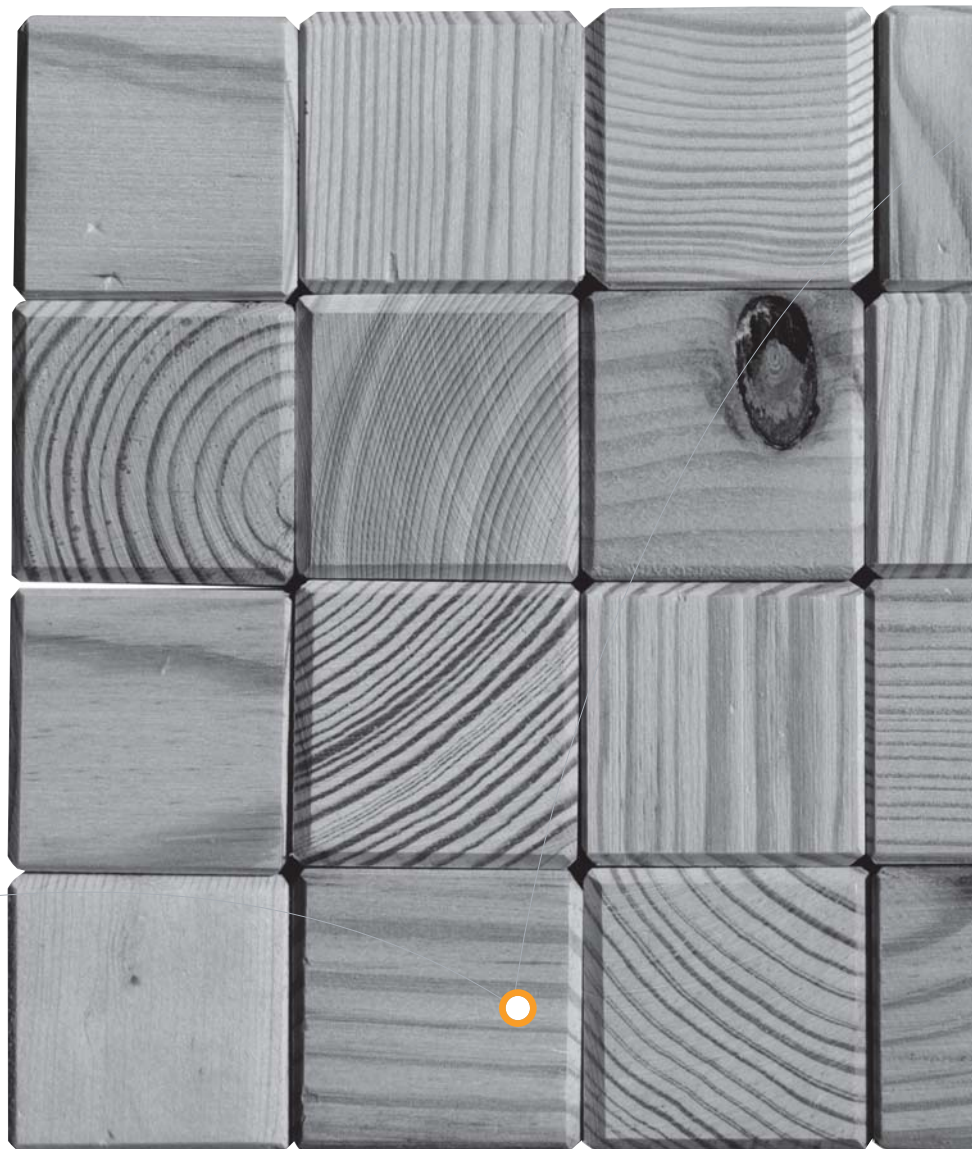


building blocks

- hot topics
- NEC tipster: testing and defects – the supervisor's role; and the joys of payment as well
- what Wagnerian opera can teach us about contract law
- challenging public procurement decisions
- adjudication – when can it be stopped?

