

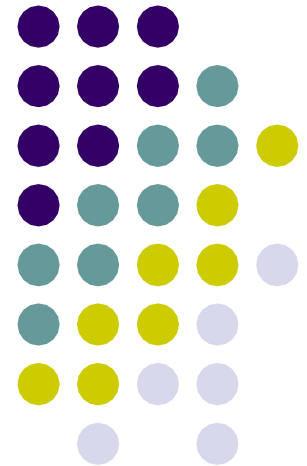
# Moving forward with NEC Contracts A Hong Kong Perspective

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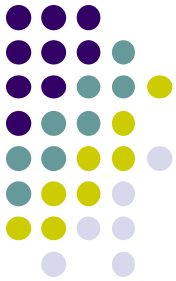
25 June 2019



# Application of NEC – Development Bureau



- Practice Notes for New Engineering Contract (NEC)– Engineering and Construction Contract (ECC) for Public Works Projects in Hong Kong, March 2017
- Current version adopted in HK: NEC 3<sup>rd</sup> Edition April 2013 Version
- NEC4 officially launched on 22 June 2017



## MEMO

<i>From</i>	Secretary for Development	<i>To</i>	Distribution
<i>Ref.</i>	( ) in DEVB(W) 506/30/07	<i>(Attn:</i>	
<i>Tel. No.</i>	3509 8739	<i>Your Ref.</i>	
<i>Fax No.</i>	2513 5608	<i>Dated</i>	<i>Fax No.</i>
<i>Date</i>	26 May 2017	<i>Total Pages</i>	2

### Adoption of New Engineering Contract (NEC) Form in Public Works Projects

I write further to our memo ref. DEVB(W) 506/30/07 dated 17 February 2016 promulgating the extended pilot on the NEC form in public works projects.

2. Since 2009, we have been promoting the adoption of NEC form in public works projects with a view to enhancing project management efficiency and cost-effectiveness through collaborative efforts amongst the contracting parties. Based on the preliminary findings from over 60 pilot projects, the Steering Committee on NEC Pilot Projects has recently reviewed the relevant administrative procedures for works contracts and consultancy agreements of values above the Quotation Limits for public works projects managed by Works Departments. The outcome of the review is that –

- (i) with the exception of (ii) below, the decision and justification as to whether or not the NEC form should be adopted in such works contracts or consultancy agreements shall continue to be documented and endorsed by an officer of not lower than D2 rank of the procuring department; and
- (ii) for capital works contracts with tenders to be invited from the Group C contractors under the List of Approved Contractors for Public Works, the decision and justification for not adopting the NEC form should be endorsed by the Head of Department.

3. The above revised arrangement shall take effect on all tenders for capital works contracts to be invited on or after 1 October 2017 but does not apply to those contracts for which the procurement arrangement has been endorsed prior to the date of this memo.

4. Please bring this memo to the attention of the project officers who are responsible for managing works contracts, term contracts and consultancy agreements for public works projects.



**Development Bureau**

# NEC Innovation Risk Sharing Adaptability Collaboration

## **PRACTICE NOTES**

New Engineering Contract (NEC)  
Engineering and Construction Contract (ECC)  
for Public Works Projects in Hong Kong

**Development Bureau**

**Practice Notes for New Engineering Contract (NEC)  
– Engineering and Construction Contract (ECC) for  
Public Works Projects in Hong Kong**

**March 2017**

# Snapshot of the Library of Amendments to NEC ECC



Core Clauses (Updated as at 17.10.2016)

In the contract, the core clauses are the ECC core clauses and the clauses set out in the ECC as main Option clauses for the respective main Options.

