

THE LONDON OLYMPICS 2012: GOOD MANAGEMENT OR GOOD CONTRACTS?

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Introduction

1. Within months of the award of the 2012 Olympic Games to London, the Olympic Delivery Authority (the ODA) was created to deliver the infrastructure for the Games. By 2012, it had delivered, on time and within budget, the Olympic Stadium, the Velodrome, the International Broadcast Centre, the Aquatic Centre, the Athletes Village¹ and all the temporary structures. The ODA chose to use for these major construction projects contracts from the NEC suite of contracts: for the Tier 1 (main) contractors, the ECC² form; for the Tier 1 sub-contractors the ECC sub-contract form; and for consultants and professionals the Professional Services Contract (the PSC).
2. This success came against a background of the far less successful construction of the new Wembley Stadium, a project that overran in terms of time and cost and spawned lengthy High Court litigation that was itself castigated for its excessive cost³.
3. The ODA established a Learning Legacy, a collection of published reports (available online) on experiences of and lessons learned from the Games – a resource that has been emulated on the current massive Crossrail project, constructing a new line West to East across London, integrated with existing tube and train lines and stations.
4. Although tempting to see the Learning Legacy reports as self-congratulatory – even with justification – a substantial number were independently prepared and all contain a wealth of information about

¹ The Athletes Village has given rise to some of the few well-publicised disputes arising out of the Olympics projects, with contractors, Galliford Try, involved in disputes with sub-contractors, including litigation in the Technology and Construction Court.

² Engineering and Construction Contract

³ Eg. *Multiplex Constructions (UK) Ltd. v Cleveland Bridge UK Ltd.* [2008] EWHC 569 [48]: "... vast and disproportionate costs have been incurred, and continue to be incurred, in litigating about matters which cry out for sensible resolution and compromise." (per Jackson J.)

what worked on the project and what contributed to its success. They should be essential reading for those who come after.

5. The reports say far more about the project management techniques deployed than they do about the contractual framework and few place any emphasis on the role of the NEC3 contracts as the chosen suite of contracts for the project. Nonetheless a clear relationship can be discerned between the characteristics of these contracts and the management systems and approaches adopted and praise for the choice of contracts is certainly to be found.
6. The NEC's website quotes the ODA Deputy Head of Procurement, John Fernau, on the rationale for the choice of contract:

"The NEC3 Engineering and Construction Contract was selected for procuring the Velodrome and other London 2012 venues as it provides a collaborative approach supporting timely delivery, which was fundamental to ODA. There is full visibility of costs supporting effective programme budget management, and full visibility for assessing the impact of change, for example as designs were developed.

The contracts provide a prescribed methodology for project management, with processes and procedures to manage delivery and support a standardised contract management approach. They also have a proven record of use and understanding within the supply chain, in contrast to potential market uncertainty over any new ODA bespoke contract.

ODA made a number of enhancements to the contract to support its policy ambitions, including enhanced payment terms (18 days), enhanced dispute-avoidance provisions, which include the use of an ODA appointed independent disputes avoidance panel, sub-contract provisions including the use of competitive tendering and flow-down of other policy requirements, and changes to insurance clauses reflecting ODAs use of project insurance."

7. The report of MacKenzie and Davies⁴ “Lessons Learned from the London 2012 Olympic and Paralympic Games Construction Programme” (authored approximately 12 months before the Games) identifies 3 “headline drivers” and 3 “critical enabling factors”, the latter being the use of a well resourced Delivery Partner, supportive contractual arrangements and a supportive programme wide culture.
8. The NEC’s website reports a quote from Ken Owen, Commercial Director of CLM, the ODA’s Delivery Partner (of which more below): *“I think NEC3 is the unsung hero of the Olympic Games, a bit like the spine or the heartbeat in the human body, I believe it helped deliver the project”*.

Characteristics of the NEC3 Engineering and Construction Contract

9. So what was it about this contract that provided the qualities identified by Mr Fernau and others and won praise in practice? The NEC itself identifies the characteristics of its contracts as follows:

“They stimulate good management of the relationship between the two parties to the contract and, hence, of the work involved in the contract.

They can be used in a wide variety of commercial situations, for a wide variety of types of work and in any location.

They are clear, simple and written in plain English using language and a structure which is straightforward and easily understood.”

