

# International Contracting with NEC for Greater Bay Projects – What Every Construction Professional Must Know

Paul Starr

# Our Greater Bay Area experience

4 GBA offices  
in Hong Kong,  
Shenzhen,  
Guangzhou and  
Haikou

Over **550**  
lawyers in the  
GBA offices

*Innovation in  
strategy and  
changing  
behaviours – KWM  
International  
Center*

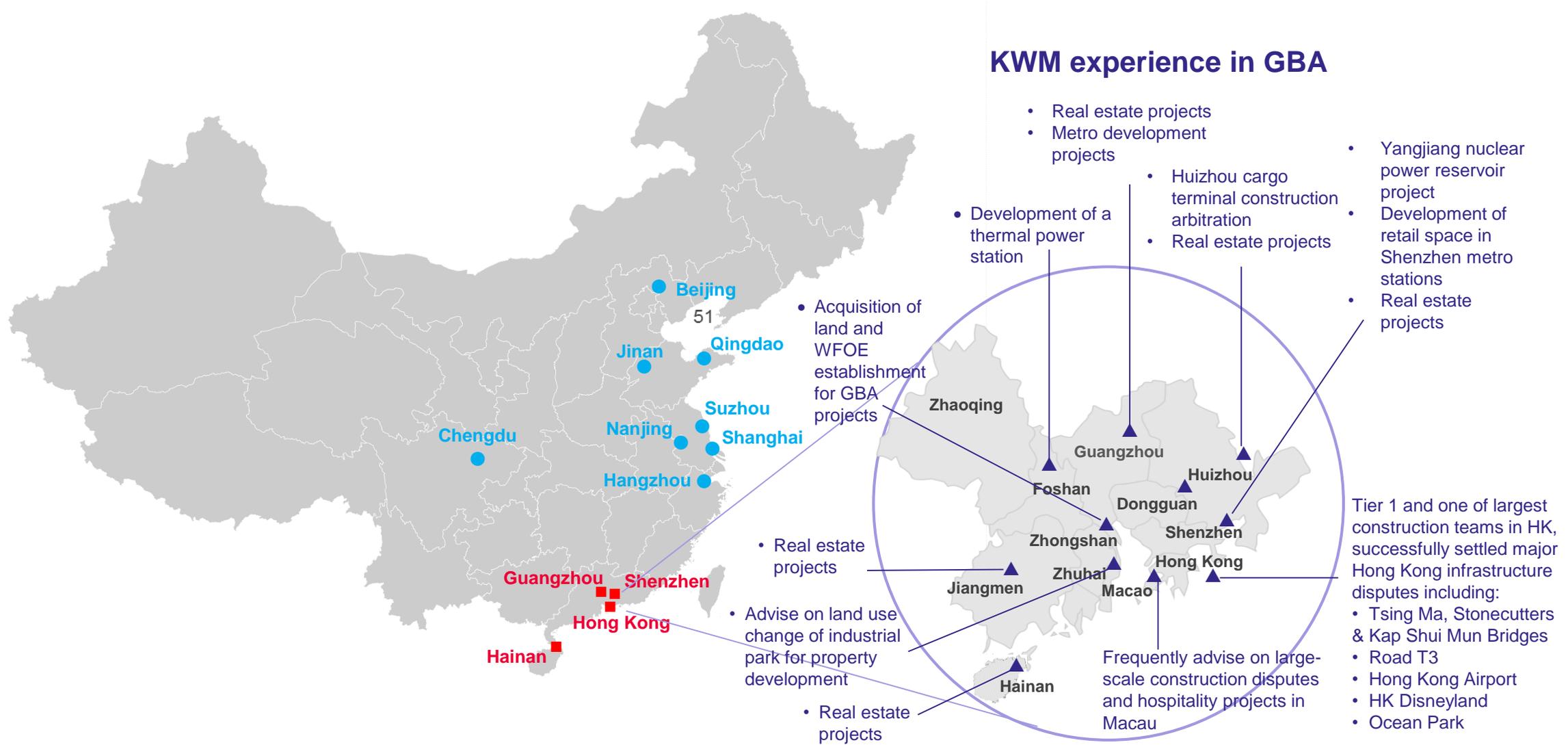
*Financial Times Asia-  
Pacific Innovative  
Lawyers Awards, 2019*



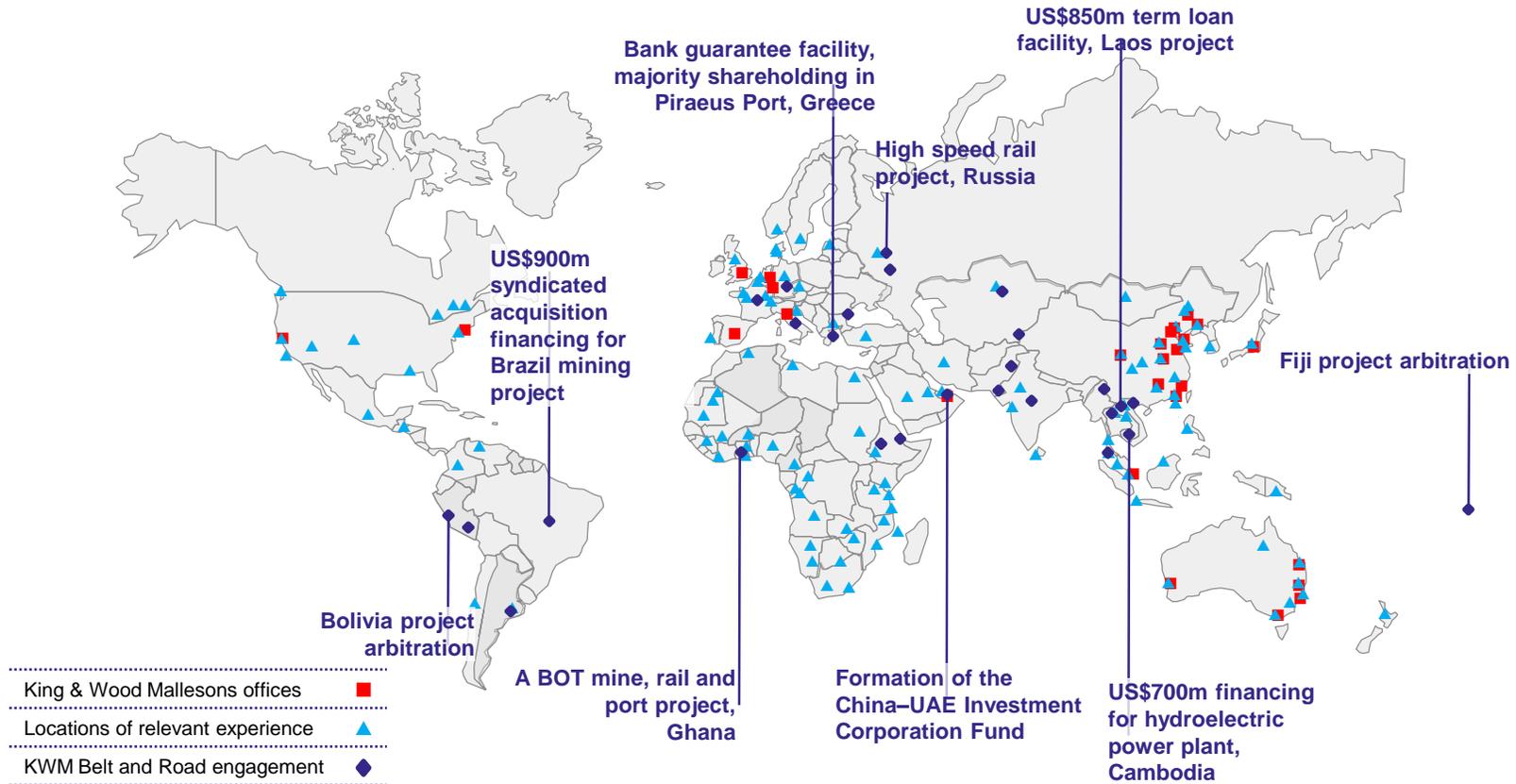
**KWM International Center** was officially launched in June 2018, connecting KWM offices in the key GBA cities of **Hong Kong, Guangzhou, Shenzhen**, as well as **Hainan**. KWM-IC office opened at the new iconic China Resources HQ Tower in Shenzhen in April 2019.