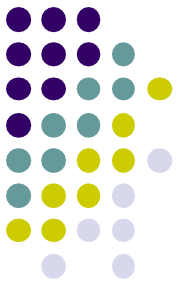
NEC/ECC Clause No.	Action	Details	Rationale	Related GCC/SCC/TC/Memo	To be applied to the stated main Option(s), unless otherwise specified below or vetted by LAD(W) and commented by the Inter-departmental Working Group and/or the Steering Committee
11.2	Add	the following after the end of the sub-clause (7):  "Equipment also includes Constructional Plant as defined in clause [D19] of the <i>additional conditions of contract</i> ."	To enhance clarity by specifying that "Equipment" covers "Constructional Plant" as defined in GCC 1. GCC's definition of "Constructional Plant" is provided in the <i>additional condition of contract</i> clause "Hired and Hire-Purchase Constructional Plant". The Project Offices should update the clause no. in square bracket.	GCC 1	Options A, B, C and D
11.2	Replace	the whole sub-clause (8) by the following new sub-clause (8):  "The Fee is the sum of the amounts calculated by applying the <i>fee percentage</i> to the Defined Cost except the part of the Defined Cost under items [11 and 12] of the Shorter Schedule of Cost Components."	To simplify calculation of fee by combining the direct and subcontract fee percentages since we are advised that contractors in UK appear to tender the same figure for both percentages. Normally, certain people's expenses may not be applied with the <i>fee percentage</i> in pilot projects. The Project Offices should update the item no. of the Shorter Schedule of Cost Components in square bracket to suit their projects.	N.A.	Options A and B
11.2	Replace	the whole sub-clause (8) by the following new sub-clause (8):  "The Fee is the sum of the amounts calculated by applying the <i>fee percentage</i> to the Defined Cost except the part of the Defined Cost under items [13 and 15] of the Schedule of Cost Components."	To simplify calculation of fee by combining the direct and subcontract fee percentages since we are advised that contractors in UK appear to tender the same figure for both percentages. Normally, certain people's expenses may not be applied with the fee percentage in pilot projects. The Project Offices should update the item no. of the Schedule of Cost Components in square bracket to suit their projects.	N.A.	Options C and D
11.2	Replace	"due to Subcontractors for work which is subcontracted without taking account of amounts deducted for" by "due to Subcontractors being accepted by the <i>Project Manager</i> for work which is subcontracted, excluding payment made in relation to contribution by the subcontractors of all tiers to the employer's mandatory provident fund for the Site Personnel under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) as set out in item 15 of the Schedule of Cost Components and without taking account of amounts deducted for" in the first main bullet point in sub-clause (23).	To adopt an approach that only subcontracted work executed by the Subcontractors who are accepted by the <i>Project Manager</i> in compliance with this contract is included as a part of the Defined Cost. Payments for the Contractor's mandatory contribution under the Mandatory Provident Fund Schemes Ordinance (Cap. 485), including contribution by his subcontractors of all tiers to the employer's mandatory provident fund for the Site Personnel under the contract, should be made under item 15 of the Schedule of Cost Components.	N.A.	Options C and D
11.2	Add	"NEC Clause 26, the <i>additional conditions of contract</i> or" before "the Works Information" in the first sub-bullet point of the third main bullet point in sub-clause (25).	To modify the definition of Disallowed Cost to suit the acceptance or procurement procedures in NEC contracts in Hong Kong.	N.A.	Options C and D
11.2	Add	", a mediation or arbitration" after "preparation for and conduct of an adjudication" in the eighth main bullet point in sub-clause (25).	To modify the definition of Disallowed Cost to suit the use of mediation or arbitration as options for settlement of disputes.	N.A.	Options C and D
11.2	Replace	"forecasts will have been paid by the <i>Contractor</i> before the next assessment date" by "assesses the <i>Contractor</i> has paid before the assessment date" in sub-clause (29).	To modify the definition of Price for Work Done to Date by adopting cost reimbursement approach.	N.A.	Options C and D if forecast of payment by the <i>Contractor</i> is not adopted.
11.2	Replace	the whole sub-clause (29) by the following new sub-clause (29):  "The Price for Work Done to Date is the total Defined Cost which the <i>Project Manager</i>  • assesses as having been paid by the <i>Contractor</i> before the concerned assessment date and  • forecasts will have been paid by the <i>Contractor</i> at or after the concerned assessment date but before the next assessment date, for the cost components in the Schedule of Cost Components shown in the <i>Contractor's</i> application for payment  in accordance with the first bullet point in clause 50.1 plus the Fee."	To modify the definition of Price for Work Done to Date by adopting an enhanced cost reimbursement plus forecast approach.	N.A.	Options C and D if comments or endorsement have been sought from the Inter-departmental Working Group and/or the Steering Committee where appropriate.

# The Current Practice: Government Driven



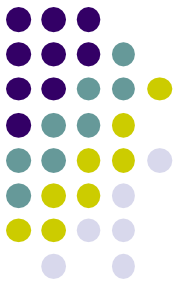
- Government being the largest employer
- The current amendments made with consultation from the stakeholders
- Regular feedback
- Consultancy agreement to gauge its success
- For NEC to sustain, need to address concerns from the industry

# Industry Concern



- Supervisor being delegated full power of PM
- No pre-bid agreement
- Procurement procedure – difficulty at early stage
- Programme not accepted or acceptance with numerous conditions
- Gain share at the end, Pain share as project goes
- More capital needed – pay when paid to subcontractor
- PMI issuance delay – RFA
- No payment until CE implemented under Options A & B
- Quotation once accepted, cannot re-open
- DRA no longer appointed
- Adjudication – voluntarily

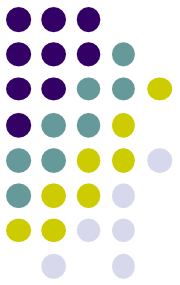
# Supervisor being delegated PM's full Power



- Separation of power is crucial in enhancing trust
- Avoid conflict of interest
- PM should and could administer the contract impartially without other roles
- In the long run, should aim at outsourcing to professional project manager

