

BRIAN EGGLESTON

SECOND
EDITION

The NEC 3 Engineering and Construction Contract

A Commentary

WILEY Blackwell

From its launch in 1991 the New Engineering Contract has rapidly overtaken traditional building and civil engineering contracts to become the UK's leading standard form for major construction projects. Additionally, under the generic title NEC 3, there is now a family of New Engineering Contract standard forms.

This book provides a detailed commentary on the latest edition of the main form - NEC 3 Engineering and Construction Contract. It explains how the contract is intended to operate and examines each clause to consider its application and legal interpretation. It draws upon the author's successful book on the second edition of the Engineering and Construction Contract, ECC 2, and it identifies and comments on the changes between ECC 2 and NEC 3.

Particular attention is given to the revised compensation event procedures in NEC3, with five chapters of the book devoted to this subject. In-depth analysis is also given to:

- The role of the project manager
- The obligations of the parties
- The liabilities of the parties
- The revised dispute resolution procedures

When NEC 3 was published in 2005, it seemed at first sight that not much had changed from the previous edition. However, a very different picture emerged when the contract was examined in detail, and it was clear that significant changes had occurred. This book aims to explain in ordinary language what the clauses of NEC 3 say and really mean.

BRIAN EGGLESTON, CEng, FICE, FStructE, FCI Arb is a registered arbitrator, adjudicator and mediator with extensive UK and international experience. He is a past President of the Chartered Institute of Arbitrators. In a career spanning over 40 years he has worked as a bridge designer, resident engineer, contracts administrator and contractor. In the last 10 years much of his work has been related to NEC contracts. Brian Eggleston is the author of six other books for Blackwell Publishing, including the bestselling *Liquidated Damages and Extensions of Time*.

Comments on the author's previous book *The New Engineering Contract: A Commentary*

'Eggleston is the author of a number of highly successful guides to engineering contracts [...] he writes with a certainty and facility that commends him to many practising lawyers and with an ease which makes him highly readable for other construction professionals. Given its readability and perceptiveness, Eggleston can be thoroughly recommended to all construction professionals.'

– **Paul Newman**, *Construction Law*

'A very useful and helpful guide.' – **Fiona Hammond**, Legal Advisor, BAA plc

'Brian Eggleston's books are always good. This one is unique, as the only analysis on this contract that is both detailed and fair. The light it shines is startlingly revealing.'

– **Robert Fenwick Elliott**, Fenwick Elliott, Solicitors

'Those who pride themselves on a comprehensive law library will buy this book straightaway. Others would be well advised to buy it as soon as they are faced with the prospect of an NEC project.'

– **Construction Industry Law Letter**

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Second Edition

Brian Eggleston

CEng, FICE, FStructE, FCI Arb

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The NEC 3 Engineering and Construction Contract

Preface

In the preface to my 1996 book on the second edition of the New Engineering Contract (ECC 2) I questioned whether it was necessary to scrutinise the detail of the contract when faith in its principles might be more important to users than the detail of its provisions. However, I went on to suggest that if the contract succeeded and gained widespread use then commercial pressures would prevail and the contract would need to be robust enough to withstand detailed analysis and criticism.

It was soon evident that ECC 2 was becoming a popular contract of choice for civil engineering works and for building works – and its usage remains on an upward curve. It has certainly succeeded. But it was also soon evident that there were problems with the contract, particularly with its compensation event procedures. The need for a third edition was obvious and urgent.

NEC 3 took a few years longer than expected to produce. Perhaps this reflected the difficulties of amending clauses written in a unique style with minimalistic drafting. Perhaps remaining true to the original concepts of the contract inhibited change. When NEC 3 did eventually emerge in 2005 it was not the comprehensive revision which might have been expected. Some useful changes to compensation event procedures had been made, a few gaps had been plugged here and there, and a few new clauses added. At first sight it seemed that not much had changed. But getting into the detail revealed a different picture. There has been significant change – probably far more than the draftsmen intended – and not all of it for the better.

My endeavour in writing this book has been to try to explain in ordinary language what the clauses of NEC 3 say and what I think they mean. Not everyone will share my views but if they do no more than provide food for thought I hope they will make some contribution to the use and development of the contract.

Brian Eggleston
May 2006

Author's note

Phraseology

The New Engineering Contract is a family of contract documents and the proper use of the acronym NEC is as a prefix rather than as the name of any single contract. This book is principally a commentary on the third edition of the NEC Engineering and Construction Contract – the main contract in the family. For convenience that contract is referred to throughout this book simply as NEC 3. Its predecessor is referred to as ECC 2.

Capitals

NEC 3 relies heavily on defined terms which have capital initials and identified terms which are in italics. However, for reasons of style which I hope make for easier reading, capitals and italics have been used sparingly in this book, and therefore both defined terms and identified terms appear usually in ordinary case.

Text of NEC 3

Very little of the text of NEC 3 is quoted in this book. I have assumed that readers will have to hand a copy of NEC 3 and the other forms in the family as appropriate.

Commentary on the text is against the June 2005 publication of NEC 3.

Content of book

I have endeavoured to cover in this book all the clauses of NEC 3 and all the changes from ECC 2. I have retained the general layout and some of the content of my book on ECC 2 whilst extending commentary on compensation events from one to five chapters.

