NEC Publishes Alliancing Guidance

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Alliancing

Alliancing is being used increasingly on construction and infrastructure projects, as indicated by the publication of the ICE’s Infrastructure Client Group’s Alliancing Code of Practice last year (available to download here).

Following suggestions some time ago that an NEC3 alliancing form of contract would be published, the NEC has now published “Guidance on implementing Alliancing using NEC3 contracts” (the Guidance) (available to download here). This was published by the NEC and the ICE Infrastructure Client Group and so reflects the recommendations in the Alliancing Code of Practice.

Alliancing Contracts

The Guidance suggests that alliancing can be achieved using NEC3 contracts by including Secondary Option X12 (Partnering) in the contracts between the employer and each “Alliance Partner” (i.e. the consultants, contractors, key suppliers, maintenance contractors and, if necessary, sub-contractors). The Guidance does not consider it necessary to create “a separate overarching alliance agreement” if all Alliance Members are signed up to NEC3 contracts. In addition, whilst the Guidance suggests that “there may be a need to amend the standard allocation of risk under the NEC3 contracts” to reflect any risk sharing, such amendments “should be limited”.

The Guidance also contains suggested wording for inclusion in the Contract Data in the Engineering and Construction Contract and the Professional Services Contract if the NEC3 approach to alliancing is to be adopted. This
includes “Z clauses” governing the agreement of a budget, assessing certain risks, project bank accounts and insurance.

In our view, the approach suggested by the Guidance will not be appropriate to all alliance arrangements and does not reflect the approach taken on recent alliance projects we have been involved in. For example, where a “true alliance” approach is to be taken with the Alliance Partners and the Employer sharing all risk and reward it is sensible for the Alliance Partners to be appointed under one over-arching agreement.

In addition, when a “pure alliancing” approach is adopted it is common for the parties to agree to a no blame/claim position under the contract. The approach suggested by the Guidance “leaves the door open” for the Alliance Partners to become embroiled in a dispute, which could prevent the alliance achieving its aims.

Partnering Information and Disallowed Cost

The Guidance does helpfully include a suggested outline of the Partnering Information, which is referred to in NEC3 Option X12 (Partnering). The suggested content includes the purpose of the alliance, the organisational model, the collective decision making process, how the alliance is to be managed and the incentive model. In any alliancing contract it is key to clearly set out the principles based on which the alliance will work to encourage the adoption of an alliancing “culture”, so this will be a useful reference point for those entering into alliancing contracts.

An interesting point made by the Guidance is that in order to encourage the Alliance Partners to focus on the costs of the Alliance, rather than their own costs, parties should consider narrowing the scope of “Disallowed Costs” (e.g. in the NEC3 Engineering and Construction Contract), such that Alliance Partners are paid for correcting defects, for example. In our view this is a sensible approach to incentivise the alliance team and an approach typically adopted in bespoke alliance agreements.

Ensure Contractual Approach Reflects Alliance

The Guidance will be very useful for those considering or adopting alliancing arrangements on any project following the Alliancing Code of Practice. However, the contractual position suggested in the Guidance will not be appropriate to all alliancing arrangements as it does not achieve a “true alliance” approach.
alliance” approach, as has been reflected in recent infrastructure alliance arrangements.

In any event, it does seem clear that alliancing is “here to stay” (as also suggested by the significant number of recent projects on which alliancing has been used). For the use of alliancing to be really encouraged, we would hope that the next NEC3 suite includes an alliancing option which goes further than the Guidance.

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