

Insights

NEC ECC HONG KONG EDITION: 5 KEY FEATURES

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The Hong Kong Edition of the New Engineering Contract (“**NEC**”) was published in July 2023 in a joint undertaking with the Development Bureau (“**DEVB**”) of the HKSAR Government (“**Government**”). Whilst jurisdiction-specific clauses have been published in the past, for example, the Y clause for Australia, Ireland and New Zealand, the Hong Kong Edition is the first jurisdiction now to have its own “stand-alone” set of Engineering and Construction Contract (“**ECC**”) conditions. The stated purpose of this jurisdiction-specific edition is clear – to increase the take up of NEC in Hong Kong public (and private) sector infrastructure projects.

So how has NEC gone about the drafting of a Hong Kong-specific version and how is it different from the standard version? The starting point is that the Hong Kong Edition is based on the standard NEC4 ECC updated in October 2020, and includes the subsequently published climate change clauses in Option X29. The Hong Kong Edition includes about 100 edits in total. While this may sound like a lot, the final product does not in fact depart from the standard ECC in any material way, and it is clear that care has been taken to ensure there is no departure from the NEC philosophy. The majority of the amendments are to localise the terms and conditions for Hong Kong law and to reflect local procurement practices.

The possibility of users introducing more significant amendments or additional clauses through Z clauses, a common feature in public sector usage in Hong Kong, remains, however this is not uncommon in other jurisdictions. Additionally, the Hong Kong Edition has expanded the use of Contract Data to provide for more project-specific flexibility. This may prove to be a useful adjustment from a user perspective.

The balance of this article delves into five differences between the Hong Kong Edition and the standard NEC4 ECC.

ASSESSING AMOUNT DUE

Under Options C, D, E and F in the Hong Kong Edition, the definition of “Price for Work Done to Date” is modified such that the assessment of the amount due is based on the actual payment by the Contractor made at each assessment date, plus an estimated amount due to the Contractor for the cost of items in the Schedule of Cost Components which will have been paid by the Contractor up

to one week after the next assessment date. This purpose of the “estimated work done” approach is to assist Contractor with cash flow by adding an extra week of forecast payment to the assessment. Helping contractor cash-flow is to be welcomed given Hong Kong is yet to enact security of payment legislation, however much will depend on whether short assessment and payment periods are maintained in practice.

Separately, the Hong Kong Edition adds an express clause recognising the Client’s entitlement to deductions of amounts the Contractor is liable to the Client as part of the assessment. The additional clause is no more than an express recognition of Client’s common law right, but adds clarity into the assessment process.

COMPENSATION EVENTS AND THEIR ASSESSMENT

Compensation events are events which may trigger the reassessment of the Prices, Completion Date and/or Key Dates.

The Hong Kong Edition adds two new compensation events. The first is a set of weather conditions affecting the Site which are typical to Hong Kong including typhoon, black and red rainstorm (terms which are referable to the signal system used by the Hong Kong Observatory) (Clause 60.1(13)). The second is for a shortage of labour which it would have been unreasonable for an experienced contractor to have allowed for at the tender closing date (Clause 60.1(21)). This latter addition is a realistic recognition of the challenge posed by Hong Kong’s aging work force and the demands of competition for resources as Hong Kong looks to infrastructure projects as a means to stimulate its economy.

As far as the assessment of compensation events is concerned, the Hong Kong Edition includes an amendment so that under Option A and B where the People Rates do not include a rate for a category of person, the assessment of the compensation event is done on the basis of actual people cost, provided they are based on tendered prices or represent open market (as per Options C and D). Similar amendments are made in the Schedule of Cost Components in relation to Equipment rates, manufacture and fabrication and design where only actual costs are to be used provided that they represent market rates or competitively tendered prices. This aligns with the payment assessment procedures that payment application made by the Contractor shall comprise the actual costs incurred by the Contractor up to each assessment date.

These adjustments follow with the valuation principles of the Government’s General Conditions of Contract for Building Works.

DISPUTE RESOLUTION

The Government’s framework for tiered dispute resolution has been incorporated into the Hong Kong Edition in place of the set of dispute resolution procedures via options under W clauses in the

standard ECC.

