

USING THE NEC CONTRACT TO ACHIEVE COLLABORATION

Shy Jackson

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Agenda

- 1 Why the interest in collaboration?
- 2 Getting the contract right
- 3 Managing the contract correctly
- 4 Avoiding and resolving disagreements

The problem

The traditional approach

- Competitive tenders driven by price
- Shifting risk (and control) to contractors
- Fixed price
- Adversarial approach and claims culture
- Final account disputes and arbitration/court
- Focus on capex



Adversarial environment leading to poor delivery and costly disputes

Collaborative contracting

- Early Contractor involvement
- Fair allocation of risk and alignment of commercial interests
- Improved project management
- Open book and transparency
- Dispute avoidance
- Opportunity to look at innovation, whole life cost, ESG etc.

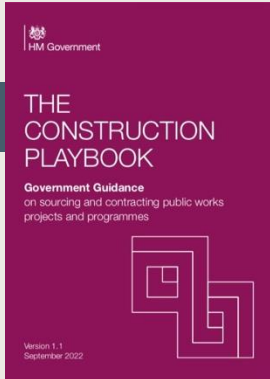


More efficient delivery and long term relationships

Setting up the contract

- The commercial bargain
- Early contractor involvement
- Aligning commercial interests - Incentives

The commercial bargain



“The commercial approach should be based on how much delivery responsibility we are willing, are able or need to take on, versus procure at whichever stage we go to market.”

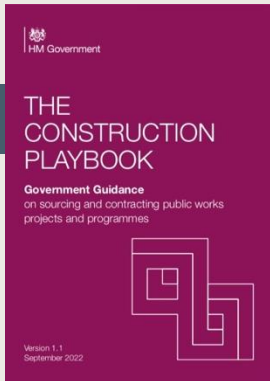
“Both parties should be comfortable and agree with the principles of the agreement and how this will affect the life of the contract. This will help avoid challenges and conflict throughout the contract’s life.”

“The fundamental principle is that contracts should be profitable. Fair returns and expectations need to be reasonable for suppliers to remain interested and for the market to be sustainable.”

“As a general principle, the approach should be to link payment to the delivery of outputs and/or of the work value and supplier performance.”

“A possible consequence of getting risk allocation and the approach to pricing wrong is that contracts can become onerous (loss making) for a supplier.”

Early Contractor Involvement



“

Public works projects and programmes should contract for early supply chain involvement (ESI) to achieve the planned outcomes, value for money and whole life value. Investing time in ESI can lead to more effective designs, reducing changes and potential cost increases downstream. This results in faster delivery when construction starts.

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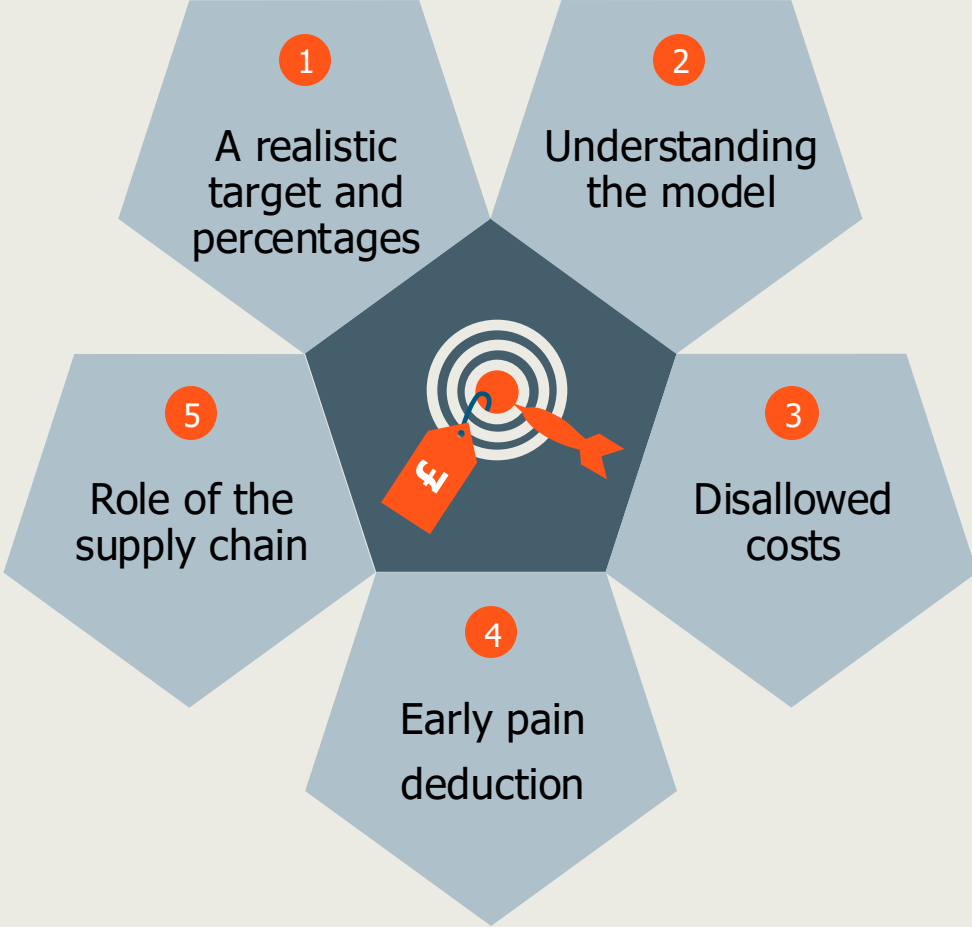
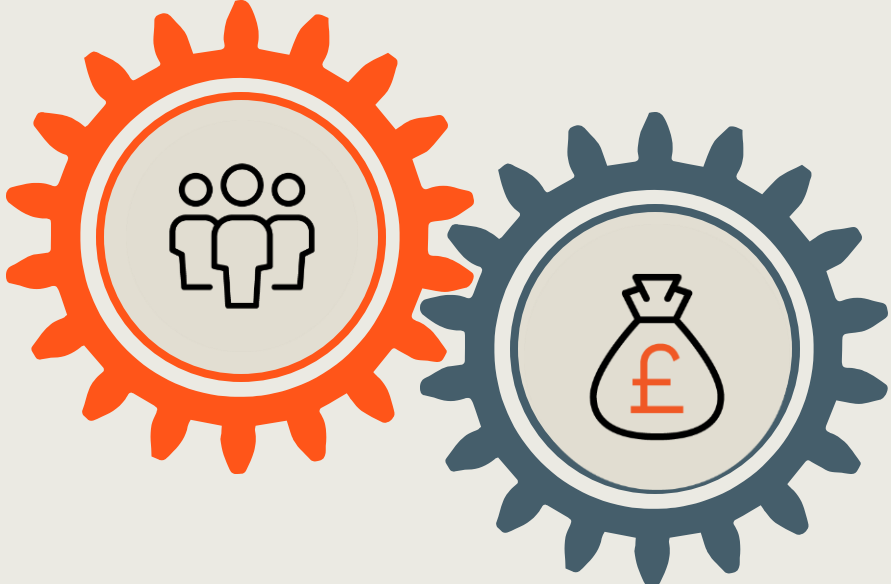
NEC4 Option X22 – May 2022 Guidance Note

- Objectives:
 1. Strong focus on client objectives
 2. Dedicated construction planning and design stage
- Key success factors:
 1. Client capability
 2. Design strategy
 3. Adequate budget
 4. Pricing Information

