JCT & NEC3

Advantages & Disadvantages for Specialist Contractors in an Irish Context

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COVERAGE OF JCT & NEC3

**JCT:** UK but Scottish Building Contracts Committee “kilts” JCT

**NEC:** Intended for UK and international use, civil and common law jurisdictions (has choice of governing law and language).
JCT/NEC3: DRAFTING APPROACHES

JCT:

- Complex since JCT attempts to cover every eventuality – clogged with procedural rules.
- Much use of open-ended words (e.g. “reasonable”, “fair”).
- Focuses on consequences of breach and liability.
JCT/NEC3: DRAFTING APPROACHES (2)

NEC:

- Accessible; use of everyday English but terminology sometimes different (e.g. “compensation events”).
- More precise.
- Focuses on pro-active risk management rather than on what happens when things go wrong.
The mainstream JCT contracts and sub-contracts are lump sum contracts – where contractor (C) and sub-contractor (S/C) carries pricing risk (contract price can only be changed if works varied or delayed by E). The Standard Building Contract 2011 has With Quantities, Without quantities and Approximate Quantities versions.

NEC3 has core clauses (suitable for most procurement routes) and 6 pricing options (priced contracts with activity schedules/Bs of Qs, target cost contracts with activity schemes/Bs of Qs, cost reimbursable contract and management contract).

NB. Sub-contracts may not necessarily mirror main contract pricing option.
MUTUAL TRUST AND COOPERATION

- An overriding obligation in NEC is that the parties (including the PM) must act in a *spirit of mutual trust and cooperation*.

- The meaning of this has been a hotly debated issue but the obligation is regarded as essential in promoting the collaborative behaviours that are at the heart of NEC.

- Whilst this obligation is unlikely to override the express terms of the contract it will impinge upon dishonest conduct (e.g. giving spurious reasons for denying payment).
RISK MANAGEMENT UNDER JCT & NEC3

• “Risk” not expressly referred to in traditional JCT contracts; hidden within the language of obligations and indemnities. JCT permeated with “what if” clauses – if A does not do B, X will happen.

• Managing risk collaboratively with all parties – including sub-contractors – is the hallmark of NEC.
JCT & NEC3: SUB-CONTRACTS

• JCT produces domestic sub-contracts for all its main contract forms but their use is not mandated under the main contract. **NB.** JCT nominated sub-contracts are no longer available.

• JCT has recently introduced optional provisions enabling employer (E) to name individual specialist as domestic sub-contractors for specified parts of the works (specialist can be pre-named in Contract Particulars or post-named in an instruction for expenditure of a provisional sum).

• Under NEC C cannot appoint a S/C until the PM has accepted the S/C; NEC sub-contract is not mandated but proposed sub-contract conditions must be accepted by PM (unless they are the NEC 3 Sub-Contract).
JCT & NEC3: EMPLOYER REPRESENTATIVE

**JCT:** Architect (A) contract administrator (CA) – "administers" the contract (e.g. certifies sums due, issues instructions).

NB. If A is also the CA there is risk of conflict of interest.

**NEC:** Project manager (PM) – more active role in closely working with contractor to manage risk.

NB. PM has role in selection of sub-contractors.
SCOPE OF WORK - JCT

- Lack of definition of scope of works generates more disputes than any other single factor.
- Quantity and quality of works under JCT forms are defined in Bs of Qs, specifications or schedules.
- Where C is expected to carry out design the JCT D&B contract/Design Portion Supplement should be used.
• Where quantity/quality cannot be fully defined at outset, JCT enables the use of defined/undefined provisional sums.

• Defined provisional sums require that C has certain information about the content of the work involved but work has not been fully designed (C makes allowance for this in pricing prelims, programming and planning).

• C is not expected to make any allowance in his tender for undefined provisional sums.
SCOPE OF WORK – NEC3

- The Contract Data/Sub-Contract Data (which lists project specific requirements) includes a section entitled *Works Information*: this must *precisely* define the scope of the work *including* any design – no separate design agreements.

- Provisional sums are not allowed in NEC.

- Completion occurs when the works as defined in the *Works Information* are complete; practical completion under JCT is more subjective.
• The Contract Particulars should indicate start and completion dates and whether sectional completion is required.

• A/CA values variations according to the valuation rules in the contract (there is an option for C to provide a quotation to deal with both the time and cost consequences of a variation).