10. The characterisation of the NEC3 contracts as written in plain English is one that many lawyers still find hard to understand. The structure of the contract is a set of Core Clauses (that start numbering at 10.1) with a choice of Options; the core and optional clauses have their own language of Contract Data, Works Information, Compensation Events

⁴ Ian MacKenzie, Senior Research Fellow, Innovation and Entrepreneurship Group, Imperial College Business School and Andrew Davies, Reader in Innovation Management, Innovation and Entrepreneurship Group, Imperial College Business School

etc. with two different ways of signalling defined terms⁵; and the contract sets out what the parties do in a descriptive present tense relying on clause 10.1 which provides that “the *Employer*, the *Contractor*, the *Project Manager* and the *Supervisor* shall act as stated in this contract and in a spirit of mutual trust and co-operation” to convert these statements into obligations. The language has been the subject of adverse judicial comment⁶. Nonetheless, it does seem to find favour in the industry and is increasingly familiar.

11. What is more readily understandable is the intention and contention that the contract stimulates good management. The requirement to act in a spirit of mutual trust and co-operation may be little more than a general requirement, difficult to enforce, but other aspects of the contract, if properly operated, can achieve transparency, co-operation and good management. As will be seen, what it can be perceived happened on the Olympics projects was that parties “bought in” to the NEC ethos perhaps encouraged by the prestige of the projects but also helped by management systems which sat alongside the formal contracts and sought to achieve the same aims.

12. A few aspects of the ECC are particularly relevant:

(i) As mentioned above, for the main contracts, the ODA chose to use Option C: Target Contract with Activity Schedule. This Option creates a target cost contract which offers an incentive, in the form of a share of the gain, to the contractor to complete the works for less than the target price and a disincentive, in the form of a share of the pain, to complete the works for more. The target cost is set from a priced Activity Schedule which itself may be adjusted for Compensation Events.

⁵ Terms identified in the Contract Data are in italics and defined terms have capital initials (clause 11.1)

⁶ Edwards-Stuart J. on the NEC2 form: “I have to confess that the task of construing the provisions in this form of contract is not made any easier by the widespread use of the present tense in its operative provisions. No doubt this approach to drafting has its adherents within the industry but, speaking for myself and from the point of view of a lawyer, it seems to me to represent a triumph of form over substance.” *Anglian Water Services Ltd. v Laing O’Rourke Utilities Ltd.* [2010] EWHC 1529 [28]

- (ii) The contract provides for an Accepted Programme which may, and usually should, be regularly updated:
 - (a) Clause 11.2(1) provides that “The Accepted Programme is the programme identified in the Contract Data or is the latest programme accepted by the Project Manager. The latest programme accepted by the Project Manager supersedes previous programmes”.
 - (b) Under clause 32.2, the Contractor submits a revised programme when instructed to do so or when he chooses to do so and, in any case, at no longer than the interval stated in the Contract Data. Commonly this is 4 weeks.
 - (c) Clauses 31.2 and 32.1 contain detailed provisions about what the Contractor must show on his programmes. Each revised programme must show actual progress and its effect on the timing of the remaining works; the effects of compensation events; how the Contractor plans to deal with delay; any other changes the Contractor proposes to make to the Accepted Programme.
 - (d) The Project Manager either accepts the programme or rejects it. Reasons for rejection are set out in clause 31.3⁷ and appear to be the sole permissible reasons for rejection⁸. In the UK, at least, a dispute between the parties as to whether a programme was properly rejected could be rapidly resolved by adjudication.
 - (e) The Accepted Programme features in the definition of Compensation Events (clauses 60.1(3), 60.1(5), 60.1(9) and 60.1(19)) but perhaps more importantly the regular revision of programmes and their acceptance/ rejection

⁷ The Contractor’s plans are not practicable; it does not show the information the contract requires; it does not represent the Contractor’s plans realistically; or it does not comply with the Works Information.
⁸ and withholding acceptance for a reasons not stated in the contract can be a compensation event – see cl. 60.1(9)

provides both the sharing of information on the progress of the works and the opportunity (or requirement) to manage the programme.

(iii) Early Warning Notices:

(a) Clause 16.1 requires both the Contractor and the Project Manager to give “an early warning” by notifying the other:

“as soon as either becomes aware of any matter which could

- *increase the total of the Prices*
- *delay Completion*
- *delay meeting a Key Date or*
- *impair the performance of the works in use”*

Early warning matters are entered on the Risk Register⁹.

(b) Either the Project Manager or the Contractor may require the other to attend a risk reduction meeting and the parties who attend are required to co-operate to minimise risk.

(c) Early Warning Notices have a direct relevance to payment under the contract. Under Option C, the contractor is paid Defined Cost (in essence sub-contractor costs) and the Fee (the sum fixed for the contractor’s costs) plus any share of saved cost or less any share of excess cost. The definition of Defined Cost involves the deduction of Disallowed Cost and Disallowed Cost in turn includes any cost incurred only because the

⁹⁹ “The Risk Register is a register of the risks which are listed in the Contract Data and the risks which the *Project Manager* or the *Contractor* has notified as an early warning matter. It includes a description of the risk and a description of the actions which are to be taken to avoid or reduce the risk.”