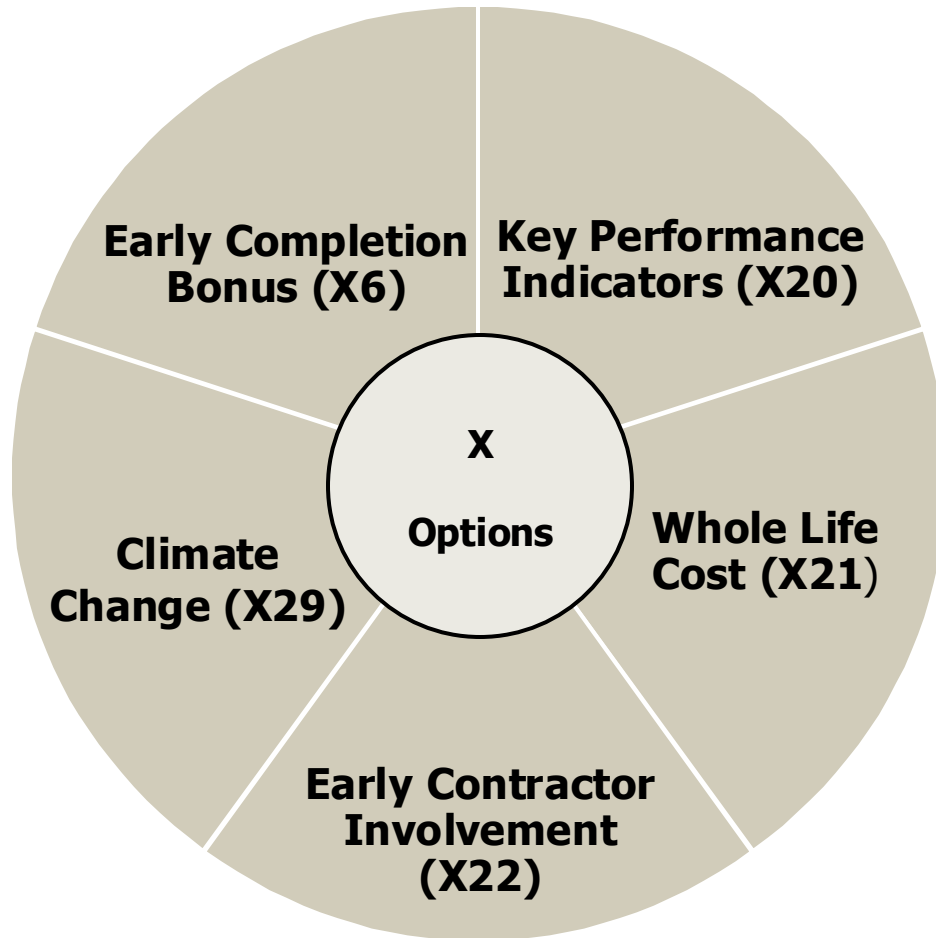
Payment incentive - Target Cost

The economic incentive model

Does it work?



Other Incentives



Effective incentives:

- Understand the purpose of incentives
- Use desired outcomes to design incentives
- Keep it simple
- Use incentives flexibly as works progress and objectives develop



There were no incentives on the contractors relating to integration or to opening of the railway. Their incentives were mainly related to achievement of their own scopes of work. As such the incentive regime perversely encouraged presenteeism, endurance and siloed ways of working

Sponsoring a Major Project The Crossrail Experience (2024)

Operating the contract

- Early Warnings
- The Programme
- Contemporaneous assessment

Early Warnings – Clause 15

Pro-active risk management:



- Register provided with contract and updated
- Anything that affects time, cost and quality
- Risk Reduction meetings
- Updating the register

Key points:



- A **mutual** obligation
- Project management tool – Not about liability
- Interaction with the compensation events mechanism

The Programme – Core Clause 3

Collaboration through transparency:



- Detailed contents to cover contractor, client and other parties
- Updated regularly based on actual progress
- Submitted for approval by Project Manager

Common issues:



- Sufficient skilled resources on both sides
- Failure to agree the Accepted Programme
- Programme being out of date
- Focus on liability instead of project management

Contemporaneous assessment and finality

Final Account –
The traditional
approach to
construction
projects

Why
contemporaneous
(and prospective
assessment)?

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The philosophy of the NEC Conditions is to avoid disputes at the end of a project by having intensive management machinery to deal with issues during the process of a project. 〰

Ramsey J, WSP Cel Ltd v Dalkia Utilities Services Plc [2012] EWHC 2428 (TCC)

Collaborative Dispute Avoidance and Resolution

Collaborative dispute avoidance and resolution

Dispute avoidance

- Set up the contract properly, for construction and commercial aspects
- Operate it correctly:
 - Early warnings
 - Transparency on time and cost
 - Ongoing communications
 - Understanding and narrowing down issues



The Traditional approach

- Post completion
- Negotiation or lengthy, hostile and expensive proceedings



Alternatives

- NEC4 W3 - Dispute Avoidance Board
- HK SAR W4 - Project Manager, Adjudication, Arbitration and Mediation

Collaboration in practice

The challenge – Overcoming the traditional lack of trust that leads to adversarial behaviour – **Not just about the contract**

Possible solutions?

- **Fair commercial deal** and risk allocation
- Early contractor involvement
- Use of **incentives and aligning commercial interest**
- Ongoing project support and **(joint) training**
- Transparency and open book accounting – **Pro-active auditing**
- Good communications (**co-location**) and early warnings
- **Authority to make timely decisions**
- Contractual, factual and credible positions/claims
- **Pro-active dispute avoidance**



Q & A

Contact details



Shy Jackson

Email: shy.jackson@bcplaw.com

Tel: + 44 (0) 7917 627 344

Website: www.bcplaw.com



bcplaw.com

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