There's no point to NECs unless all parties are prepared to share risk

NECs are designed to cut out claims, but they only work if contractors and clients agree to show some trust

PROJECTS
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Any form of contract will be more successful if the parties work together

By now most people in construction can point out the main differences between the NEC and traditional contracts.

They typically highlight that it is a relatively new contract where variations are agreed in advance. Also high on the hit-list of factors is that there is no such thing as claims.

What, however, continues to surprise me is that if most of us are aware of these principal differences, why then is one of its most important principles, the agreement in advance of changes – compensation events – frequently ignored in practice?

Clause 60 of NEC 3 identifies those matters that give rise to change and provide the contractor with a contractual entitlement to compensation.

Clause 62 details the procedure for submitting quotations for compensation events, while clauses 63 and 64 provide the mechanisms for their assessment by the contractor and the project manager respectively.

Quotations and their assessment should include for proposed changes to the prices and delay to the completion date.

> "The NEC will not work effectively until all parties are prepared to take risks"

Traditional v NEC

So what is the real purpose of all these changes? The easy answer is to look back at the type of problems that often affect traditional contracts.

Typically the variation account has not been agreed some six months after the works have finished, no final completion date has been agreed, extension of time requests have been ignored and claims submissions have not been paid due to a purported lack of substantiation.

In summary the job is a mess: the contractor blames the contract administrator for his lack of cash flow, the contract administrator blames the contractor for not providing adequate information, whilst the employer is left carrying the can.

To circumvent these problems, the NEC decided to change things. The idea was simple; work together in a spirit of mutual trust and co-operation to forecast matters in advance so that all parties can be certain at any point what the outturn cost and completion date will be.

All parties would have to take some risk; contractors would have to forecast their likely costs and their effect on completion, whilst the project manager would have to advise of any assumptions upon which the change is to be made and accept that the contractor has to price for risk and uncertainty and make his assessment prospectively.

With the event agreed in advance, everyone would be happy; the contractor can manage his cash flow and programme the remainder of the works whilst the employer knows when he will get his project and how much it will cost.

What goes wrong?

So why then have I seen so many NEC projects blighted by the same old problems that beset traditional construction contracts?

Why is it that despite most people appreciating the perceived benefits of the NEC these get ignored in practice?

Project managers continue to adopt a wait-and-see approach before committing to an agreement. The element of risk sharing goes out of the window as the project manager thinks that he will get a better deal by waiting until the works are complete and establishing the contractor's total cost and overall delay before looking to strike a deal.

This approach can badly affect a contractor's cash flow and simply perpetuates the existing problems. Unfortunately some project managers seem to measure the success of financial administration by how much they can starve a contractor of cash.

If you are not prepared to utilise a risk sharing approach, then why choose the NEC in the first place? To create certainty in an uncertain industry like construction requires risks to be taken and it is employers and their advisors who must take the lead in administering the contract as it is intended.

Professional advisors are perfectly capable of forecasting risk – they can do it successfully during the pre-tender stage.

So do they baulk at using the same approach post contract? The NEC will not work effectively until all parties are prepared to take risks, rather than just paying lip service to it. Buying into the risk-sharing process and working together in mutual trust and co-operation can work, as it allows parties to make more informed decisions based on a background of certainty.

Any form of contract can be successful if the parties are willing to work together.

However if you are going to use the NEC, don't do it unless you are prepared to enter into the principles that underpin it.

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