



Infrastructure and Construction

Tony Norris, Partner

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Who are we ?



Tony Norris,
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NEC route map for today

- The Good
- The Bad
- The Future

In the beginning.....

The image shows the front cover of a report. The cover is black with white text. The title 'CONSTRUCTING THE TEAM' is at the top in large, bold, serif capital letters. Below the title, the author's name 'BY SIR MICHAEL LATHAM' is centered. Further down, the subtitle 'FINAL REPORT OF THE GOVERNMENT/INDUSTRY REVIEW OF PROCUREMENT AND CONTRACTUAL ARRANGEMENTS IN THE UK CONSTRUCTION INDUSTRY' is centered in smaller, all-caps, sans-serif font. At the bottom, the publisher 'HMSO' is centered.

**CONSTRUCTING
THE TEAM**

BY SIR MICHAEL LATHAM

FINAL REPORT OF THE
GOVERNMENT/INDUSTRY REVIEW OF
PROCUREMENT AND CONTRACTUAL
ARRANGEMENTS IN THE UK
CONSTRUCTION INDUSTRY

HMSO

Gestation of NEC3 – time line (1)

- 1991 Consultative Edition of NEC issued
- 1993 New Engineering Contract First Edition published
- 1994 Sir Michael Latham's Ground Breaking Report Constructing the Team
- 1995 NEC Second Edition published as the Engineering and Construction Contract or ECC2 (following Sir Michael Latham's comments)

Gestation of NEC3 – time line (2)

- 1999 the Short Contract published
- 2005 NEC3 published with Guidance notes
- 2011
 - Construction Act amends published. Brief!
 - Fair Payment clauses published
- 2012 Works Information Guidance published
- 2013 Re-issue of the Contracts
- 2017 : NEC4

The rise and rise of NEC (3)

- HM Treasury endorsement 2011
- London Olympics 2012
- CEW HOW2 Wales 2012 www.h2guide.co.uk
- Suitability for Frameworks and Term Contracts?