- King & Wood Mallesons offices in GBA ■
- King & Wood Mallesons offices ●

# Our Greater Bay Area experience



# Our Belt and Road experience



# NEC: Background 背景

- In traditional contracts parties work in an adversarial manner even before a dispute arises
- 传统的建筑合同当事人在发生争议以前就已经处于对抗状态
- NEC represents a cultural shift in construction contracting
- NEC代表的是一种建筑合同文化上的转变

# NEC: Background 背景

- Clause 10.1 of NEC3:  
*“The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in the contract and in a spirit of mutual trust and co-operation.”*  
依据合同行事，且秉持相互信任与合作的精神
- Contract administrators need to move from a culture of enforcing strict contractual rights to one of collaborative decision making and problem solving
- 从严格行使合同权利，转变为共同协作与解决问题

# NEC Philosophy 理念

- Facilitate and encourage good management of construction projects
- 促进和鼓励良好的项目管理
- Promote mutual trust and collaboration in effective management of unexpected risks and uncertainties
- 通过提升相互信任与合作来有效管理意料不到的风险和不确定性因素

# NEC Philosophy 理念

- Promote equitable risk sharing among contracting parties
- 公平合理的风险分担
  - *Early warning* 早期警告
  - *Compensation events* 赔偿事件
  - *Pain/gain sharing* 分享增益与分担减损
- Adopt clear and simple language, and allow flexibility to cater for the entire supply chain
- 用语简洁明了，灵活处理供应链

# Key features 特点

- Collaboration / cooperation in dealing with issues (actual or potential)
- 通过协作/合作解决问题（含实际的或潜在的）
- Clear assignment of responsibilities
- 明确责任分担

# Key features 特点

- Focus on getting the works complete with both parties sharing in risks and rewards
- 专注于为达到完工，双方当事人共担风险和共享收益
- Cash flow neutral for Contractors
- 对承建商之现金流保持中立

# Key features 特点

- Any changes either by way of amendment of the Core Clauses or inclusion of Additional Clauses (Z clauses) should be considered in light of the co-operative spirit of NEC
- 任何对NEC核心条款，或是额外条款（Z条款）的修订都应当秉持相互合作的精神

# Key features 特点

- Changes that make the contract more adversarial in some parts could mitigate the benefits of the overall co-operative approach
- 对部分条款作出对抗性的修改可能导致降低全面合作带来的收益

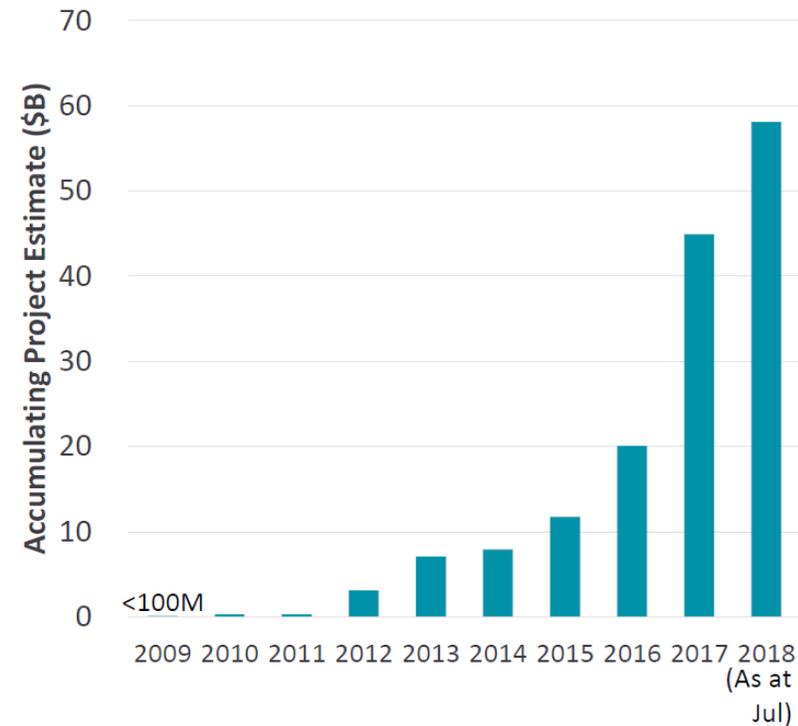
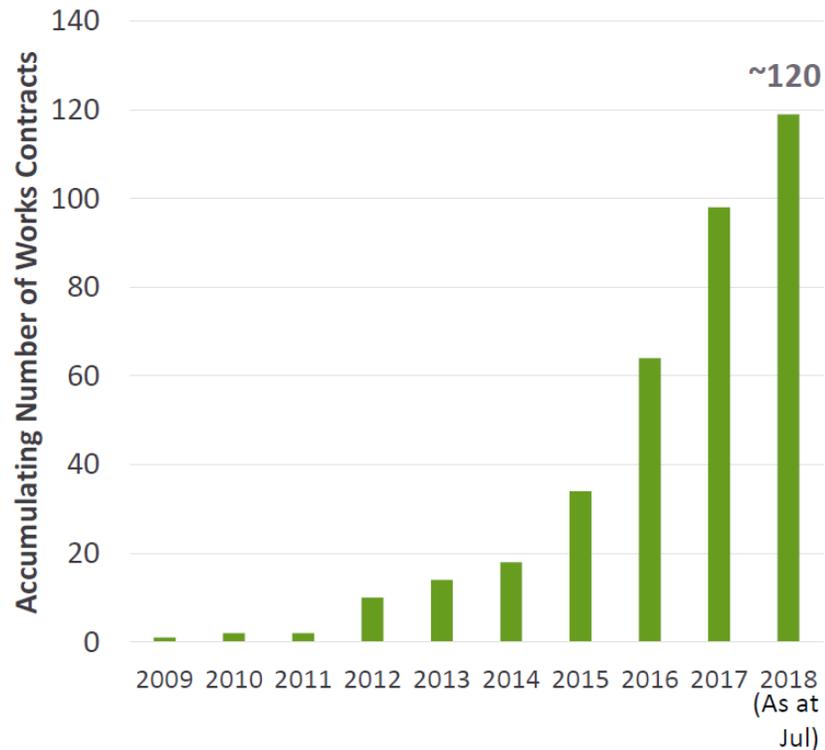
# NEC in Hong Kong



# NEC in Hong Kong



## Wide Adoption of NEC in Public Works Projects



# NEC in Hong Kong



## More Large Scale Projects in Target Cost Options



**Central Kowloon Route –  
Kai Tak East and Central Tunnel**



**Relocation of Sha Tin  
Sewage Treatment Works to Caverns**



**In-situ Reprovisioning of Sha Tin  
Water Treatment Works - South Works**



**Drainage Services Department Building  
at Cheung Sha Wan  
(Relocated from Revenue Tower)**

# NEC in Hong Kong



## Commence to Migrate from NEC3 to NEC4



Drainage Improvement Works in Mong Kok (NEC4 PSC)



Upgrading of Fire Services Installation at  
Ngong Ping Sewage Treatment Works (NEC4 ECC)



Construction of Pressure  
Management and District  
Metering Installations under  
Water Intelligent Network  
(NEC4 TSC)



