom
Faithful & Gould
Flagship Housing
Franklin & Andrews
FTI Consulting
Gleeds
Gve Commercial Solutions
Health Facilities Scotland
Heathrow Airport Holdings Ltd
Imtech Traffic & Infra UK Ltd
IPP Contracting Ltd
J N Bentley Ltd
Jacobs UK Ltd

John Sisk & Son Ltd
John X Birchall
Knowles Ltd
Liverpool Mutual Homes
London Borough Of Hillingdon
London Borough Of Merton
Management Process Systems Ltd
Mott MacDonald Limited
Mouchel Group Plc
MWH UK Ltd
Natural Resources Wales
NBS Services
Nexus Rail
North Ayrshire Council
Northern Ireland Housing Executive
Northumberland County Council
PD Group Management
Pick Everard
Playe & Partners
Physman Cables & Systems Ltd
R J McLeod (Contractors) Ltd
Ramboll UK
Renfrewshire Council
Resolute Project Services Ltd
Rugby Borough Council
Salvation Army
Scottish Water
South East Water Ltd
South Lanarkshire Council
South West Water Ltd
Thames Tideway Tunnel
The Orange Partnership
The Royal Parks
The Sheffield College
Thorntask Limited
Turner & Townsend
URS Infrastructure & Environment UK Limited
Veale Wasbrough Vizards LLP
Volker Rail Ltd
Walker Thompson (Contractors) Ltd
Wardell Armstrong LLP
Wheeler Group Consultancy
Worcestershire County Council
Yorkshire Water Services Ltd

BRONZE

4Projects
Allied Infrastructure Management Ltd
AMEC Foster Wheeler
Environment & Infrastructure
Anthony Collins Solicitors LLP
Ardent Consulting Ltd
Argyll and Bute Council
Beattie Communications
Bennetts Associates
Bilfinger Industrial Services UK Ltd
Black & Veatch Ltd
Blake Newport Associates
Bowdon Consulting Limited
Brodies LLP
C&W Consulting
Caledonian Maritime Assets Limited (CMAL)
Castle Hayes Pursey LLP
Chandler KBS
Client Managers Toolkit
Conject
Construction Dispute Resolution
Crummock (Scotland) Limited
Clor Construction Consultants Limited
Diamond Light Source Ltd
DKB Project Controls Ltd
Docté Consulting
Doig & Co
Doig & Smith Ltd
Dumfries & Galloway Council
East Lothian Council
Engineering Contract Strategies
Flaggate LLP
FP McCann Ltd
Gearing Consulting Services Ltd
George Corderoy & Co
GHA Livignun Ltd
Glasgow City Council

H A Goddard & Sons
Hannah Reed & Associates Ltd
Hanover Housing Association
Harrow Council
HLG Associates Limited
Hydro International (Wastewater) Limited
Ironside Farrar Ltd
J Breheyn Contractors Ltd
JIL Consultancy Ltd
John F Hunt Demolition
Keegan's Ltd
Lancaster City Council
Land & Water Group Ltd
Leicestershire County Council
Lindford Consulting Ltd
MacKenzie Construction Limited
McAdam Design
Met Office
Mon-Arch
Navigator Consulting (Europe) Ltd
Newcastle City Council
North Yorkshire County Council
Nottinghamshire County Council
Novi Projects
Nuclear Decommissioning Authority
Nuvia Limited
Orkney Islands Council
Oxand Limited
Pat Munro (Airlines) Ltd
Patrons Consulting Ltd
pdConsult
Pellings LLP
Peter Brett Associates
Peters Cousins & Associates
Portsmouth City Council
Procom-IM Ltd
Project Engineer Ltd
Pyments Ltd
Qatari Diar
Quest Interiors Ltd
Quigg Golden Ltd
R A Gerrard Ltd
Ramsden Enterprises Ltd
Ramskill Martin
Ridge & Partners
Royal Haskoning DHV Ltd
Royal Holloway, University of London
SeWoods Limited
Sheffield City Council
Shropshire County Council
Solomons Europe Ltd
South Ayrshire Council
Specialist Engineering Contractor's Group
Stages Property Services
Synergie Training
Sypro Management Ltd
T & N Gilmartin
Taylor Wessing LLP
Telford & Wrekin Council
The Big Red Apple Company Ltd
The Clarkson Alliance
The Highland Council
Trowers & Hamlin
VHE Construction Plc
Viridor Waste Management Ltd
Walker Sime Ltd
Wallace Stone LLP
WDR & RT Taggart
Wei Power & Industrial
Wiltshire County Council

