

## Regional News for October 2012

### Construction News

*Eric Tse / Andrew Keung*

**Shatin to Central Link (SCL)** - One of the major civil works contracts on SCL has been awarded to Samsung-Hsin Chong Joint Venture. This HK\$4.6 billion contract (SCL Contract 1109) comprises the construction of Ma Tau Wai and To Kwa Wan underground stations and 1.6km of twin bored tunnel. In addition to this contract, MTR Corporation has also awarded the following contracts recently for SCL:

Contract 1101 – Ma On Shan Line modifications – Sun Fook Kong JV

Contract 1113 – Animal Management Centre & Quarantine Station Reprovision – Kaden-Leader JV

Contract 1114 – Tze Wan Shan Pedestrian Link – Paul Y Construction

Contract 1117 – Pat Heung Depot modifications – Paul Y Construction

**Largest NEC Government Contract awarded** - The Drainage Services Department has awarded a HK\$678m contract to Chun Wo Construction & Engineering Ltd for the Happy Valley underground stormwater storage scheme. With the experience gained, the Development Bureau and the Works Department are actively planning more NEC construction and consultancy contracts estimated HK\$8 billion in coming three years

### Reaching out

*Eric Tse*

#### 2012 AIAB BIM Conference



ICES was invited to be one of the supporting organizations for the AIAB BIM Conference held at the Mira Hong Kong on 12 October 2012. Our Chairman, Honby Chan and Vice Chairlady, Miranda Lui represented ICES to attend the conference and exchanged ideas with BIM speakers and other experts. It was a good opportunity to keep abreast of the latest practice of BIM in Hong Kong and how it benefits the whole project team through showcase projects.

### **Transportation Summit in Suzhou (蘇州)**

Our Chairman, Honby Chan was invited by the Hong Kong Institution of Highways and Transportation to join the first Highway & Transport Summit of Chinese Mainland, Taiwan, Hong Kong and Macau (两岸四地公路交通发展论坛) in Suzhou from 23 to 25 October, 2012. This first forum was hosted by the China Highways and Transportation Society (CHTS, 中国公路学会) and the speakers were invited from Chinese Mainland, Taiwan and Hong Kong to share their views in the updated development of highway and transportation. Keeping abreast of the latest practice and development in highway and transportation amongst various experts from different areas, the Summit was very successful. The next forum was scheduled to be held in Taiwan by the Taiwan counterpart in 2013 and then followed by the Hong Kong Institution of Highways and Transportation in 2014 in Hong Kong.



Photo with the President (Ir Reuben Chu) and the Vice President (Ir Albert Cheng) of the Hong Kong Institution of Highways and Transportation

## Legal Corner

Steven Yip

### Are expectations too high for NEC3 contracts?

Next year, the NEC family of construction and engineering contracts celebrates its 20th birthday. Developed in the UK it has become widely used internationally, especially since its third edition, NEC3, was published in 2005.

The NEC form was the contract of choice for the major venues and related infrastructure for the 2012 Olympic Games in London. It has been used for projects ranging from power stations in South Africa to a research station in Antarctica. NEC3 has been particularly successful in the public sector but its use in the private sector is also increasing.

#### NEC3 in Hong Kong

The Hong Kong Government is trialling the use of NEC3 and there is a high level of interest across all sectors of the industry in its simple structure and language and its promotion of collaborative working and the avoidance of disputes.

In structure and content the NEC3 suite of contracts is very different from the standard forms which are most frequently used in Hong Kong. These forms have preserved and developed a number of features no longer to be found in most common law standard forms, including the use of nominated subcontractors and an emphasis on deferring dispute resolution until the end of the project. This approach has been criticized as out of date in government reports and elsewhere. It does however reflect long-established local practice on the part of an industry which is by

many measures extremely successful. Against that background, how likely is NEC3 to succeed in the Hong Kong market and achieve the very desirable goals it has set for itself? The answer will to a large extent depend on how successfully its distinctive elements can be applied to the unique construction environment that is Hong Kong. Let us look in that context at some of the key features of NEC3 and how they operate.

#### The contract as project management tool

Although they are expressed in very different language, most of the subjects one would expect to see in a construction contract can be found in NEC3. Uniquely among standard forms, though, NEC goes further by linking these closely to a project management scheme which relies on strict deadlines, notice and programming requirements and also rapid decision-making.

The logic is clear – if the parties use them properly these mechanisms will (in the words of the NEC drafters) ‘mitigate problems and shrink risk’. The challenge for those parties is twofold. First, they need to make a major investment in the management resources required to meet the demands placed on them. The significance of this should not be underestimated. Some readers will recall the problems generated when many clients adopted construction management as a procurement route, only to find that they were not able to cope with the demands which it imposed. NEC3 is a very different animal. If it is not

managed properly, however, this poses problems for client and contractor alike.

The second challenge is the need for swift and effective decision making. For the NEC methodology to work decisions need to be made in advance, for example, about the cost and time to be allowed for a substantial change which could have major implications for the completion date and the out-turn cost of the project. This can only work if client and contractor are both comfortable with a proactive approach.

If it does not work, the consequences can be serious. If deadlines are missed, for whatever reason, the interdependent nature of the NEC system means that there can be a domino effect on the rest of the project. One commentator has likened it to a wall being built without proper foundations.

