



# Collaborative Contracting

*Monday 2 August 2021*

*08:00am- 09:00am (PET)*



# Housekeeping

- Please mute your mics and turn off your video
- Remember to keep your microphone on mute when not speaking
- Recording and slides to be distributed after session

# Speakers

**Peter Higgins**  
NEC4 Board Chair



**Alex Wagemann**  
Chairman of Working  
Group for Construction  
Contracts, CICA



**Carlos Nuñez**  
SCL Peru President





# Agenda

- Why collaborative contracting is recognised as best practice in industry
- What makes NEC a collaborative contract?
- How NEC delivers projects on time and to budget



# INTRODUCTION – Society of Construction Law, Peru President



# INTRODUCTION – NEC Contracts

## Peter Higgins, NEC4 Board Chair

## What is NEC



- Suite of contracts developed and published by Institution of Civil Engineers in 1993
- NEC4 is the current edition published in 2017
- Creation of a contract between parties which forms a manual for managing the contract interfaces
- Neutral legal jurisdiction to allow use anywhere in the world

## Government endorsements:



**The Government Construction Board, Cabinet Office, UK**

*The Government Construction Board recommends that public sector organisation use the NEC Contracts in particular the NEC4 contracts where appropriate, when procuring construction. Standardising use of this comprehensive suite of contracts should help to deliver efficiencies across the public sector and promote behaviours in line with the principles of the Government Construction Strategy*

**The Development Bureau, HKSAR Government**

*The Development Bureau recommends the progressive transition from NEC3 to NEC4 in public works projects in Hong Kong. With suitable amendments to adapt to the Hong Kong local environment, NEC4 is expected to further enhance collaborative partnering, unlock innovations and achieve better cost management and value for money in public works projects.*



# NEC International Projects



Shell Environmental clean up - North Africa



Christchurch International Airport, New Zealand



London Olympics 2010



Lima 2019

Happy Valley, Wan Chai, Hong Kong



Partnering for success – Sydney Water



# INTRODUCTION – CICA

## Alex Wagemann, CICA



## Confederation of International Contractors' Associations

- Organization based in Paris and created in 1974
- The mission of the Confederation of International Contractors' Associations (CICA) is to serve, promote and enhance the image of the construction industry across the world.
- CICA is a non-profit, voluntary and global association of trade associations representing member construction firms from their respective regions.

# Stakeholders



THE WORLD BANK



ADB

ASIAN DEVELOPMENT BANK



BUSINESSatOECD

THE BUSINESS AND INDUSTRY ADVISORY COMMITTEE



Global Alliance  
for Buildings and  
Construction



G20 GERMANY 2017  
BUSINESS 20 DIALOGUE

B20

ARGENTINA 2018



UNEP



SIF

SUSTAINABLE  
INFRASTRUCTURE  
FOUNDATION



OECD



United Nations  
UNCITRAL



Inter-American Development Bank

nec



International Federation of Consulting Engineers  
The Global Voice of Consulting Engineers

# Composition

## Full Members



## Associate members



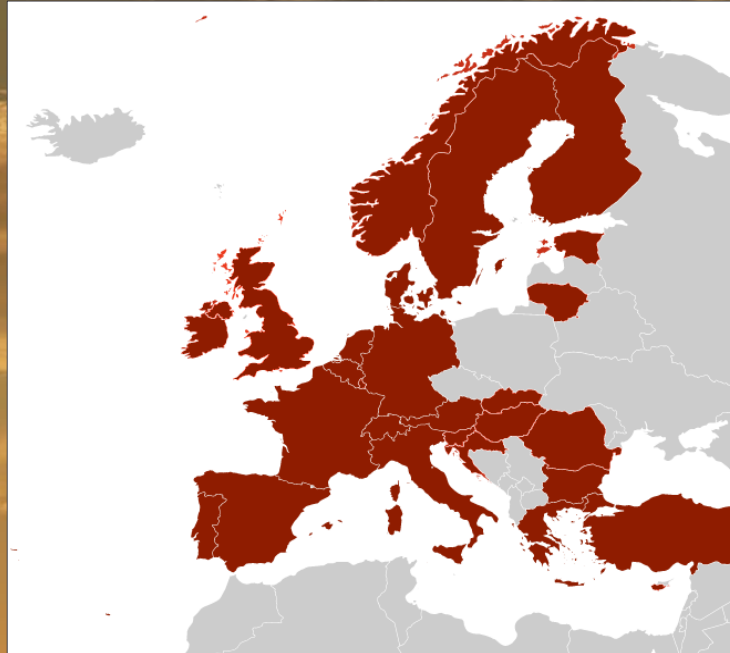
## Supporting Members



# Representativeness



America



Europe



Asia

Its member countries represent 18% of the world's population, 40% of world GDP and 57% of world construction GDP