Contractor did not give an Early Warning Notice which the contract required him to give¹⁰.

(iv) Compensation events:

- (a) These are events which change the cost of the work or the time needed to complete it for which compensation is given. They are dealt with in core clause 6. Clause 60.1(1) to (19) is the principal source of the identification of compensation events, including, for example, the Project Manager's giving of instructions changing the Works Information, the Employer not providing something by the date shown on the Accepted Programme, a breach by the Employer, unexpected physical conditions, etc.
- (b) What marks out the NEC3 contracts is the manner in which compensation events are to be dealt with.
- (c) Firstly, Clause 61.3 provides:

"The *Contractor* notifies the *Project Manager* of an event which has happened or which he expects to happen as a compensation event if

- the *Contractor* believes that the event is a compensation event and
- the *Project Manager* has not notified the event to the *Contractor*

If the *Contractor* does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion

¹⁰ Keating on NEC3 (by David Thomas QC) at p. 166 highlights the difficulty in applying this clause pointing out that the cost can only be disallowed if it is incurred only because of the failure in question, which may be difficult to show in practice. But it is also suggested that if there are other contributory causes, it may be open to the Project Manager to apportion cost. Failure to give an early warning notice may also affect the amount recoverable for a compensation event – see clause 63.5.

Date or a Key Date unless the *Project Manager* should have notified the event to the *Contractor* but did not.”

There are numerous drafting issues with this clause¹¹ but it clearly precludes the Contractor’s claim where he ought to have but has not notified.

- (d) There is express provision that notified compensation events are first to be dealt with by discussion between Contractor and Project Manager (clause 62.1). At the discretion of the Project Manager, after such discussion, they are addressed by quotations, in which the Contractor assesses the effect of the compensation event in terms of time and money¹², which the Project Manager may accept. Clause 64 provides for the Project Manager to make his own assessment of the compensation event in defined circumstances, including where he decides that the Contractor has not properly assessed the compensation event.
- (e) Then, by virtue of clause 65.2: “The assessment of a compensation event is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong”. Again there are drafting issues with this clause including the use of the word “forecast” (which is only used elsewhere in relation to price not time) and “later recorded information” which is not defined. But the thrust (or at least threat) of the clause is surely intended to be that once an assessment has been made and the compensation event implemented¹³, it is not to be revisited on the basis that things did not work out as

¹¹ When is the Project Manager obliged to notify a compensation event? What if he should have notified but has not? How do you assess when the Contractor became aware of an event which he expects to happen? Is the time limit to be construed as an exclusion clause?

¹² Clause 64 provides for the Project Manager to make his own assessment in defined circumstances,

¹³ See clause 65.1

anticipated¹⁴. This provides a clear incentive to get the assessment right and, in the Contractor's case, provide a quotation that is likely to be accepted, something that is more likely to be achieved with visibility of time and cost to both parties.

13. The point about much of this is that it fosters good management and collaboration if the parties operate the contract as intended. With notable exceptions relating to EWNs and Compensation Events, the contract is notably short on provisions for the consequences if one of the parties fails to perform as intended. What can be said about the 2012 Olympics is that the ODA applied itself to ensuring that performance was not left to chance.

The Delivery Partner model

14. Firstly, the ODA, as a public sector body set up for its specific purpose, took the approach of working with a private sector Delivery Partner. The Delivery Partner was CLM, a joint venture of CH2M HILL, Laing O'Rourke and Mace.
15. The Learning Legacy paper "The ODA's Delivery Partner approach – creating an integrated framework for mutual success"¹⁵ summarises the role of the Delivery Partner as "to provide specific skills and resource to the client organisation where the client lacks capability..., experience ..., resource... and/or the desire to undertake the project in house. The key phases in this partnership (and their intended outcomes) are:
 - (i) Project definition: Project scope defined, scope and objective.
 - (ii) Delivery Partners definition: Delivery Partner role defined, selection strategy agreed.

¹⁴ This does not preclude the Contractor disputing the Project Manager's contemporaneous assessment.

