

Insights

EVERYBODY NEEDS GOOD NABERS – ACCOMMODATING THE NEW RATING SCHEME IN CONSTRUCTION CONTRACTS

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There's a new kid on the energy efficiency ratings block in the United Kingdom. *NABERS UK Energy for Offices*, a cousin of the established Australian system, *officially launched* in the UK in November 2020.

The NABERS UK system focuses on the energy efficiency of office buildings when they are in use, to gauge actual performance in a way that is comparable with similar buildings. The scheme seeks to close the existing gap between theoretical design-based energy performance and actual in-use energy performance. A separate scheme exists for newly built or renovated offices and existing office buildings.

The energy rating systems we are familiar with in the UK construction industry tend to focus on design-based ratings, setting a target performance rating in the contract at the outset, with varying degrees of obligations on contractors and consultants to achieve such targets by practical completion of the project.

NABERS UK, on the other hand, seeks to measure and rate the actual energy use of offices once occupied with the intention of accurately measuring the performance of operating buildings. The scheme encourages projects to commit to achieve a certain NABERS rating in post-construction performance, based on a scale of 1 (poor) to 6 (market leading) stars. In its *own words*:

“Like the efficiency star ratings that you get on your fridge or washing machine, NABERS provides a rating from one to six stars for offices. This helps building owners to understand their building’s performance versus other similar buildings, providing a benchmark for progress...”

Developers and their project teams are encouraged to target an operational energy rating at the design stage assisted by advanced simulations, modelled against a series of anticipated occupational conditions. Once the building is completed and reaches 75% occupancy for at least 12 months it will be assessed by an independent assessor who issues the rating.

On paper, the scheme's philosophy and ambition is laudable, and its rating system is appealing in its simplicity. However, is the construction industry ready to accept the contractual changes that may be required in order to adopt this system successfully?

In practice

Of course, including requirements in UK construction contracts to meet sustainability ratings is nothing new for the public sector and has gained notable traction in the private sector in recent years.

Historically, obligations to meet such requirements sit in the building contract and take the form of short contractual obligations linked to certain contractual milestones (typically *practical completion*) with the detail of what is required sitting in the contract technical documents. Delivery obligations have notably lacked "contractual teeth".

Recently, there has been a gradual shift in some quarters towards tying these obligations to contractual penalties and widening sustainable contractual requirements (*The Chancery Lane Project model clauses* provide an example of how such provisions are evolving in this area). However, the duration of the obligations normally ends on completion.

NABERS UK goes one step further. It challenges traditional notions of when obligations end on a construction project and also the extent to which certain obligations should apply. For example:

- **Specify performance outcomes:** developers need to consider how to maintain the design intent for energy efficiency from the design stages of a project through to occupation and measurement. The scheme suggests that building contracts could include obligations on the contractor to deliver the target rating and other performance indicators in their legal terms. However, including design for performance obligations of this nature in a building contract may elicit cries of "fitness for purpose". In addition, where substitute materials are proposed, the contract could stipulate that such substitutions must not reduce project efficiency.
- **Involvement post-practical completion:** the scheme recommends that the building's performance is not assessed until it has been more than 75% occupied for at least 12 months. In order to achieve the target rating, the developer would probably need to extend the contractor's involvement beyond the typical *defects liability period*, a move that is likely to be resisted by contractors. The scheme envisages that the contractor is more involved in overseeing the building's operation following practical completion and collaborating closely with the facilities manager. Contractors will most likely incorporate such costs into their pricing, passing it onto employers. Until the occupier market is insisting on buildings having this rating, employers may need persuading that using the scheme represents good value for money.

- **Retention:** the scheme recommends that a retention is held under the building contract until the target rating is met. Contractors are likely to object to achievement of this rating being linked to the release of the *standard retention*, as this could in effect delay such release for months beyond the contractual defects liability period. It may therefore be that a separate retention is built into the contract sum for this purpose, which is large enough to incentivise delivery without muddying the existing defects liability period. This, of course, arguably runs contrary to fair payment principles and could result in inflated pricing as contractors hedge against cash flow risk.
- **Monitoring:** the scheme recommends ongoing monitoring and reporting to ensure that the building is on track to achieve the desired rating. This may involve requiring members of the design team to spot building tuning opportunities. There may be conflicts between this process and the usual defects rectification process, not least where recommended improvements do not constitute defects.
- **Independent assessor:** the performance assessment and rating must be undertaken by an independent assessor, with no direct or indirect involvement with the design, construction or commissioning of the project nor any interest in the project or the building owner. We will probably see a mixture of established consultancies re-skilling in order to offer this role, as well as private outfits springing up to offer bespoke services. At least initially, there may be a shortage of appropriately qualified professionals to perform this role.
- **Disclosure:** ratings are valid for 12 months, ensuring they represent a building's current operational performance. As part of its commitment to disclosure, the Australian scheme publishes all results, good and bad, on an interactive map. This spirit of openness should discourage participants from only paying lip service to the scheme.

The future

So is the construction industry ready to accept the contractual changes that may be required in order to adopt NABERS UK successfully?

My view is that it won't happen overnight and it won't be for everyone (we are talking about an industry that took 20 years to get comfortable with third party rights).

The early adopters will need deep pockets to fund the implementation and maintenance costs in addition to navigating the contractual hurdles outlined above and identifying those appropriately qualified to undertake the role. There will inevitably be setbacks and frustrations.

However, I do think that for those who weather these challenges and persevere the outcome will be worth it. In a world where sustainability is increasingly valued, projects that sign up to the scheme will be able to promote their target rating to lenders, tenants and other interested parties. And of course, the trailblazers won't be the only ones to benefit. Once the scheme gains momentum, wider

adoption will be easier as methods of implementing the scheme become established and the necessary skillsets will develop.

For now, NABERS UK is a voluntary initiative, albeit one already backed by a cast of impressive industry bodies, private property companies and other stakeholders. Perhaps in time the UK government will follow the New South Wales government and make disclosure of the measured operational rating compulsory for commercial offices of a certain scale. This would demonstrate which neighbours really are good friends to the environment.

This article first appeared on the Practical Law Construction blog dated 15 June 2021.

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