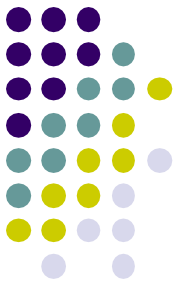


# No Pre-bid Agreement



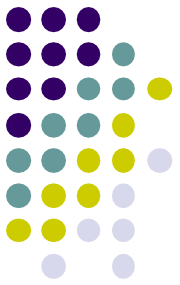
- The procurement procedure laid down prohibits pre-bid agreement
- Pre-bid agreement is essential in securing a competitive subcontractor or supplier at the tender stage at a locked-in price
- Particularly important at times of volatile market especially given the long tender validity period nowadays
- may consider relaxing some trades or materials not following the procurement procedure

# Procurement Procedure



- Difficult to follow the procurement procedure at the early stage of the Contract, eg. Erection of site office, hoarding
- Options A & B: procurement procedure laid down for compensation event. Is this really needed?
- PMI adding some items of works, does it need to follow the procurement procedure or issuing a VO to an existing subcontractors?

# Programme



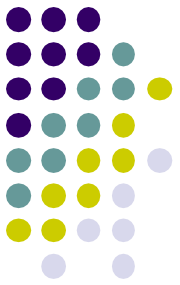
- Programme is very important in NEC as the accepted programme will form the basis of assessment of CE
- Problem now encountered is that the programme is either not accepted for a long time or accepted with numerous conditions

# Gain share at the end Pain share as project goes



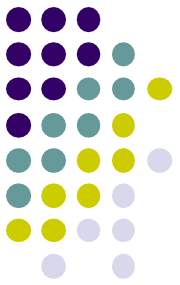
- Being criticised as unfair
- Contractor tries to delay the realization of pain situation
- CE not being implemented timely causing contractor falling into pain situation
- Substantial portion of profit only made at end of contract
- May consider recognising some gain share at interim payment

# More Capital needed



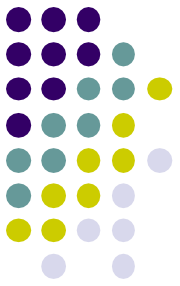
- For Options C & D, the Main Contractor will only get paid with receipts or evidence proving payment to subcontractors or suppliers
- Cash-flow is now much tighter
- Smaller contractors are screened out
- May consider adopting the default payment mechanism of NEC rather than local amendments

# PMI issuance delayed - RFA



- Long Government internal procedure for request for approval
- PMI issuance delayed
- PM asked contractor to proceed on a trust basis
- Not entirely satisfactory
- May need to visit the internal procedure to streamline and expedite the approval process

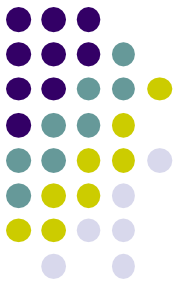
# No payment until CE implemented under Options A & B



- CE's quotation not dealt with fast enough
- Cumulative CE not implemented causing cash-flow problem
- Pressure for contractor to agree CE's quotations dictated by PM
- Otherwise, subsidizing CE at Contractor's cost
- May consider amendment to allow partial payment before acceptance of quotation

# Quotation once accepted

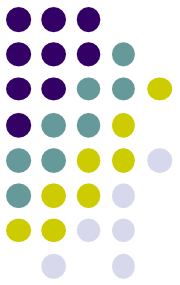
## Cannot re-open



- PM not willing to accept quotation for CE not actually carried out
- Contractor worries quotation's under-estimate and tend to be conservative
- Now, a lot of quotations are agreed to be extended till the CE actually done with actual records
- But this is against the spirit of NEC
- May empower the PM with more professional judgment without worrying being challenged by audit team
- May waive PM's liability if acting in good faith

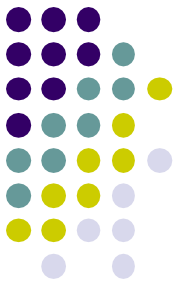


# DRA no longer appointed



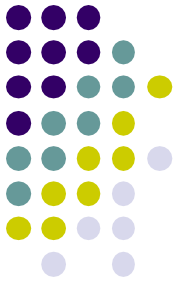
- Practice Note says NEC adopts partnering culture, DRA may not be necessary, discretion given to departments to determine if DRA is required
- NEC4 – Introduction of Dispute Avoidance Board
- My experience in NEC contracts – Essential to appoint DRA to resolve differences in views

# Adjudication



- Essential features in NEC
- Should make this mandatory rather than voluntary
- Should encourage Departments be more liberal in adopting adjudication in resolving disputes
- May blend in with the Security of Payment Legislation in the future

# Future of NEC in HK



- Would like to see more application in private sectors
- Should aim for NEC application at Sub-contract level
- Should make accredited PM a stand-alone profession
- Should see more adjudications being used to resolve disputes timely

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# Thank you