# Hong Kong Observations 观察

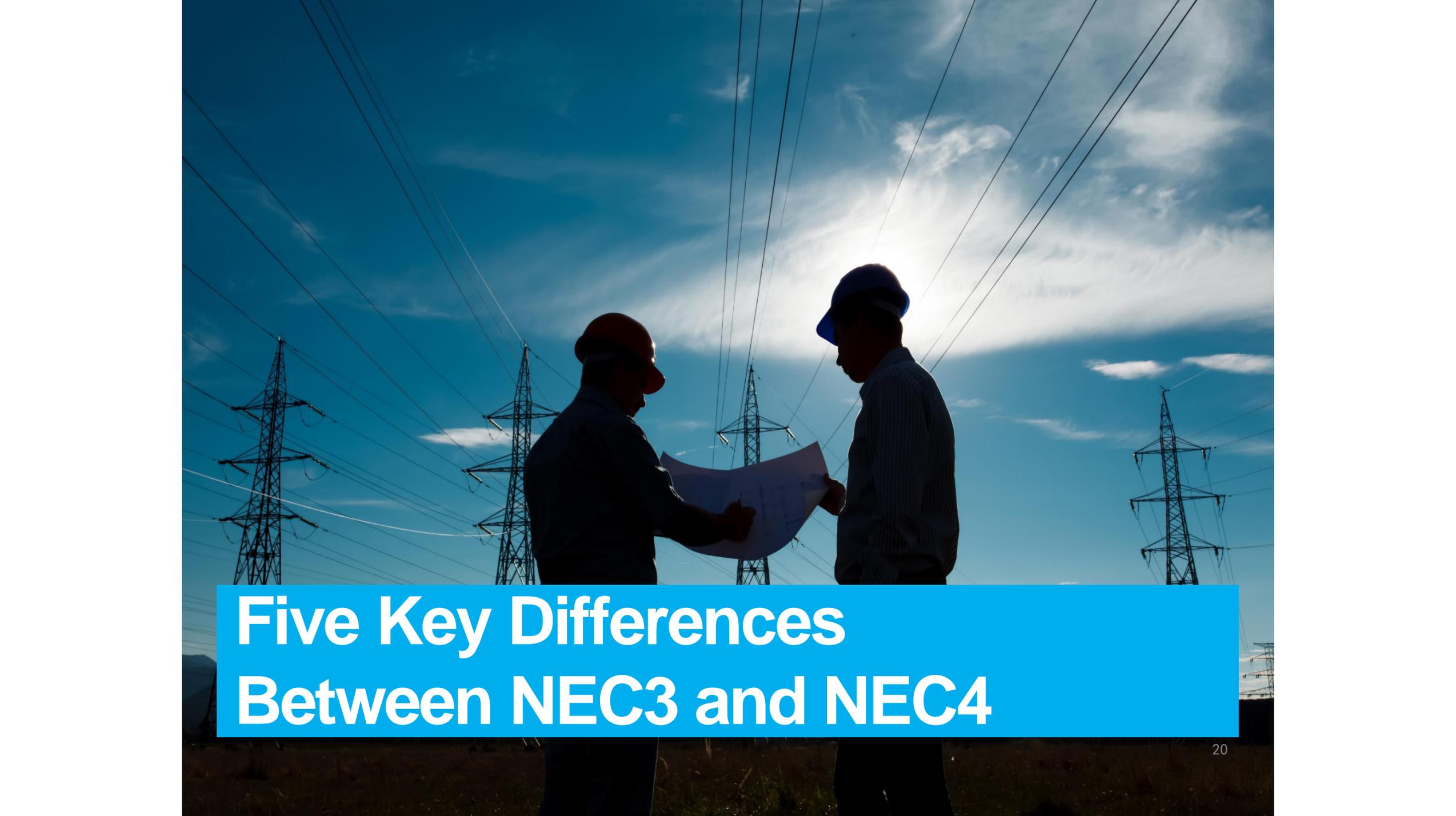
- Increasing interest in the use of NEC but still limited experience
- 越来越多地使用NEC，但是经验仍然有限
- NEC is opposite to normal HK government contracts which are very adversarial and Employer friendly
- 与香港政府常规使用的合同相比

# Hong Kong Observations 观察

- To be effective, government will need to significantly change its approach
- 政府需要作出重大转变
- NEC contracts so far include both amendment of Core Clauses and many Z Clauses
- 对核心条款的修改，以及大量的额外的Z条款

# Hong Kong Observations 观察

- Hybrid NEC: less adversarial than traditional contracts, but still a long way from the pure NEC approach
- 混合型的NEC: 与传统的合同相比对抗性较低，但仍然离纯粹的NEC合同有很长的距离

The image shows two men in silhouette, wearing hard hats, standing in a field and looking at a large set of blueprints. They are positioned in front of several high-voltage power line towers. The sky is bright blue with some clouds, and the sun is visible, creating a strong backlighting effect. The overall scene is industrial and professional.

# Five Key Differences Between NEC3 and NEC4

# 5 Key Differences between NEC3 and NEC4

- Terminology
- New forms of Contract
- New & Amended Core Clauses
- Dispute Resolution Options
- Changes to Secondary Options

# Terminology

NEC4 updates use of certain terminology:

NEC3	NEC4
<ul style="list-style-type: none"><li>• Employer</li></ul>	<ul style="list-style-type: none"><li>• Client</li></ul>
<ul style="list-style-type: none"><li>• Masculine</li></ul>	<ul style="list-style-type: none"><li>• Gender neutral</li></ul>
<ul style="list-style-type: none"><li>• Risk Register</li></ul>	<ul style="list-style-type: none"><li>• Early Warning Register</li></ul>
<ul style="list-style-type: none"><li>• Works Information</li></ul>	<ul style="list-style-type: none"><li>• Scope</li></ul>

# New forms of Contract

- NEC4 Introduces the following new forms of contract:
  - Design, Build and Operate Contract
    - Allows design, construction and operation / maintenance functions to be procured from one supplier
  - Alliance Contract
    - Allows for the integration of multiple suppliers on complex projects
    - One contract is entered with a number of suppliers to deliver a project
    - This contract will encourage collaborative working by all parties to deliver the project

# New & Amended Core Clauses

## Contractor's proposals

NEC3	NEC4
No express equivalent provision providing for Contractor's proposals	The Contractor may issue proposals to the Project Manager for value engineering [cl. 16]

# New & Amended Core Clauses

## Acceleration

NEC3	NEC4
Only the Project Manager may instruct the Contractor to submit a quotation for acceleration [cl. 36]	Either the Project Manager or the Contractor may propose to the other an acceleration [cl.36]

# New & Amended Core Clauses

## Review and Acceptance of Defined Costs

NEC3	NEC4
<ul style="list-style-type: none"><li>• No equivalent provision in NEC3 Core Clauses</li><li>• Changes in Defined Costs assessed at the end of the Contract</li></ul>	<ul style="list-style-type: none"><li>• NEC4 introduces new clauses to allow Contractors to request a review and acceptance of its Defined Costs during the project, rather than waiting until the end [cl.50.9]</li><li>• Contractor notifies Project Manager who has 13 weeks to accept or advise of any errors</li><li>• Deemed acceptance if Project Manager does not respond</li><li>• Easier to confirm Defined Costs during the project rather than at the end when Contractors / Sub-contractors have moved on</li><li>• Progressive confirmation allows Contractor to manage cash flow and avoids long arguments at the end of a project</li></ul>

# New & Amended Core Clauses

## Programme

NEC3	NEC4
<ul style="list-style-type: none"><li>• Under NEC3<ul style="list-style-type: none"><li>• There is no specified form for the Programme</li><li>• There is no deemed acceptance</li><li>• Even implemented Compensation Events must be shown of the programme</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Under NEC4 [cl. 31]:<ul style="list-style-type: none"><li>• Programme must be in the form set out in the Scope<ul style="list-style-type: none"><li>• Now deemed acceptance if:<ul style="list-style-type: none"><li>• the Project Manager does not notify its acceptance or non-acceptance within 2 weeks; and</li><li>• The Contractor notifies the Project Manager of its failure and such failure continues for a further week</li></ul></li></ul></li><li>• There is no longer a requirement for the effects of implemented compensations events to be shown on each revised programme</li></ul></li></ul>

# New & Amended Core Clauses

## Other New Core Clauses

NEC3	NEC4
No equivalent provision	Bribery & corruption, including a right to terminate [cl.18]
No equivalent provision	Confidentiality and publicity [cl. 29]
No equivalent provision	Transfer of benefits (assignment of rights) – either party may assign to a third party [cl. 28]
No equivalent provision	Obligation on Contractor to prepare a quality management plan for Project Managers Acceptance [cl. 40]

# Dispute Resolution Options

NEC provided for two dispute resolution options:

- **Option W1** is used when adjudication is the method of dispute resolution:
  - Adjudicator decides a matter independently as an adjudicator and not as an arbitrator
  - Adjudicator's decision is final unless revised by the tribunal
  - Decision is enforceable as a contractual obligation, not as an arbitral award
  - A matter may only be referred to the tribunal after adjudication
- **Option W2** is only used for UK contracts to which the provisions of the Housing Grants, Construction and Regeneration Act Apply

# Dispute Resolution Options

NEC4 adds an additional option:

- **Option W3** is used when a dispute avoidance board is the method of dispute resolution
  - A Dispute Adjudication Board may be one or three members
  - The Dispute Adjudication Board visits the site often and identify potential disputes and seeks to resolve any potential disputes before they arise
  - Any potential dispute referred to and not resolved by Dispute Adjudication Board may be referred to the tribunal for resolution
- NEC4 also introduces a procedure for disputes to be resolved by discussions between Senior Representatives over 4 weeks

# Secondary Options

The following are new and amended Secondary Option Clauses in NEC4:

