Nearly everything clear

Ian Pease reviews the latest addition to the NEC family of standard form contracts

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Given an official imprimatur by the 1994 Latham report, the New Engineering Contract (NEC) has subsequently gone from strength to strength. The latest addition to the third generation of contracts, the NEC3, is the Supply Contract, launched on 11 February. It is to be used:

> ... for local and international procurement of high-value goods and related services including design.

This extends the NEC3's scope beyond procurement of works and services, to the purchase and supply of equipment and materials. The contract should be taken seriously by all involved in procurement, yet the doubters still remain.

Divide and rule

What is it about the NEC (now more properly called the New Engineering and Construction Contract) family of contracts that so divides opinion? To answer that you have to appreciate its history (as well as that of its putative rivals). The NEC is certainly the new boy on the block: the ink was only just dry when it got Latham's endorsement, whereas the traditional forms have been around for decades (the Joint Contracts Tribunal was established in 1931 and The Institution of Civil Engineers dates back still further, to 1818) and their contracts are of similar longevity. Their age, it is often said, has imbued these contract forms with certain advantages (and disadvantages) that the NEC lacks.

Chief among the advantages of the NEC's alternatives is that they have been through the legal mill and have been ruled on by the judiciary at all levels. Hence (it is said) we know what they mean, whereas a newly written clause cannot make that boast. The problem with this argument is that there are a remarkable number of crucial and much-used clauses in the older contracts where this isn't the case. For example, *Henry Boot Construction v Alstom Combined Cycles* [2000] (in which I acted for Henry Boot Construction in the Court of Appeal) concerned the meaning of the ICE's clause 52(1)(b) – the valuation of variations. Before then, that clause, one of the most used in the contract, was without judicial precedent.

Further, this alleged advantage comes with a commensurate disadvantage: these contracts have no incentive to undergo root and branch change. Changes are made only if it is deemed that case law has highlighted a deficiency in a particular clause, or if there has been a radical change in the law (for example, to institute adjudication and payment regimes arising from the Construction Act 1996). Therefore, there is a built-in conservatism about these contracts, and it is never mooted that their entire direction and tenor may be wrong. Nor is it suggested, in that oft-used phrase these days, that they may not be 'fit for purpose'.

Here is the nub: there is a chasm between the purposes of the traditional contracts and the NEC. Why enter into either contract in the first place? For the traditional, the answer is that, should things go wrong, it will regulate the rights of the parties, allowing them, if needs be, to seek redress through the courts and to obtain damages or performance of the bargain entered into. That, arguably, is not what the NEC is all about (or at least not its

primary goal). Perhaps that is what so appealed to Sir Michael Latham, charged as he was in 1993 with *Constructing the Team*. Construction was going down the wrong path and part of the problem was with its contracts. These were too adversarial, too focused on what happens when things go wrong, and insufficiently concerned with avoiding that scenario in the first place. They did not promote teamwork.

The first thing we do, let's kill all the lawyers

The discontent is manifest among those who are happiest with the concept of enforcing rights: the lawyers. I must count myself as similarly disconcerted when I read the NEC forms: what do they mean? The principal problem is the use of present tense verbs. That goes for the new Supply Contract as much as for the NEC3 itself – they are part of the same family.

For example, the supply contract says, at clause 23:

> The supplier co-operates with others in obtaining and providing information which they need in connection with the goods and services.

Does this mean that the supplier shall co-operate or merely that it can co-operate if it wants to? Is it an obligation, and, if so, what is the penalty if it is not followed? This use of the present tense is endemic and very disconcerting. One way a lawyer would attempt to resolve the ambiguity and construe the clause could be to look for where 'must' or 'will' obligations occur elsewhere in the contract, and to conclude that in other cases (such as clause 23) the parties must have contemplated such an obligation before discounting it.

So do we find such instances? The telling clause is number 10, which states:

> The purchaser, the supplier and the supply manager *shall act* as stated in this contract and in a spirit of mutual trust and co-operation. [Emphasis added.]

This appears to be an overarching contractual obligation and hence, on one analysis, all the present tense verbs in the contract (such as clause 23) are converted into such obligations. However, this has yet to be tested and, until it is, there will be no certainty.

The project toolkit

All this misses the point about the NEC family of contracts, which is that, when weighing the pros and cons of their use, one has to consider in their favour the emphasis on process and procedure. This comes from their origin. They were drawn up as a code for the proper and efficient running of a modern-day project. As stated in the preamble to the contract:

> Its use stimulates good management of the relationship between the two parties to the contract.

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All the forms (including the supply contract) arrive with a coterie of attendant documents, including guidance notes and flow charts, to assist the parties in their use. That's right: they are effectively a how-to guide for the running of a project, not a document that is hauled out of the bottom drawer (to be given to the lawyers) when things go wrong.

So on their own terms, how do they shape up? The key word with the NEC family of contracts is flexibility. The scheme of 'core', 'option' and 'other' clauses is maintained in the supply contract. Further, there is a light version of the Supply Contract (called the NEC3 Supply Short Contract), which can be used when 'sophisticated management techniques' are not necessary. Hence, the component nature of the set-up does live up to the goal to be 'used in a wide variety of commercial situations', and the idea of selecting from a range of pre-drafted clauses is less likely to lead to inconsistent and unworkable drafting than the long list of bespoke-drafted clauses that one commonly sees.

I wrote in 'Laying the foundations' (*PLJ*238; 19 October 2009 pp5-7) about the Chartered Institute of Building's initiative to highlight the programme as a critical part of ensuring a project's success. I drew the contrast between traditional forms and the NEC. The Supply Contract, being part of the family, contains similar provisions. Again the emphasis on the programme, missing from more traditional forms, should be wholeheartedly endorsed.

Calling a spade a spade

The problem with the traditional forms is that they tend to gain length with each new iteration. Problems are often addressed by adding to the wording rather than scrapping the whole thing and starting again. The NEC's aim is:

> ... a clear and simple document – using language and a structure which are straightforward and easily understood.

Anyone reading the clauses would have to admit that the English is clear and easy to understand.

The proof of the pudding is in the eating

The bottom line in contractual procurement is whether the contract works. Does it help the parties during the construction phase, and does it allow them to ascertain, allocate and monitor the contractual risks they are taking on? The NEC family, disconcerting though it may be to many lawyers, is certainly better than the older forms of contract as a working document. However, whether it will prove easy to ascertain the contractual risks remains to be seen. Certainly the ultimate arbiter of where those risks reside (the judge or arbitrator) has so far seen the NEC only rarely. But perhaps that says it all. ■

Henry Boot Construction v Alstom Combined Cycles [2000] EWCA Civ 99