NEC4 - What’s all the fuss about?

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It was 25 December 1987.
As I ripped open the Christmas wrapping paper that covered the box of my Nintendo Entertainment System, I had never felt excitement like it before in the 7 years I had spent on this earth. Santa had finally given me the gift I had been begging my parents for months.

Fast forward 20 years, the date is 22 June 2017. As I ripped open the brown envelope that covered my newly arrived NEC4 ECC, I felt the same excitement as that Christmas day in 1987, when I had opened the box of my Nintendo.

That excitement quickly diminished after I opened the cover of my the ECC and reviewed this new and wonderful form of contract.

To be honest, my statements regarding excitement levels are a bit of an exaggeration – both in comparison of my Nintendo and my NEC4 but I do think the NEC4 is a new and improved version of the contract but I was somehow expecting something more. Like the NEC3, it requires all the parties to follow the terms closely and work together and if this does not happen the contract will fall apart. Nothing in the NEC4 changes this.

The message from the ICE was that the NEC4 is "evolution not revolution". This message is 100% correct. I do think that this "evolution" is a good thing but it also adds to the already administratively burdensome procedures of the NEC3.

I do believe that a lot of the amendments were required. For example, something that has been added and much needed is the addition to Clause 31. Under the NEC3, if the Contractor submitted a programme for acceptance and the Project Manager did not respond, the subsequent consequences were a bit of a grey area.

Not responding to a communication is a compensation event under 60.1(6) but the "problem" is that this compensation event might not necessary mean there is a change to the Contractor's Defined Cost and/or Completion Date. So, in certain instances, the Project Manager could "avoid" accepting the Contractor's programme (which in the end helps no one).

Now, under Clause 31 of NEC4 ECC, if the Project Manager does not notify acceptance or non-acceptance then the Contractor may notify the Project Manager of that failure. If the failure continues for a further one week, the Contractor's submitted programme is treated as accepted. This "deemed acceptance" type procedure was in the compensation event mechanism but has always been missing from a programming point of view. This change can only be a good thing as it means that there should always be an up to date Accepted Programme.
Another beneficial change from the NEC3 is the procedure surrounding risk reduction meetings or what the NEC4 now calls early warning meetings. These are now scheduled to be held not just when the Project Manager and/or the Contractor instructs the other to attend but also at certain intervals as stated in the Contract Data. Any clause that “forces” the parties to meet for early collaboration can only be an advantage to all involved.

Core Clause 5 has also gone through a bit of an evolution. The Contractor is now required to submit an application for payment to the Project Manager. Clause 50.4 states that if the Contractor does not submit an application for payment, he may not be entitled to payment for that assessment interval. Also, to add finality and conclusiveness to the contract, the NEC4 also now allows for a “final assessment” under Clause 53.

The way disputes can be resolved has also been changed. Option W3 allows for “potential disputes” to be referred to a Dispute Avoidance Board. However, Option W3 further states it is not to be used where the UK Housing Grants, Construction and Regeneration Act 1996 (the “Act”) applies.

Option W2, which is to be used when the Act applies, has also been amended. Option W2 now allows for a dispute to be referred to “Senior Representatives”, who are to be named in Contract Data 1 and Contract Data 2. Each Party submits their statement of case which is limited to no more than ten A4 pages together with supporting evidence. Subject to as many meetings as the Senior Representatives may wish to attend, a list of agreed and non-agreed issues are produced within 3 weeks and the Project Manager and Contractor then put the actions from the issues agreed upon into effect. The ten-page limit means that the parties will need to have their paperwork in order and be well organised in order to be able to succinctly put forward their case with the necessary clarity and accuracy. From experience, this can be a challenge for parties without external assistance.

There are many other “upgrades” within the NEC4 ECC and overall, I believe the NEC4 is a good “evolution” to the NEC3. There is no doubt that the NEC4 will be the NEC contract of choice as the Government Construction Board, Cabinet Office UK has recommended that public sector organisations use the NEC4 where appropriate.

While the NEC4 is not as exciting as a Nintendo Entertainment System, I am enthusiastic about the amendments and looking forward to how the industry will accept it.

I hope you have found this article helpful. If you have any questions regarding the NEC3, NEC4 or the article then please do not hesitate to contact me or anyone in the Quigg Golden NEC cell and we will be happy to assist.

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