## Working Groups

- Construction Contracts
- Construction 5.0
- Long-term financing of Infrastructure
- Health & Safety
- Multilateral Development Banks
- Public-Private Partnerships
- Anti-corruption and Integrity



## Working Group for Construction Contracts

- Created in 2018
- Focused on improving the contractual conditions of engineering and construction standards
- Currently integrated by professionals from 12 countries (Brazil, Chile, Costa Rica, France, Germany, Israel, Italy, México, Peru, Spain and Turkey)





# Working Group for Construction Contracts





# Working Group for Construction Contracts





# Working Group for Construction Contracts



- Collaboration agreement subscribed in November 2020
- Focused on spreading the collaborative approach in the construction industry worldwide



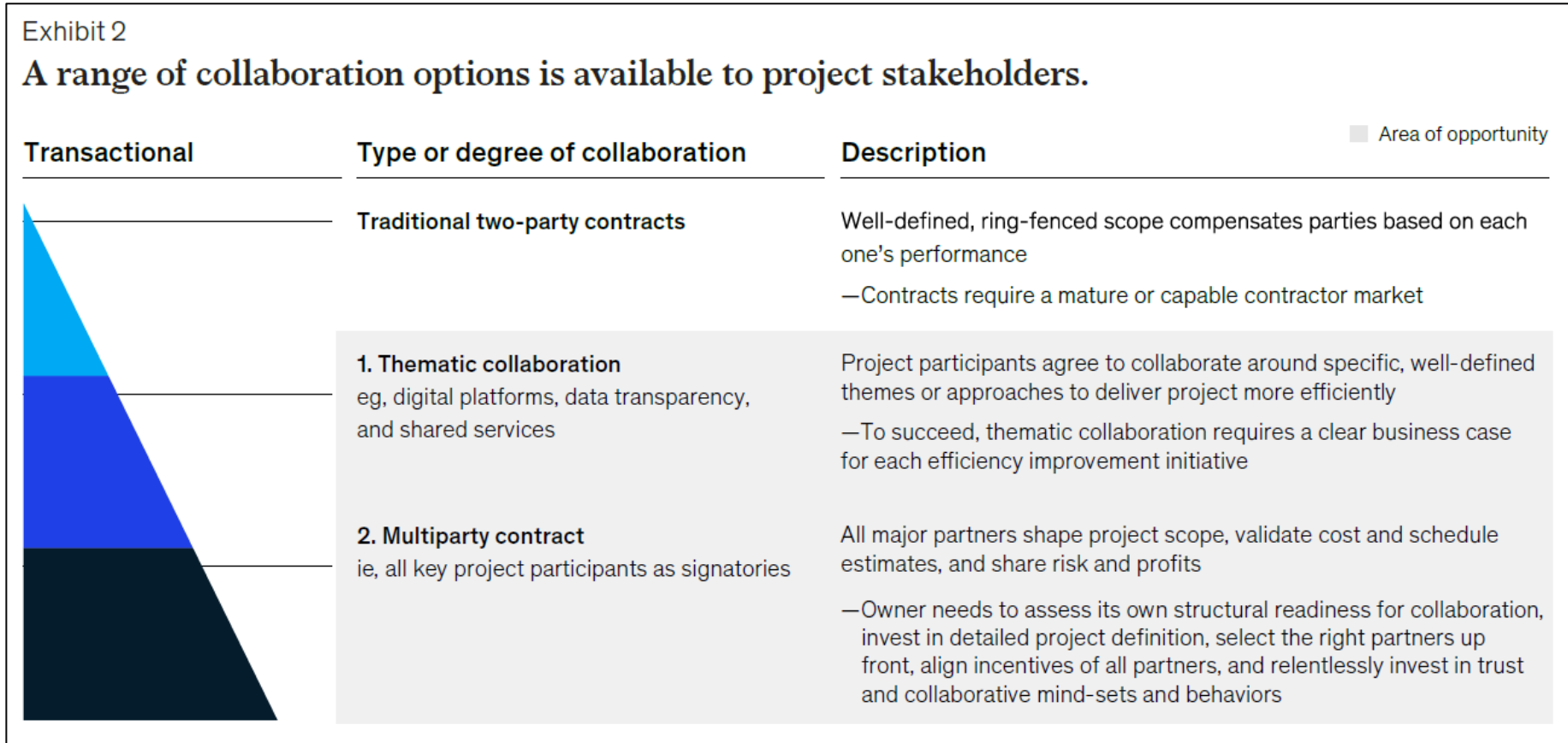
## Collaborative contracting in the industry



