NEC4: A collaborative challenge to project management

Former NEC drafting panel adviser Tony Backler and Stephen Woodward of Resolex examine the newly launched NEC4 which aims to help bring construction procurement into the 21st Century. Alliancing and risk management are key themes of the new contract.

KEY POINTS
- New collaborative contract focuses on proactive risk management and integrated whole-life delivery
- Evolution of NEC3 with potential for digital revolution through supply chain involvement
- Allocation of risk and risk sharing central to contract solutions and contract administration
- Responsive call to industry for innovative project management and work methods to avoid disputes and bring construction into the 21st Century

In 2002 working collaboratively with government departments and non-departmental public-sector bodies, HM Treasury through OGC set a risk profile for an ideal ‘value for money’ standard form of construction contract. This led to a first government procurement endorsement for the NEC form of contract as work in progress. With the launch of NEC4 on 22 June 2017 the gap between ideal and actual is closing.

Introducing the launch of the new contract, NEC Users’ Group President, Professor Rudi Klein opened by saying that with the focus on risk, NEC4 is not just a contract, it is more about managing risk. The launch theme was appropriately evolution. However, the opportunity for revolution, particularly by harnessing the full potential of building information modelling (BIM), is significant with speakers at the launch urging a move from the 19th to the 21st Century digital age. One launch speaker summed up by referring to ‘along’ rather than ‘down’ the supply chain. Referring to the Farmer Review the mood was of one of need to change basic assumptions in the way the industry runs. For NEC users, nowhere is this more noticeable than through past overuse of ‘Z clauses’. While with NEC3 now tested in the courts ‘It is important to get the words right’, the prevailing view was that NEC4 gives a real opportunity to drive out unnecessary Z clauses and preserve the contract risk profile which is about collaboration not confrontation. Rudi Klein concluded his opening address by recommending the next step following collaboration is alliancing. This is a theme picked up post launch by David Mosey Professor of Construction Law and Dispute Resolution, King’s College London:

‘NEC is right to focus on collaborative working and alliancing as the way forward, and they do not stand alone. For example, the NEC4 project contracts can be further integrated through the Association of Consultant Architects’ FAC-1 Framework Alliance Contract, with its systems for supply chain collaboration and joint working to achieve improved value. Meanwhile, the NEC4 consultation draft of a project alliance contract will draw new attention to the potential of multi-party models that have been well proven over the last 17 years by PPC2000.’

NEC4 seeks to fulfil its mission through: (i) Proactive management of risk and change. (ii) Allocation and sharing of risk. (iii) Contract solutions. (iv) Supply chain involvement.

The challenge to the construction industry is innovative project management and work methods for successful outcomes. To succeed NEC4 needs to be a key driver in bringing about culture change affecting human behaviour. Below a risk manager and a lawyer consider the components of the new contract.
Communications (cl 13)
Risk manager
Developed in tandem with the evolution of NEC4, there is a new risk management system called project horizon scanning. RADAR® bridges the gap between forensic data and perceptions of stakeholders on a project. It audits the effectiveness of communication, giving an insight into working relationships, tackling subjects not usually raised at project meetings particularly in the areas of communication, decision-making, team working and general perception of progress. It works in conjunction with project reporting methods to give added clarity on the state of a project. The benefit is in giving alerts of all emerging issues. The output is regular confidential and anonymised reporting in time for project progress meetings.

Lawyer
The basics of how, when and to whom, important communications (eg a pay less notice or an adjudication notice) are to be made are critically important to a contract promoting collaboration. The courts have endorsed the view that cl 13 exclusively defines how such communications can be effectively delivered. Nothing less than compliance with the clause will do. The only novel feature is the encouragement to specify an appropriate digital communication system. One long-standing feature of the clause, however, could have been reviewed. This is the obligation on the parties to communicate each ‘notification’ separately. So when the project manager gives an instruction changing the scope he must also give a separate notification of a compensation event.

What happens if these notifications are rolled up into one? Absent any estoppel it seems the contractor can later claim that the instruction, or the notification – or both – are ineffective because the clause has been breached. This does not sit well with a collaborative contract.

Early warning (cl 15)
Risk manager
As a system aligning goals to create a collaborative environment RADAR is evidence based and supports two-way communication between stakeholders. The system picks up any project issues needing attention. Confidential, anonymous reporting allows discussion of issues before they escalate into delay or dispute.

Client, development advisor, ICE Fellow and Chartered Arbitrator Richard Bayfield comments: ‘It is axiomatic that small problems, when left unchecked, develop into bigger and bigger problems. The early warning is a great tool for Project Managers to “keep a lid” on disputes escalating to matters which the PM can no longer control’

Lawyer
Possibly the most important innovation ever made by the NEC, the early warning system is refined in NEC4 but not substantively changed. It is the embodiment of a collaborative contract, requiring both parties to give an early warning as soon as they become aware of anything that could delay the works or increase costs. Crucially this requires notification of one’s own errors or defaults. Furthermore, the requirement is mandatory and a contractor’s failure to give an early warning is a breach of contract which results in the assessment of compensation events in a manner that could be highly detrimental. This procedure is an excellent reminder that collaborative contracts are not necessarily ‘soft’. They nudge the parties into collaborative mode by building in sanctions for failure to do so. The adoption of this device by numerous other standard form contracts is testimony to the NEC’s pioneering work in this area.