- **‘Parent Company Guarantee** – reference is now changed to ‘Ultimate holding company guarantee’. The Contractor is now required to provide a guarantee from its ultimate holding company instead of an intermediary parent company
- **Undertakings to Others** – provides for collateral warranties (however there are no standard form collateral warranties)
- **Transfer of rights** – this clause gives the option for the Client to own the rights over the material prepared by the Contractor and its Subcontractors for the design of the works
- **Building Information Modelling** – this clause supports the management of Information Model Requirements and deals with issues such as who owns information and liability

# ...Secondary Options

- **Termination by Client** – right for Client to terminate for any reason has been removed from the Core Clauses and added as a Secondary Option
- **Whole of life costs** – allows Contractor to make proposals to change the Scope in order to reduce the costs of any asset over its lifecycle
- **Contractor's Design Option** – drafting updated to support design and build by the contractor. Provisions include clauses relating to intellectual property and professional indemnity insurance
- **Early Contractor Involvement (Option C & D only)** – allows Client to appoint contractor at an early stage to input into the design process

# Secondary Options – NEC3

Option X1	Price adjustment for inflation (used only with Options A, B, C and D)	Option X15	Limitation of the Contractor's liability for his design to reasonable skill and care
Option X2	Changes in the law	Option X16	Retention (not used with Option F)
Option X3	Multiple currencies (used only with Options A and B)	Option X17	Low performance damages
Option X4	Parent company guarantee	Option X18	Limitation of liability
Option X5	Sectional Completion	Option X20	Key Performance Indicators (not used with Option X12)
Option X6	Bonus for early Completion	Option Y(UK)1	Project Bank Account
Option X7	Delay damages	Option Y(UK)2	The Housing Grants, Construction and Regeneration Act 1996
Option X12	Partnering	Option Y(UK)3	The Contract (Rights of Third Parties) Act 1999
Option X13	Performance bond		
Option X14	Advanced payment to the Contractor	Option Z	Additional conditions of contract

# Secondary Options – NEC4

Option X1	Price adjustment for inflation (used only with Options A, B, C and D)	Option X14	Advanced payment to the Contractor
Option X2	Changes in the law	Option X15	The Contractor's design
Option X3	Multiple currencies (used only with Options A and B)	Option X16	Retention (not used with Option F)
Option X4	Ultimate holding company guarantee	Option X17	Low performance damages
Option X5	Sectional Completion	Option X18	Limitation of liability
Option X6	Bonus for early Completion	Option X20	Key Performance Indicators (not used with Option X12)
Option X7	Delay damages	Option X21	Whole Life Cost
Option X8	Undertakings to the Client or Others	Option X22	Early Contractor involvement (used only with Options C and E)
Option X9	Transfer of rights	Option Y(UK)1	Project Bank Account
Option X10	Information modelling	Option Y(UK)2	The Housing Grants, Construction and Regeneration Act 1996
Option X11	Termination by the Client	Option Y(UK)3	The Contract (Rights of Third Parties) Act 1999
Option X12	Multiparty collaboration (not used with Option X20)	Option Z	Additional conditions of contract
Option X13	Performance bond		

A photograph of an offshore oil platform at sunset. The platform's complex steel structure, including pipes and walkways, is silhouetted against the bright, low sun. The sky is filled with dramatic, dark clouds, and the sun's reflection creates a shimmering path on the dark ocean surface. In the background, several tall, cylindrical structures, likely distillation columns, are visible. A crane is positioned on the platform, and a long, narrow structure extends from the main deck towards the right side of the frame. The overall scene is industrial and atmospheric.

# NEC3 Structure

# Structure of NEC Contracts

- NEC Contracts allow users to structure a contract to best suit their requirements by including options, as follows:
  1. Core clauses & main options;
  2. Dispute resolution options;
  3. Secondary options;
  4. Contract Data;
  5. Works Information

# Core Clauses

1. General
2. The Contractor's main responsibilities
3. Time
4. Testing and Defects
5. Payment
6. Compensation events
7. Title
8. Risks and insurance
9. Termination

# Six ECC Payment Options

The ECC provides six payment options:

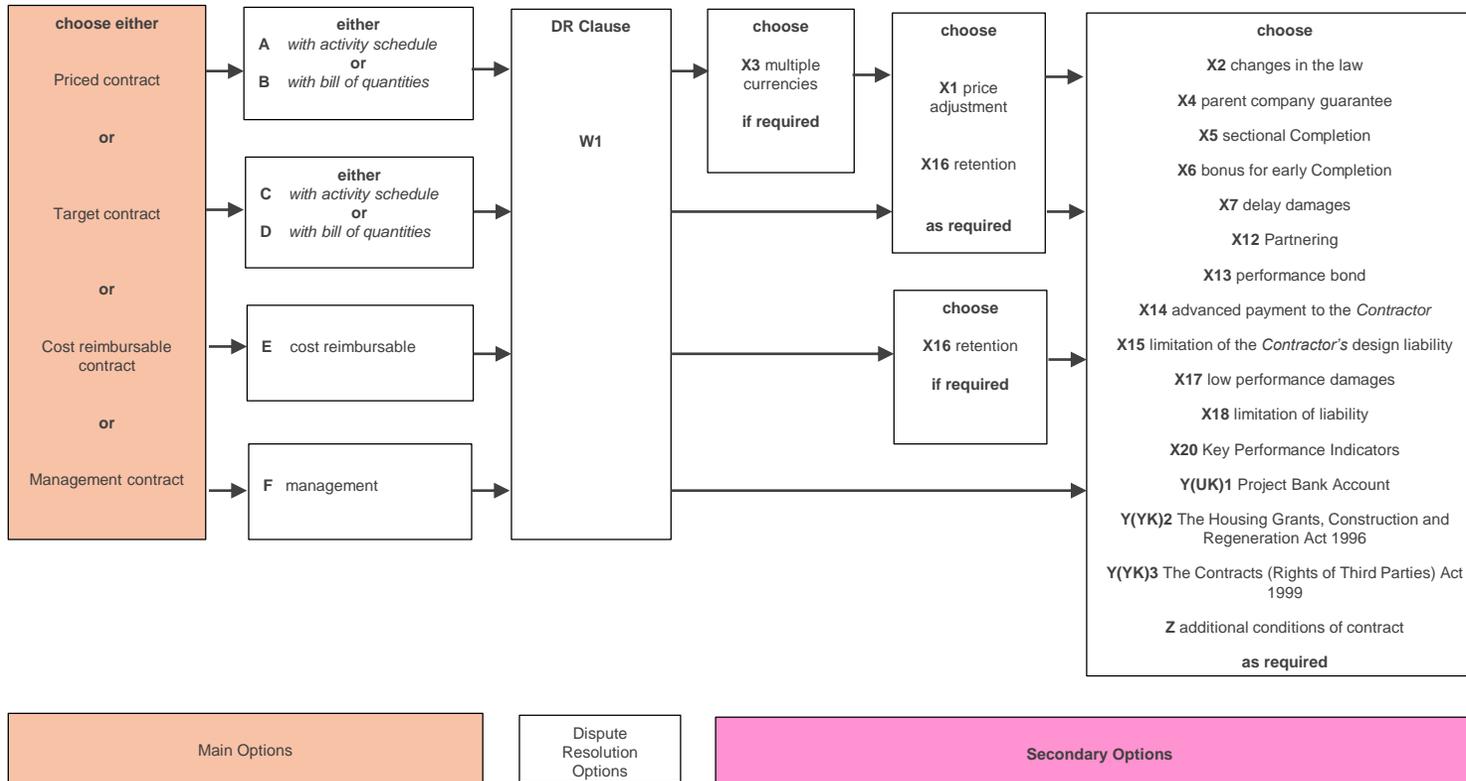
- Option A – Priced contract with activity schedule
- Option B – Priced contract with bill of quantities
- Option C – Target contract with activity schedule
- Option D – Target contract with bill of quantities
- Option E – Cost reimbursable contract
- Option F – Management contract

# Two Main Payment Options

## Priced Contracts and Target Contracts

- **Priced Contracts**
  - Contractor is paid at tendered prices (Option A) or tendered rates (Option B) for the work done
- **Target Contracts**
  - Contractor is paid on the basis of its costs
  - Designed to encourage efficient management of the works by offering financial incentive to the Contractor

