



Comments from Quantity Surveying Division of The Hong Kong Institute of Surveyors on the Draft FAQ on NEC3 prepared by CIC NEC3 Task Force

The following is a list of comments received from Council Members of QSD of HKIS, although some comments may have been addressed in the FAQ, QSD would like the Task Force to review the FAQ to see whether amendments/rewordings are necessary.

General

1.	The FAQ emphasize on the benefits of NEC3 with little mention on the possible pitfalls or drawbacks of NEC3. They give an impression to readers that CIC is promoting NEC3. It is doubtful whether CIC should promote a particular form of contract and give an impression to the readers that NEC3 is better than other forms of contract.
2.	In various FAQ, it emphasizes the need of training to construction parties on NEC3 because it is new to Hong Kong. It is noted that construction professionals in Hong Kong do not have adequate experience on NEC3 and there is no or little training in the universities in Hong Kong on NEC3, the readiness of using NEC3 in Hong Kong is in doubt.
3.	It is suggested that all possible pitfalls/drawbacks should be stated to let the stakeholders know before they choose the form of contract to be used for a particular project.
4.	It would be useful if the FAQ can highlight the changes to the entrenched concepts and practices as brought about by the NEC3. E.g. Change to the rules of valuation, BQ rates no longer be binding; no provisional sums, prime cost sums or contingency sums; order of precedence for inconsistencies in documents not stated; no differentiation between variation and other compensation events; float time to be owned by contractors; same list of relevant events for time and cost compensation (neutral events could be an compensation events attracting both time and cost claims), etc.



Comments on Individual FAQ

1.3(ii) & 3.2	The use of simple English in lieu of the commonly adopted contractual terms may run the risk of dispute in interpretation of the meaning of the contract and cast uncertainty on the applicability of the established case laws under the traditional forms of contract. The 2 nd and 3 rd paragraphs of FAQ 3.2 which try to protect and promote NEC3 by stating that difficult issues of interpretation also exist in other contract forms and that case law is not always extensive and clear may not be appropriate and may need to be reworded.
1.3(iii), 1.4(ii), 2.2(iv) & 3.8(d)	The onerous requirements and the short time frame set in making decision and for acceptance of Contractor's quotations and assessments for compensation events by the Project Manager may affect the Project Manager in making a wrong decision or a fair assessment due to the heavy workload of the Project Manager.
1.3(iii), 2.2(ii), 2.7, 3.8(a) & 3.17	The open-book and collaborative approach, in particular target cost, cost reimbursement options may enhance the risk of collusion. This may be one of the reasons why target cost contracts and cost reimbursement contracts are seldom used in Hong Kong. Furthermore, for cost reimbursement option, the Contractor will have no incentive to obtain the best price for work items.
1.4	The passage implicitly suggests that common standard forms used in Hong Kong do not embody partnering concepts. This is not quite right. Although the HKIS SFBC 2005 does not contain a "Partnering Clause" (the exact legal implications of which have yet to be decided by the courts), the HKIS SFBC 2005 features partnering-friendly provisions such as (i) a more equitable risks allocation and (ii) a robust system of time frames and workflow designed to achieve early handling and resolution of differences and claims.
1.6 & 3.11	The power and responsibility of the Project Manager are so extensive, there may be conflicting role of the Project Manager if he is empowered to give instructions and also the one to accept/reject contractor's quotation/assessment of compensation events or to making his own assessment. There is no express provision in NEC3 that the Project Manager must act independently and fairly, the questions on his impartiality and issue of accountability may be raised in particular when a compensation event was a result of his wrong decision or in



	public projects using public money. It is suggested that assessment of payment and costs of compensation events and all other financial matters be handled by independent construction cost consultants. Check and balance function should be implemented. Suggestions to overcome this problem should be included in the FAQ.
2.2(vi), 3.9 & 3.26	The assessments of compensation events are contemporaneously. This prospective approach to forecasting the effects of compensation events may be based on incorrect assumptions, however they are not allowed to be revised if they are found to be incorrect by later recorded facts. The Employer is deemed to accept such risk/deviation/difference. This possible drawback is particular important and must be addressed in public projects where public money must be used correctly and justified.
2.2(viii)	This FAQ suggests that NEC3 can improve financial outcome. This statement needs to be justified.
2.4 & 2.5	This FAQ suggests that experienced NEC3 practitioner support throughout the whole process of selecting and drafting the form of contracts, and training on NEC3 is a critical factor of the successful implementation of a NEC3 project. It is noted that we don't have enough experienced NEC3 practitioners in Hong Kong taking into account of the period of learning curve required, in addition to training, by local contract practitioners. This deficiency may need to be mentioned.
2.5	The suggestion of change of key personnel needed to be further explained. Changing key personnel of a project may be interruptive to a project because it needs time for the new comers to learn and pick up due to the unique nature of each project.
2.6	The statement that internal staff and usual contractors will continue with familiar behaviours if the familiar form of contract is used and hence it will likely be harder for the Employer to achieve the desired change in behaviours if the Employer is using his own form by adding contractual partnering seems to be an assumption only without justifications. It is noted that many Employers using their own forms by simply adding the contractual partnering with slight



