

Issues with the PN on NEC ECC (March 2017 Edition)
Cost-saving Design

1. The PN issued by DEVB about 18 months ago amended Cl 63.11 of the original NEC target cost contract in that it effectively catches all cost saving proposals and subjects them to an elaborated design approval, checking and insurance procedure.
2. In addition, the PN also requires these savings be separated and disallows other “pains” or negative savings to be offset by these earlier savings.
3. These together would likely discourage contractors from making cost saving proposals, which is not conducive to the NEC spirits.
4. The current PN seeks to protect client’s interest on change of design, which is legitimate for significant changes of design of the permanent works, but may not be so, in my view, for minor design change or non-design-related changes.
5. So, in the next edition of the PN, it would help if it may distinguish between non-design related CS measures or minor design changes with that which will bring about significant changes in the design of the permanent works.

“Best & Final Offer in Sub-contracting”

1. In Happy Valley underground flood storage contract (a target cost ECC), we tendered out about 160 sub-contracts. About half of these underwent a process of “best & final offer”, to strive for cost saving.
2. B&FO is a 2-stage tendering process. After the first bidding, the lowest 3 tenderers would be interviewed, for clarification of details, discrepancies, and assumptions, adjustment of boundary conditions, interfacing constraints, or even thrashing out alternative designs or alternative works packaging. The PM can issue tender addendums or even re-tender the significantly re-packaged works.
3. All the 3 lowest tenderers would then be provided with the same tender addendums and all the information revealed in the process. And they will be required to each make a “B&FO”. More often than not, the final offer is lower than the earlier ones (except in the case where a tenderer put in a higher bid, after correcting certain wrong assumptions as clarified during the interview, which is legitimate). Of course the lowest would be awarded the sub-contract.
4. This process has the advantage of removing discrepancies, misunderstanding and hence removing the tenderer’s risk premium that may otherwise be included into his bid. This also minimizes subsequent disputes during works execution.
5. However, this may be seen as a risky process particularly from corruption prevention point of view, in that it allows the tenderer to have the second bite of the cherry, with a potential risk of manipulation during the process.
6. The current PN therefore disallows this. And tender interview was turned to pre-tender interview, with some pre-set screening criteria to limit the number of tenderers to be interviewed. And the 2-stage tendering is reduced to 1-stage (ie 1 bid – the conventional way).
7. While the B&FO proves effective in arriving at a genuine price for the sub-contract and minimizing misunderstanding (both reducing wasted costs), we recognize the current PN’s good intention of curbing potential corruption and manipulation of price with the 1st stage tendered amounts being known and put onto the table. We wonder if we could devise a Z clause which preserves the merits of the “B&FO” and embraces more checks and balance (by way of documentation) during the 2nd stage of tendering. In view of the burden to effect these checks and balance, the “B&FO” arrangement should perhaps be confined to subcontract with significant scale.