THE TROUBLE WITH anything that is given the tag ‘New’ is that it starts to look a little odd when it is twenty years old and still referred to with that prefix. The first edition of the New Engineering Contract (NEC - also referred to as the Engineering and Construction Contract - ECC) was published in 1993, so in purely chronological terms it is hardly ‘new’ at all. However, it was certainly given a new lease of life when this form of contract was given the endorsement of the UK Office of Government Commerce as the form of choice for any government sponsored works, the endorsement is prominently placed within the first few pages of each of the NEC publications. NEC is also more recently the ‘new’ kid-on-the-block in terms of international work as other governments follow suit for public procurement across the globe. Some people will already be NEC old-hands, but with the rapid spread of its usage, if one has not done so already, then within the coming several years getting to grips with managing projects based on the NEC form will be a new experience for many.

From its first edition in 1993 the NEC is now in its third edition (NEC 3) published in 2005. The NEC began life out of a perceived dissatisfaction with the orthodoxy of the Institute of Civil Engineering forms which had been around for the previous fifty years or so. It is not too much to say that it was, and to an extent remains, something of an evangelical movement and, with the growing acceptance of NEC one can hear the declaration of the faithful that, “we were right!” This was almost not the case, the new form when first published had a slow take-up, it was only the intervention of one Sir Michael Latham with his government report on the ills of the UK construction industry[1] that life was breathed into the form with his endorsement of the co-operative and proactive approach to contract relations which its supporters say NEC promotes.

Brevity and clarity
The wording of NEC clauses is very sparse, perhaps rather unkindly it has been described as ‘ladybird’ language. The brevity is aimed at promoting clarity, perhaps a blessed relief from over-wordy contract clauses and multi-levelled decimalised points favoured by some forms. It is however submitted that this brevity, and hence clarity, is more apparent than real. Running to some 154 pages the NEC guidance notes provide help and assistance on what is meant by the various sparsely worded clauses. NEC is at pains to point out that the guidance notes do not form part of the contract, on page 1 of the guidance notes it says:

Neither these guidance notes nor the flow
charts published with the contract are contract documents, nor are they part of the ECC. They should not be used for legal interpretation of the meaning of the ECC.” In practice though, one cannot read an article on the NEC or see a submission, for example, to an adjudicator without liberal reference being made to, and indeed reliance being placed upon, the guidance notes. The eminent commentator Sir Humphrey Lloyd QC [ex judge in the UK Technology and Construction Court] opined on this aspect where he said:

“The guidance notes state very clearly that they are not contract documents; that they are not part of the ECC; and that they should not be used for the legal interpretation of the ECC. This is sensible and proper; although in reality arbitral tribunals and courts will rarely now refuse to look at such notes, if presented with them.”

So, it would seem that despite the NEC’s attempts at brevity and clarity the more lengthy guidance notes have become de facto extensions of the main and option terms. This reliance on the guidance notes may be because the form and its sparse wording are still untested legally, there are almost no reported cases on the NEC. Gone then, is the certainty of decades of jurisprudence which underpins the more ‘traditional’ forms. Some would argue that the lack of case law on the NEC, even after twenty years, is a sign that the clarity of language works and the parties do not need to resort to legal action to have their rights determined, more cynically it is said that no-one wants the risk of being the first guinea-pigs of this completely novel approach.

Project management approach versus contract obligations approach

The aim of the form is to focus less on the parties respective obligations and put project management centre stage. Consequently, commentators on NEC divide into, ‘love it’, ‘hate it’, camps. The two camps are likely to be populated respectively by project managers in favour and lawyers as detractors. I am never a supporter of the view that one should only take the contract out of the drawer once one has a problem. However, that is certainly not the aim of NEC and it is very much designed to be a ‘manual’ of how a project should be run and managed, such tools as ‘early warnings’, Risk Registers and risk reduction meetings are not matters which one will normally find in purely lawyer-drafted forms. That said, the ‘manual’ should also be followed closely in respect of the areas of the form where it does deal with legal obligations. NEC deals in definite timescales after which rights can be lost, there are no ‘soft landings’ with NEC, the ethos is to deal with matters quickly, be they delay or money claims; changes to the works and the like, and then get on with the rest of the project with each side aware of where its risks lie. This is a very laudable aim but the ‘manual’ needs to be followed to the letter to make it work.

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Contracting jack-of-all-trades

From its first versions aimed at replacing re-measurement forms in civil engineering works, principally for the UK industry, the form has grown to an extensive and multi-coloured compendium of contracts, sub-contracts, supply agreements, consultancy agreements, guidance notes and flow-charts. The various parts of the contract are assembled in ‘kit-form’, described in further detail below, so as to build, ‘Aftel-like’, into a contract suited to the particular project. By the inclusion or deletion of a few clauses, the NEC turns into either an employer designed; design and build or cost-plus contract, the inclusion of a couple of more clauses turns NEC into a contract suitable for international projects to rival the FIDIC forms in that arena [be in no doubt that the various contract drafting bodies are rivals in seeking market share]. NEC is said to be suitable for all manner of projects way beyond the original scope of civil engineering including building and process works. The NEC then is a veritable contracting jack-of-all-trades, the only question however is, in aiming to be all things to all people does NEC do any of them well?