	modifications to their own forms are quite successful. This statement need to be reconsidered.
2.6	Although this FAQ stated that the Employer can use his own standard terms and conditions and modify them to incorporate the spirit of collaboration and management framework of NEC, the whole FAQ seems not to support such modification but to encourage using the whole NEC3 unaltered. The wording of this FAQ may need to be reconsidered.
2.7	This FAQ suggests that target cost contract can be used if “lowest cost” is not as important as other project success factor such as timely completion. This suggestion that target cost contract can achieve timely completion needs to be justified. Furthermore it will be difficult for public works projects not to consider the cost when using public money.
2.7	The statement that target cost contract can mitigate the effect of risk-premiums included by tenderers for unquantifiable risks, and the Employer can be benefited from savings in project cost where a gain-share is realised. This FAQ has no mention that all such risks will in fact be paid during the construction period when they arise. Whether there will be any cost saving is in doubt.
2.7 & 3.19	For target cost contract, in order to have the actual cost not to exceed the target cost and to share the saving, contractors may tend to mark up the costs by over-allowing some uncertainties and risks. This possible drawback may need to be mentioned.
2.8	This FAQ seems to promote NEC3 to the private sector by quoting examples in private sector. It is doubtful whether CIC should promote a particular form of Contract.
3.1	This FAQ introduces to the readers the services provided by service providers on NEC3, it may be seen as a promotion to these services providers. The role of CIC may be questioned.
3.3	Early warning for any Employer’s risks will be considered as compensation events, this may increase the cost to the Employer and may need to be mentioned in the



	FAQ.
3.5	There is no mention of whether the NEC3 is compatible with the arrangement of Nominated Sub-contracting or named sub-contracting commonly used in Hong Kong. There will be no control over appointment of specialist sub-contractors by the Contractor or on quality of works.
3.9	In this FAQ and various FAQ such as 2.4 and 2.8, it emphasizes that there is a need to increase resources to implement NEC3 project. This FAQ also states that administration input will be much increased but suggests that the increase in administration costs can be offset by the higher chances of improved project outcomes, greatly reduced final account work period, and reducing the risk and expense of long-running disputes. It seems that this suggestion is an assumption only without any supporting data.
3.10	The suggestion that it is likely in Hong Kong that courts, arbitrators and adjudicators will treat the obligation to act in a spirit of mutual trust and co-operation as one which binds the parties seems to be assumption only without any supporting case law.
3.12	This FAQ suggests that when using NEC3, it should not be amended. Any amendments may increase the risk of inconsistent, conflicting and ultimately ineffective amendments. It is in fact quite common for all types of standard forms, amendments to suit the Employer's needs or the project particulars are necessary. The stated risks can actually be avoided by careful drafting of the amendments. The wordings of this FAQ may need to be reconsidered.
3.18	No provision for provisional sums, prime cost sums or contingency sums in NEC3 may impose a barrier to the Employer in controlling the budget, this budgeting exercise is particular important in public works projects. This possible drawback may need to be mentioned.
3.20	The Accepted Programme forms the basis of assessment of compensation events, without having an Accepted Programme, assessment of compensation events could not be done, and when the time period expires, contractor could then consider it as a compensation event. This important message may need to be



	mentioned.
3.21 & 3.22	It is noted that some of the NEC3 pilot projects took about a year or more to get the programme approved. One may question how the Project Manager can fairly assess the compensation events in the absence of an approved programme. This possible drawback may need to be mentioned.
3.23	Some contractors may abuse the system by submitting unrealistic and impracticable programme. Although they are stipulated reasons for not accepting programme, it may be difficult for the Project Manger to prove that the programme is unrealistic and impracticable. This possible drawback may need to be mentioned.
3.26	The last paragraph of this FAQ confirms the success of using NEC3 in the 2012 London Olympics with only a very small number of disputes arising. To draw a conclusion of the success of a project simply based on the number of disputes without referring to other factors such as costs etc. is not appropriate. Furthermore, there are many reasons attributed to the success of timely completion of projects for London Olympics. Using an appropriate procurement strategy and type of contracts are only part of the success factors. This statement also gives readers the impression of promoting NEC3 and may need to be reworded.