NEC - the key objectives

The three objectives of the original drafting team

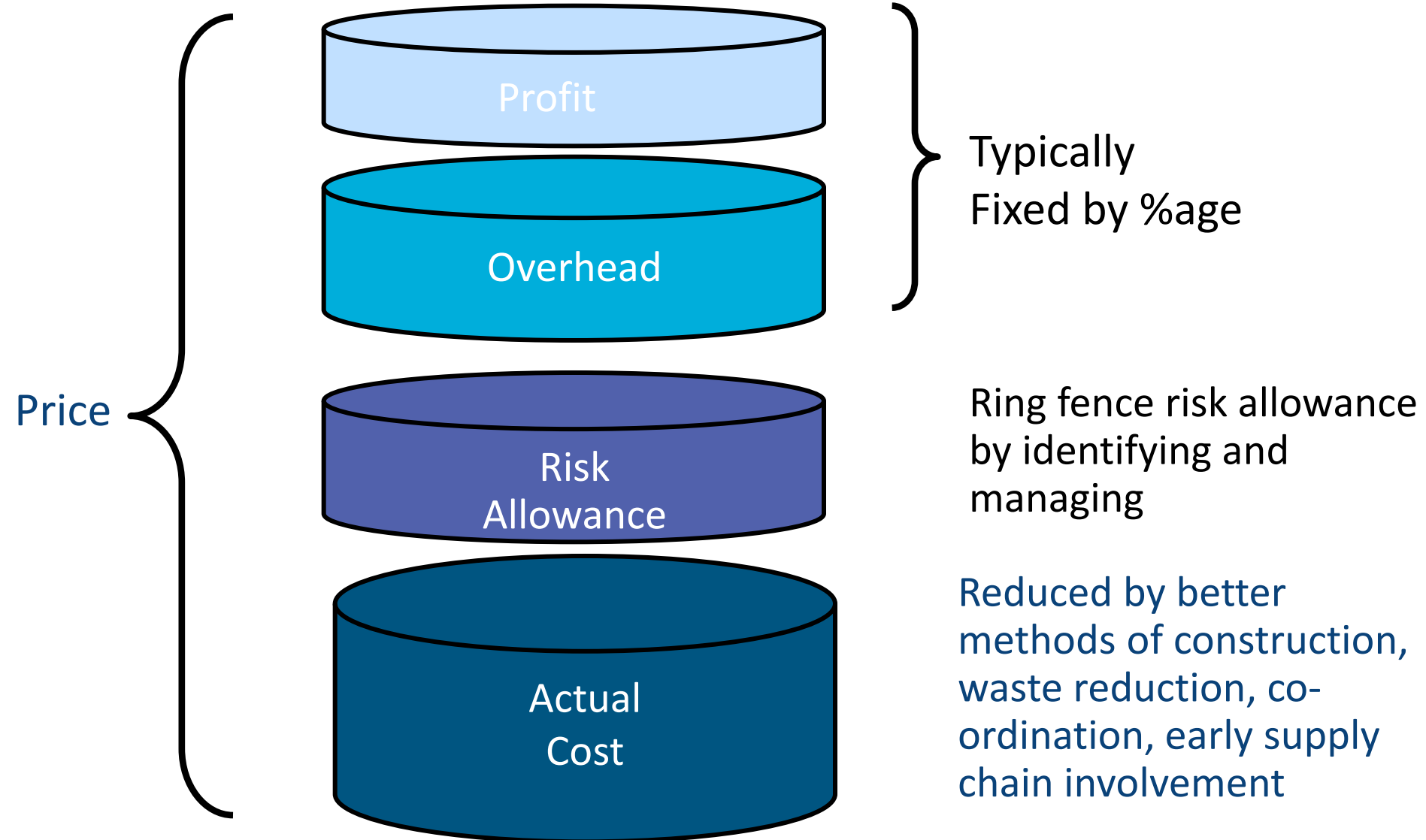
Simple



**Good
Management**

Flexible

- Simple, “Ordinary” language
- Flexible and nominal contract structure
- Emphasis upon good management including:
 - Risk Management
 - Collaborative approach
 - Prevention disputes



Case for the opposition

Philip Boulding QC, Keating Chambers

- “Despite such eminent approval:
 - the use of “simple language” in the NEC has not met with universal approval; and
 - on the whole the quality of its drafting is not often considered one of its greater strengths”



THE NEC CONSTRUCTION
AND ENGINEERING CONTRACT:
TO AMEND OR NOT TO AMEND?

*A paper based on the joint highly commended prize entry in
the Hudson Prize essay competition 2010
presented to a meeting of the Society of Construction Law
in London on 3rd May 2011*

Mike Barlow

May 2011

D123

www.scl.org.uk

Problems and Option Z resolutions (2)

- Form of Agreement – “in writing” Clarifying the Contract Documents and their order of precedence
- Amending the interpretation clause
- Clarifying the Contract Date
- Inserting a design & development process
- Amending the definition of Disallowed Cost
- Adding an obligation to comply with legislation

Problems and Option Z resolutions (2)

- Deleting clause 19 (prevention)
- Tailoring the indemnity and insurance provisions to suit the project
- Permitting the Employer to assign the benefit of the Contract
- Addressing other project-specific issues

NEC4 - Some of the changes (1)

- The most relevant changes proposed are: -
 - Contractor's Design – new secondary option with more extensive provisions to support design and build contracting
 - Consensual Dispute Resolution – introduces escalation process for disputes to go through senior management, but unlikely to cut across statutory regime of adjudication

NEC4 - Some of the changes (2)

- Finality of assessments – final account process – a significant departure for NEC
- Payment provisions – the introduction of periodic assessments that require an application by the Contractor
- Undertaking to others – NEC4 talks of undertakings instead of collateral warranties and is going to include a “form of undertaking”
- Early Contractor Involvement
- Building Information Modelling

NEC4 - Some of the changes (3)

- Bribery and Corruption
- Confidentiality and Publicity
- Transfer of benefit (assignment) – express provisions to be added but the position is the same, so these will still need to be amended as per current Option Zs
- Additional Compensation Events – Contract Data Part 1
- Terminology
 - Employer – now “Client”
 - Works Information – now “Scope”
 - “Gender neutral”

NEC4 - The changes (4)

- Risk Register – now the “Early Warning Register”
- Option X4 Parent Company Guarantee – now “Ultimate Holding Company Guarantee”
- Guidance Notes – now 4 distinct volumes

NEC4 - The changes (5)

- Authorities may want to consider the following other areas: -
 - BREXIT and EU Law references
 - Payment Regulations
 - Modern Slavery & Ethical Employment
 - Prompt Payment
 - Data Protection
 - Termination and PCR Regulations
 - Delay and Disruption Protocol
 - Impact of Mutual Investment Model (Band B) and the National Infrastructure Commission

Sir Michael Latham (2005):

“In my 1994 Report constructing the team I said the first edition of the then new engineering contract met 11 of the 13 principles that characterised and effective, modern construction contract – far more than any other contract for then available.

Within a year the NEC second edition came out and became the only contract to comply with all 13 principles. It is, thus, not surprising that the NEC third edition remains the forefront of best practice, becoming the first contract to meet all criteria of the UK Governments achieving excellence in construction initiatives.

*In addition to supporting the OGC’s recommendation that any CB used by all public sector construction procurers, I also commended adoption by any private sector client wishing to procure their construction **work on time, within budget and without litigation.**”*

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