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Dispute Avoidance in Construction Contract: Analyzing the NEC Form of Contract

Tara Prasad Kharel†††

Abstract

This study focuses on dispute avoidance in construction contracts, specifically through the implementation of the NEC (New Engineering Contract) system. The objective is to explore how the collaborative framework of NEC, which includes elements such as mutual trust, proactive communication, early warnings, and structured risk registers, and good faith clauses, can enhance project efficiency and reduce disputes. The methodology involves a qualitative analysis of existing literature, comparing the NEC system with Nepal's traditional procurement laws, which are often less structured and prone to disputes. The findings suggest that NEC's proactive approach significantly reduces conflicts by fostering clear communication and equitable risk distribution. Additionally, the emphasis on early warning systems and risk management allows for better conflict resolution before issues escalate. The study highlights that the adoption of the NEC system would align the Nepalese construction industry with international standards, leading to cost reductions and improved project outcomes. The implications of the study recommend the integration of NEC methodologies in Nepal's public procurement system to ensure smoother project execution, reduce legal disputes, and increase overall industry efficiency. The research advocates for a shift towards more structured and collaborative contract frameworks to enhance the construction sector's competitiveness and global integration.

Keywords: NEC contract, early warning, arbitration, dispute avoidance, risk management, contract management.

Introduction

Brief overview of the NEC form of contract

Engineers in the UK, aimed at improving project management and dispute resolution within the construction and engineering industries. Praised for its clarity, flexibility, and collaborative approach, the NEC system is designed to foster cooperation among all parties involved. Initially launched in 1991, the NEC suite sought to address the inefficiencies and deficiencies of conventional contract forms used in the construction sector, offering a more proactive and

†††*Deputy Director of Studies, Nepal Administrative Staff College*
Email: kharel47@yahoo.com

collaborative framework for project management. Since its inception, the NEC has undergone several updates, with the most recent version, NEC4, introduced in 2017 (NEC, 2017). Each new edition has refined and adapted the NEC suite to align with changes in industry practices.

Unlike many traditional contracts that may foster an adversarial environment, NEC contracts emphasize cooperation and mutual support. They require open communication, early warnings, and joint problem-solving to ensure a cooperative project environment. This makes NEC contracts highly flexible and applicable to a wide range of projects, from simple construction tasks to complex professional services.

A key feature of NEC contracts is their proactive risk management approach. By identifying and addressing potential issues early in the project life cycle, the risk of significant problems is minimized. This is achieved through mechanisms such as the Early Warning process and the Risk Register. Through these mechanisms, the NEC contract aims to limit delays, control cost increases, and ultimately improve the overall outcome of the project.

The NEC4 suite of contracts includes several key forms, such as the NEC4 Engineering and Construction Contract (ECC), NEC4 Professional Services Contract (PSC), NEC4 Term Service Contract (TSC), and NEC4 Framework Contract (FC). The ECC is the most commonly used form for construction and engineering projects, offering flexibility for both design-and-build and traditional contracting arrangements. It also covers project management, risk management, and dispute resolution, all structured to support a collaborative approach. The PSC is used for the appointment of consultants and other professional services, aligning with the NEC's principles of collaboration and proactivity. The TSC is designed for maintenance and service contracts that are expected to continue over time, providing provisions for managing service delivery and performance. The NEC4 Framework Contract facilitates the procurement of a series or program of projects or services through long-term relationships, offering a flexible and efficient procurement mechanism that supports collaborative working and effective project management.

This paper aims to answer the question: What are the concepts and processes of dispute avoidance in the NEC form of contract, and how do the dispute avoidance mechanisms and good faith provisions in the NEC form impact effective contract management? By addressing this question, the paper provides a comprehensive understanding of the concept and process of dispute avoidance, particularly in relation to the principle of good faith. Furthermore, the insights gained from the relevant clauses will provide a foundation for effective contract management for contracting parties and legal advisors involved in public construction procurement. Additionally, this paper contributes to existing knowledge, offering a valuable resource for policymakers and practitioners in the field of construction contracts. It also highlights the relevance of these concepts in the Nepalese context.