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When will the court grant an injunction to prevent adjudication proceedings?

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welcome to the spring 2010 edition of *building blocks*

In this edition of *Building Blocks*, in the Hot Topics section, we comment on the latest additions to the NEC3 suite of contracts and amendments to the JCT contracts.

Ron Plascow also continues with his series of tipsters on NEC3.

The other two articles in this edition concentrate on issues that we have seen increasingly coming to the fore in the present economic climate. One is the issue of termination and the other is challenges to public procurement decisions. As you will see from the article, the rules for procurements after 20 December 2009 have changed.

We will be running seminars on the procurement changes in the autumn in London, Cambridge and Norwich. We shall also be running other seminars in the autumn, which will include topics as diverse as health and safety and Procure 21+. Look out for details of the dates and venues on our recently updated website www.mills-reeve.com where you will also find back copies of *Building Blocks* and other information relevant to the construction industry.

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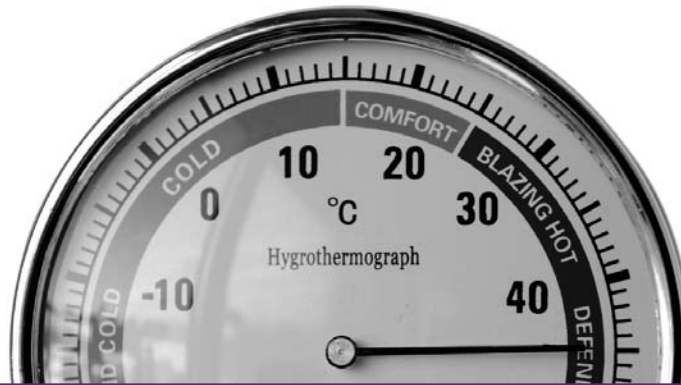
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hot topics



NEC3 Supply Contract and Supply Short Contract

These contracts were issued by the NEC on 11 February 2010. The Supply Contract (SC) is, according to the NEC, designed for complex purchasing of goods, and should be used for local and international procurement of high value goods and related services, including design.

The Supply Short Contract (SSC) is designed for low risk/simple purchasing of goods. It should, according to the NEC, be used for local and international procurement of goods under a single order or on a batch order basis. It is for use with contracts which do not require sophisticated management techniques and impose only low risks on both the purchaser and the supplier.

As with other NEC forms, each document will be accompanied by guidance notes with commentary on the contract clauses and flow charts.

Amendments to the JCT

The JCT has issued an update to, in the words of the JCT, "rationalise" a contractor's liability for loss or damage on a project resulting from an act of terrorism.

The JCT has perceived that the passing of the Terrorism Act 2000 led to a gap emerging between risks excluded from insurance policies and risks covered by Pool Reinsurance (Pool Re), which is the default cover on a project where no terrorism insurance is specified – (the insurers of last resort, underwritten by the Treasury). JCT say that possible difficulties in complying with the requirements of insurance options A, B and C have previously been highlighted and the purpose of this update is to avoid such problems.

Technology and Construction Court electronic working scheme

The Technology and Construction Court has been part of a pilot for the electronic commencement of court proceedings and subsequent steps in proceedings.

From 1 April 2010 this became permanent allowing for the future submission of claims electronically and for subsequent steps in proceedings also to be dealt with electronically.



highlight

It is important to note that the supervisor issues the defects certificate, irrespective of whether there are still outstanding defects

NEC tipster: testing and defects – the supervisor's role; and the joys of payment as well

The supervisor – testing and defects

The supervisor comes into his own in the testing and defects provisions. It is the supervisor who:

- runs the tests and inspections process; and
- issues the defects certificate.

A slightly unusual twist within the testing and defects regime is that the supervisor can carry out his own independent tests irrespective of what the contractor is doing. The NEC3 *Guidance Notes* states that there is a choice so either the contractor or the supervisor can carry out the necessary tests. The *Guidance Notes* and *Managing Reality Guidebooks* stress that this is a “quality issue” and part of the quality systems which are expected to be embedded in the works information.

