SUBCONTRACTING UNDER THE NEC3 ENGINEERING AND CONSTRUCTION CONTRACT

In the construction industry today subcontracting is a way of life. Many main contractors do not employ any direct labour and those that do only employ the trades that they have a constant demand for and can therefore keep busy without the risk of standing time. As a result having some or all of the work carried out by another organisation is a common place and accepted practice, commonly known as subcontracting. Different contractual arrangements manage this process in different ways so it is important to know the specific requirements under the contract in use. This article examines the specifics of the Engineering and Construction Contract (ECC) within the NEC3 family of contracts.

Let us start by considering who constitutes a subcontractor under the ECC. Clause 11.2(17) identifies three qualifying classes of person or organisations. The first of these is someone who constructs or installs part of the works, a definition that does not pose any problems as this class is easily recognisable as being the common definition of a subcontractor. It should be noted that by restricting this class to someone involved in only a part of the works the ECC prevents the Contractor from subletting the whole of the works to a single person or organisation.

The second class is someone who provides a service necessary to Provide the Works (being the phrase used to describe the Contractor’s principle obligation). The key word in the definition of this second class is ‘service’, which acts to bring into this class anyone not caught in the first class but who provides some type of service. In particular this definition determines that designers providing a service to the Contractor will qualify as subcontractors under the ECC. For anyone who doubts this conclusion it is confirmed by the Guidance Notes. It is also worth noting that this part of the definition does not refer to being limited to part of the works and therefore all the design, for example, could be subcontracted to one designer. As we will see later, that designers are classed as subcontractors is confirmed in other relevant clauses in the ECC.

The third and final class covers a group of people or organisations who under other contractual arrangements would not be classified as subcontractors. These are people or organisations who have a contract with the Contractor to “supply Plant and Materials which the person or organisation has wholly or partly designed specifically for the works”. In interpreting this definition remember that Plant and Materials are things that are incorporated into the permanent works (clause 11.2(12)) (what many in the industry think of as plant (i.e. excavators, dumpers etc) is called Equipment in the ECC - clause 11.2(7)). This class clearly refers to the supply of such Plant and Materials; there is no mention of construction or installation. The final requirement is that the Plant and/or Materials have been wholly or partly designed for the works. This requirement will, in practice, probably mean that this class will only arise infrequently. However items such as purpose designed and made pipe bends may fall under this class if any part of the design is done by the supplier. This is a classification that should be remembered and considered carefully when the need arises. In the event of any doubt the Contractor is advised to simply discuss the individual circumstances with the Project Manager under the spirit of trust and mutual co-operation.

Without wishing to dwell on the third classification it must be pointed out that this class could arguably capture, for instance, a concrete mix where the supplier supplies the mix design based on a strength requirement specified by the designer (who could be working for the Employer or the Contractor) and a slump requirement specified by the Contractor to suit the method of deposition. In such circumstances, the concrete supplier will have carried out a design function when producing the mix design from the two performance criteria supplied to him. Strictly speaking the concrete supplier would then be classified as a subcontractor. Whether this is what was actually intended by the drafting body is not clear but in my view providing the parties consider such situations and proceed with agreement then the goal of the ECC will have been satisfied. The difficulty if such
suppliers are classified as subcontractors comes from the requirements in respect of the terms and conditions for subcontractors in clause 26 which is where we turn to next, as the vast majority of suppliers would not accept terms and conditions aimed at subcontractors.

Firstly, clause 26.1 makes it clear that the Contractor remains responsible for Providing the Works when he subcontracts any part of it. The clause also states that the contract applies as if any subcontractor’s employees and equipment were the Contractor’s. This is the situation you would expect; the Contractor cannot sublet his responsibilities to the Employer to a third party.

The remainder of clause 26 deals with the identification of potential subcontractors to the Project Manager and the acceptance of proposed terms and conditions. Clause 26.2 requires the Contractor to submit the name of each proposed subcontractor to the Project Manager for acceptance. In reply to such a submission the Project Manager is given one reason for not accepting the proposed subcontractor, that reason being that the appointment of the proposed subcontractor will not allow the Contractor to Provide the Works. It is difficult to see what factors might exist that would allow the Project Manager to use this reason. The use of any other reason would potentially trigger a compensation event as clause 60.1(9) so Project Managers must tread carefully when considering such matters.

By the final sentence of clause 26.2 the Contractor is prohibited from appointing a proposed subcontractor until the Project Manager has accepted that subcontractor. Contractor’s should be aware of this prohibition as at clause 91.2 the appointment of a subcontractor for substantial work before the Project Manager has accepted the subcontractor is Reason 13 of the reasons allowing the Employer to terminate the Contract. The only point for debate in respect of this reason is what is substantial work as opposed to unsubstantial work.