# Contract Structure of NEC3



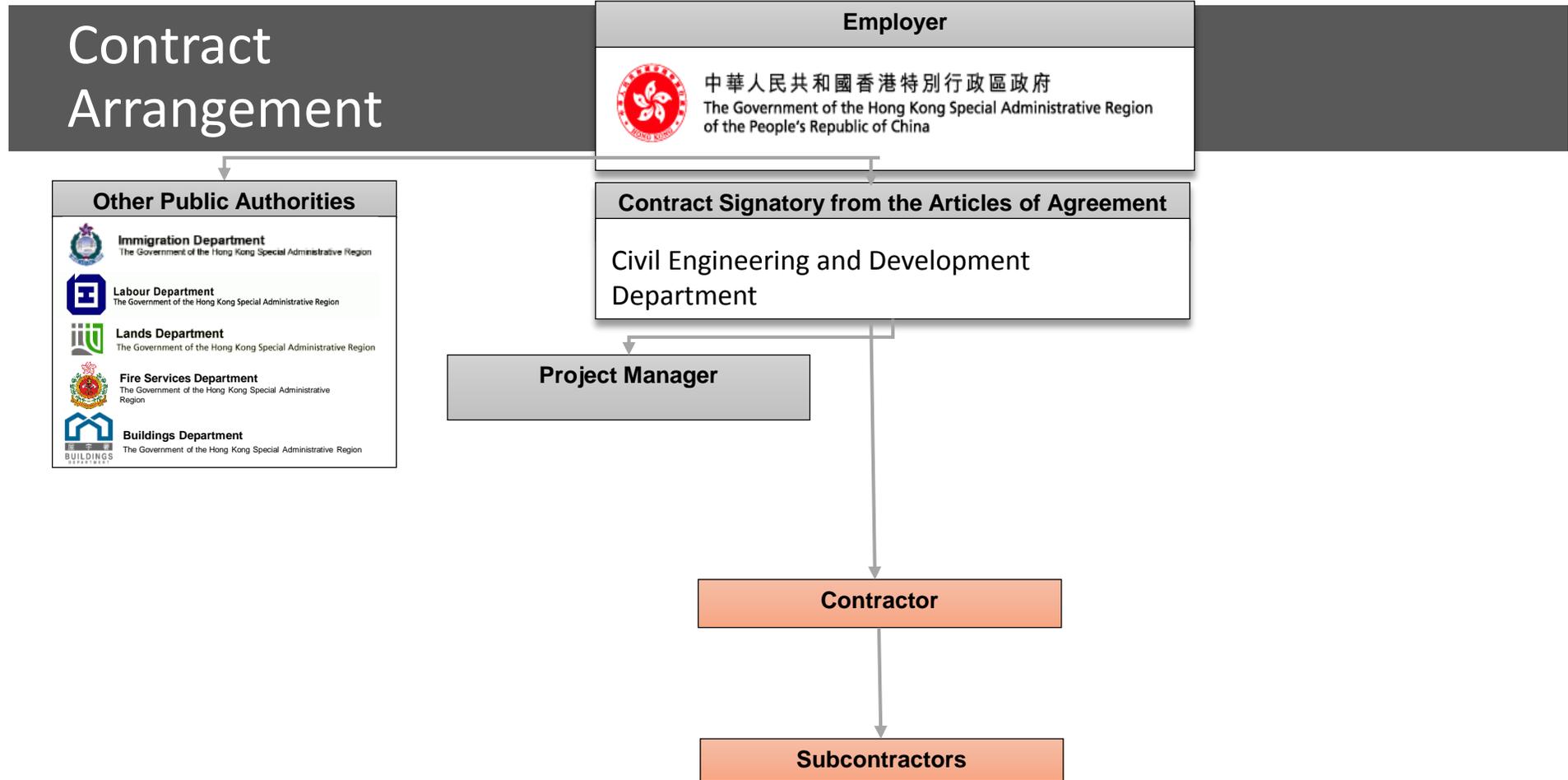


**Preliminary Planning & Bidding Phase:  
Need for good drafting**

# Who is your Employer?

- **Contract Data: “The Employer is the Government of [one of the GBA governments]**
- **What does that mean?**

# Example in Hong Kong



# And in Hong Kong, this may incorporate into NEC obligations from the Government project handbook

## CHAPTER 1

### PROJECT PLANNING

The parts of the PAH shown in blue and bold should only be updated by Works Branch of Development Bureau.

Rev	Issue Date	Amendment Incorporated
First Issue	October 2014	NA
1	20 April 2015	Amd No. 1/2015
2	6 July 2015	Amd No. 2/2015
<b>3</b>	<b>3 August 2015</b>	<b>Amd No. 3/2015</b>

## Project Handbook Editions that we have been able to find:

- 1998
- 2006
- 2008
- 2009
- 2010
- 2012
- 2014

# Project Handbook

## SYNOPSIS

This chapter gives a general view of the overall process of planning a project, from identification of the need through various stages of detailed planning to physical implementation. While the actual work involved in planning differs from one project to another, some general patterns and sequence of work are common to all projects. Proper planning saves manpower and financial resources and ensures smooth progression of a project.

This chapter also gives general guidance on the consultation required at various stages of planning, on sources of information that may be needed, and on the standard requirements for keeping essential records and reporting on progress.

A general description of the various stages of a project in the Public Works Programme is given in this Chapter. However, details of the procedures to be followed in processing a project through the Public Works Programme are given in Chapter 2 "Project Approval".

Reference should also be made to manuals, guidelines and circulars issued by relevant authorities.

Works departments are urged to adopt the Project Management Approach in the delivery of public works projects to ensure clear accountability and allocation of responsibilities. Some measures have been introduced to streamline the delivery of public works projects. These include replacing the Client Project Brief and the Preliminary Project Feasibility Study by the Project Definition Statement and the Technical Feasibility Statement, parallel action between the EIA process and the statutory gazetting of projects, initiating works-related tendering and consultant selection procedures before funding is secured, and shortening the administrative procedures for land resumption.

## Extract from one of our Arbitration Statements of Claim for a Contractor

- 2.17 The Handbook sets out:
- (a) the procedures to be followed by the Respondent, acting through its departments, in relation to the Project; and
  - (b) duties and responsibilities of the Respondent in administering the Contract and the Project.
- 2.18 The Claimant was entitled to and did expect that the Respondent and its officials, departments and divisions would comply with the Handbook.
- 2.19 Without limitation, the Handbook sets out the following requirements for the Respondent acting through its officials, departments and divisions:

	<b>Requirement</b>	<b>Handbook reference</b>
1	During all stages of planning the Project consult with the relevant departments of the Respondent to obtain comments and agreement to the proposals, and to ensure smooth co-ordination.	Chapter 1 (Project Planning), paragraph 1.5.

## Extract from one of our Arbitration Statements of Claim for a Contractor

	Requirement	Handbook reference
2	During the planning phase of the Project, consult with the relevant departments of the Respondent on anticipated problems or requirements during construction.	Chapter 1, paragraph 4.2.1.
3	Send to all interested parties, including utility companies, the general layout plan of the Project together with an explanatory memorandum, and ask the interested parties for:  (a) their agreement to or comments on the proposals;  (b) details of their existing facilities/services in the area; and  (c) details of any work they propose to carry out in conjunction with the Project or which will be required as a result of the Project.	Chapter 4 (Project Design and Estimates), paragraph 2.5.2.

## Extract from one of our Arbitration Statements of Claim for a Contractor

4	Identify areas of interface, technical works implementation issues and potential conflicts among the Respondent's departments in connection with the implementation of the Project as well as its future operation and maintenance, and resolve them among the concerned departments in a timely manner.	Chapter 1, paragraphs 1.5 and 3.1.2(vii).  Works Bureau Technical Circular No. 25/2000, 18 September 2000.
5	Consult at any early stage with utility undertakers, including CLP, in relation to major utilities facilities and installations, and any facilities required for the Project.	Chapter 1, paragraph 1.6.  Chapter 4, paragraph 4.16.
6	Consult at an early stage with the FSD on fire services installations, including the adequacy of fire hydrants, fire escape routes, and for dangerous goods licences for the storage of dangerous goods and chemicals.	Chapter 4, paragraph 4.8.
7	Monitor the planning, design and construction of the Works to ensure that there is adequate consultation among the parties concerned on all interface and technical works implementation issues.	Chapter 1, paragraph 1.1.