# Different contractual approaches

- Traditional
  - Two-parties
  - Orientation to distribute the risk to the party that didn't prepare the contract
  - Separated management structure
- Collaborative (McKinsey & Company - Collaborative contracting: Moving from pilot to scale-up - January 2020)
  - Partners working together during a defined preplanning period
  - Single contract among all key partners (multiparty)
  - No-fault clause
  - Joint management structure
  - Programme as a management tool and focus in the project execution instead of contract wording

# Different contractual approaches





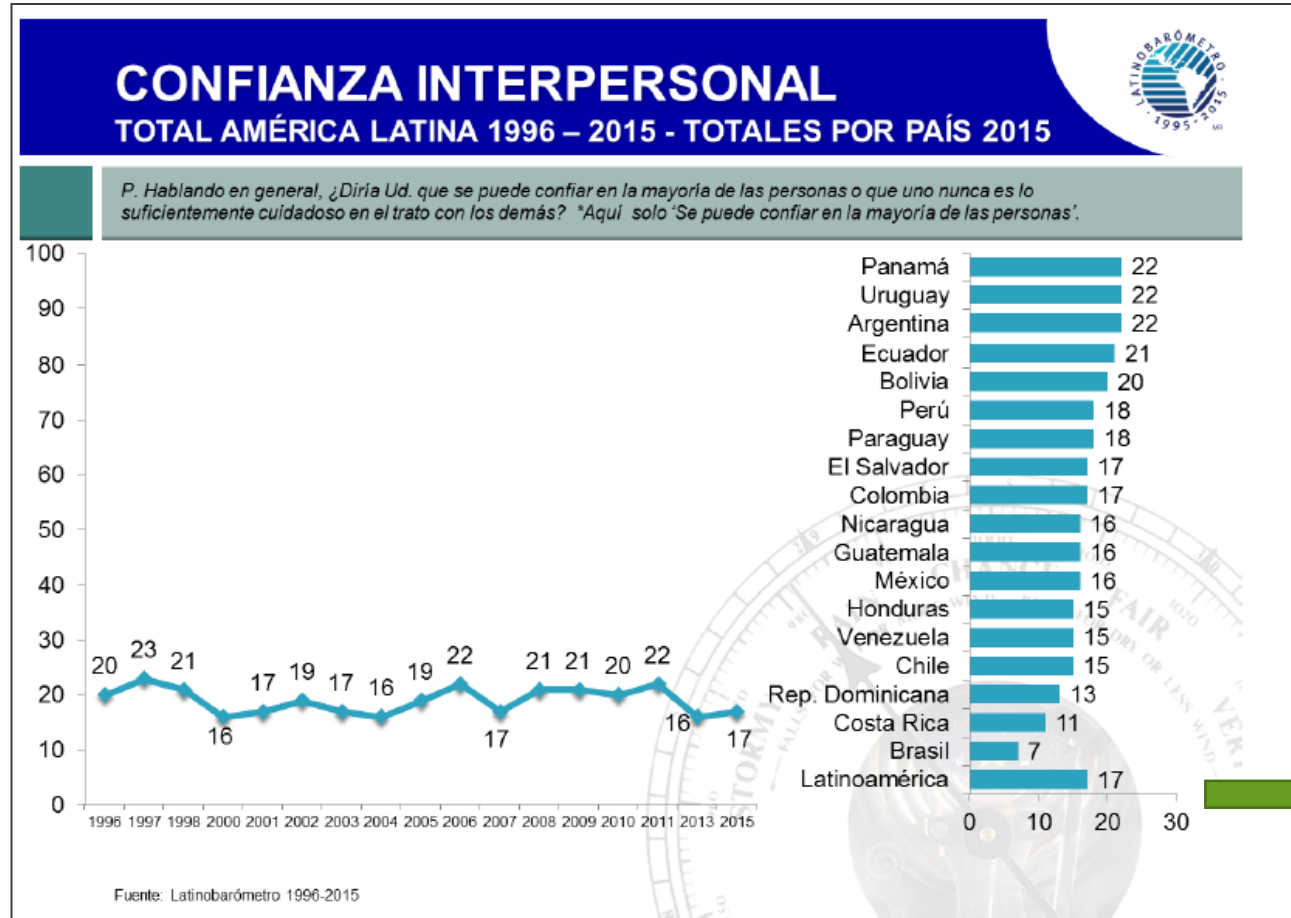
# Different contractual approaches

## Relentlessly invest in trust

Moving from an adversarial to a collaborative approach requires persistent investment in not only building and maintaining trust among delivery partners but also instilling collaborative behaviors (such as problem solving, knowledge sharing, curiosity, and creativity). To succeed, project owners should define their organizational aspirations and make those as important as a project's financial or schedule goals and enforce reliability and openness, two of the key dimensions of the “trust equation.”<sup>2</sup>

McKinsey & Company: Collaborative contracting: Moving from pilot to scale-up (January 2020)

# Collaboration and trust in L.A.



Can you trust most of the people?



17%!!!





## Collaboration and trust in L.A.

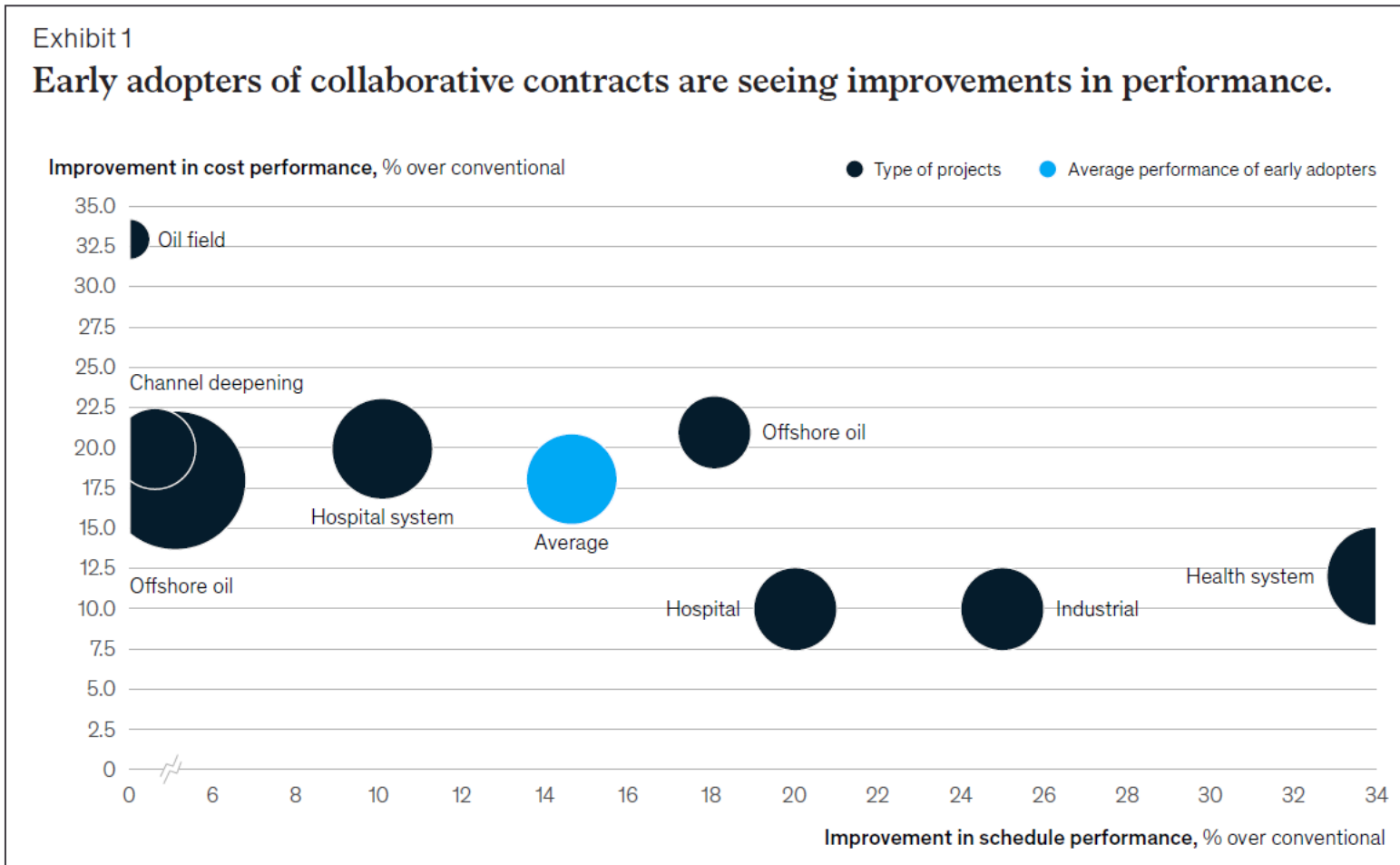
- Trust is a condition precedent for collaboration
- Latin America has one of the lower levels of trust in the world
- Consequences in construction projects:
  - Inflexibility in contract provisions
  - Lack of adaptive management
  - Unbalanced transference of risks
  - More oriented in dispute resolution instead of conflict avoidance during project execution



## Collaboration and COVID

- Maybe you don't have trust, but you have needs to satisfy...
- COVID-19 pushed on the Latin governments into the position to declare construction industry as an strategic sector. Why?
- Because construction is a key factor for the economic recovery via public infrastructure investment and PPP's
- Simplest way: boosting a new deal with contractors
- How do you get that? With more collaboration and flexibility
- Symptoms? Some L.A. countries are searching for pilots of collaborative systems
- Benefits? Multiple. See examples

# Collaboration and COVID





# Collaboration and COVID



<b>Trial project:</b> Project Horizon	<b>New delivery model / procurement route:</b> Two Stage Open Book under TPC2005
<b>Cost savings targeted:</b> 17.4% averaged over 5 years (15% achieved against spend in 2013)	
<b>Other key benefits achieved:</b> Improved warranties and quality control, additional employment and skills commitments and innovation through increased recycling/reduced landfill, creation of integrated project delivery team	



<b>Trial project:</b> Cookham Wood	<b>New delivery model / procurement route:</b> Two Stage Open Book under PPC2000
<b>Cost savings achieved:</b> 20%	
<b>Other key benefits achieved:</b> Increased cost and programme certainty, innovation and reduced prospective operating costs	

# Collaboration, structural aspects and COVID

N.º	COUNTRY	IGP (MUSD)
1	Brasil	1 363 767
2	México	1 040 372
3	Argentina	382 760
4	Colombia	264 933
5	Chile	245 414
6	Perú	195 761
7	Ecuador	93 078
8	Rep. Dominicana	77 883
9	Guatemala	76 191
10	Panamá	60 286

## CEPAL

Contraction 2020: -7,7%

Expansion 2021: 3,7%

## IADB

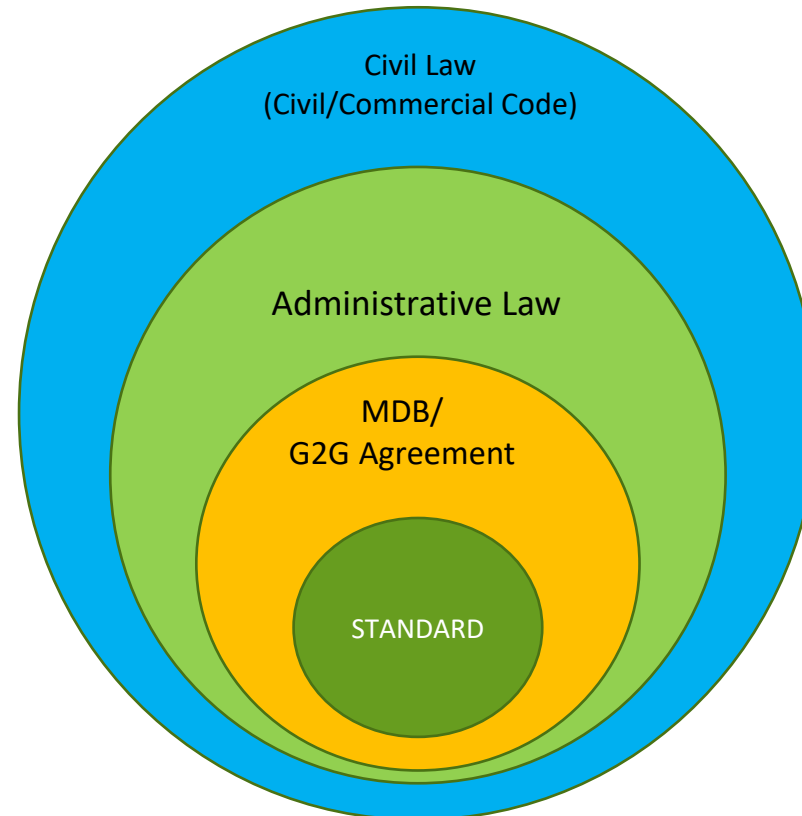
GAP of investment in infrastructure represents 2,5% of the L.A. IGP and it is equivalent to MUSD 150.000



## How governments are filling the Gap?

- Direct investment: Public Budget
- PPP-PPA: Under respective Concessional Law
- Loan Agreement with MDB's: FIDIC
- G2G Agreements: New Standards, such as NEC

# Normative framework with Standards



## STANDARD

- Taking over
- Duty to warn
- Liquidated Damages

## CIVIL-ADMINISTRATIVE LAW

- Recepción
- No-Duty to warn
- Penalidades



## How to harmonise 2 different legal systems?

- Amending the standard

AND/OR

- Particular legal framework, separated of Administrative Law



# Pros-Cons

	PROS	CONS
Modify the standard via amendments	Simple to apply	The Administrative Law keeps the unbalance into the contractual relationship
Particular framework	Administrative Law is not applicable, at least the procedures	Unclear application of principles (not procedures) of Administrative Law

The real problem is **treating a standard contract as a normal contract of public works**



# Pros-Cons

Public Works Contracts

Procedural Administrative Law

Principles of Administrative Law

Concessions (PPP/PPA)

Concessional Law with special treatment to the Concessionaire

Principles of Administrative Law

Standard Contract

Procedural Administrative Law

Principles of Administrative Law

It's appropriate?



# Example

<b>13.3</b>	
<b>Variation Procedure</b>	If the Engineer requests a proposal, prior to instructing a Variation, the Contractor shall respond in writing as soon as practicable, either by giving reasons why he cannot comply (if this is the case) or by submitting:
<input type="checkbox"/> deleted	
<input type="checkbox"/> consult PC	
<input type="checkbox"/> replaced PC	
<input type="checkbox"/> amended PC	(a) a description of the proposed work to be performed and a programme for its execution, (b) the Contractor's proposal for any necessary modifications to the programme according to Sub-Clause 8.3 [ <i>Programme</i> ] and to the Time for Completion, and (c) the Contractor's proposal for evaluation of the Variation.

**Standard**  
(no deadline to present a proposal)

*3.1.1 When a variation is requested, the Contractor will have 10 calendar days to present a proposal. If the Contractor does not present the proposal within this period, it shall be deemed as a waiver of the cost and time that the variation involves.*

Regulation for Public Works contracts  
(deadline: 10 days)

What prevails? How Administrative Law complements the standard in this case?



## Conclusions

- L.A. faces a crisis derived from COVID-19, which increased the infrastructure deficit that already existed.
- Construction is a strategic activity for economic recovery, as it rapidly generates jobs.
- However, to be efficient in the economic recovery, a reformulation is necessary in the way of managing construction projects, changing from a traditional approach to a collaborative approach.
- Why? Because this reduces the risk of an industry that generates high levels of employment. Likewise, good collaborative planning allows savings margins for governments (proved).



## Conclusions

- A collaborative standard contract, and particularly NEC, requires a process of adaptation in some provisions, to harmonise it with Civil Law principles (particularly, Administrative Law).
- Notwithstanding, the main challenge is related to acknowledge that a collaborative contract has a different risk balance compared with a normal public-work contract and the application of administrative procedures should be re-considered.
- Finally, it is urgent an additional training to the L.A. stakeholders involving a better understanding of the collaborative standards and their managing tools, not just limited to an application of the model under the mindset of the local public rules.



