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Speechlys

How has the risk profile of the NEC4 and new FIDIC suite of contracts changed, with reference to (1) dispute avoidance; (2) compensation; (3) design responsibility; and (4) payment notices?

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NEC4 and FIDIC 2017

- NEC4 suite of contracts was released on **22 June 2017** at the NEC Users' Group Annual Seminar.
- New Forms of NEC contract:
 - NEC4 Design, Build and Operate (DBO) Contract
 - NEC4 Alliance Contract (ALC).
- FIDIC launched the 2017 editions of its three major forms of contract – the Red, Yellow and Silver Books – at its International Contract Users' Conference in London, on **5 and 6 December 2017**.

What do ICE say about NEC4?

- The NEC4 Suite of Contracts builds upon the success of the NEC3 Contracts. The proven **and unique** processes for **collaboration, fair dealing and good project management** that are inherent in the NEC philosophy remain in this evolved edition.
- The NEC Contracts have been **updated and streamlined** following feedback from the industry, considering Government priorities and emerging best practice.
- The result is a contract suite with **improved flexibility, clarity and which is easier to use.**
- Whether supplying high-value goods or low-risk items, **NEC4 enables you to deliver projects on time, on budget and to the highest standards.**

FIDIC 2017: Underlying philosophy / intentions:

- **enhance project management** tools and mechanisms
- **reinforce the role of the engineer**
- achieve a **balanced risk allocation**, through reciprocity between the parties
- achieve clarity, transparency and certainty
- reflect current **international best practice**
- address issues raised by its users over the past decade and a half
- incorporate recent developments into a contract which has not been revised since 1999

5 Golden Principles for Special Provisions (i.e. Particular Conditions Part B):

- The duties, rights, obligations, roles and responsibilities of all the Contract Participants must be generally as implied in the General Conditions, and appropriate to the requirements of the project.
- The Particular Conditions must be drafted clearly and unambiguously.
- **The Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions.**
- All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration.
- **All formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration.**

Dispute Avoidance / Resolution: NEC4

- Dispute Avoidance under NEC4
- NEC4 Dispute Resolution Procedure
 - Options W1 and W2
- The NEC Dispute Avoidance Board (DAB)

Dispute Avoidance / Resolution: FIDIC 2017

- Separation of Claims and Disputes
- The Dispute Avoidance/Adjudication Board (DAAB)
 - New time bar provision: Clause 21.4.1
- Changes to the Engineer's Role
- Advance Warning Procedure
- Notices under FIDIC

Notices and time etc

- **Notices:** must be in writing and identified as a Notice. (Sub-Clause 1.3)
- **Not Notices:** the **Progress Report** (Sub-Clause 4.20) and the **Programme** (Sub-Clause 8.3).
- Claims for time and/or delay damages to be made in accordance with Sub-Clause 20.2.
- **Programme:** detailed requirements set out in Sub-Clause 8.3.
- **Advance Warning:** Note mutual Employer / Contractor obligations under Sub-Clause 8.4: at the heart of dispute avoidance.....

Compensation: NEC4

- The NEC Early Warning Procedure
- New Compensation Events under NEC4:
 - List of Compensation Events under section 6
 - Specific new compensation event: Cost of preparing a quotation for a proposed instruction, where the quote is not taken forward.
- Additional Amendments to Compensation Events

Compensation: FIDIC 2017

- Claims under FIDIC 2017
- FIDIC 2017's Advance Warning Procedure
- Compensation: FIDIC 2017 Concurrent delay

Compensation: FIDIC 2017 Concurrent delay

Sub-Clause 8.5:

- *“If a delay caused by a matter which is the Employer’s responsibility **is concurrent** with a delay caused by a matter which is the Contractor’s responsibility, the Contractor’s entitlement to EOT **shall be assessed in accordance with the rules and procedures stated in the Special Provisions** (if not stated, as appropriate taking due regard of all relevant circumstances).”*

Design Responsibility under NEC4

- Option X15
- BIM under NEC4

Design Responsibility under FIDIC: Yellow Book 1999 to 2017:

1999:

- *“The Contractor shall design, execute and complete the Works in accordance with the Contract and shall remedy any defects in the Works. When completed **the Works shall be fit for the purposes for which the Works are intended** as defined in the Contract.”*

2017:

- *“The Contractor shall execute the Works in accordance with the Contract. When completed, the Works (or Section or Part of major item of Plant, if any) shall be fit for the purpose(s) for which they are intended, **as defined and described in the Employer’s Requirements (or, where no purpose(s) are so defined and described, fit for their ordinary purpose(s)).**”*

FIDIC design responsibility

Sub-clause 17.7 requires the contractor to:

- *“...indemnify and hold harmless the employer against all errors in the Contractor’s design of the Works and other professional services which result in the Works not being fit for the purpose(s) intended...”*

FIDIC & BIM

PAYMENT NOTICES AND PROCEDURE: NEC4

- Contractor now subject to an obligation to submit interim applications for payment.
- If the contractor fails to submit its payment application on time, the project manager is obliged to assess the amount due to the contractor.
- The sum paid will be the lesser of:
 - The amount assessed by the project manager
 - The amount due at the previous assessment date

Conclusions:

- Generally welcome
- Some convergence and cross fertilisation going on.
- What is driving this?
- International v domestic markets?
- Has FIDIC overdone the micro management?
- Will parties comply with the FIDIC Golden Principles?