The Importance of Dispute Avoidance in Construction Contracts

Dispute avoidance is crucial in construction contracts as disputes can have significant impacts on stakeholder relationships, project efficiency, and financial health. Due to the complexity of construction projects and the number of parties involved, disputes are likely to arise, which can hinder progress, inflate costs, and often damage professional relationships irreparably. The success of a project, both in its implementation and maintenance, heavily depends on the resolution and avoidance of conflicts before they escalate.

Dispute avoidance is critical to maintaining project momentum, as disputes only prolong project timelines and increase risks, requiring resources to be diverted to address conflicts. According to the Institution of Civil Engineers, "disputes only extend the period of a project and subsequently increase the risk of further delays" (ICE, 2020). Proactive dispute avoidance mechanisms, such as clear contract terms and an early warning system, help identify potential issues early, keeping the project on schedule and reducing the likelihood of costly delays. Dispute avoidance is also widely regarded as a key factor in project cost management, as disputes lead to additional costs, such as legal fees, arbitration, and compensation claims. The Construction Industry Institute reports that disputes continue to incur substantial monetary expenditures (CII, 2021). Implementing appropriate dispute avoidance strategies, including detailed contract provisions and risk management practices, can help reduce these costs and maintain financial stability throughout the project's lifecycle.

Furthermore, avoiding disputes fosters positive relationships among key stakeholders, such as clients, contractors, subcontractors, and suppliers. Effective dispute avoidance encourages open communication and collaboration, ensuring trust and cooperation are maintained. According to the Royal Institution of Chartered Surveyors, good professional relationships, developed through a constructive approach to problem-solving, ensure better project management with fewer conflicts (RICS, 2019). Conversely, unresolved disputes can lead to damaged relationships and project delays. The Construction Management Association of America views dispute avoidance as one of the core principles supporting quality and safety in construction. Proactively managing issues before they escalate into disputes prevents the compromise of work quality or safety (CMAA, 2022), enhancing the final outcome and reducing defects and accidents, thus contributing to a safer and more successful project.

The "Good Faith" Clause in NEC Contracts

The "Good Faith" clauses in NEC contracts establish a mutually beneficial working relationship based on fairness, transparency, and cooperation between the parties throughout the contract lifecycle. In legal contracts, fairness refers to the equitable distribution of obligations and risks. This can be achieved through clear risk allocation, early warning systems, precise definitions of compensation events, and tiered dispute resolution mechanisms (e.g., negotiation, mediation, adjudication). Compensation events outline a clear process for adjusting the contract so that no party is unfairly burdened by changes in the project. Regular communication fosters openness and trust. A Good Faith clause builds trust and cooperation between contract parties, establishing respect and integrity while ensuring that disputes are resolved justly to maintain the contractual relationship. NEC contracts are specifically designed to foster a partnering approach, as opposed to adversarial practices. Clause 10.1 of the NEC4 contract mandates mutual trust and cooperation between the parties, the Project Manager, and the Supervisor.

Clause 10.1, titled Contractor's Main Responsibilities, stipulates that the contractor must perform their duties according to the contract terms and deliver the project as agreed. This presupposes the good faith performance of duties and cooperation with the project team. Similarly, Clause 10.2, titled The Project Manager's Main Responsibilities, defines the project manager's obligations, including managing the contract in good faith by acting fairly and transparently.

The early warning mechanism in the NEC form of contract is crucial for proactively managing risks and maintaining a collaborative project environment. This is mandated under NEC4 contract Clause 15, which requires parties to give an early warning of any matter they become aware of that may increase the cost of the project, delay its completion, or impair its performance. This mechanism works effectively only when specific conditions such as variations in the scope of work, unexpected site conditions, third-party delays, resource constraints, design issues, or missed milestones are identified in advance. By doing so, decision-making becomes timely, fostering transparency and effective use of the early warning process.

In Clause 16, titled Early Warning, it is stated that both parties must keep each other informed of any event that could affect the execution of the contract or the project outcomes. This early warning mechanism demonstrates good faith by attempting to address problems before they escalate. For this to be effective, the parties should openly communicate any perceived problems, provide early warnings, and offer practical solutions to mitigate negative effects. They should also take proactive steps, such as reallocating resources or adjusting schedules, in accordance with the principles of NEC. Showing proof of actions taken, inviting stakeholder input, and providing regular updates on progress serve as evidence of trust and cooperation, which are essential for resolving issues effectively and maintaining a strong working relationship.

Good faith within NEC contracts is fundamentally interpreted as cooperation, transparency, fairness, and constructive problem-solving. The parties are expected to cooperate in solving problems efficiently, share appropriate information, and communicate openly to avoid misunderstandings. Decisions should be made fairly and reasonably, considering the interests of all parties involved. Good faith clauses can influence dispute resolution by encouraging the parties to negotiate a settlement or mediate, rather than resorting to formal litigation. The NEC's approach to good faith is generally understood through its collaborative clauses. However, how these clauses are applied may differ across jurisdictions or specific contracts, and parties should be aware of how good faith is interpreted locally.

NEC actively promotes good faith through its collaborative mechanisms, which foster transparency, fair dealing, and proactive problem-solving. Examples of these mechanisms include the early warning process, the risk register, the compensation event process, regular progress meetings, project program updates, and the role of the Project Manager in maintaining neutrality. These principles ensure openness in communication and encourage joint efforts to resolve issues fairly for all parties involved.

However, the application of these principles can vary depending on the jurisdiction, as interpretations of good faith differ. Some jurisdictions impose a higher duty of fairness and disclosure, while others focus more on the specific wording in the contract. Proper implementation requires parties to align their expectations with the local legal context, as NEC’s collaborative mechanisms inherently support the concept of good faith.

Concept and Process of Dispute Avoidance within the NEC Form of Contract

The NEC form of contract is one of the more commonly used contracting styles in the construction industry, particularly for its emphasis on cooperation and the prevention of disputes. It incorporates several conflict prevention and resolution approaches, fostering a much friendlier relationship between the parties involved.

Concept of Dispute Avoidance

The NEC contract's dispute avoidance strategy is based on two fundamental principles: proactive problem-solving and early intervention. This framework prioritizes resolving issues before they escalate into major disputes. The NEC encourages openness between parties in how the project is managed, through processes such as the Early Warning system, which requires one party to notify another when a risk or problem arises. This encourages collaboration in addressing issues and includes details regarding the likely impact on time, cost, or quality. Honesty is ensured contractually, while speed is achieved by setting specific deadlines for notifications to be given and responded to.

Mutual trust and cooperation are promoted through shared project objectives, cooperative work environments, and equitable risk distribution. The NEC contract discourages adversarial behavior by fostering a culture of collaboration, where parties are encouraged to work together for the success of the project. Risk reduction meetings are used as tools to address collective issues and promote a collaborative approach. This collaborative strategy helps resolve issues before they become significant, reducing the likelihood of disputes escalating into costly litigation.

The key elements of the NEC contract, which support proactive problem-solving and prevent disputes from escalating, include dispute avoidance mechanisms. These mechanisms require early warnings of potential risks, allowing the parties to discuss and agree on mitigating measures before problems escalate. The contract provides clarity through periodic progress reports and a system of communication. It adopts a structured approach to risk management by documenting, assessing, and monitoring all potential risks. This mutual understanding enables the parties to focus on solving issues in line with project goals.

The NEC encourages collaborative problem-solving, building confidence and teamwork through joint meetings aimed at reducing risks and making mutually agreed decisions on dispute resolution early in the process. Dispute-resolution processes such as adjudication and mediation encourage the resolution of conflicts without resorting to court, thus maintaining relationships and reducing delays. By addressing these principles, the NEC contract provides a structured, efficient, cooperative, and transparent approach to project delivery.

Problem Resolution

Clause 2.2 defines the role of the Project Manager (PM), stating that the PM must act in accordance with the Contract and the Works Information. The Project Manager shall adhere to these terms as outlined in Clause 2.2. This provision ensures that the role of the Project Manager is clearly defined, and their actions are within the scope of the project's terms and conditions. The Project Manager will encourage adherence to these requirements through efficient project management, maintaining fairness and transparency throughout the project by complying with the contract and Works Information.

Clause 2.6 further emphasizes that the Project Manager and the Contractor must cooperate with each other, as well as with other appointed individuals involved in the project. They are required to consult as necessary to ensure the smooth running of the project and resolve any issues that arise. This obligation for cooperation and consultation stems from Clause 2.6, which highlights the importance of teamwork, communication, and proactive problem-solving. The NEC approach encourages frequent consultations between the Project Manager and the Contractor through management meetings, as specified in the contract. Communications must be in writing, either via letter, email, or the project's digital collaboration platform. The NEC emphasizes clarity and transparency—recording instructions, notices, and decisions in writing to create a clear audit trail. Early warnings are always issued in writing, typically through digital tools or formal emails, followed by risk-reduction meetings. Program updates are provided in a structured written format, reviewed, and commented on by the Project Manager. Regularly scheduled meetings serve as the primary forum for discussing progress, resolving issues, and aligning on project goals, with minutes formally recorded and shared. This approach is designed to ensure the successful and comprehensive closure of the project.

Communication and Collaboration

Clause 10.1 stipulates that the Contractor is responsible for designing and providing the Works in accordance with the Works Information and other requirements specified in the Contract. According to this clause, the Contractor must design and construct the works following the Works Information, detailed design documentation, and the project's requirements. The employer plays a crucial role in the success of the project by actively participating in the design, execution, performance, quality standards, and other contract requirements. The employer defines the project's objectives, scope, and performance criteria, and ensures the contractor receives accurate, complete, and timely design information. If design responsibility is delegated, the employer reviews and approves the contractor's designs as outlined in the contract. During execution, the employer provides necessary access, approvals, and resources. The employer will also designate a Project Manager and Supervisor to monitor quality standards and ensure compliance with contract requirements. The employer must collaborate actively to mitigate risks, avoid disputes, ensure timely decisions, provide feedback on key submissions, and make payments, all of which foster fairness and trust.

Clause 13.1 specifies that all communications must be in writing. A communication is considered validly made if it is sent by letter, fax, or email to the address or number specified in the Contract Data. This clause ensures that all formal communications are in writing, allowing letters, faxes, and emails to be sent to the addresses or numbers outlined in the Contract Data. This provision makes the communication of vital information between parties effective by providing documentation. It reduces misunderstandings, aids in proper project management, and helps maintain a comprehensive and complete record of all relevant contacts, ensuring formal communication follows appropriate guidelines and techniques.

Early Warning System

Clause 15.1 states that "the Contractor and the Employer shall each give an early warning to the other as soon as either becomes aware of any matter which could: (a) increase the total of the Prices; (b) delay the Completion Date or Key Dates; or (c) impair the performance of the Works in accordance with the Scope." The purpose of this clause is to identify potential issues as early as possible and address them promptly. It ensures that difficulties are managed at an early stage by requiring both parties to notify each other as soon as they become aware of any matter that may impact the project. Whenever such a condition arises, both the Contractor and the Employer are required to serve a notice to the other party if a potential problem could affect cost, time, or performance. This proactive approach helps prevent minor issues from escalating into full-scale disputes.

Sub-Clause 15.1(a) addresses conditions that could lead to an increase in the overall project cost. These might include circumstances beyond the parties' control, additional requirements, or unexpected changes to the scope of work. Sub-Clause 15.1(b) covers issues that may cause delays in the completion date or key milestones of the project. Since both parties are informed of potential delays in advance, they can take remedial measures to minimize the impact on the project timeline. Sub-Clause 15.1(c) focuses on issues that could affect the project's ability to be completed according to the predefined scope or performance parameters. This ensures that any factors influencing the project's functionality or quality are addressed early on. By requiring early warnings of potential problems, the clause fosters joint problem-solving. The early warning system promotes open communication and cooperation, allowing all parties to assess the situation, explore possible solutions, and create a plan to mitigate the effect on the project.

Clause 15.2 mandates that the Early Warning Notification be issued in writing. Any early warnings under Clause 15.1 must be provided in writing, as specified in Clause 15.2. This ensures that potential issues that may affect the project budget, schedule, or performance are well documented and clearly articulated. Clause 15.2 promotes effective communication, accountability, and solution-finding by requiring written notices. This documentation process helps prevent minor issues from developing into major ones and encourages a structured approach to risk management, creating a collaborative environment for resolving problems.

In the Nepalese construction industry, there is often a lack of a structured, collaborative approach to risk management, which is promoted by the NEC form of contract. