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THE NEW ENGINEERING CONTRACT FOURTH EDITION (NEC4): SOME INTERESTING DEVELOPMENTS

The NEC suite of contracts have been updated and a fourth edition of these contracts was published at the end of June this year. As a result, there are changes to the Engineering and Construction Contract (the ECC), and the other contract forms that make up this suite. In addition, the NEC has published a Term Services Subcontract (TSS), a Professional Services Subcontract (PSS) and a Design Build Operate (DBO) Contract. An Alliance contract is in pre-release consultation form and will, we understand, be released early next year.

Whilst the changes to the NEC 3 are considered evolutionary rather than revolutionary, there are some interesting changes which are intended to make the mechanisms embodied in this agreement more effective and aligned to best industry practices. This article considers two of the, what may be considered, more significant changes effected to the ECC contract.

Deemed Acceptance of the Programme

It appears that the NEC drafting committee has identified the ECC's "Achilles Heel" (one of them at least!) and has attempted to remedy it with the inclusion of a mechanism (borrowed from the NEC3 Compensation Event procedure) to ensure that programmes submitted are accepted by the Project Manager.

The Time Clause now provides:

31.3 *"Within two weeks of the Contractor submitting a programme for acceptance, the Project Manager notifies the Contractor of the acceptance of the programme or the reasons for not accepting it..."*

If the Project Manager does not notify acceptance or non-acceptance within the time allowed, the Contractor may notify the Project Manager of that failure. If the failure continues for a further one week after the Contractor's notification, it is treated as acceptance by the Project Manager of the programme."

There was no such mechanism under the NEC3. Notwithstanding the fact that the NEC3 addressed the project manager's non-response to compensation events (notices, assessments and quotations), the change management mechanisms, which are the cornerstone of the NEC suite, was compromised if the Project Manager didn't respond to programmes submitted

under clause 31.3. The change to the NEC4 should assist the change management processes under the contract significantly and introduce a greater degree of certainty which we consider to be a positive development.

The change also settles another problem often encountered when the Project Manager's silence on the programme submitted by the contractor under NEC 3 clause 31. Under the NEC 3 the argument has often been put forward that the Project Manager's silence was 'tacit' acceptance of the programme. The reliance on 'tacit' terms to resolve contractual disputes is an acceptable legal remedy. However, clause 13.1 of the NEC 3 provided that each instruction, certificate, submission, proposal, record, acceptance, notification, reply and other communication which this contract requires is communicated in a form which can be read, copied and recorded. As such, under clause 31.3 read with clause 13.1, the Project Manager's silence cannot be construed as a tacit acceptance.

Despite this perceived "change for the better", the amendment may have unintended consequences where programmes do not satisfy the requirements of clause 31.2 and 32.1. An inadequate programme if treated as accepted, may fundamentally undermine the Contractor's right to claim Compensation Events.

Of the 21 Compensation Events now listed in clause 60.1 (another change to the NEC 3 that we will discuss in a future article), five refer to the accepted programme. The impact of Compensation Events is measured against the accepted programme. If this programme omits certain information and/or reflects plans unrealistically, this could limit the Parties' respective rights with regards to Compensation Events.

The overriding message however remains that Project Manager's need to be proactive and engage with Contractor's timeously with regards to the approval of programmes.

Dispute Resolution

Under the dispute resolution clause, Option W1 has been changed. Option W1 now includes a provision in terms of which the referring party is obliged to first refer the dispute to Senior Representatives, (these are identified at tender stage in the Contract data) for discussion with a view of settling the matter. If the Senior Representatives fail to agree and settle the difference as it then exists, the dispute is referred to Adjudication. Disputes not resolved by the adjudicator are referred in the normal way to the Tribunal. This process is an ad hoc process and is only initiated as and when a dispute arises in

accordance with a Dispute Reference Table.

The introduction of the a new option W3 under the NEC 4 now provides for the use of a Dispute Avoidance Board ("*the board*") as an alternative to ad hoc adjudication. The board is made up of one or three members as identified by the Contract Data or nominated by a DAB nomination body. This new option obliges parties to refer all "*potential disputes*" to the board prior to referring the matter, if remaining unresolved, to a Tribunal. The board is a standing DAB as they are required to attend to site at regular intervals from the start of the project under W3.1(1)(5).

Option W1(1) states:

(1) *A dispute arising under or in connection with the contract is referred to the Senior Representatives in accordance with the Dispute Reference Table. If the dispute is not resolved by the Senior Representatives, it is referred to and decided by the Adjudicator.*

The dispute reference table requires disputes to be referred to the Senior Representatives within 4 weeks of the dispute. A party wishing to refer a dispute has to give notice to the other party of the nature of the dispute and within 1 week of such notice the parties are required to exchange statements of case (limited to 10 A4 pages).