ASIA-PACIFIC

Advisian Limited
Airport Authority Hong Kong
APM (HK)
Bera Consultants Ltd
BK Surco Ltd
Chinese University of Hong Kong
Chun Wo Construction & Engineering Co Ltd
Civil Engineering & Development Department HKSAR Government
CLP Power Hong Kong Ltd
Construction Industry Council

Continental Engineering Corporation
Development Bureau, the Government of the Hong Kong Special Administrative Region
Drainage Services Department
Driver Trett (Hong Kong) Ltd
EC Harris (Hong Kong) Ltd
Fugro (Hong Kong) Ltd
Gamon Construction Ltd
Highways Department HKSARG
Hogan Lovells (Hong Kong)
Hsin Chong Construction Group Ltd
Institution of Civil Engineers (Hong Kong)
Kum Shing (KF) Construction Co Ltd
Langdon & Seah Hong Kong Limited
Leighton Contractors (Asia) Ltd
Mace Limited (Hong Kong)
Maka Consulting Company Ltd
Mayer Brown JSM
Meinhardt Infrastructure & Environment Ltd
Mott MacDonald Hong Kong Ltd
MTR Corporation
Navigator Consulting (Hong Kong) Ltd
Paul Y. Construction Company, Limited
Pinsent Masons
Shun Yuen Construction Co. Ltd
Sum Kee Construction Ltd
The Contracts Group Ltd
The Hong Kong Construction Association Ltd
Turner & Townsend (HK)
URS Hong Kong Ltd
VSL Intrafor (HK)

AUSTRALASIA

Arrow Strategy Ltd
Christchurch City Council
City Care Limited
Coffey Projects Ltd
Donald Cant Watts Corke
Dow Airen
Evans & Peck Pty Ltd
InfraSol Group Pty Ltd
Meridian Energy Limited
PBA Ltd
RCS Oceania
Watercare Services Limited

REST OF WORLD

Aquatera Consultants Ltd
Cementation Canada Inc.
Contract Communicator
Fulton Hogan Limited
Nuclear Consultants International
Simpson Grierson
Thurlow Associates
Thurlow Services (New Zealand) Ltd
VGI Consulting Inc.
Yared Yahuu

ACADEMIA

Anglia Ruskin University
Glasgow Caledonian University
Leeds Metropolitan University
Loughborough University
Oxford Brookes University
University of Birmingham
University of Central Lancashire
University of Greenwich
University of Northumbria
University of Portsmouth
University of Salford
University Of The West Of England
University Of Ulster
University Of Wolverhampton

nec DIARY

04 March	Managing risk under the ECC	London
19 March	Introduction to the ECC	South West
19 March	ECC programming workshop	London
23 March	ECC project manager accreditation	London
26 March	Practical application of the ECC	London
08 April	Preparing and managing the ECC	Scotland
20 April	NEC Users' Group annual seminar	London
22 April	ECC project managers' workshop	West Midlands
23 April	Introduction to the ECC	London
28 April	ECC compensation events workshop	London
29 April	'NEC in action' workshop	London
04 May	ECC project manager accreditation	Hong Kong
07 May	TSC pre- and post-contract workshop	West Midlands
11 May	ECC project manager accreditation	Hong Kong
12 May	Preparing and managing the ECC	South West
14 May	Introduction to the SC	West Midlands

All articles in this newsletter are the opinions of the authors and do not necessarily reflect the views of the NEC. Only NEC's wholly-owned products and services are endorsed by NEC, so users need to satisfy themselves that any other products and services referred to are suitable for their needs.

For ease of reading, all NEC contract terms are set in lower-case, non-italic type and their meanings (unless stated otherwise) are intended to be as defined and/or identified in the relevant NEC3 contract.

Constructive contributions to the newsletter are always welcomed and should be emailed to the editor Simon Fullalove at simon@fullalove.com (telephone +44 20 8744 2028).

Current and past issues of the newsletter are also available in the MyNEC area of the NEC website at neccontract.com.

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