There is a strong argument that there is no need for a “snagging list”, or as they are sometimes called a list of “incomplete and outstanding items”, because the contractor is responsible for correcting all defects whether notified to it or not by the supervisor. Then there is the “defects correction period”. As the defects correction period begins before completion and then continues for

defects notified after completion, there is an argument that snagging items should inevitably be picked up. Completion after all should only arise when all the work set out in the works information has been done, and notified defects that would prevent the employer from using the works and others from doing their work, have been corrected. It is not uncommon though to find snagging-related provisions added in.

It is important to note that the supervisor issues the defects certificate, irrespective of whether there are still outstanding defects. Its issue is linked to the later of the defects date or the end of the last defects correction period. The employer is however allowed to trade off the correction of defects outstanding by the contractor against correcting defects itself, if that is more convenient.

Payment

The tenor of the payment provisions is not dissimilar from other standard forms.

A point to note is the ability to withhold one quarter of the price for work done to date until the contractor submits a first programme to the project manager containing the information that the contract dictates is to be in that programme.

The payment intervals will be the usual monthly basis unless otherwise stipulated. There are express provisions for the payment of interest on late payments. Interest is calculated on a daily basis and is compounded annually, so it will roll up and could become a sizeable sum.

Each of the options, A to F, contains its own definition of what the price for work done to date is. It is important to be clear what the contractor is going to recover. The standard schedule of cost components or its shorter “sibling” at the back of the form sometimes do not reflect the components which are intended to fall within the price. Defined costs and disallowed costs can be unclear. Contractor’s own errors may then end up added to the list of disallowed costs.

Getting the target arrangements right when a target contract can become a guaranteed price contract is never going to be straightforward.

There is no one-size-fits-all type of advice available. The message is to take an extra bit of time to record fully what the price is and how it’s made up.

That is all for the moment. I will next turn to compensation events and various twists and turns relating to them.

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highlight

...absent express words in the contract, neither party can, as a matter of law, automatically terminate

what Wagnerian opera can teach us about contract law

Over Christmas, I ended up in discussion (with a very well-educated friend) about the phrase “It ain’t over until the fat lady sings”. Apparently, the larger lady in question is the valkyrie, Brünnhilde, who brings *Götterdämmerung*, the last opera in Wagner’s epic Ring Cycle, to an end.

Unfortunately, spotting the end to a contract may not be so easy – for many contracts, there is no legal equivalent to a powerful 10 minute aria to wake up those members of the audience snatching a peaceful 40 winks in the cheap seats at the back. And this is the case even in those construction and engineering contracts which require certificates (perhaps the closest contractual equivalent of Brünnhilde having a final stretch of the tonsils) of practical completion, making good defects and the like: many of you will have been involved in disputes as to whether the certifier was premature or late in issuing the certificate.

The problem is even more acute when either party wants to terminate the contract early – you can’t interrupt the epic halfway through and send Brünnhilde on for a grandstand early finish.

In fact, absent express words in the contract, neither party can, as a matter of law, automatically terminate. Indeed, you may not be able to terminate even though the other party has failed to comply with their obligations. The breach (or breaches) in question need to be sufficiently serious as to entitle the innocent party to decide to terminate – and distenangling the law on all of that is sufficiently tricky a problem to have

caused sleepless nights amongst generations of law students. When you add in the difficulties of calculating the losses which flow from the wrongdoer’s breach(es) of contract, then you start getting into sleepless weekend territory, although I’m assured that a bit of Wagner helps keep you awake.

The best (and simplest) advice for anyone embarking on a construction project – particularly where they are the client – is to agree express rights to suspend or terminate the contract, ideally (from the client’s perspective) for no reason and with immediate effect. The contract should also deal with the financial consequences of such termination or suspension: a common provision would result in the client paying the contractor or consultant for the work done up to that date but nothing further (and expressly excluding any claims for damages, loss of profit or consequential loss).

