

# CONSTRUCTION INSIGHT

## Procurement Law Special Edition

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#### The JCT into the 21st Century

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## CHANGE FOR CHANGES SAKE

**In this Special Edition of Construction Insight, we take a look at the rules surrounding public sector procurement. Convoluted rules, as well as amendments to common Standard Form Contracts will mean a painful 'change in life' for us all.**

There is still a lack of understanding of public sector procurement rules. The Joint Contracts Tribunal (JCT) and the New Engineering Contract (NEC) have heavily amended their contracts. Consultants are up in arms about the new BPF Consultancy Contract and the Institution of Civil Engineers has revised the Measured Term Contract.

***In an industry where project managers and designers, struggle to keep up commercially and technically, clarity and simplicity in contracts, makes real sense.***

The people responsible for these changes obviously believe such change to be necessary, however many of us working within the industry remain to be convinced.

Sir Michael Latham and John Egan in

various reports produced in the nineties, assured us that massive savings could be made in our industry, if we just sorted ourselves out. We are still tirelessly pursuing that ideal.



by Ruth Farrell

One of the fundamental recommendations by Latham was a single, coherent Standard Form of Contract. He supported the NEC. In an industry where project managers and designers, struggle to keep up commercially and technically, clarity and simplicity in contracts, makes real sense.

***Keep the contract simple and builders can get on with the real jobs of building.***

They do not need to be concerned with constant swapping of basic contractual responsibility. Keep the contract simple and builders can get on with the real jobs of building. Unfortunately that is the opposite of what is being achieved.



# TENDERING - WHAT YOU CAN DO AND CANNOT DO



by Edward Quigg

**Although most people in the construction industry have at least a working knowledge of the Conditions of Contract, most do not know what the rules are in relation to tendering, whether as tenderers or employers. This has led to an increasing number of cases before the courts, which could have been avoided.**

The courts now have no difficulty in implying a contract in relation to tendering; sometimes this is called the

## Two Contract Theory.

At its most basic level, the implied contract states that if a tenderer submits a compliant tender, the employer will consider that tender properly and adhere to any applicable rules.

These rules are often expressly agreed between the parties.

***The courts now have no difficulty in implying a contract in relation to tendering; sometimes this is called the Two Contract Theory.***

For example in the instructions to tender it is common to find a paragraph stating that the tender shall be treated in accordance with the National Joint Consultative Committee (NJCC) Code of Practice for Single Stage Selective Tendering. That code of practice sets

out a detailed set of rules of how tenders are to be considered. If the employer does not adhere to those rules that is a breach of the tendering contract.

In other common law jurisdictions such as Canada, the courts are also content to imply an obligation to treat a tender in good faith. However, the UK courts are not willing to adopt such a wide definition just yet.

If the employing body is a public body, then there may also be a further set of rules setting out the public body's policy and procedures and if the works are above a certain value, then the European Union has set out a number of directives which must be followed.

These include an obligation to advertise in the Official Journal and also set out what can and cannot be taken into consideration when assessing bids. If any of the rules are not followed an unsuccessful tenderer may argue that had the rule not been broken then he would have been awarded the contract and would therefore be able to claim his loss of overhead and profit recovery as damages for breach of contract.

Lastly it should never be assumed that just because the employer is a large

public body they will get it right. The courts are littered with cases where national governments totally fail to obey the relevant rules.

There are also rules regulating how a contractor completes its tender. These may be expressly set out in the instructions to tender, such as no item in the bill can be zero rated and every item must be priced, and failure to comply would mean that the tender could be treated as invalid.

More serious is where tenderers enter into agreements with other tenderers in relation to their bids. This is called a cartel and the tenderer would not only not have his tender considered but also would be open to criminal prosecution leading to fines and even imprisonment.



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For membership information contact

membership2005.org.uk or www.ices.org.uk.

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# NEC - Making Partnership a reality



by James Golden

Whenever the Latham Report was produced in 1992 Sir Michael Latham heaped praise on the New Engineering Contract (NEC) as a model which should be used by all in the construction industry. That was NEC Edition 1.

We have subsequently had the 2nd Edition and now Thomas Telford Publishing has released NEC 3. The changes are in form rather than in substance. They include:

1. a re-numbering of options into X, Y and Z clauses. This makes the documents clearer and easier to follow;
2. adjustment of valuation of compensation events. These increase the pressure on the project manager to consider quotations and deal with them; and
3. tightening of some ambiguous provisions in the other terms of the contract.

The NEC prides itself on being a model for project management as well as a contractual tool. Some observers have described it as illegible and obscure. It has cut little ice with the Royal Institute of

Chartered Surveyors (RICS) or the Joint Contracts Tribunal (JCT). However, the contract has survived the steely eye of the President of the Technology & Construction Court in England, HHJ Jackson. HHJ Jackson made no adverse comment on the NEC in the case of *Costain Ltd & Ors - v - Bechtel Ltd & Anor* [2005] EWHC 1018 (TCC) (20 May 2005). This, coupled with this helpful new edition, means the NEC is getting stronger.

***“NEC 3 is the result of hard work, hard listening and careful thought. It is, and remains the best option for proving construction contracts available.”***

Those that are advocates of the NEC are often evangelical in their support, and their enthusiasm balances the hostility of the opposition. There seems no middle ground in the use of the NEC. Given that the Treasury and National Audit Office support it, it is clearly here to stay.

To those used to the traditional JCT and ICE Forms of Contract, the NEC is not so much a breath of fresh air as a tidal wave of change. The system of numbering and the use of the present tense often lead to a mental seizure whenever the document is first picked up until its purpose and rhythm become clear. All of this remains unchanged in NEC 3.

The new NEC 3 Suite comes complete with a Measured Term Contract, Adjudicator's Contract and Consultant's Contract along with documents suitable for sub-contracting.

Peter Higgins of the NEC drafting panel says “NEC 3 is the result of hard work, hard listening and careful thought. It is, and remains the best option for proving construction contracts available.”



## ICE REVISES ITS MEASURED TERM CONTRACT

### The ICE Revised Measured Term Contract causes little stir.

The Institution of Civil Engineer's revisions to their Measured Term Contract has caused little reaction from the industry. The revisions are not substantial but do maintain the possibly illegal Clause 66 Engineers Decisions as a precursor to adjudication. This carries a number of familiar difficulties including the status of the adjudication decision in subsequent arbitration if the decision is obtained under the Scheme.

Perhaps the reason for the silence surrounding the change is the massive growth in the use of the NEC in this area. NEC 2nd Edition Contracts have been adapted to suit Measured Term work with some success and now the 3rd Edition provides a fully integrated Measured Term option. It seems likely that with the considerable government support for NEC the traditional ICE Contracts will gradually lose market share.

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