## Extract from one of our Arbitration Statements of Claim for a Contractor

	Requirement	Handbook reference
8	Give consideration to the availability of staff resources to undertake detailed planning, design and construction management, taking into account the urgency of the project and the proposed programme of implementation. In cases where the necessary resources or expertise are not available within the relevant department of the Respondent, consider employing consultants to undertake the work.	Chapter 1, paragraph 4.2.3.
9	Promptly bring any unresolved issues to the attention of higher-ranking directorate officers, or should the situation warrant it, the Directors of the departments concerned for an early resolution of the issues.	Chapter 1, paragraph 1.1. Works Bureau Technical Circular No. 25/2000.
10	Raise any unresolved issues with the Secretary for Works for a final decision.	Chapter 1, paragraph 1.1. Works Bureau Technical Circular No. 25/2000.

## Extract from one of our Arbitration Statements of Claim for a Contractor

11	Clearly define the duties and responsibilities of each project team within the relevant departments of the Respondent and set up channels, such as regular meetings, to ensure effective communication was achieved amongst the project teams.	Chapter 1, paragraph 1.7.
12	Use an "open book" approach to project management involving:  (a) full access for all concerned parties to reports and information notes, and open attendance at review meetings; and  (b) a free flow of information between the Respondent's departments to facilitate effective monitoring of progress of all key items.	Chapter 5, paragraph 9.40 and Appendix 5.38.
13	Given that the Respondent has the ultimate responsibility and authority in relation to the Project:	Chapter 5 (Contract Documents), paragraph

## Extract from one of our Arbitration Statements of Claim for a Contractor

	<b>Requirement</b>	<b>Handbook reference</b>
	<p>(a) vest powers in a Project Management Office within the Respondent as a central point of monitoring and control with sufficient authority over the Project scope, schedule and budget;</p> <p>(b) provide the Project Management Office with the necessary resources so that it is able to control critical milestones, use budget and project contingencies, order risk assessments and authorize acceleration of the Works; and</p> <p>(c) appoint a high-level Steering Committee to oversee the progress and budget of the Project</p>	<p>9.40 and Appendix 5.38.</p> <p>Works Bureau Technical Circular No. 26/2002, 27 June 2002.</p>

# Impossibility

NEC4	Possible Changes by GBA Governments
<ul style="list-style-type: none"><li>• Project Manager must give instructions to change the work scope in order to eliminate an illegality or impossibility. [cl. 17.2]</li><li>• Such change to the work scope is a compensation event under cl. 60.1(1).</li></ul>	<p>Additional Condition provides that:</p> <p><i>“(6) If it is legally or physically impossible for the Contractor to execute the Works in accordance with the technical proposals, the Contractor shall make the necessary modifications or amendments to the technical proposals for execution of the works and shall inform the Project Manager in writing. Any such modifications or amendments to the technical proposals shall conform to the Works information.”</i></p>
	<p>Does Additional Condition preclude financial recovery for impossibility?</p> <p><i>“(10) The Contractor shall not be entitled to, except and to the extent that the Contractor is in compliance with an instruction given by the Project Manager changing the Works Information under NEC Clause 60.1(1) of the contract, any change to the Prices or the Completion Date for the execution of the works in a manner which differs from the tender submissions on technical resources or technical proposals (including the technical proposals modified or amended as provided in sub-clauses (6) or (7) of this Clause) or both.”</i></p>

## Table of Compensation Events

Compensation Events	Price	Time
<p>(1) The Project Manager gives an instruction changing the Works Information except</p> <ul style="list-style-type: none"> <li>• a change made in order to accept a Defect or</li> <li>• a change to the Works Information provided by the Contractor for his design which is made either at his request or to comply with other Works Information provided by the Employer.</li> </ul>	√	√
(2) The Employer does not allow access to and use of a part of the Site on its access date.	√	√
(3) The Employer does not provide something which he is to provide by the date for providing it shown on the Accepted Programme.	√	√
(4) The Project Manager gives an instruction to stop or not to start any work or to change a Key Date.	√	√

## Table of Compensation Events

Compensation Events	Price	Time
(5) The Employer or Others <ul style="list-style-type: none"> <li>do not work within the times shown on the Accepted Programme,</li> <li>do not work within the conditions stated in the Works Information or</li> <li>carry out work on the Site that is not stated in the Works Information.</li> </ul>		√
(6) The Project Manager or the Supervisor does not reply to a communication from the Contractor within the period required by this contract.	√	√
(7) The Project Manager gives an instruction for dealing with an object of value or of historical or other interest found within the Site.	√	√
(8) The Project Manager or the Supervisor changes a decision which he has previously communicated to the Contractor.	√	√

## Table of Compensation Events

Compensation Events	Price	Time
(9) The Project Manager withholds an acceptance (other than acceptance of a quotation for acceleration or for not correcting a Defect) for a reason not stated in this contract.	√	√
(10) The Supervisor instructs the Contractor to search for a Defect and no Defect is found unless the search is needed only because the Contractor gave insufficient notice of doing work obstructing a required test or inspection.	√	√
(11) A test or inspection done by the Supervisor causes unnecessary delay.	√	√

## Table of Compensation Events

Compensation Events	Price	Time
<p>(12) The <i>Contractor</i> encounters physical conditions which</p> <ul style="list-style-type: none"> <li>• are within the Site,</li> <li>• are not weather conditions and</li> <li>• an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for them.</li> </ul> <p>Only the difference between the physical conditions encountered and those for which it would have been reasonable to have allowed is taken into account in assessing a compensation event.</p>	√	√
<p>(13) One or more of the following weather conditions affecting the Site:</p> <ul style="list-style-type: none"> <li>(i) the hoisting of tropical cyclone warning signal No. 8 or above, or</li> <li>(ii) Black Rainstorm Warning, or</li> <li>(iii) Red Rainstorm Warning, or</li> <li>(iv) Amber Rainstorm Warning, or</li> <li>(v) inclement weather and/or its consequences adversely affecting the progress of the works.</li> </ul>	√ √ √	√ √ √ √ √

## Table of Compensation Events

Compensation Events	Price	Time
(14) An event which is an Employer's risk stated in this contract.	√	√
(15) The Project Manager certifies take over of a part of the works before both Completion and the Completion Date.	√	√
(16) The Employer does not provide materials, facilities and samples for tests and inspections as stated in the Works Information.	√	√
(17) The Project Manager notifies a correction to an assumption which he has stated about a compensation event.	√	√
(18) A breach of contract by the Employer which is not one of the other compensation events in this contract.	√	√

## Table of Compensation Events

Compensation Events	Price	Time
<p>(19) An event arising from the Employer or Others which</p> <ul style="list-style-type: none"> <li>• stops the Contractor completing the works or</li> <li>• stops the Contractor completing the works by the date shown on the Accepted Programme,</li> </ul> <p>and which</p> <ul style="list-style-type: none"> <li>• neither Party could prevent,</li> <li>• an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it and</li> <li>• is not one of the other compensation events stated in this contract.</li> </ul>		√
<p>(20) A Change in Law as defined in clause A1 of the additional conditions of contract.</p>	√	√
<p>(21) A shortage of labour which would have been unreasonable for an experienced contractor to have allowed for at the tender closing date.</p>		√

## Payment

<b>Cl.</b>	<b>NEC3</b>	<b>Possible Changes by GBA Governments</b>
50.1	Project Manager makes the assessment. There is no requirement for Contractor to submit a statement or supporting documents.	14 days before each assessment date the Contractor must submit a statement and supporting documents showing the estimated amount due

Cl.	NEC3	Possible Changes by GBA Governments
50.2	Pain / gain share is calculated at the end of the contract	The amount due with respect to any payment may be reduced by the <b>Project Manager's interim assessment</b> of the Contractor's share of any forecast excess of the final PWDD above the total of the Prices
51.1	Payment is certified within 1 week from the assessment date	Payment is certified within 3 weeks from the Assessment date
51.4	Such amounts are subject to interest	Unpaid amounts due that are corrected in later payment certificate as a result of a mistake or a Compensation Event do not accrue interest

## Payment

- Unfair pain/gain share –takes full pain after 110% of the Price, Contract Data Part 5 Is it really a target cost contract? Or look at it as a lump sum contract with a 5% contingency
- NB Tendering

## Subcontracting

NEC3	Possible Changes by GBA Governments
Limited control / restrictions of subcontractors	Significantly increases the Project Manager's control over the appointment of subcontractors
Limited grounds for rejecting a subcontractor – “appointment will not allow the Contractor to Provide the Works” [cl. 26]	Project Manager can reject a subcontractor based on price, failure to competitively tender
	Additional Clause C sets out detailed requirements with respect to Subcontractors, including: <ul style="list-style-type: none"><li>• requirements for Specialist Subcontractors to be on the Approved List;</li><li>• obligation to maintain Subcontractor Management Plan;</li><li>• specific subcontract conditions;</li><li>• tendering obligations</li></ul>

