Time for a dose of realism?

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MUCH as I welcome the ethos in the industry to reduce conflict and adversarialism through such means as partnering arrangements and the drafting of new forms of contract, it still seems to me that many of the industry's ills will only be changed once those involved in the construction process genuinely enter into new thinking. Despite the obvious good intentions of many parties, practical experience has shown that such good intentions are frequently not carried over in practice, leaving it plain to see why disputes and confrontation continue to be rife.

The use of the Engineering and Construction Contract (ECC) was widely touted as providing a remedy to many of the problems that had blighted other forms of contract. It made a contractual requirement for "mutual trust and co-operation" and was prompted as a tool to promote good management. Indeed the latest version, NEC3, has been adopted by the Olympic Delivery Authority (ODA) to procure all fixed assets and infrastructure for the 2012 Olympic Games, a fact welcomed by NEC Users' Group chairman Rudi Klein who stated: "*This announcement by the ODA has sent out a clear message that adversarial relationships and contracts aimed at risk dumping will not be tolerated.*"[1]

However, the good work of the ECC drafting committee may well be undone through the attitudes of those using or advising on the use of the contract. At one recent Olympic update seminar, for example, a colleague of mine asked an ODA representative, whether the NEC3 would be subject to bespoke amendments. Despite the purported enthusiasm for the contract, no such response could be given. Given that much of the impact of the changes to the third edition stem from the time sanctions placed on the parties to actually do what they are obliged to do or else certain events are deemed to have occurred, the whole benefit of these changes will be lost should an advisor decide that signing up to such terms represents a step too far.

Indeed, it could be argued that the need for the amendments introduced into NEC3 have stemmed from the lack of mutual trust and cooperation adopted by the parties when using NEC2 (ECC). The ECC was never meant to be a prescriptive contract, but rather a framework around which the parties could work together to develop workable, practical solutions. Although use of the ECC has brought many successes, there have also been some significant failures which reflect that it is generally not the contract that is at fault but the attitude of those managing the works.

Take the assessment of compensation events, for example, this can throw up a whole myriad of problems. If two parties' representatives have 'agreed' the value of a compensation event (CE), is it fair that the client should refuse to pay it on the basis of a subsequent review carried out by their newly appointed advisors if they do not consider there is any entitlement to the CE in the first place? How can such actions be in a spirit of mutual trust and cooperation? Notwithstanding, it happens.

Although the ECC seeks to agree events as they go along, no doubt you'll have seen instances where both parties work in such a way that this objective is untenable. Take the contractor, for example, why do they persist in submitting budget or on account figures when pricing CEs? Surely this works against them on all fronts? The idea is for them to price the CE in advance, making appropriate allowances for risk and other uncertainties. This is where they have the opportunity to maximise their commercial position through pricing risk at an early stage. If they fail to do this and put in budget figures, this delays agreement on the CE until later in the contract. Should the contract already be in difficulty, this makes such agreement extremely difficult as the client will be vigorously defending their budget.

Taking this example from the client's perspective, in circumstances when the contractor actually does submit their assessment prospectively and with risk priced in, how often does a client's QS strike out any risk allowance entirely and only agree to pay the direct cost of the event, leaving such matters as disruption unaccounted for? From experience, both clients and contractors still have difficulty getting out of the 'wait and see' mentality of agreeing matters retrospectively for fear of paying over the odds. If parties are to adopt a risk sharing approach, then this is what they must do in practice. However clients often seem reticent to take such an approach when their budget is under pressure. Old attitudes therefore remain; avoid paying until the final cost is known and then see if a deal can be done to suit the budget. By this time, the contactor has almost certainly already suffered cash flow difficulties and financing costs and is probably forced into making a less than advantageous settlement at the end. Their alternative is to take the matter to formal proceedings… and along with that goes the Utopian idea that adversarial relationships will not be tolerated; this, in spite of the use of a genuinely proactive form of contract.

Further evidence for the requirement for a shift in attitude came to light recently when my company was required to review some contract documents provided to a contractor to sign up to. It was not an ECC but this only serves to demonstrate that it is primarily attitudes, not the contract, that are at fault. On submission, the contractor advised that "some bespoke amendments" had been made by the client's representatives. Two examples included:

1) **Taking away the contractor's right of reasonable objection to the issue of an instruction**
   What practical purpose does this serve? Does it not start suspicions rumbling that the client might be considering issuing some very unreasonable instructions? Although this is unlikely, the mere fact of making such a change is contrary to a general principle of mutual trust and co-operation.

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2) **Qualifying the relevant event for terrorism to the extent that the event was reasonably foreseeable**
If the combined resources of the world's secret service agencies couldn't predict 9/11 or 7/7 what joy would a medium sized contractor have foreseeing such events?

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Upon investigating the representative concerned, we found that he was from their 'non-contentious' department! Perhaps he was, but presumably he was paving the way for further work to be carried out by their contentious department. The equitable allocation of risk should be on the basis that it is borne by the party best able to manage it. In the above examples, a medium size contractor was in contract with an extremely large financial organisation. Why should such a client feel the need to further distort the balance of risk allocation when the standard forms have already been negotiated by representatives from trade organisations from all sides of the construction process? Such attitudes do little to instil a belief that parties are genuinely committed to the non-adversarial approach.

Where does all this lead? Much as I welcome the ECC, and particularly its third edition, the pace of change will be slow until mindsets alter. I am not saying that this is not happening already; in a lot of instances it is. However it is easy to be successful when a client or contractor has deep pockets. When the budget is tight or exceeded altogether, what happens to mutual trust and cooperation then?

If a client has made failures on a project but needs to obtain further money from its own funding organisation, is it likely to blame itself for those failures? I doubt it. The typical scenario will be to justify those legitimate changes as far as possible and then to seek to deny the contractor recompense by playing the contractual game.

If parties really do want to start improving the performance of the industry, they should start by taking responsibility for their own actions. If you are at fault, don't penalise someone else; deal with it and move on. True mutual trust and cooperation is not something that can be written into a contract. Either the parties intend to act in such a way or they don't. One of the best ways of showing a positive intent would be for clients and contractors to avoid making bespoke changes to a contract. However, in many instances, that is still a step too far.

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[1] Fullalove S, 'NEC chosen for London 2012' *NEC Newsletter*, no. 36, July 2006