# NEC Objectives

## Key concepts

- Flexibility
  - use of options to create desired contract arrangement
  - worldwide use for any type of work
- Clarity
  - simple language to aid understanding
  - avoid jargon & legal terms
- Stimulus to good management
  - contract includes management procedures



## Working together

- Clause 10 – mutual trust and cooperation
- Clause 15 – Early warning
- Clause 31 – Accepted Programme
- Clause 61 – Compensation events
- Options C/D – Target share
- Option X12 – Multiparty collaboration
- Option X22 – Early Contractor involvement



## Mutual Trust and cooperation

10.1 The Parties, the Project Manager and the Supervisor shall act as stated in this contract.

10.2 The Parties, the Project Manager and the Supervisor act in a spirit of mutual trust and co-operation

- Trust one another to act as stated in the contract
- Cooperate to help each other to do what is required by the contract





## Early warning

- Obligation to warn of potential problems to time, cost or performance
- Early warning register
  - initial register at Contract date
  - updated for each warning
  - regular reviews
  - agree actions
- Register sets out who does what to deal with risk
  - mutual trust and cooperation



## Accepted Programme

- Initial programme
- Regular updates
- Programme shows Contractor's intentions at date of issue
  - timing of work
  - need for involvement by Client or others
  - how work is to be done



## Compensation events

- List of events that give rise to change to time or payment
- Notification at time of event or shortly after
- Quotation is forecast of cost and time effect
- Once accepted no further change



## Target share

- Parties share in savings or cost of overrun of target
  - sharing of construction risk
- Parties motivated to cooperate in avoiding unnecessary costs or delay
- Regular updates of forecast final cost



## Multiparty collaboration

- Several contracts froming single scheme
- Mutual trust and cooperation applied between contractors
- Early warning to other contractors
- Reduces disruption at contract interfaces



## Early Contractor Involvement

- Major contractor involvement in design & planning stage
  - increased level of cooperation of Parties
  - reduces construction risk
  - reduces likelihood of unexpected cost increases or delay



## Working together

- NEC approach – knowledge of what comes next
  - removes surprise
  - reduces likelihood of disputes
  
- Tools to stimulate this approach



## Questions?

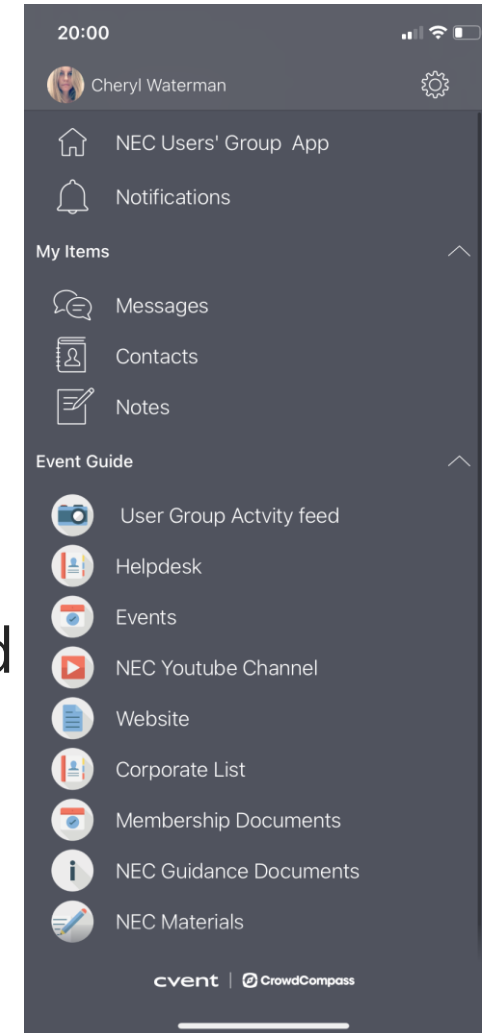


# Become an NEC Member!



Use discount code **UGIntro10** for 10% discount on our Corporate and Individual levels – expires **30 Sept 2021**.

Become a member and gain access to our Users' Group app exclusive to NEC members



<https://www.neccontract.com/NEC4-Products/NEC-Users-Groups>



## Contact us

☎ +44 (0)20 7665 2446

✉ [info@necontract.com](mailto:info@necontract.com)

One Great George Street, London SW1P 3AA

• [necontract.com](http://necontract.com)