The Senior Representatives have 3 weeks within which to deal with the dispute. At the end of this period they are required to produce a list of agreed issues and put such list into effect. Only issues not agreed can be referred to Adjudication.

Notice of Adjudication must be given within 2 weeks of the production of the list of agreed issues and the referral must be submitted within 1 week of such notice.

These amendments to the dispute resolution procedure could be problematic. There is now an element of uncertainty in the procedure, which given the time bars (see W1.3(2)), may lead to a uncertainty regarding the correct interpretation of the procedure. The uncertainty with regards to the procedure in W1 was an issue in the NEC3 which has not, in our opinion, been adequately addressed in the NEC4.

Furthermore, the agreed list of issues is similar to the list required to be drawn up by the contractor and engineer in clause 10.1.3 in the GCC2010. This requirement in the GCC2010 is very rarely complied with – parties who are in (or at least very close to) dispute are most likely to agree to everything, or nothing at all. Are we facing a similar situation with the NEC4 agreed list of issues?

Another issue is that the requirement to involve the Senior Representatives of the Parties now adds a further layer of administrative burden to the most administration intensive contract or all the standard forms.

The new optional W3 provides for the establishment and use of a standing DAB. Use of the board is a prerequisite to help the parties resolve any '*potential disputes*' and must be approached prior to the dispute being referred to the tribunal. What meaning is attributed to a '*potential dispute*' as opposed to an ordinary '*dispute*' is not provided. Should a difference in meaning be attributed at all? Does the use of the words '*potential disputes*' leave room for a party to raise the question of jurisdiction and the board's authority to hear a matter when a '*potential dispute*' has crystalized and become a '*dispute*'? Questions of interpretation and jurisdiction almost certainly remove the focus from resolving the dispute and turn it into a legal matter. Unfortunately, if there are grounds to raise these points, the consequences will be contrary to the purposes of the changes, and NEC's general underlying ethos.

Option W3 states that:

W3.1 (1) The Dispute Avoidance Board consists of one or three members as identified in the Contract Data. If the Contract Data states that the number of members is three, the third member is jointly chosen by the Parties.

W3.12 (1) The Dispute Avoidance Board assists the Parties in resolving potential disputes before they become disputes.

W3 can be used in Southern Africa. The board is established at the outset and meets regularly and does not decide any dispute referred to it by the parties. The reasoning is for the members to become familiar with the progress of the project prior to the occurrence of a dispute. Once a matter is referred to the board, it provides a recommendation to avoid a dispute. In other words, the board simply offers guidance. If the recommendation is not accepted, the dissatisfied party may refer the matter to the tribunal. The benefit of this new option is to encourage and support the parties in resolving any potential dispute consensually. Experience in North America has shown that these dispute avoidance boards can be highly effective – especially where the members of such board are well respected individuals.

This amendment intends to provide a flexible, inexpensive, practical and speedy resolution, as members of the board are familiar with the facts leading to the dispute, whereas tribunal proceedings are time consuming and rigid as the adjudicator or arbitrator attempts to familiarise themselves with the facts at the start of proceedings. Under W3, the board replaces the adjudication process. Dissatisfaction with its decisions, means referral is directly to arbitration.

On careful consideration of W3 there also appears to be a 'gap' in its procedure. Clause W3.2(1) and (5) state:

W3.2 (1) The Dispute Avoidance Board assists the Parties in resolving potential disputes before they become disputes; and

W3.2 (5) The Dispute Avoidance Board, inter alia;

- reviews all potential disputes and helps the Parties to settle them without the need for the dispute to be formally referred,*
- unless the Parties have resolved the potential dispute by the end of the Site visit, provide a recommend for resolving it.*

In short, the DAB deals with '*potential disputes*' and makes '*recommendations*' to avoid rather than resolve the disputes. This idea of the DAB '*recommending to avoid*' appears to undermine the process of adjudication we are accustomed to, which it replaces. It is unclear if the DAB's recommendation is binding. The ordinary use of the word '*recommend*' suggests it's not. If so, there is a question of whether W3 serve its intended purpose. We accept that an adjudicator's award is an interim award enforceable by a court, except in limited circumstances, until overturned by arbitration proceedings. The available cases on the topic pertain to the enforcement of a valid/binding adjudicator's award and not one which purports to be. Therefore, is it plausible that a court, despite its discretion, may refuse to uphold an award which is uncertain or lacking finality. It seems the '*recommendation*' by the DAB lacks the necessary finality. If so, the obvious question then is, whether the decision will be enforceable? Such a scenario may be fertile ground for protracted and expensive arbitration proceedings resembling a bygone era which it was hoped was long over.

Only time will tell if the opportunity to discuss disputes through senior party representatives or the board, backed with the possibility of a referral directly to arbitration, will yield the intended benefits.