Others Comments/Drawbacks not specifically mentioned in the FAQ which may need to be addressed

Compensation Events

CI 60.1(3)	The Employer does not provide something which he is to provide by the date as shown in the Accepted Programme.	Contractors would indicate dates for such information as early as possible; failure to provide such information on time would constitute a compensation event. Contractors may not always submit programme on time; or submit a programme
------------	--	--



		that is not acceptable to the Project Manager. Lack of basis for assessing compensation event.
CI 60.1(6)	The Project Manager or Supervisor fail to reply to a communication from the Contractor within the required time.	The Project Manager or Supervisor must keep up with all contract administration, otherwise the Employer's position could be placed at risk. Alternatively if the Project Manager or Supervisor simply replies to the Contractor without addressing the issues in question, this could be ground for dispute.
CI 60.1(9)	The Project Manager withholds an "acceptance" for a reason not stated in the Contract.	It may be quite common for Project Manager rejects or dis-approves a submission from Contractor for reasons not expressly stated in the Contract; but under NEC3, this would constitute a compensation event, again places the Employer's position at risk.
CI 60.1(14)	An event which is an Employer's risk stated in the Contract.	No incentive for Contractor to bear or absorb or mitigate part of this risk.
CI 60.1(17)	The Project Manager notifies a correction to an assumption which he has stated about a compensation event.	In reality, Project Manager may need to make assumptions, whether "intelligent / educated" assumptions or just guesses in his decision. It appears that if he needs to make a correction at a later date, this will constitute a compensation event. Any delay in instructing and/or assessing a compensation event will have time / cost implication to the Contractor.



CI 61.4	Following receipt of the Contractor's notice of a compensation event, if the Project Manager does not notify the Contractor of his decision within a given date, the notification is treated as acceptance by the Project Manager.	<p>The Project Manager or Supervisor must respond timely to all communication with the Contractor, otherwise the Employer's position could be placed at risk.</p> <p>Equally, Contractor could abuse the system by submitting notices constantly on any issues whether with contention or not, and failure of the Project Manager to reply would consider as being accepted by the Project Manager as Compensation Events.</p>
CI 61.4 & 62.6	If the Project Manager does not reply of the Contractor's notification within two weeks, the notification is treated as acceptance by the Project Manager.	<p>There are complex issues related to some compensation events, of which the full effects (time / cost) sometimes may not be easily assessed within a short period of time. This again places the Employer's position at risk.</p> <p>Also there is no incentive for contractor to mitigate the impact of the compensation event, as he knows that the Project Manager will be "forced" to make a decision when the stated time is up.</p>

Programme

CI 30	Contractor to complete works by the "Key Dates"	No delay damages imposed on failure to achieve completion by the Key Date unless Option Clause X7 is added.
-------	---	---



Payment

CI 50.1	Project Manager to assess all payment due under the Contract.	Due to the conflicting role of the Project Manager in issuing instructions and assessing the compensation events, it is suggested that assessment of payment and costs of compensation events be carried out by independent construction cost consultants. Check and balance function should be implemented especially in public works projects using public money.
CI 51.1	Project Manager to certify payment within one week of assessment. Any late payment will attract interest payment.	<p>This short time frame is not practical.</p> <p>There is no requirement for Contractor to submit any payment application. The Project Manager has to make an assessment and pay the Contractor within a fixed time even if the Contractor does not submit application.</p> <p>Failure to make payment by the due date will lead to potential claims for interest on late payment.</p>
CI 51.3	If the Project Manager makes correction (presumably for under-certification) of any amount in later payment certificate, this will again attract interest payment.	<p>This is not practical.</p> <p>There is no provision for over-certification; presumably the Employer cannot recover from the Contractor for any over-certified amount.</p>

Quantity Surveying Division

The Hong Kong Institute of Surveyors

9 December 2013

香港上環干諾道中111號永安中心12樓1205室

Room 1205, 12/F Wing On Centre, 111 Connaught Road Central, Sheung Wan, Hong Kong

Telephone: 2526 3679 Facsimile: 2868 4612 E-mail: info@hkis.org.hk Web Site: www.hkis.org.hk