Australasia Users' Group hosts successful inaugural conference

GARRY MILLER AUSTRALASIA USERS' GROUP SECRETARY

The NEC Australasia Users' Group held its inaugural regional conference in Christchurch, New Zealand in November 2011. Coinciding with the launch of the NEC3 Y(NZ) clauses, the event was a great success, with more than 80 existing and potential users attending from all over the region.

Delegates were particularly complimentary about the quality of the presentations and diversity of speakers, which provided perspectives on using the NEC3 contracts from clients, contractors, project managers and advisors.

Key themes

Some key themes emerged on the day, as follows.

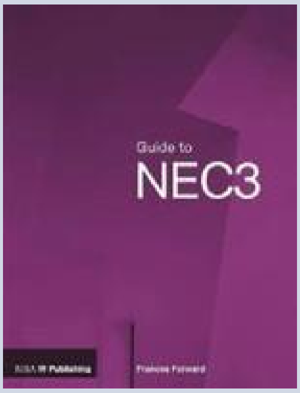
- Flexibility – the NEC3 suite of contracts, with different payment options and secondary options such as X19, provides the flexibility to deliver outcomes.
- Invest up front – implementing NEC3 contracts initially requires some investment in training staff and setting up systems and so on, but is well worth it.
- Collaboration – the collaborative way of working delivers better outcomes than transactional contracting. NEC is about running the project rather than operating the contract – it is not a silver bullet, but it helps. It is down to people at the end of the day.
- Trust – New Zealand has the benefit of a high trust work ethic and NEC fits well with the local way of doing business.
- Stimulus for change – there is an appetite for collaborative ways of doing business, NEC is a signal by client that they are serious on collaborating with the supply chain.

The date and venue for the 2012 conference will be announced in due course.

For further information *please call +64 21 337 280 or email usersgroup@neccontract.com*

RIBA publishes first NEC3 guide for architects

SIMON FULLALOVE EDITOR



The rapid expansion of NEC3 contracts in the building sector has prompted the Royal Institution of British Architects to publish its first NEC3 guide for architects. The 112 page *Guide to NEC3* by Frances Forward (2011) cost £39.95 and is being widely promoted to the profession.

According to RIBA, NEC usage 'has grown steadily in all sectors of the construction industry over its 20-year lifetime, and a working knowledge of it is becoming essential for all architects, allied professionals, their clients and contractors involved in building projects.'

Key role for architects

Sir Michael Latham says in his foreword to the guide, 'I hope that architects see the benefits that the NEC system can bring to a project as well as appreciating the key role an architect plays in this.'

Explaining the background to the book, Frances Forward says in her introduction that, 'The RIBA Plan of Work and architectural education at part 3 level acknowledge that architects give procurement advice; in practice, a lack of consistent knowledge about the NEC among the architectural profession could put architects at risk of giving incomplete procurement advice. The key aim of this book is to make an adequate level of knowledge readily available to all architects. The book is intended to make NEC3 more accessible to many and at many levels.'

More new NEC books in 2012

Two further books aimed at supporting NEC users will be launched this year. *NEC3: A Users' Guide* by Jon Broome provides essential guidance for successful operation of an NEC3 Engineering and Construction Contract, while *NEC Managing Reality (2nd edition)* is a comprehensive update of this bestselling five-part guide.

All three books will be available via the NEC website at **www.neccontract.com**.

Reference

Forward F (2011) Guide to NEC3, RIBA Publishing, London.

Get with the programme

GLENN HIDE
GMH PLANNING

It never ceases to amaze me how under-utilised and under-valued the use of a construction programme is on many (or dare I say most) construction projects.

The benefits of an up-to-date programme reflecting where the contractor is and how it plans to complete the remaining works is fundamental to the team working efficiently and effectively to achieving success on any project.

NEC3 contracts have long recognised this and translated good programming into contractual requirements rather than just hoping or assuming the parties will manage the process. Certainly the drafters of section 3 of the NEC3 Engineering and Construction Contract (ECC) had a pretty good idea about what good-practice planning is. The contact steers its parties – particularly the contractor – down the path of what they should be doing with regard to programming.

It is possible however for contractors to do the bare minimum to 'keep the employer off their backs', which is pretty sad given there is nothing in ECC clause 31.2 contractors should not want to be doing to benefit them practically as well as protecting their commercial interests on the project.

Commercial importance of planning

The commercial function on an NEC3 project cannot operate without the planning function. Indeed, half the reasons for project managers to make their own assessments of compensation event quotations are to do with the programme.

If the latest programme issued for acceptance has not been accepted, project managers can make their own assessment. If the remaining works have been affected by a compensation event, then the quotation should include a programme demonstrating what has changed compared to the last accepted programme. Without this programme as part of the quote, project managers can make their own assessment.

In my experience in both cases, project managers' assessments are never higher than what the contractors believed, so there is a good reason for contractors to try to avoid the need for this.

The 'beating heart' of NEC3 contracts

The construction industry and particularly contractors are generally still pretty poor at planning. In times when competition is fierce, margins tight and risk liability increased, there is all the more reason that we should be focusing on the programme as the key contract document.

At a NEC Users' Group workshop last year a lawyer referred to the programme as, 'the beating heart of the contract', which is a great analogy. If your heart stops, you die. If the parties stop managing the programme on an NEC3 project, your contract effectively dies, and the adjudicators will be queuing up to take on your case. In my experience, in disputes resolved by adjudicators no-one is ever fully happy with the result and everyone spends a lot of time and money along the way to argue their best case. It would seem much more logical and efficient

Retrospective assessment of compensation events under NEC3

ALAN WILLIAMSON SCHOFIELD LOTHIAN

A conundrum that has often arisen on NEC3 Engineering and Construction Contract (ECC) projects in which I have been involved concerns where the dividing line falls between the 'actual Defined Cost' of the work already done and the 'forecast Defined Cost' of the work not yet done, particularly when the compensation event is assessed retrospectively.