Table of clause numbers

The published version of the NEC 3 contract contains a comprehensive index of subjects referenced to clause numbers. In this book a full table of clause

numbers with descriptions is referenced to chapter sections. The table is set out on pages 359–78.

Readers of this book who wish to have the benefit of a subject index will find it a straightforward matter to move from the subjects in the NEC 3 contract to the chapter sections in this book.

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Chapter 1

Introduction

1.1 *Development of NEC contracts*

NEC 3 is a generic name for a family of contracts published for the Institution of Civil Engineers by Thomas Telford Services Ltd. NEC stands for New Engineering Contract and it is by this name that the contracts are generally known. The main contract and the subcontract were first published as consultative editions in January 1991. First formal editions followed in March 1993; second editions in November 1995; and third editions in June 2005.

It was always intended that there would be a family of New Engineering Contracts and in the short space of time between 1991 and 2005 other contracts were produced such that by 2005 the NEC 3 family comprised:

- the NEC 3 Engineering and Construction Contract
- the NEC 3 Engineering and Construction Subcontract
- the NEC 3 Professional Services Contract
- the NEC 3 Short Contract
- the NEC 3 Short Subcontract
- the NEC 3 Adjudicator's Contract
- the NEC 3 Term Services Contract
- the NEC 3 Framework Contract

The contracts are supported by officially published guidance notes, flow charts and an advisory document entitled *NEC 3 Procurement and Contract Strategies*. The Engineering and Construction Contract has six main procurement options and although one document (the *Black Book*) covers all six, each option is separately published. In all, as at June 2005, the complete set of NEC 3 documents comprised twenty-three volumes.

Background to NEC contracts

The background to the development of the New Engineering Contract does much to explain its style and content. In the 1980s there was on-going debate within the Institution of Civil Engineers, the lead body for the production of the ICE Conditions of Contract – at that time the standard form used for most civil engineering works in the UK – as to the direction of future contract strategies. At issue were questions as to whether the then existing standard forms adequately served the best interests of the parties by focusing on the

obligations and responsibilities of the parties rather than on good management, and whether an entirely new approach was needed to promote co-operation and to reduce confrontation. The prevailing view was that something new was needed, particularly for sizeable contracts where attention to good project management was the key to successful completion. So although confidence remained high that the standard ICE forms would remain the popular choice for routine civil engineering works, the Institution embarked upon the drafting and production of what is now the New Engineering Contract.

The drafting team was charged with three specific objectives for the contract:

- that it should be more flexible in its scope than existing standard forms
- that it should provide greater stimulus to good project management than existing forms
- that it should be expressed more simply and clearly than existing forms

It was, therefore, a matter of policy that the New Engineering Contract should be different from other standard forms in style and content.

For users of the contract the difference is of very significant practical effect. It used to be said that a good contract was never taken out of the drawer until it was needed. For the New Engineering Contract that rule does not apply. It is as much a manual of project management as a set of contractual conditions – and it should never be taken off the desk and put in the drawer.

Prospects for the future

The rapid expansion of use of the New Engineering Contract has been a remarkable success story. Contrary to intentions and to expectations the contract has within just a few years replaced ICE Conditions of Contract as the contract of popular choice for civil engineering works and it is already in widespread use for building, process and plant works. Although much used for major projects it is also used at more mundane levels. With the support base it has now built amongst clients and professionals, and with the range of contracts now available, there are real prospects that the New Engineering Contract in its various forms will become the dominant contract of the future.

1.2 Characteristics of NEC contracts

As noted above the New Engineering Contract was drafted with the objectives of achieving flexibility, stimulus to good project management, clarity and simplicity.

Flexibility

Flexibility is perhaps the most ambitious of these objectives. Thus the NEC 3 Engineering and Construction Contract aims to be an all purpose contract for all construction and engineering disciplines at home or abroad. It offers this through a combination of uniquely drafted provisions and a complex structure of options. Four distinct features are presented:

- discipline specific terminology and references to the practices of particular industries are avoided. Reliance is placed on a framework of general provisions written largely in non-technical language
- responsibility for design is not fixed with either the employer or the contractor but can be set at any amount from nil to total with either party
- primary options give a choice of pricing mechanism from lump sum to cost, *plus*
- secondary options allow the employer to build up the provisions in the contract to suit his individual policies

Stimulus to good management

Again, as noted above, much of the inspiration for the development of NEC contracts came from a belief that existing forms of contract no longer adequately served the best interests of the parties. The argument was put that expanding procurement strategies, changing practices in contracting, and developments in project management required contracts to focus as much on management as on the obligations and liabilities of the parties. So NEC contracts lay great emphasis on communications, co-operation, programming, and the need for clear definition at the outset of various types of information. Reports from users of NEC contracts suggest that improvements in project management are being achieved and that job satisfaction for those involved is better than with traditional contracts.

Clarity and simplicity

The approach adopted by the drafting team towards the objective that NEC contracts should be expressed more simply and clearly than existing forms of contract was to start from scratch rather than to build on old foundations. So NEC contracts are intentionally and conspicuously different from other standard forms in style and structure. They are written in non-legalistic language using short sentences and avoiding cross-references. Familiar phrases such as 'extension of time' and 'variations' are absent as is the regular use of the word 'shall' to signify obligations.

However, there is a price to pay for this brevity. Taken by themselves, the contracts are, at least for first time readers, more of a mystery than a model of clarity and simplicity. Fortunately, there are guidance notes and flow