Contractors and consultants often object to these clauses but, for a client, they offer key financial security. In what remain difficult economic times, a source of funding can be cancelled or lost at any minute. And once the funding has disappeared, no client wants to be faced with invoices for work going forward that it does not want or need.

The alternative to wording of this sort may be lengthy and expensive disputes between the client and its team, which could prove to be a more painful and draining experience than sitting through the entire 15 hours of the Ring Cycle; something my friend assures me is not for the faint-hearted.





challenging public procurement decisions

In these recessionary times, competition for public sector contracts is fierce and challenges to decisions are becoming more common. The construction team has dealt with several challenges in the last few months alone. Matters are complicated by the changes to the regulations that came into force on 20 December 2009.

Public procurement is regulated by EU and UK public sector law contained in the Public Contracts Regulations 2006 as amended by the Public Contracts (Amendment) Regulations 2009, together called "the regulations".

The regulations impose strict rules upon the way in which public bodies procure contracts. They also provide remedies for unsuccessful bidders if the regulations are breached.

Broadly speaking, the regulations apply to contracting authorities who seek offers in relation to public works, supplies or services contracts which are above the threshold value.

Thresholds

As of 1 January 2010 the thresholds changed. The regulations now apply to:

- Public works contracts with a value above **£3,927,260**.
- Public supplies and services contracts:
 - If the contracting authority is a central government department, or other listed organisations, which include NHS trusts, the value of the contract has to be above **£101,323**.
 - Otherwise the value of the public supplies or services has to be above **£156,442**.

A couple of words of caution on thresholds:

- We have seen situations where contracting authorities have decided to comply with the regulations for all contracts, regardless of the value of the contract. This has had the effect of imposing all the obligations in the regulations on the contracting authority.
- Where a contract is terminated (which is much more common in the present economic climate), and the works or services remaining to be undertaken after termination are still above the thresholds, then those works should be retendered in accordance with the regulations. This can be a major headache for contracting authorities who are faced with addressing the fallout and delay that arises from a termination anyway.

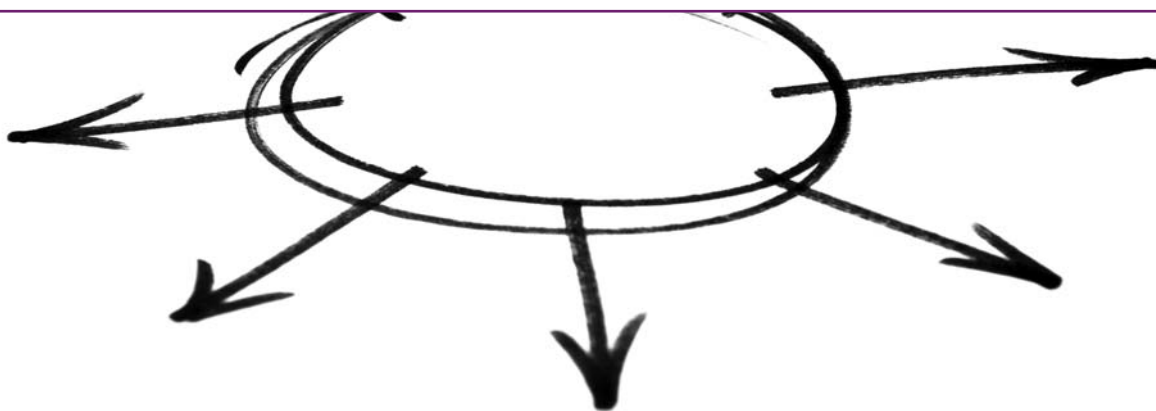
Procedure

Contracting authorities can only use one of four procedures for selecting the bidders which are the open, restricted, competitive dialogue or negotiated procedures.