# Force Majeure

## NEC4

- While NEC4 does not explicitly use the term “force majeure”, the accompanying User Guide identifies clause 60.1(19) as dealing with a type of “force majeure” event – see clause 60.1(19) below:
  - “An event which:
    - Stops the Contractor completing the whole of the works; or
    - Stops the Contractor completing the whole of the works by the date for planned Completion shown on the Accepted Programme;
  - And which
    - Neither Party could prevent;
    - An experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for it; and
    - Is not one of the other compensation events stated in the contract.”
- In such an event:
  - Project Manager must instruct Contractor on how the event is to be dealt with. [cl. 19.1]
  - Contractor has recourse to recover additional time or cost through the compensation event mechanism. [cl. 60.1(19)]
  - Client has option to terminate the contract if the event will (i) stop completion of the whole works or (ii) stop the Contractor completing the whole of the works by the stated completion date and completion is forecast to delay by more than 13 weeks. [cl. 91.7]

## Possible Changes by GBA Governments

- The broad force majeure claim under clauses 60.1(19) and 91.7 has been removed, and has been limited to events arising from the Client or Others.
- Also, Contractor is only entitled to claim time, not additional cost under clause 60.1(19).
- Client has right to terminate for convenience if Project Manager certifies that completion will be delayed by a period of not less than one year.

# Design Risk



Check scope of design obligations, NB hidden design



The obligation to verify the Client's design



Check whether tender terms require title to intellectual property in Tender Design to pass to Client upon creation



Ensure that design consultants are signed up to suitable consultancy agreements

# Design Risk

## NEC4

- Limited control over Contractor's design
- Any design to be carried out by Contractor must be assigned to them in the Scope. [cl. 21.1]
- Core clauses silent on Contractor's design obligations
- If Contractor is responsible for design, secondary option clause X15 is often used → i.e. Contractor must design the works using the skill and care normally used by professionals designing similar works
- Contractor may also have recourse to time extension or cost through compensation event mechanism for any design fault from Client or Project Manager. [cl. 60.1(14), 80.1]

## Possible Changes by GBA Governments

- Significantly increases Project Manager's control over Contractor's design
- Pages of Z clauses that supplement Contractor's design obligations – examples:
  - Replacement of independent checking engineer
  - Design amendments
  - Warranties and indemnities over IP

# Geotechnical Risk

## NEC4

Contractor has recourse to recover additional time or cost through the compensation event mechanism if:

- the geotechnical issue occurs within the Site and is something that an experienced contractor would have judged as having a small chance of actually being encountered [cl. 60.1(12)]

## Possible Changes by GBA Governments

- Same as NEC4

# Definition of Site / Site Access

## NEC4

- Definition of the Site:  
*“The Site is the area within the boundaries of the site and the volumes above and below it which are affected by work included in this contract”*
- Site access [cl. 33]:  
*“The Client allows access to and use of each part of the Site to the Contractor which is necessary for the work included in the contract. Access and use is allowed on or before the later of its access date and the date for access showed on the Accepted Programme.”*

## Possible Changes by GBA Governments

- *“The Client allows access to and use of each part of the Site to the Contractor which is necessary for the work included in this contract on its access date.”*

# Contract Documents / Order of Precedence

## NEC4

- Not expressly addressed in core or secondary option clauses, but Project Manager has power to state how the ambiguity should be resolved – see clause 17.1:

*“The Project Manager or the Contractor notifies the other as soon as either becomes aware of an ambiguity or inconsistency in or between the documents which are part of the contract. The Project Manager states how the ambiguity or inconsistency should be resolved.”*

- There are certain exceptions to the general principle in clause 17.1, depending on the type of NEC4 ECC contracts used.

## Possible Changes by GBA Governments

- Same as NEC4

# Suspension

## NEC4

- Project Manager may give instructions to stop or not to start any work. [cl. 34]
- If Project Manager has instructed Contractor to stop or not to start any substantial work or all work and an instruction allowing the work to re-start or start or remove work from the Scope has not been given within 13 weeks, then either party may terminate depending on who is responsible for the suspension. [cl. 91.6]

## Possible Changes by GBA Governments

- Same as NEC4

# Termination

NEC4	Possible Changes by GBA Governments
<ul style="list-style-type: none"><li>• Both parties can terminate when [cl. 91]:<ul style="list-style-type: none"><li>a) Insolvency of the other</li><li>b) Released under the law</li><li>c) Suspension for over 13 weeks due to neither party's default</li></ul></li><li>• Client can terminate when:<ul style="list-style-type: none"><li>d) Contractor's default not put right within 4 weeks</li><li>e) Suspension due to Contractor's default</li><li>f) Corrupt Act</li><li>g) Force majeure-type event</li></ul></li><li>• Contractor can terminate when:<ul style="list-style-type: none"><li>h) Client fails to pay within 13 weeks</li><li>i) Suspension due to Client's default</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Termination Table essentially identical to NEC4.</li><li>• Additional right of Client to terminate for convenience if Completion will be delayed by no less than one year due to interfacing problems.</li></ul>