Let us consider the following typical scenario.

Example scenario

A contractor submits a quotation as instructed by the project manager pursuant to ECC clause 61.1, giving its forecast of the defined cost of the work not yet done concerning the laying of an additional pipeline not included within the works information. The project manager rejects the quotation as being far too high, primarily due to the level of risk allowance included by the contractor for possible unknown or adverse ground conditions. The project manager then makes his own assessment under clause 64.1.

The contractor disputes the project manager's assessment and refers the dispute to adjudication. By the time an adjudicator is appointed and the adjudication is underway, the additional pipeline has been completed. On an assessment of the cost of the work already done, the 'actual Defined Cost' is considerably less than the contractor's quotation and also less even than the project manager's assessment.

In reaching a decision, can the adjudicator take into account the 'actual Defined Cost' of the work already done, or must he put himself in the shoes of the project manager and contractor seeking to assess 'forecast Defined Cost' at the time quotations were sought and considered?

Assumptions made

In considering this example scenario, let us make the following assumptions.

- Both the contractor's and project manager's assessments were carried out prior to the works commencing.
- Option W2 is incorporated into the contract which permits the adjudicator to, 'review and revise any action or inaction of the Project Manager or Supervisor related to the dispute and alter a quotation which has been treated as having been accepted.'
- The project manager did not state any assumptions about the event in his instruction to the contractor to submit quotations. He had the option to do so pursuant to clause 61.6 if he considered that the effects of the compensation event were too uncertain to be forecast reasonably.

Compensation event mechanism

The relevant provision under 'Assessing compensation events' is to be found at ECC clause 63.1. Here the wording in the third edition has been changed to read:

> 'The changes to the Prices are assessed as the effect of the compensation event upon
>
> - the actual Defined Cost of the work already done,
> - the forecast Defined Cost of the work not yet done and
> - the resulting Fee.
>
> The date when the Project Manager instructed or should have instructed the Contractor to submit quotations divides the work already done from the work not yet done.'

Apart from the change in terminology of 'Actual Cost' becoming 'Defined Cost', the principle change from the second edition is the addition of the final paragraph. This now makes clear the dividing line between 'forecast Defined Cost' and 'actual Defined Cost', by stating it is the date upon which the project manager instructed or should have instructed the contractor to submit quotations for the compensation event.

Establishing the dividing line

In the example scenario described here it is relatively easy to establish the dividing line, as the project manager instructed the contractor to submit quotations before the works commenced.

However, if an event had commenced before either party became aware of it constituting a compensation event, then the assessment could have become somewhat more subjective. Here an argument could develop as to when the contractor should have become aware that the event was a compensation event, to establish the dividing line between 'forecast Defined Cost' and 'actual Defined Cost'.

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to put this effort in during the project where its practical and commercial benefits will be so much greater.

Managing the programme provides a clear and contractual mechanism for agreeing change between the parties as it happens and not waiting for the traditional end of project 'sport', where both parties spend time, effort and resources in trying to agree the entitlement to any extensions of time and the resultant final account figure.

Key considerations to manage planning

The key considerations you should make when thinking about how you are going to manage planning on your project are as follows.

Promotion

Establish planning as a key business objective within your organisation and promote it down the line accordingly, otherwise it is very unlikely to happen. Set benchmarks on your projects to measure performance against this aspect.

Resource

Provide sufficient resource and experience to produce and manage the programme. It does not necessarily have to be a dedicated planner if someone within the team has the capacity, knowledge and experience to manage the programme. However, on most projects those people have lots of other responsibilities to do as well, and the danger is that the programme input could be the one that suffers unless you do have a dedicated (part-time or full-time) planner.

Tender stage

It all starts before you even win a project. At tender stage the same level of effort and understanding has to be put in as at the construction phase, as you are normally committing to meet a fixed date and do it for a fixed cost. The programme is key in establishing that completion date and hence associated cost, and if it proves to be wrong then that could mean financial disaster either for that project or the business as a whole. A well thought out tender programme serves two purposes – it proves that you have understood the job, and also that you can generate a well-thought-out detailed programme in the required planning software.

Updating and rescheduling regularly

If you are using the programme as a real management tool then updating the programme should be on an ongoing basis, preferably almost daily but as an absolute minimum weekly. Unless you have a very simple project with little change, then having someone update once a month will not allow you to be managing that project efficiently or contractually. It will be more difficult to justify the effect of change, and hence you will lose out financially.

Detail

The programme should be as detailed as it needs to be to effectively manage the works. Long-duration activities on a programme will not allow you to manage either the works or in particular change to those works. Short-term programmes should simply be a filter of the main programme. All programmes should be resource loaded, otherwise how can you be sure that it is achievable?

Training

Consider training to your project team so that everyone on the project understands contractually how the programme should be managed under an ECC project and what they should be feeding into and out of the programme. Part of the issue with planning is that because most members of the team will not have access or understand the specific planning software that is used to generate the programme, they tend to ignore it.

Conclusions

We need to get to a position on a project where everyone is living and breathing the programme – and reaping the collective benefits that this will bring.

Remember, it is the beating heart of any NEC3 contract.

For further information *please contact the author at glenn@gmhplanning.co.uk*