

Insights

NEC4 X22: ECI FOR AN ASIAN CONTEXT?

Jan 14, 2021

SUMMARY

Updates to NEC4 optional clause X22 – Early Contractor Involvement and its suitability for use in HK, Singapore and elsewhere in Asia.

In October 2020, NEC issued amendments to the NEC4 suite. These were discussed by our BCLP colleagues Kimberly Roberts, Lucy Hawley, Sophie Broddle and Freya Scott in their recent blog-post [“NEC4: 2020 amendments”](#). As noted in that article, the recent NEC4 update includes revisions to NEC4 Secondary Option Clause X22 which covers ‘Early Contractor Involvement’ or ‘ECI’.

Starting with a summary of what ECI involves, this Insight takes a closer look at the updated X22 and considers the likelihood of its uptake in the Asian regions.

ECI: A recap

ECI is a two stage procurement process which can take various forms. The first stage involves the development of scope and design leading to the agreement of price and key project dates. The project is then built and delivered during the second stage.

ECI has been common in the UK for some time, particularly on large and complex projects. Key benefits of ECI include closer collaboration, quicker delivery and effective design development. ECI procurement allows employers to obtain specialist input from contractors early in the project lifecycle. Typical ECI stage activities include supply chain identification and engagement, risk reduction studies, cost planning, programme development and buildability assessments. It is sometimes said that these benefits are delivered at the expense of preserving the competitive tension available under a traditional tendering model. The contractor is “embedded” at an early stage, leaving it in a strong negotiating position with respect to agreeing the Prices.

ECI, the NEC4 way: X22

Introduced in 2015 as part of the NEC3 suite, X22 requires the employer to select a single ECI contractor to perform the pre-construction services, usually following a competitive tender. During the first stage, the employer pays a specified fee to the ECI contractor in addition to reimbursing pre-approved costs. Given the nature of pre-construction services, when selecting its preferred ECI contractor, employers often focus upon relevant experience, the track-record of innovation and the skill-set of key personnel.

X22 was updated in October 2020 to introduce greater flexibility in the first stage and to provide a more structured process for proceeding to the second stage. One of the main issues with X22, prior to the update, was that completion dates and other key dates originally specified in the contract could only be modified because of a compensation event. This was not ideal, as changes to these dates may become desirable or necessary as a project evolves during the ECI stage. Under the updated X22, the employer can review and agree or reject any changes to key dates proposed by the ECI contractor.

Some other notable characteristics of the X22 approach to ECI include:

Procurement approaches: X22 can be used with the NEC4 Engineering and Construction Contract (the **ECC**), Main Options C (Target Cost based on an Activity Schedule) and E (Cost reimbursable). X22 can also be used with the NEC4 Alliance Contract form, with the Alliance Board performing the review and approval functions which are performed by the Project Manager under the ECC.

The Budget: Prior to engaging the ECI contractor, the employer sets the 'Budget'. The Budget is intended to set a maximum amount available to cover all costs for the complete delivery of the project, not limited to construction costs. Any savings will be shared between the parties in pre-agreed proportions, incentivising the ECI contractor to innovate and save costs during the ECI stage.

Forecasting: During the pre-construction stage, the ECI contractor is required to provide the employer with regular pre-construction cost forecasts. Any costs not included in an employer approved forecast will be disallowed and not be reimbursed, giving the employer a high degree of cost control. This is balanced by the fact that the ECI contractor is not required to incur any unapproved costs.

ECI contractor's proposal: At the end of the ECI stage, the ECI contractor is required to submit a proposal for the delivery of the project. The proposal is to include revised key dates, a revised programme and the contract price.

The employer's response: If the employer is satisfied with the proposal, it can instruct the ECI contractor to proceed. The employer can reject a proposal for reasons listed in X22, including that it will cause unnecessary delay or costs. If a proposal is not accepted, the ECI contractor will usually have to submit a revised proposal addressing the employer's objections. Interestingly, X22 does not mandate a time before which the employer must accept or reject the ECI contractor's proposal. This

is consistent with NEC4's emphasis on mutual trust and cooperation. Presumably the intention is that the parties are to work collaboratively to resolve differences.

Proceeding with a different contractor: Notwithstanding NEC4's focus on collaboration, X22 recognises that the employer and the ECI contractor may not be able to agree a proposal for the delivery of project. X22 entitles the employer to proceed using a replacement contractor where the price or key dates cannot be agreed or where the ECI contractor fails to meet the performance requirements for the ECI stage.

NEC4 X22 – an ECI approach for Asia?

In our experience, there is no prevalent approach to ECI procurement in Asia. Pre-construction activities such as preliminary design or engineering may sometimes be required as part of the tender stage (more of a two-stage tendering approach). Alternatively, a contractor or multiple contractors will enter into a bespoke “pre-construction services agreement”, with the main contract to be tendered or negotiated following completion of the pre-construction activities. The lack of a standard form or standardised approach to ECI can lead to protracted negotiations of contract terms. NEC4 X22 offers a simple standardised approach to ECI. This should allow the parties to focus on finalising the important issues such as the key dates, programme and price.

Final thoughts

X22 allows an employer to benefit from the specialist planning, programming and procurement skills of contractors including during design development and to identify buildability issues before they manifest down the road in cost claims, delays and disputes. The NEC4 ECI model also allows for the collaborative adoption of technology early in a project, such as the joint development of BIM or similar design tools or the deployment of pre-fabricated modular construction methods. However, for the benefits to be realised, ECI requires rigorous management and adherence to the process. Employers and their project management teams need to engage with contractors pro-actively during the ECI stage to get the most out of the process. Nonetheless given the potential benefits, procuring employers in Asia and elsewhere would do well to consider whether NEC4 approach to ECI may be a good fit for their project.

RELATED CAPABILITIES

- Real Estate
- Commercial Construction & Engineering
- International Arbitration
- Construction Disputes

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.