

NEC3 Dispute Resolution Provisions

By Peter Sheridan and Jonathan Marvin

NEC contracts have become increasingly popular for civil engineering and PFI projects. The NEC3 suite of contracts has received the endorsement of the Office of Government Commerce, indicating likely increased public sector use. Greater use, however, is also likely to mean more potential disputes.

NEC3 adopts a two-tier approach to dispute resolution. The first step is adjudication. If the dispute is not finally resolved at this stage, the second step is either arbitration or litigation. The Engineering and Construction Contract (in common with the Term Services Contract and the Professional Services Contract) offers two different dispute resolution provisions, Options W1 and W2.

Option W1 should only be used where the Housing Grants, Construction and Regeneration Act 1996 (“the HGCR”) does not apply. It is largely a recycled version of the old NEC2 provisions, which fell foul of the HGCR by attempting to limit the statutory right to refer a dispute “at any time”. As NEC3 is pitched as an international contract, this option can be used outside the UK, so long as it meets any local rules on adjudication.

Option W2 is normally used in the UK. A referral to adjudication may be made by any party at any time. This is the principal difference from Option W1, which includes a table setting out who may refer disputes, within certain time periods (W1.3). An Adjudicator and Adjudicator nominating body may be named in the Contract Data. If no Adjudicator is identified or they resign or become unable to act, the parties may try to agree on an alternative adjudicator or ask the Adjudicator nominating body to choose (W2.2(3)). Keeping in-house, the Adjudicator will be appointed under the NEC Adjudicator’s Contract. The referring party provides the other party with a notice of adjudication giving a brief description of the dispute and decision sought. If the Adjudicator is already named in the Contract Data, they also receive a copy of the notice (W2.3(1)). The referring party has seven days from notice of adjudication to refer the dispute to the Adjudicator (W2.3(2)). The parties then have 14 days to provide the Adjudicator with further information, unless this period is extended by agreement between the parties and the Adjudicator (W2.3(2)). If the same matter is disputed under a sub-contract, the Contractor may refer the sub-contract dispute to the Adjudicator at the same time, with the agreement of the sub-contractor (W2.3(3)).

The Adjudicator then has twenty-eight days from the date on which the referring party refers the dispute to the Adjudicator to provide the decision and reasons (W2.3(8)). This period can be extended by up to 14 days with the consent of the referring party and by any amount by agreement. Once the decision is provided, a party has four weeks to notify the other if it wishes to refer the dispute to tribunal (arbitration or litigation)(W2.3(11) and W2.4(2)), otherwise (please note carefully) the intention is that the adjudicator’s decision becomes final.

Given its opening emphasis on “*a spirit of mutual trust and co-operation*” (clause 10.1) it is perhaps surprising that NEC3 has not built in any forms of alternative dispute resolution. Reference to a dispute board or mediation might be welcome future additions and in the meantime parties may consider taking these routes by consent. One of the amendments to the NEC3 made by the Olympic Delivery Authority (ODA) was the addition of an eleven-member Independent Dispute Avoidance Panel. Resolving disputes expeditiously was key for the ODA in view of the desirability of completing work in time for the 2012 Olympics.

Some caution is needed with the new Supply Contract. A contract for supply only is not subject to the HGCRA, but a contract for supply and services often will be. Although the contract and guidance notes suggest the Supply Contract can be used for services including design work, its dispute resolution provisions seem non-compliant with the HGCRA, as they set time limits for referrals to adjudication (akin to NEC3 ECC Option W1). Under the HGCRA, construction contracts include agreements for design work in relation to construction operations (s104(2)). If the Supply Contract is used in the UK as a construction contract as defined in the HGCRA the statutory Scheme provisions on adjudication are likely to apply in place of those of the Supply Agreement.

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