In particular, the Hong Kong Edition contains a separate Clause W4 which, among other things, allows the Contractor to initiate an adjudication of a Payment Dispute, which is a payment dispute defined in the security of payment provisions under the Contract Data. For public works contracts, the security of payment provisions under DEVB's pilot scheme for security of payment will be incorporated into the contract by reference in the Contract Data.

Otherwise the dispute resolution procedures in the Government's General Conditions of Contract for Building Works are reflected in Clause W4. Unless a Payment Dispute has been determined by a decision of the adjudicator, the Project Manager can give a decision on the Dispute in the first instance (Clause W4.2). If dissatisfied with the decision, the Dispute may be referred to mediation and subsequently to arbitration (if the mediation fails). After arbitration is initiated, neither Party can take further action until Completion of the works or the issuance of a termination certificate by the Project Manager, whichever comes first.

EARLY CONTRACTOR INVOLVEMENT

Early contractor involvement ("ECI") is a secondary option (Clause X22) available for use with Options C or E under both the standard ECC and the Hong Kong Edition. The parties enter into a single two-stage cost reimbursable contract to collaborate in developing the project, including design and planning for construction (Stage One), before progressing to the main construction phase (Stage Two).

Until now, the take up of ECI under Clause X22 in Hong Kong has been limited. The preference has been for a two stage tender process. However the fact that amendments to this clause have been made specifically in the Hong Kong Edition is a positive sign and possibly foreshadows an intention to adopt ECI under the NEC model.

Under the standard ECC, additional Scope provided by the Contractor during Stage One becomes Scope provided by the Contractor for its design in Stage Two (Clause X22.3(7)). Changes to the Key Dates, Completion and Prices agreed by the Project Manager and Contractor are incorporated into Stage Two. By contrast, the Hong Kong Edition provides for a more limited role for the incorporation of the Stage One output whereby only Site Information can be changed if agreed by the Project Manager and the Contractor (Clause X22.3(7)). Whether this approach ultimately limits the benefits of the early engagement with the Contractor remains to be seen.

Other amendments to Clause X22 in the Hong Kong Edition seek to provide more clarity around the process for transfer between Stage One and Stage Two including an express provision for notice to be given whether or not the Client will proceed to Stage Two with the Contractor. Additional drafting is provided to deal more expressly on the rights and entitlements in the event that the Contractor does not proceed to Stage Two.

Further helpful additions are that where a notice to proceed to Stage Two is issued, a compensation event will be judged against the date of the notice rather than the Contract Date, and any change to the Prices, Completion Date or Key Dates for a compensation event occurring in Stage One is treated as included in the change to the Prices, Completion Date and Key Dates for Stage Two.

INNOVATION AND TECHNOLOGY

To offer incentives to encourage the adoption of innovation and technology by contractors, the Hong Kong Edition has introduced a novel approach for the adoption of an Innovation & Technology Proposal (“**I&T Proposal**”) under Clause X30.

As defined under Clause X31.1(1), an I&T Proposal is a proposal to change the Scope in order to adopt an innovation or technology which (a) is additional to or more advanced than the requirements in the Scope; and (b) could enhance Site safety, Site supervision efficiency or decarbonisation. Following the same type of process for early warnings, an I&T Proposal can be made by either the Contractor or the Project Manager, after which subsequent innovation and technology meetings for discussing the I&T Proposal may be arranged. If a decision made at the innovation and technology meeting requires a change to the Scope, the Project Manager will instruct the change.

CONCLUDING REMARKS

A stand-alone jurisdiction-specific edition of NEC ECC is somewhat of an innovation and a coup for Hong Kong. Certainly a stand-alone version will help to make NEC an attractive contracting option for the delivery of major infrastructure projects in Hong Kong. It will be interesting to see whether other jurisdictions look to follow suit.

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MEET THE TEAM



Ilan Freiman

Singapore / Hong Kong SAR

ilan.freiman@bclplaw.com

[+65 6571 6610](tel:+6565716610)



Raymond Sin

Hong Kong SAR

raymond.sin@bclplaw.com

[+852 3143 8424](tel:+85231438424)



Shy Jackson

London

shy.jackson@bclplaw.com

[+44 \(0\) 20 3400 4998](tel:+442034004998)



Glenn Haley

Hong Kong SAR

glenn.haley@bclplaw.com

[+852 3143 8450](tel:+85231438450)

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