Clause 26.3 follows a similar theme and in practice would run in parallel with clause 26.2 in that the Contractor is required to submit the proposed conditions for each subcontractor unless either an NEC contract is proposed or the Project Manager has agreed that no such submission is necessary. Again the Contractor is prohibited from appointing the subcontractor until the proposed conditions have been accepted by the Project Manager, although the Project Manager is restricted to two reasons for withholding such acceptance. The first of these reasons is the same one as allowed under clause 26.1 and the second is that the conditions do not include a statement requiring the parties to work in a spirit of mutual trust and co-operation. A breach of this prohibition does not lead to a reason for termination.

Main Options C, D, E and F all include clause 26.4, which, following clauses 26.2 and 26.3, requires the Contractor to submit the proposed contract data for each subcontract, where an NEC contract is proposed and the Project Manager instructs such a submission. The Project Manager is given one reason for not accepting the contract data, being, as in clause 26.2, that it will not allow the Contractor to Provide the Works.

The requirements of clauses 26.2 and 26.3, and, where one of Main Options C, D, E or F is in use, clause 26.4, whilst being necessary, might be considered to be bureaucratic in their requirements. Users of the contract should not forget that they are required to work in a spirit of mutual trust and co-operation. By using this principle the Contractor and the Project Manager can manage these requirements between them by discussing how the Contractor intends to sublet portions of the works and agreeing what submissions shall be made to the Project Manager in advance in respect of the requirements of the 2 or 3 clauses that form part of their particular contract.

Having reviewed the requirements of the ECC in respect of subcontracting let us examine the options for subcontracts within the NEC3 family. Sticking with subcontractors who will construct or
install part of the works rather than designers the family includes 2 options. The first choice is the NEC3 Engineering and Construction Subcontract (ECS). Anyone who is familiar with the ECC will recognise the contents of the ECS instantly. The ECS is on the face of it identical to the ECC once the names of the relevant personalities have been changed (in the ECC substitute Employer, Project Manager and Supervisor with Contractor, and Contractor with Subcontractor). In fine detail there are in fact some changes in periods, for example in clause 62.3 regarding the submission of and reply to quotations and clause 51 in regard to payment. Do note however that the periods for payment in Secondary Option Y(UK)2 in the ECS are identical to those in the ECC version of the same secondary option resulting in identical payment timetables. Main Contractors will no doubt wish to use the facility in the Subcontract Data Part One to amend these periods.

The other option provided by the NEC3 family is the Engineering and Construction Short Subcontract (ECSS). The ECSS is said to be for subcontracts “which do not require sophisticated management techniques, comprise straightforward work and impose only low risks on both the contractor and the subcontractor”. The ECSS simplifies most, but not all, of the processes contained within the ECS and so becomes more appropriate for subcontracting organisations that do not possess sufficient management resources or skills to carry out many of these requirements. In particular the ECSS does not allow for design responsibility to be passed to the subcontractor, simplifies programming to the requirements set out in the Works Information and simplifies the management of defects amongst other matters.

What the ECSS does not do to any great extent is simplify the procedures related to compensation events albeit that the content is different. The Subcontractor is required to notify compensation events within seven weeks of becoming aware of the event and is subject to the same condition precedent as the Contractor under the ECC should he fail to so notify. What is not included is the deemed acceptance procedure should the Contractor fail to reply that is present in the ECS. The combination of these two would appear to make the compensation event procedures more onerous on the Subcontractor under the ECSS than it is under the ECS.

The other major difference between the ECSS and the ECS is the presentation of the Subcontract Data. In the ECS this is found at the front and contains clearly set out sections enabling the parties to fill in all the relevant details including a Price List, Works Information and Site Information together with all the other detail necessary to make the ECS work. Guidance is given where needed in each section of the Subcontract Data to assist the parties in completing the relevant information, which if followed should not present any difficulties.

Finally a word about subcontracting to designers. Clause 26.3 of the ECC refers to the proposed subcontract conditions being an NEC contract. This wide definition includes reference to the Professional Services Contract (PSC) which as part of the NEC3 family provides the perfect vehicle to sublet the design under for both the Contractor and the Employer. The content of the PSC will be the subject of a future article.

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Date: June 2006

This article was published in the July/August 2006 edition of "Civil Engineering Surveyor", the journal of the Institution of Civil Engineering Surveyors.