# Corruption

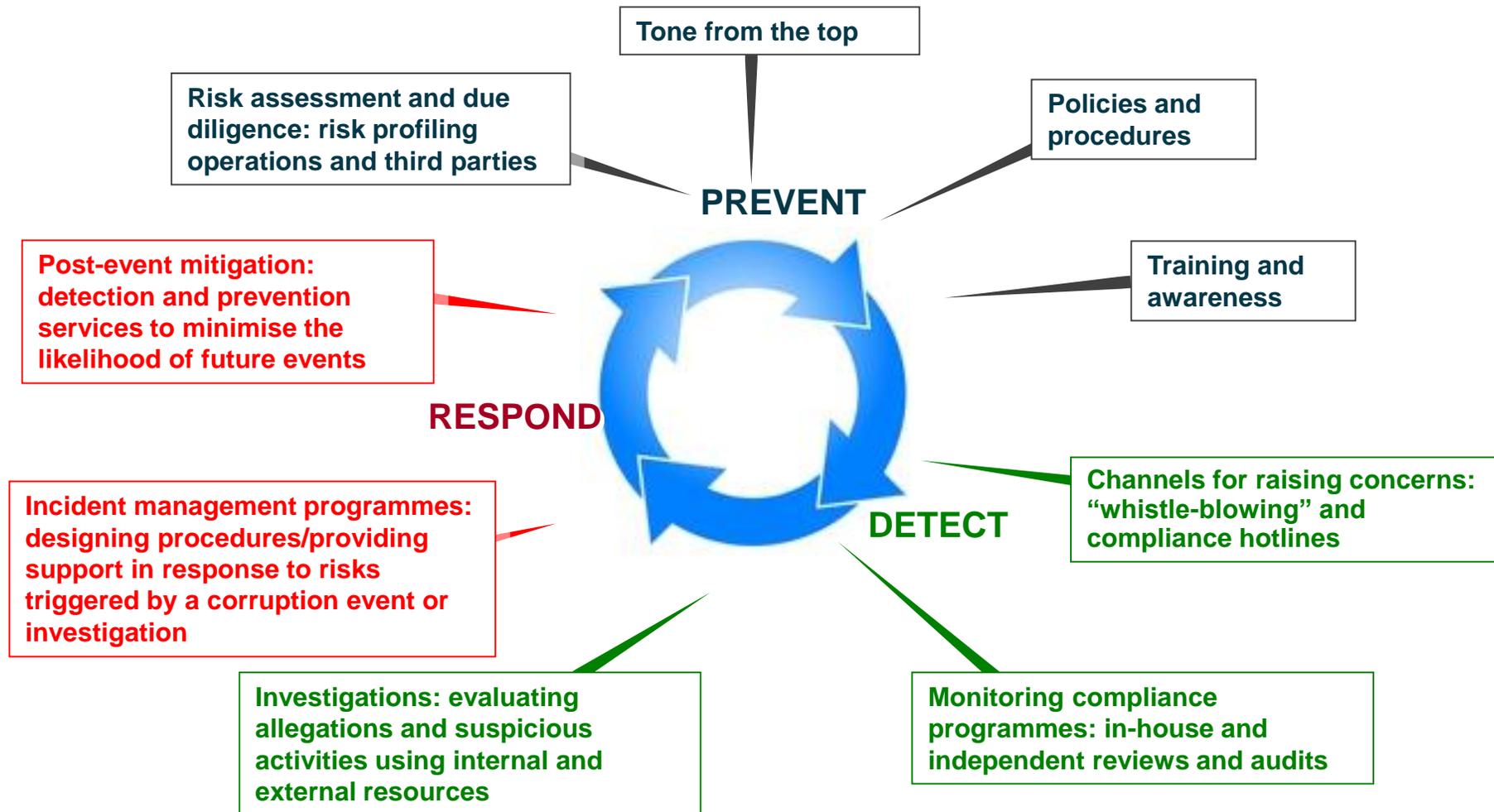
## NEC4

- Contractor must not engage in a Corrupt Act and must take positive actions to stop such acts of its subcontractors and suppliers. [cl. 18]
  - Definition of a 'Corrupt Act' is broad
  - Equivalent anti-corruption provisions must be included in subcontracts and supply contracts for Plant and Materials and Equipment. [cl. 18.3]
- Client has right to terminate due to a Corrupt Act by Contractor (or by its subcontractors or suppliers depending on Contractor's knowledge and actions). [cl. 91.8]

## Possible Changes by GBA Governments

- Almost identical to NEC4 except that:
  - Client has right to terminate only if Contractor's agents or employees have offered or given bribe of any sort to any agent or employee of Client / Project Manager / Supervisor
- Specific provisions e.g. requiring cooperation with the ICAC by giving them access to all relevant documents.

# Components of an anti-corruption program



# Practical compliance: red flags

- Remember: prosecutions can happen even if **no actual knowledge** that bribes are being paid. The below are key **red flags** to be aware of when selecting distributors, partners and other 3rd parties
  - Family relationships
  - Business consultants with political connections
  - Unusual payment patterns or financial arrangements
  - High prevalence of corruption in the country
  - Business partner rejects anti-corruption policy or form
  - Unusual high commissions
  - Lack of transparency in expenses/accounting records
  - Apparent lack of qualifications or resources
  - Recommendation by government official
  - Payment issues



# Criminal Offence under PRC Law

- PRC Criminal Law Article 387 (*“Acceptance of a bribe by an entity”*)

Offending party	Offending conduct	Monetary threshold	Punishment under PRC criminal law
Corporate entity and its responsible personnel	<ol style="list-style-type: none"><li>1. Extorts from another person or illegally accepts another person’s money or property in return for securing benefits for the person; and</li><li>2. The circumstances are serious.</li></ol>	RMB200,000 (provided that the offer is made to an individual who can wield influence over others)	<b>Criminal detention or imprisonment up to 5 years.</b>

# Criminal Offence under PRC Law

- PRC Criminal Law Article 389 (“Offering of a bribe to a state functionary”)

Offending party	Offending conduct	Monetary threshold	Punishment under PRC criminal law
Any natural or legal person	<p>Will be guilty of offering bribes where:</p> <ol style="list-style-type: none"><li>1. For the purpose of securing illegitimate benefits;</li><li>2. The person gives money or property to a State functionary.</li></ol> <p>Except where the person offers money or property to the State functionary through extortion, but gains no illegitimate benefits.</p>	RMB30,000 (or, if there is an aggregate factor, RMB10,000)	<b>Criminal detention or up to 10 years’ to life imprisonment, in combination with financial penalties or confiscation of property, depending on the monetary value of bribes.</b>

# Other Criminal Offences under PRC Anti-Bribery Law

Offence	Provision of the PRC Criminal Law	Criminal Sanction
<b>Offering</b> of a bribe to a <b>non-state</b> <b>functionary</b> (including companies, enterprises or other units (“ <i>danwei</i> ”))	Article 164	Imprisonment for up to 3 years, plus a monetary penalty (for major bribes, up to 10 years’ imprisonment, plus a monetary penalty)
<b>Offering</b> of a bribe to an <b>entity</b> (including state organs, state companies, enterprises, public institutions, or people’s organisations)	Article 391	Imprisonment for up to 3 years or criminal detention (plus a monetary penalty)

# Criminal Offence under Hong Kong Law

- Section 9(2), Prevention of Bribery Ordinance (PBO)

Offending party	Offending conduct	Punishment under Hong Kong law
Any person making the bribe	<p>Any person who, without lawful authority or reasonable excuse, offers any advantage to any agent as an inducement to or reward for or otherwise on account of the agent's:</p> <ul style="list-style-type: none"><li>a. doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or</li><li>b. showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business</li></ul> <p>Does <u>not</u> apply to bribes paid outside Hong Kong.</p>	<p><b>Imprisonment up to 7 years plus a fine up to HK \$500,000</b></p>

# Change of law

## NEC4

- Not addressed in core clauses.
- Secondary option clause X2 provides that:

*“A change in the law of the country in which the Site is located is a compensation event if it occurs after the Contract Date. If the effect of a compensation event which is a change in the law is to reduce the total Defined Cost, the Prices are reduced.”*

## Possible Changes by GBA Governments

*““Change in Law” means any addition or amendment to any enactment, regulations, by-laws or rules listed in **Appendix A** attached to these additional conditions of contract:*

- *Made on or after the date 10 days prior to the tender closing date; or*
- *Made before the date 10 days prior to the tender closing date and the commencement date of which is only ascertainable on or after the date 10 days prior to the tender closing date and this contract does not expressly provide for the parties’ respective rights and obligations in relation to compliance with such addition or amendment upon its commencement.”*

# Indemnity

## NEC4

- Each party indemnifies the other against any cost due to an event for which the other party is liable. [cl. 82.1, 82.2]
- Liability to indemnify is reduced proportionally to the extent that the other party contributes to the cost. [cl. 82.3]

## Possible Changes by GBA Governments

- Only Contractor indemnifies Client; Client does not indemnify the Contractor.

# Limitation of Liability

NEC4	Possible Changes by GBA Governments
<ul style="list-style-type: none"><li>• Core clauses silent on this</li><li>• Secondary option clause X18 limits Contractor's liability to the amounts stated in the Contract Data</li></ul>	<ul style="list-style-type: none"><li>• Option X18 is not adopted.</li></ul>

# Liquidated Damages

## NEC4

- Core clauses are silent on this
- Secondary option clause X7:
  - Contractor to pay liquidated damages until Completion or the date when Client takes over the works, whichever is earlier. [X7.1]
  - If the Completion Date is changed to a later date after liquidated damages have been paid, the overpaid damages are repaid to Contractor with interest. [X7.2]
  - If Client takes over a part of the works before Completion, the liquidated damages are reduced from the date on which the part is taken over, in proportion to the benefit to Client of taking over the part of the works. [X7.3]

## Possible Changes by GBA Governments

- Identical to NEC4 except that:
  - any reduction under X7.3 can't fall below a minimum rate of liquidated damages set out in Contract Data.

# Permits and Approvals

## NEC4

- Contractor to obtain approval of its design from Others where necessary. [cl. 27.1]
- Silent on approvals for other aspects of the works.

## Possible Changes by GBA Governments

- Contractor has sole responsibility to obtain approval of its submission, proposal, design and work.

# Subcontracting

## NEC4

- Limited control / restrictions of subcontractors
- Limited grounds for rejecting a subcontractor – “appointment will not allow the Contractor to Provide the Works”. [cl. 26]

## Possible Changes by GBA Governments

- Significantly increases Project Manager’s control over the appointment of subcontractors.
- Project Manager can reject a subcontractor based on price or failure to competitively tender.
- Pages of other additional Z clause setting out detailed requirements with respect to subcontractors:
  - Requirements for Specialist Subcontractors to be on the Approved List;
  - Obligation to maintain Subcontractor Management Plan;
  - Specific subcontract conditions;
  - Tendering obligations.

# Confidentiality

## NEC4

- Burden on each party relatively fair
- New core clause – see cl. 29:

*“The Parties do not disclose information obtained in connection with the works except when necessary to carry out their duties under the contract.*

*The Contractor may publicise the works only with the Client’s agreement”*

## Possible Changes by GBA Governments

- Much wider burden on Contractor
- Contractor to procure subcontractors of all tiers to comply with the confidential obligation.
  - Examples: to include equivalent obligations in subcontracts.
- Contractor to indemnify Client against all losses incurred due to breach of confidentiality provisions by itself, its employees, agents or subcontractors