

Early contractor involvement is growing in popularity with local authorities, but which is the best route, JCT or NEC?

Joint Contracts Tribunal (JCT) and New Engineering Contract (NEC) - which drafting works best, and where are the traps for the unwary?

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Early contractor involvement can help smooth the way for large or complex construction projects, but it is not without its pitfalls. If not drafted properly, an Authority may find itself shackled to a contractor it no longer wants to work with or facing inflated construction costs with no easy way out. Joint Contracts Tribunal (JCT) and New Engineering Contract (NEC) now provide off-the-shelf options for early contractor involvement, but which drafting works best, and where are the traps for the unwary?

How does early contractor involvement work?

Early contractor involvement, or two-stage tendering, splits the tendering process into two stages. During stage one the designs, cost estimates and other pre-construction elements are finalised in anticipation of the contractor being engaged to carry out the works under a building contract which forms stage two.

While this approach does imply additional costs at the early stages of a project, for large or complex projects the extra costs at design stage may be justified if, as a result, costly hold ups during construction are avoided.

When using JCT contracts, the first stage of the tendering process often results in these works being undertaken using a Pre-Construction Services Agreement (PCSA). When using NEC contracts, the first stage is often undertaken using NEC Early Contractor Involvement (ECI) clauses.

Joint Contracts Tribunal (JCT) Pre-Construction Services Agreement (PCSA)

The JCT first published two forms of pre-construction services agreement in 2008 and these closely follow the terms and approach used in other JCT contracts. They are designed to be used with other JCT contracts, including the JCT Standard Building Contract and JCT Design and Build Contract.

Employers and contractors already familiar with JCT construction contracts are likely to feel at home with the JCT PCSA, while those that struggle with the traditional contract terminology and detailed approach used in JCT contracts may not.

As with existing JCT contracts, risk allocation is largely fixed, there is no proactive early-warning procedure, and the contractor claims for more time and money after a risk event occurs. An issue specific to the PCSA is that, unamended, the Contractor has no responsibility for design unless and until the main building contract is entered into.

The implication is that the contract must be modified to transfer risk, and clarify which party is responsible at which stage for any defects that may arise. This may include amendments to the execution clauses if the employer wishes to execute the PCSA as a deed and

increase the limitation period for claims against the contractor to 12 years. As drafted, the JCT PCSA is designed to be executed as a contract under hand, with a limitation period of 6 years.

In the event of a dispute, the use of the established JCT approach is likely to mean the courts will be able to draw on existing case law on JCT contracts and terminology.

New Engineering Contract (NEC) Early Contractor Involvement (ECI)

The NEC "early contractor involvement" clauses for use with the ECC, Options C and E, have now been incorporated as ECC Option X22. The ECI clauses are designed to merge seamlessly with the NEC4 ECC contract, and so do not require the negotiation of an additional separate PCSA.

In contrast with the JCT approach, NEC contracts include only limited details, leaving the parties to supplement these with negotiated Z clauses. The same language that is used across the NEC contract suite is used in the ECI clauses. The Cabinet Office has recommended that all public sector construction contracts should be upon NEC forms of contract.

The ECI clauses address issues likely to arise during a two-stage tendering process, for example, recognising that the Authority is likely to have relied on proposed key people in the contractor's team in deciding which tender to accept and requiring the contractor to maintain these named key people in post.

To incentivise cost saving by the contractor the ECI clauses allow for the contractor to be paid a share of any saving on the budget, but the burden for cost overruns is placed on the Authority. Whilst this may work for an Authority which is experienced in operating construction contracts, for one-off contracts or Authorities that lack this experience the ECI approach may not be appropriate, particularly given the costs involved in halting and restarting the design process with a new contractor.

Conclusion

There are clear differences between the JCT and NEC approaches to two-stage tendering pre-construction. In choosing between them, factors to consider will include policy considerations, the likely approach to construction of the works under the subsequent building contract, and perhaps most importantly the experience of the team that will be administering the contract.

If the team ordinarily uses NEC contracts, then that may be the sensible option and vice versa if they are used to using JCT contracts.

If the team administering the contracts has little experience in administering either NEC or JCT forms of contract, it is usually considered that a JCT is the easier to administrate as it requires less ongoing management than an NEC contract.

If you need further information on early contractor involvement, please do get in touch and we would be delighted to assist.

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