¹⁵ James Jacobson, Commercial Manager ODA

- (iii) Delivery Partner selection: Delivery Partners selected and engaged.
 - (iv) Delivery Partner alignment: Objectives and incentives aligned and organisations structured.
 - (v) Development: Relationships built, reporting, assurance and governance implemented.
 - (vi) Management/ delivery: Mutual trust and co-operative works.
 - (vii) Complete: Objective delivered, mutual success.
16. In simple terms what was crucial to making this relationship work and add value was defining and managing the role of the Delivery Partner and giving the Delivery Partner real status and authority in the supply chain, with the Delivery Partner developing and implementing the management procedures. “The ODA experience has shown that the Delivery Partner must provide the delivery management systems and define requirements for the systems while incorporating the client’s requirements. This was a key lesson from the experience of the ODA.”¹⁶
17. CLM itself was engaged on the NEC3 Professional Services Contract with provisions for incentivisation and CLM appears to have valued the use of NEC contracts for the construction projects:
- “The project has utilised the NEC3 form of contract which helped define behaviours from the outset. Leadership and organisational structure also helped to establish the right cultures and behaviours and foster an open, honest and communicative relationship with an appreciative level of commercial tension.”¹⁷*

¹⁶ At p. 11

¹⁷ At p. 8

Management systems

18. The use of the ECC then sat alongside a raft of management tools including a suite of monthly reviews (Implementation reviews; Anticipated Final Cost/ Trend reviews; Change Control Meetings) and six-monthly assurance reviews. “These focussed on different aspects of delivery and in aggregate ensured that a “single truth” was established for Project performance”¹⁸. Monthly costs reports and monthly Project Status reports were produced by CLM using the information from the Tier 1 contracts.
19. Although the submission of revised programmes could feed in to this “single truth”, CLM also saw them as a negative. In their Learning Legacy paper “Using Earned Value/stable baselines with NEC Contract projects”, David Birch and Gavin McGuire of CLM¹⁹ describe the ECC as giving contractors “the right to amend their Accepted Programme each month” and as such see the Accepted Programme as having no use as “a stable low-level baseline”. The ODA therefore mandated the use of Earned Value “to objectively and consistently measure project performance across the London 2012 Construction Programme”.
20. The elements of this approach were
 - (i) A Work Breakdown Structure and Performance Management Baseline which fed into the Original Baseline Budget (also known as the Yellow Book).
 - (ii) Three financial comparators were then used to measure performance: Budget Cost of Work Scheduled (giving Baseline or Planned Value); Budget Cost of Works Performed (giving Earned Value); and Actual Cost of Work Performed. Two forecast data sets were used: the Contractors’ data to capture

¹⁸ See “Monitoring and control of delivery at the ODA”: Gordon Alexander, ODA Programme Assurance Executive

¹⁹ David Birch, Head of Programme Controls and Gavin McGuire, Head of Cost Management. See also David Birch’s presentation: Programme Monitoring and Control; Change and Baseline Management; Integrated Planning

monthly progress and logic updates, using the Accepted Programmes, and the Project Manager's independent assessment. "All progress was then expressed as percent complete, applied to budget-loaded summary activities then aggregated to an EV figure and percent complete for the project."

- (iii) A Change Control Procedure was put in place and Birch and MacGuire record that that a "control culture" was fostered with trust in the accuracy of reporting and, as necessary, the baseline was updated to a Current Baseline Budget.

Contract or management?

- 21. Clear themes of the Learning Legacy are the importance played by visibility of information about the progress of the project, trust in that information and collaboration in implementing the project and solutions to problems. Of course much of that has to do with attitude and management rather than contractual requirements but, as the Earned Value example demonstrates, those contractual requirements can and did effectively contribute to good management practice.
- 22. Another key contractual contributor is thought to have been the Early Warning Notice provisions. Giving EWNs can run contrary to contractors' instincts. Whilst giving notice of matters that might give rise to claims is embedded in construction contracts and contractors' thinking, and, one hopes, procedures, giving notice of perceived problems or shortcomings is quite a different thing. But on the Olympics projects, contractors seem to have entered into the spirit of EWNs. Speaking to the King's College Construction Law Association in 2010, Mark Reynolds, Deputy Programme Director of the ODA said that 21,000 EWNs had been given and were regarded as a vital risk management tool²⁰.

²⁰ As reported in Building Blog (Building.co.uk) 27 April 2010.

23. In his report “London 2012 – a Global Showcase for UK plc”, Sir John Armitt, Chair of the ODA, concluded that “The use of the NEC3 family of contracts ensured that most problems were solved when they occurred, rather than ending up in the courts at the end of the process” – another ringing endorsement for NEC3 and its encouragement of openness and trust. But the “problems” could not have been solved without robust management structures to identify them and their solutions and to implement those solutions. The lesson to be learnt from the ODA’s experience cannot be that the choice of an NEC contract is some sort of universal panacea. It is rather that the use of a contract that encourages openness and collaboration is a good start and achieves a good finish if it is operated properly and the management tools are put in place to take full advantage of the opportunities it provides.