Moving with the times

Guest editor Andrew Croft of Beale & Company reviews the new edition NEC3 suite of contracts which, although welcomed, could have gone further, he argues. An NEC Alliancing Contract could be in the offing.

In April 2013 a new edition of the NEC3 Suite of Contracts was published. This is not the NEC4, but a consolidated version of the September 2005 NEC3 forms, with some new additions in response to industry developments since 2005. This editorial examines the recent developments of the NEC suite, and discusses, in particular, the recent changes.

Behind the times?
The NEC3 suite got off to a positive start – in 2005, following the suite’s introduction, the UK Office of Government Commerce (OGC) endorsed its use on public sector projects. The forms quickly became a dominant force, particularly in the civil engineering sector, where they largely replaced the popular ICE/ICIC forms. However, more recently, various factors have resulted in many calling for the NEC3 suite to be updated, in order to keep up with developments in the industry.

Key developments in the construction industry which were not fully reflected in the original NEC3 forms, include: (i) the UK government’s adoption of a fair payment charter in 2008, aiming to encourage fair payment throughout the supply chain and the resultant fair payment charter in 2008, aiming to encourage fair payment, (ii) the NEC3 forms being far from the only kid on the block. For example, the government is known to be using the PPC2000, amongst other forms, on existing projects.

Positive developments
However, very recent events have quickly helped the NEC suite resolve the majority of the above issues. First, the courts have interpreted the NEC with little difficulty in a number of recent cases. Those worth highlighting include: (i) WSP Civil Ltd v Dalblair Utilities Services Pl (2012) EWHC 2428 (TCC), which considered the dispute resolution clause of the PSC; (ii) Atkins Ltd v Secretary of State for Transport (2013) EWHC 139 (TCC) where the compensation event regime under the Highways Agency’s MAC contract, an amended form of the NEC3, was discussed; and (iii) RWE Npower Renewables Ltd v JN Bentley Ltd (2013) EWHC 978 (TCC), which considered the resolution of ambiguities between the works information and the contract data in the NEC3 Engineering and Construction Contract (ECC).

In Atkins v Secretary of State for Transport, Akenhead J addressed what he called the ‘sten or other voices which criticise the NEC3’, and stated that the NEC3 is ‘highly regarded’ and is seen as ‘providing material support to assist the parties in avoiding disputes and ultimately resolving any disputes that do arise’. This clear judicial endorsement of the NEC3 should help alleviate any concerns regarding the language used.

April 2013 amendments
Perhaps more significantly, in addition to some relatively minor drafting amendments, the April 2013 edition of the NEC3 Suite of Contracts includes some important changes: (i) project bank account provisions have been introduced as a direct response to the government’s fair payment initiative (including the 2008 charter), including a trust deed and a joining deed. This should further encourage the use of project bank accounts; (ii) the NEC3 forms now incorporate amendments arising out of the LDEDC4. This should reduce the risk of parties inadvertently failing to comply with the new payment and adjudication regime; (iii) the updated suite includes new ‘How To Guides’ for completing the works information, scope and the service information in the ECC, PSC and term service contract respectively, and on using the communication forms on those contracts. These should be of real assistance to those specifying the technical requirements; (iv) a guide for using BIM with NEC3 has been published, containing suggested amendments to the ECC, the engineering and construction subcontract and the PSC to incorporate the CIC BIM Protocol. The guide suggests that the technical requirements of a protocol should form part of the works information, whereas the other provisions should be additional conditions. Additional compensation events have been included in relation to BIM. This is a positive step in encouraging the wider adoption of BIM; and (v) the suite includes a new short form of the PSC, the Professional Services Short Contract (PSSC).

This was developed in conjunction with the Association of Project Managers and is designed for small projects, where less sophisticated levels of management are required. This should see the increased use of the NEC3 for consultants’ appointments and the PSSC may emerge as a competitor to the RIBA and ACE forms on smaller projects.

Still room for improvement?
There are many positives to draw from the April 2013 suite. However, one wonders whether the drafters could have gone even further. In relation to BIM, the provisions are ‘haddon away’ in a guide, when it would have been more proactive to include them as an additional X Option. Further, the suggested amendments regarding the CIC BIM Protocol could create risks for consultants and contractors, particularly the inclusion of Cl 3 and 4 (the obligations of the employer and the contractor/consultant regarding BIM) in the works information. As the works information can be changed by an instruction from the service manager this approach enables the service manager to unilaterally change the obligations of the parties and increase/decrease the standard of care. Although this would constitute a compensation event, it is difficult to see how it would be assessed.

Furthermore, the amendments regarding the LDEDC4 were already available on the NEC’s website and those in relation to project bank accounts are not a new concept – a project bank account requirement was published in 2008 as a document entitled ‘OGC fair payment practices for use with NEC Contracts.’ Moreover, whilst the ‘How To Guides’ will be useful for those completing the NEC forms, they mainly supplement the contracts to which they apply and do not change the existing position.

What next?
Now that some of the concerns regarding the NEC suite appear to have been allayed, the NEC is likely to go from strength to strength. However, the NEC3 should not rest on its laurels. There are perhaps further improvements needed as demonstrated above. Additionally, following the publication of the CIOB Contract for Complex Projects in April 2013, which aims to encourage a proactive and collaborative approach to risk and time management and includes detailed provisions to facilitate the use of BIM, there may well be a viable alternative (and a competitor) to the NEC3 on complex projects.

One way in which the NEC may set itself apart would be the introduction of an alliancing contract. In January 2013 HM Treasury’s Infrastructure Procurement Routemap stated that an initial consultation exercise has been carried out to explore this. Given the increased uptake of the alliancing model in both the public and private sector, the time does seem ripe for a standard form of alliancing contract.

To conclude, the NEC is moving with the times and the recent amendments to the NEC3 suite are key to this. However, as with any standard form, there is still room for improvement and development. We may well have to wait for the NEC4 suite for further changes.