Risk sharing: client’s liabilities and contractor’s liabilities (cll 80 and 81)
Risk manager
RADAR effectively engages with all involved in a project who have vital information affecting risk identification and evaluation. It captures information in an environment that is safe to the person giving the information, allowing the collection and validation of risk information in an anonymous way. It gives proof of what individuals feel about technical risks on the risk register and ‘soft risks’ that are not (information extremely difficult to obtain through traditional project management techniques however good these are). The system checks individual and team perceptions of the project to discover potential risk areas.

Lawyer
There are welcome changes to s 8 dealing with liabilities (formerly ‘risks’) and insurance. The previous regime not only entitled a contractor to claim that an employer’s risk event was a compensation event, to be assessed under cl 63, but also gave him an indemnity against the consequences which could have been a more favourable remedy. The indemnity clause has now
gone and client liabilities are dealt with exclusively as compensation events. The approach to defining contractors’ liabilities has also changed. Formerly contractors’ risks were any risks not falling within client risks, which, though just about workable, was extremely wide and alarmed many contractors. Contractor’s liabilities are now listed out specifically which will facilitate insurance arrangements.

A major development is the withdrawal of the NEC3 clause requiring contractors to fund the repair of damage to the works after completion, even if it was unclear that the damage was due to the contractor’s default. The dangers of this clause were highlighted by a recent Scottish case in which a contractor was required to undertake repairs to a collapsed tunnel on a hydroelectric scheme. The contractor was convinced it was not liable and refused to do the repairs – a blatant breach of contract – which were subsequently done by a replacement contractor at huge cost. It was ultimately held by the court that the contractor was not to blame and was not liable to pay for the remedial costs. But the financing could have bankrupted an insubstantial contractor had the contract been followed. So, a sensible amendment appropriate to a collaborative contract.

Dispute resolution: resolving and avoiding disputes (cll W1, W2 and W3)

Risk manager
RADAR supports a ‘cooling off’ period for negotiation if an adjudicator decides to allow more time for parties to present information, reducing the potential for ‘ambush’ and supporting specific provisions for dispute avoidance after failure of negotiations. Early on it allows early identification of emerging issues before they escalate into disputes. Significantly for Z clause inclusion it neutralises any unforeseen impact of bespoke contract drafting adversely affecting the desired contract risk profile. Importantly it supports the culture that collaborative management avoids disputes by improving communication and creating an environment for negotiation.

Lawyer
All contracts in the United Kingdom are subject to statutory adjudication if either party wants to use it. For a contract designed to promote collaboration nothing could be more disconcerting than adjudication with its encouragement of game playing and adversarial manoeuvring.

Other approaches have been tried on a consensual basis, which require the parties to waive, or suspend, their adjudication rights. One well tried and tested method is the requirement that senior representatives of each party should meet at an early stage to try to resolve problems before they mature into disputes. It is good to see NEC4 implementing this approach.

The second method is the use of the Dispute Adjudication Board. Members of the Board are appointed before the contract is signed, and during the project they make regular site visits, and get to know the participants. If disputes arise they take evidence on site and make recommendations. A dispute can only be referred to formal legal procedures if a recommendation has been rejected. While this is a relatively costly option it can pay huge dividends. The secret ingredient is the respect that the participants have for senior professionals in their peer group, whose judgement they trust as much as and possibly more than a judicial tribunal. It is good to see the NEC calling on this respected procedure. It must, of course, remain a consensual procedure given the availability of adjudication, but there is every reason to think that it will find favour.

These two innovations on the dispute resolution front very much strengthen the NEC’s claim to promote collaborative contracting.

A 21st Century contract
The industry suffers acutely from a lack of cash investment. Will NEC4 give the platform for reviewing the controversial matter of retention and its management? The last word goes to Rudi Klein:

‘We are now putting in place mechanisms that will help to integrate our delivery processes and reduce process waste. The mechanisms include project bank accounts (to integrate the payment processes), integrated project insurance and BIM (to integrate project data). Alliancing will complete the circle by integrating the contracts.’

* RADAR is a risk management tool developed by ResoLex: www.resolex.com

Stephen Woodward, commercial director at ResoLex, led the OGC 2002 risk profiling evaluation.

Tony Backler, former head of construction at two leading law firms, has been involved with the evolution of the NEC contract as former NEC panel drafting advisor and advisor to parties entering into NEC contracts. CL