Structure

The structure of the contract is something of an alphabet soup, the terms and conditions section comprises a set of core clauses which are applicable irrespective of which of the following Options are selected. To the core clauses various Options are selected, the first is to choose one of the ‘main Options’, these are principally concerned with the basis for the valuation and payment of works undertaken and are listed below:

- **Option A** - Priced contract with activity schedule
- **Option B** - Priced contract with bill of quantities
- **Option C** - Target contract with activity schedule
- **Option D** - Target contract with bill of quantities
- **Option E** - Cost reimbursable contract
- **Option F** - Management contract

At the end of the main Option section, irrespective of which Option, A to F, is selected, a further selection is needed at Clause W1 and W2 on an either-or basis. These options set out the dispute resolution procedures and depend on whether the contract is to be carried out in the UK where they will be subject to the adjudication provisions of the UK Housing Grants Construction and Regeneration Act (HGCRA), or outside the UK where they are not. That said, there would be nothing to stop the parties from other jurisdictions adopting the UK Act by agreement.

Next are added the ‘X Options’, X1 to X20, none of these are mandatory and are in effect ‘bolt-on-goodies’ dealing with such matters as price adjustment, sectional completion and advanced payments. The ‘Y Options’ are again UK specific, but less bolt-on-goodies and more essential if one is to avoid UK statutory default provisions which would otherwise apply. YUKOJ 21 makes the contract compliant with the payment provisions of the HGCRA. So long as YUKOJ 3 is adopted it effectively switches off rights which would otherwise accrue to the third parties under the UK Contracts (Rights Of Third Parties) Act 1996. At the end of the terms and conditions section of the contract comes the troublesome ‘Z Options’. I say troublesome as this is the part of the NEC Contract where the contract draftsman is given something of a free hand to add in bespoke items which are particular to the project. In practice however, and again contrary to the advice given by NEC itself in the guidance notes, they are often used to make changes to the standard clauses noted above, by way of ‘delete and add back’. As noted above the terse drafting style of NEC gives a very fine balance when interpreting its provisions, the type of amendment often included in the Z Options can very easily upset this balance. Anecdotally, there are instances where the Z Options are so extensive and the drafting style so out of keeping with the NEC that they render the clauses in the various Options noted above at best very difficult to interpret and at worst meaningless. I suppose the advice is, that if parties want to make the NEC look like more ‘traditional’ forms that they are used to, then they should use the traditional form and not the NEC.

By way of appendices to the terms and conditions section of the contract are two documents, the first is the Schedule of Cost Components which is a set of rules for what costs can be included and which excluded when either pricing the original works in the cost reimbursable main Option or additional works for the other main Options. The second is the Contract Data, this is the bespoke information which is needed to make many of clauses in the documents described above work. The Contract Data itself begins with something of a health warning where it says:

“Completion of the data in full, according to the Options chosen, is essential to create a contract.”

The warning should be well heeded, and great care should be taken to ensure that the data inserted is compatible with the selected main and secondary options. It is not unknown for Contract Data to be inserted which relates to Options which have not apparently been selected in the main body of the contract. Considerable difficulties of interpretation will then arise, the usual rule is that all terms should be given meaning and effect, and so, does the insertion of apparently orphan provisions mean they are just that, that is, superfluous wording? Or does it mean that other, otherwise unintended, Options are imported into the contract by reference? These are open questions with no ready answer but are fertile ground for disputes.

And finally, with its newness, gone are ‘old-hat’ phrases such as ‘specification’ and ‘site investigation report’, instead following on from the main conditions [A to Z], Schedule of Cost Components and Contract Data described above we have Works Information and Site Information respectively. Again, the Works Information is another area where employers’ contract draftsmen can feel a certain release from the rather terse drafting style of the NEC and begin to include all manner of obligations not really in keeping with the fine balance which the main conditions of the NEC tries to achieve.

Conclusion

For those, like me, brought up in the orthodoxy of the ICE and FIDIC contracts the landscape presented by the NEC is an unfamiliar one. The style and terminology is completely different from the other forms, nothing in NEC has a familiar ‘tag’, there are no ‘variations’, there are no ‘extensions of time’, there is no ‘practical completion’. Of course, all these issues are dealt with but in NEC’s own inimitable fashion using its own particular terminology. NEC needs some perseverance to gain proper insight and nothing less than total emersion in the project management ethos of the contract if it is not to unravel. When one is working on an NEC contract, one has no choice but to become a ‘believer’.

REFERENCES

1. Constructing The Team (HMSO, 1994)
3. Albeit that X8, X11 and X19 are not used under NEC 3
4. The reference YUKOJ 1 is not used in NEC 3