Once selected, the bidders submit tenders which are assessed by the contracting authority on one of two bases. The chosen basis must be stated in the contract notice. The bases are either:

highlight

In respect of procurements on or after 20 December 2009, a contracting authority is also automatically obliged to suspend the contract making when a legal challenge to the decision is launched



- a. lowest price (which is not permitted if the competitive dialogue process is used); or
- b. the most economically advantageous offer. This takes into account other elements of the tender as well as the price and can probably best be equated with best value for money. The criteria and sub-criteria that will be evaluated must be set out in the contract notice, contract documents or any descriptive document. The relative weightings must also be set out.

The contracting authority then decides who to award the contract to.

If the decision arose out of a contract award procedure which commenced on or after 20 December 2009 then as soon as possible after the decision the contracting authority must inform all unsuccessful bidders of the following:

- the name of the successful bidder;
- the award criteria used;
- the score of that particular unsuccessful bidder and of the successful bidder;
- reasons for the decision, including the characteristics and relative advantages of the successful tender; and
- a precise statement of when the standstill period (or "alcatel" period) is expected to end. The standstill period is either:

1. 10 days, if the award decision letter is sent by email or fax; or
2. 15 days, if the award decision letter is sent by any other means.

This is different from the position for contract procedures commenced before 20 December 2009, when the onus was on the unsuccessful bidder to request information from the contracting authority within 48 hours of being informed of the decision.

Challenging decisions

An unsuccessful bidder must usually commence high court proceedings "promptly and in any event within three months" from the date when the grounds of the challenge first arose. As a result of the recent case of *Uniplex*, an unsuccessful bidder is likely to have the whole three months to bring proceedings.

There is one important exception to the three-month rule, introduced by the 2009 amendments to the regulations, which relates to a declaration of ineffectiveness where there is a six-month rule (although this can be shortened to thirty days where a contract award notice has been published in the Official Journal or where the contracting authority has informed the economic operator of the conclusion of the contract and a summary of reasons).

In relation to procurements prior to 20 December 2009 the court has the power to order a temporary injunction, set aside a decision, order documents and/or where a contract has yet to be entered into, award damages.

In respect of procurements on or after 20 December 2009, a contracting authority is automatically obliged to suspend the contract making when a legal challenge to the decision is launched. If a contract with the successful bidder has already been entered into the court can order the ineffectiveness of a contract where certain serious rule breaches have occurred and fine the contracting authority as well. It can also shorten the period of a contract or simply impose a fine.

Finally, apart from court proceedings it is also always open to an unsuccessful bidder to make a Freedom of Information Act request, which can be used as a tactic to obtain documentation to support a challenge.

This whole area is rapidly evolving and merits careful attention by all parties involved in it. If one prediction can be made, it is that challenges to decisions are likely to continue to increase.

Look out for our autumn seminar programme which will include seminars on this topic.

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adjudication – when can it be stopped?

The courts have recently said that in certain circumstances they will grant an injunction to stop adjudication proceedings.

On the face of it this might seem very harsh, bearing in mind that the Housing Grants Construction and Regeneration Act 1996 says that a claim by way of adjudication can be brought at any time, but in *Mentmore Towers and Others v Packman Lucas Limited* the court decided that an injunction should be granted to stop adjudication proceedings.

First, it confirmed that the court did have jurisdiction to grant an injunction to prevent adjudication. This jurisdiction comes from Section 35 of the Senior Courts Act 1981 (formally known as the Supreme Court Act).

Second, on the particular facts it decided it was appropriate to grant an injunction. Briefly, the facts were that there had been a series of adjudications which had found in favour of Packman. Mentmore did not pay Packman the amount awarded, not even when Packman obtained court judgments.

Subsequently Mentmore issued adjudication proceedings. The court decided this was an attempt by Mentmore to circumvent the machinery and policy of the Housing Grants Construction and Regeneration Act. It found that it was unreasonable and oppressive for Packman to be subjected to further proceedings by way of adjudication, when Mentmore had failed to honour the first awards and the subsequent judgments of the court.

It will be interesting to see how this develops and how far the court is prepared to go to stop adjudication proceedings, when previous adjudication decisions between the parties have not been complied with.

We shall have to wait and see.

