

FOCUS ON THE NEC

The NEC3 Engineering and Construction Contract has recently been recognised as 'setting the benchmark' for construction contracts by a UK government select committee and is increasingly being used as the contract of choice in the industry. First published in 1993, the 3rd, and current, edition was published in 2005. It is a "different" type of contract that shows marked differences in its procedures and mechanisms to the more recognisable forms such as the JCT. Too often we see that its procedures are NOT followed which leads to confusion, uncertainty and complex disputes.

One of the most critical procedures to be aware of is the **Compensation Event Mechanism** - The NEC3 contains a comprehensive set of provisions for dealing with "compensation events". An important aspect of this provision is that it deals with both time and money, unlike the JCT forms which separate the issues.

Amongst the actions required by the project manager and contractor for dealing with a compensation event are that:

- ◇ the project manager notifies the contractor of a compensation event and instructs it to submit quotations (clause 61.1);
- ◇ the contractor notifies the project manager of a compensation event (clause 61.3) and the project manager instructs the submission of quotations (clause 61.4);
- ◇ the contractor submits quotations for compensation events and the project manager accepts the quotation or gives notice that he will be making his own assessment (clause 62.3);
- ◇ the project manager makes his own assessment of compensation events in certain specified circumstances (clause 64) and notifies the contractor of his assessment (clause 64.3).

The procedures are designed to avoid the problem of unresolved compensation events and introduce measures which are clearly intended to encourage the parties to operate the contractual provisions. They do this by imposing a sanction for non-compliance i.e. to discourage the practice of late notification of compensation events by the contractor (clause 61.3). Clause 61.3 has given rise to a great deal of legal debate as to whether or not it constitutes a condition precedent to the contractor's entitlement. It seems however, that the intention of the clause is clear and a contractor that chooses to disregard the time limit for notification will, at best, create hurdles that will have to be overcome and will, at worst, lose its entitlement to time and money. This can be avoided if the parties are fully aware of the procedures within the contract.

NEC Contracts and Programming

Good planning and programming is always important on any construction project and is even more so on NEC Contracts when good project management with a detailed programme are pivotal to NEC procedures and the construction process.

The requirements for an NEC compliant programme are rigorous when compared with other forms of contract and are set out in detail at clause 31. The programme must be revised regularly and this is set out in clause 32.

The importance of the programme is reinforced by way of clause 50.3 which says:

*If no programme is identified in the Contract Data, one quarter of the Price for Work Done to Date is retained in assessments of the amount due until the **Contractor** has submitted a first programme to the **Project Manager** for acceptance showing the information which this contract requires.*

It is essential that contractors and subcontractors are aware, understand and are able to implement the requirements for programming in NEC contracts.

NEC Contracts - Training

We have found over the last two to three years that there has been an increased demand for training on NEC Contracts. Most contractors and subcontractors need 'nuts and bolts' training so that they understand how to price, manage and deal with change. Much of the terminology used in NEC Contracts is very different to that used in, for example, the JCT suite of contracts. This means that we have to question the practices and procedures which we have followed for many years. The requirements for such things as compensation events, programming and the use of the schedules of cost components are often misunderstood. If you require help with bottom up training dealing with the practicalities of the NEC Contracts then please get in touch with either Gary Martin on 01773 599 299 or Nic Kidd on 0114 230 1329.

The New Construction Act

The New Construction Act (The Local Democracy, Economic Development and Construction Act 2009) will now come into force on the 1 October 2011. This will involve changes to the Adjudication and Payment Provisions that we have all become familiar with since 1998 with the onset of The Housing Grants Construction and Regeneration Act 1996 (the Construction Act). If you are to ensure that you are paid your proper entitlement under a construction contract, or if you are to avoid paying what is not properly due, then the procedures of this new Act must be followed. To help contractors and subcontractors understand what is required **ramskill martin** will be looking at the practical application of this Act at its **10th Annual Seminar** which is to be held at **Pride Park, Derby** on the **10 November 2011**. We will also be issuing guidance on the main provisions of the Act and the amendments to JCT and NEC Contracts.

NEC : THE CONTRACT OPTIONS

NEC3 Option A

- ◇ **Activity schedule**
 - ◇ Lump sum contract
 - ◇ Project well defined at tender
 - ◇ Activities defined and priced by Contractor
 - ◇ Payments on completion of defined activities
 - ◇ Milestone payments by grouping activities
 - ◇ Suitable for design and build

NEC3 Option B

- ◇ **Bill of quantities**
 - ◇ Measure and value contract
 - ◇ Project well defined at tender but change likely
 - ◇ Standard method of measurement used
 - ◇ Contractor prices items at tender stage
 - ◇ Contractor paid for quantity of work completed

NEC3 Option C

- ◇ **Target cost**
 - ◇ Target cost set by activity schedule
 - ◇ Contractor may recover defined cost and fee
 - ◇ Project adequately defined to establish target
 - ◇ Target moves with changes
 - ◇ Contractor is paid or pays a share of difference between costs and final target

NEC3 Option D

- ◇ **Target cost**
 - ◇ Target cost set by bill of quantities
 - ◇ Contractor may recover defined cost and fee
 - ◇ Project adequately defined to establish target
 - ◇ Target moves with changes
 - ◇ Contractor is paid or pays a share of difference between costs and final target

NEC3 Option E

- ◇ **Cost reimbursable contract**
 - ◇ Contractor reimbursed the cost he incurs
 - ◇ Contractor tenders on fee percentage
 - ◇ Contractor has no financial risk (except fee percentage)
 - ◇ Used on emergency works or where scope undefined

NEC3 Option F

- ◇ **Management Contract**
 - ◇ Contractor generally organises work only
 - ◇ Works (or package) subcontractors
 - ◇ Contractor tenders fee percentage
 - ◇ Works subcontractors paid on prime cost
 - ◇ Complex projects with many works subcontractors
 - ◇ Contractor has no financial risk (except fee percentage)
 - ◇ Management of interfaces crucial