Climate change provisions in NEC

STUART JORDAN* discusses the provisions of the new NEC draft clause, which is the first initiative of its kind to address climate change specifically.

THE publishers of the NEC (New Engineering Contract) have recently put out a draft clause for industry consultation. This is "Secondary Option X29" which NEC hopes will "be used to support, incentivise and tangibly demonstrate carbon reduction initiatives on future builds across the sector".

This is prompted by the increasing emphasis on climate sustainability. There are already some initiatives in this area, promoting "climate-friendly" contract provisions across all sectors; and of course we have, for a long time, had environmental and social requirements in construction contracts, but NEC is the first to address climate change specifically.

The NEC's guide to the consultation sets out its aims: "Achieving net-zero emissions and sustainable outcomes is principally a technical issue that can be addressed in the Scope. However, there is now a growing view that standard contract conditions can be used to further support the reduction in the climate change impact of built assets. This has led NEC to develop a new secondary option to specifically to address the issue."

I agree that technical objectives can be (and usually are) wholly contained in the technical parts of the contract. NEC, perhaps, takes the view that there is more chance of them being implemented if they are set out in the conditions – albeit in an optional clause. Briefly, Secondary Option X29 provides for:

- **Climate Change Requirements** – to be included in the contract as part of the scope. This means that failure to meet these requirements is a defect which has to be corrected in order to achieve works completion.
- **A Performance Table** – an optional set of climate measures (other than Climate Change Requirements) which might be financially incentivised (positively or negatively) or compliance simply recorded. This is optional and it appears to be a KPI (Key Performance Indicator) schedule. NEC acknowledges the overlap with general KPIs and recommends that a Performance Table is not used if Option X20 (KPIs) is in use. NEC guidance includes the suggestion that it might include stretch targets, going beyond the requirements on certain obligations in the Climate Change Requirements.
- **Early Warning** – a mutual obligation on the parties to warn each other of events or circumstances which could (negatively) impact meeting the Climate Change Requirements.
- **A Climate Change Execution Plan** – to set out the methods by which the contractor intends to meet the Climate Change Requirements. NEC says this would identify stakeholders, roles, timescales, key milestones, tools and tasks to meet those obligations. Similar to the usual approach with a Quality Plan or a Project Execution Plan, this plan might be fully developed in tender stage or it might be submitted shortly after contract execution.
- **An obligation on the contractor to "collaborate" with the Climate Change Partners**, defined as "people or organisations who contribute to the achievement of the Climate Change Requirements". It isn't obvious to me what collaboration means or how it is measured. Nor who these partners might be. The NEC guidance says that they can be changed by the owner, for instance when subcontractors are engaged or when the owner engages other contractors or consultants.

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Is any of this new? Climate change goals are not materially different from other "ancillary" outcomes from project delivery – such as health and safety, environmental and social impact management, local content requirements, local training objectives, worker rights, welfare, anti-bribery and corruption, and other "social responsibility" objectives which are not completion of the works. Contracts already deal with these, both in the contract conditions and in KPI schedules, and parties are free to add climate change objectives into these existing mechanisms.

As far as I can see, the real innovation with X29 is the inclusion of the Climate Change Requirements in the works scope, so that failure to comply is also a defect in the works. And that also is the potential problem. I don't immediately see how climate protection measures can usefully be treated as part of the works. NEC's guidance suggests that the requirements might include "levels of recycling, use of renewable power on-site or electric vehicles, reducing waste generation, designing out waste, designs that reduces carbon emissions..." To me, most of these still look like implementation measures, suitable for a KPI schedule. If Climate Change Requirements have not been implemented but the works are physically complete, I am not clear about how that "defect" will be corrected.

This is not to suggest these objectives are not important, only that their treatment as part of the works might not be right. For instance, contracts already recognise something like worker welfare as important and include it in the conditions of contract. Failure to comply is a breach potentially leading to contract termination. But that failure is not a works defect.

In conclusion, I expect these or similar provisions to be popular with governments and development banks. Less so with private developers. As with other "social responsibility" provisions, they have to be paid for. Owners will face the usual question: how much do you really want this? ■

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