There have been examples in other jurisdictions of contractors trying to take advantage of the NEC system by deluging the project manager with notices to which he cannot respond in time and exploiting the confusion which can result. Clients too can be at fault. Regardless of the cause, if the NEC machinery breaks down this poses problems for everyone involved.

### **Less is more – or is it?**

One of the most striking aspects of NEC3 is its apparent brevity and simplicity. Sentences are short and written in the present tense, the forms are short and flowcharts provide a non-verbal way to understand their contents. There is an admirable principle at work here. If a contract can be made accessible in a way that works for everyone, then everyone wins – even lawyers,

who (contrary to popular belief in some quarters) are actually rather keen on the idea of happy clients who bring repeat business.

Construction projects are however inherently complex and there are limits to the extent to which the legal issues which they raise can be simplified without exposing the parties to unnecessary risk. The following example illustrates the problem: Clause 11.2(4) of NEC3 reads *'The Contract Date is the date when this contract came into existence.'*

This looks to be self-explanatory. There is however (presumably in the interests of brevity) no form of agreement or other provision for this date to be written into the contract. In its absence establishing exactly when the contract was formed may not be easy and this could become a problem especially in the event of a dispute. The parties would therefore be well advised to prepare their own form of agreement to make the position clear.

So simplicity can have its pitfalls. It may also not be quite what it seems. The brevity of NEC3 for example is achieved partly by relegating key contractual issues dealt with in other forms to the Works Information (or specification) or to optional clauses falling outside the core provisions of the contract. With the right advice this should not be a problem but it is a feature of NEC3 to which all parties need to be alert.

### **Taking stock**

NEC3 has its critics. Some in the industry say that it is simply too demanding. Others are concerned about its drafting, which (in the words of leading QC Philip Boulding) 'is not often

considered one of its greatest strengths'. Such views cannot be lightly dismissed. The aims of NEC3 are however entirely praiseworthy and there is no doubt that in the right circumstances it can help deliver successful projects. No form (whatever its strengths) can be expected to do so unless it is in keeping with the client's culture and philosophy and the parties know what they are taking on and are equipped to do so.

As others have said, NEC3 is not a panacea for all. It will not deliver collaborative working and

win-win solutions by itself. With that in mind the Development Bureau is putting a lot of effort into training and raising awareness both among its staff and across the industry of how the NEC operates. At the same time the Hong Kong Housing Authority is considering a very different approach – adapting some features of the NEC but not others for use in an amended version of its own conditions of contract. The NEC debate is clearly set to continue in Hong Kong for some time to come.

## **Past Events**

*Eric Tse / Denny Mak*

**11 October** : 40 members and guests attended the evening CPD talk “ **From 1D to 6D, BIM application for Engineers and Surveyors**”, presented by Mr Elvis Li, CEO of isBIM Ltd. Mr Li shared his views and practical experience on the latest industry hot topic - how BIM could value-add to Quantity Surveyors' current practices with the readily available BIM quantity data to accelerate the entire cost estimation cycle.



## **Coming Events**

**21 November** : “**BK SURCO Annual Construction Conference**” a full day conference on “**Managing Construction Risks for the benefit of Employers and Contractors**” organized by BKSURCO and supported by ICES will be held at the Hong Kong Convention and Exhibition Centre.

Our CEO, Mr Bill Pryke and some senior members of ICES will speak at the conference. Members of the Chartered ICES are entitled to the discount price.

**23 November** : “**Lighthouse Club Annual Dinner**” will be held at the Hong Kong Convention and Exhibition Centre. Ir Wai Chi Sing, Permanent Secretary for Development (Works) will be the guest speaker of the evening. ICES Hong Kong is also hosting our CEO and other senior members from UK at this charity function. Members are welcome to book their seats through Lighthouse Club.



**BK SURCO TRAINING** presents its Annual Conference on

## Managing Construction Risk for the benefit of Employers and Contractors

**21 November 2012** ★ Hong Kong Convention and Exhibition Centre



**BK SURCO Training** is the International Training Company of the Chartered Institution of Civil Engineering Surveyors providing commercial and contract management training to engineers, project managers, quantity surveyors and others engaged in the construction and engineering industries.

**BK SURCO Training** will be making a donation from this conference to the Lighthouse Club Construction Industry Charities.

- ◆ Introduction to Managing Construction Risk
- ◆ Construction Design Management
  - effective planning and coordination to reduce Risk
- ◆ Managing Employers’ Risks from a Legal Perspective
- ◆ Managing Contractors’ Risks from a Legal Perspective
- ◆ How can the Risk of Unforeseen Ground Conditions be avoided/mitigated by Employers and Contractors using Hong Kong’s Standard Forms of Contract? – a view based on UK Experience
- ◆ Geotechnical Baseline Reports – Excellent Tool for Measuring Effects of Changes in Ground Conditions – Let’s make it work!
- ◆ Architect’s and Engineer’s Risks – Awareness from a Legal Perspective
- ◆ Managing Construction Arbitration Risks
- ◆ Panel Discussion

The subject of this one-day conference will be of interest to everyone involved in the Construction Industry and has been designed to meet CPD requirements (CPD Points applied for from the Law Society of Hong Kong).