• A/CA may grant a reasonable extension of time if a relevant event has occurred; where C default is the cause of delay there is provision for LADs.
In addition to start and completion dates and sectional completion option NEC also has provision for **key** dates (e.g. for completion of certain elements of the works such as lift installation).

The programme is the key management tool in NEC – it has to be kept up to date and must be submitted to the PM for acceptance.

Whilst there is an option for LADs there is also an option of a bonus for early completion.
• The programme is an element within a management framework involving early warning (by both PM and C) of matters that could affect time, cost and quality.

• An early warning notice is then followed by a risk reduction meeting where both sides focus on solutions to minimise impact or time and cost.

• *Compensation events* giving rise to a claim from C are dealt with by the PM and C agreeing quotations dealing with both time and cost.
JCT STANDARD BUILDING SUB-CONTRACT 2011

• E has no influence over the selection of the sub-contractor or the sub-contract terms; use of the JCT sub-contract is entirely a matter for the C.

• The exception is the recently-introduced named sub-contractor option which prevents C from using his own terms.

• There are 2 sub-contract pricing options – lump sum and re-measurement.

• Not suitable for design; a separate sub-contract is available.

• The C and S/C are to work in “a co-operative and collaborative manner” but there is an option to delete this.
The S/C’s primary obligation is to carry out and complete his works “in a proper and workmanlike manner, in compliance with the Sub-Contract Documents….and in conformity with [the]… reasonable requirements of the Contractor……”

The Sub-Contract Particulars helpfully lists the elements of the Sub-Contract Works and the extent of their incorporation into the Main Contract Works to be regarded as practically complete.

Retention bonds are an option to be agreed.
THE NEC 3 SUB-CONTRACT

• The NEC Sub-Contract – like most standard sub-contracts – is “back to back” with the Main Contract.

• But the Sub-Contract is self-contained; it doesn’t refer back to the Main Contract (although this is possible in the Works Information).

• The Sub-Contract also has the same structure of the Main Contract with core chances, main options clauses, and secondary option clauses and the Sub-Contract Data.

NB All sub-contracts (including bespoke sub-contracts must require the parties to act in a spirit of “mutual trust and collaboration”).
THE NEC 3 SUB-CONTRACT PRICING OPTIONS & SECONDARY OPTIONS

• Main option clauses A & B (lump sum options), C & D (target cost options) and E (cost reimbursable option).

• The C is not bound to reflect his pricing option in the sub-contract; he is generally keen to use the lump sum options.

• The C is free to choose sub-contract secondary options (e.g. Option X16 – retentions – may not apply to the main contract but could apply to the sub-contract).

• The S/C’s primary obligation is to deliver his works in accordance with the *Works Information*. 
Underlying Concerns

- Lack of identification of risk and risk management. "Proper risk management is the key to successful delivery of building projects" (para. 3.2.1).
- Uncertainty in time and cost outcomes.
- Focus on price – not value.
- Lack of visibility over value of supply chain contribution.
- Little co-operation between parties.
SOME OBSERVATIONS ON INTERIM RECOMMENDATIONS

• Bills of quantities to be primary pricing reference for employer – designated contracts.
  ➢ Still a focus on price.
  ➢ Assume *everything* will have been designed beforehand.
  ➢ What about building performance outcomes? MEAT

• Directly tendering key specialist works packages.
  ➢ This is a positive recommendation.
  ➢ How early will the specialist be involved?
SOME OBSERVATIONS ON INTERIM RECOMMENDATIONS (2)

• Review of dispute resolution procedures to enable engagement between parties at senior management level.

  ➢ Introduction of standing dispute convenor for contracts over €10m – will this apply to disputes in supply chain?

  ➢ Aim is to reduce costs incurred by parties when disputes arise but NEC risk management process could avoid/minimise disputes.
LOOKING AHEAD

• Medium – term strategy is to consider other construction contracts.

• Need to move away from pre-occupation with lump sum prescriptive requirements that focus on establishing blame, penalty and risk transfer.

• NEC focussed on collaborative risk management that seeks early solutions rather than end of contract fault – finding.

• Government could be encouraged to pilot NEC to test whether it represents better value for clients and supply chain.

• **BUT** procurement strategies – not contracts – should be the overriding concern.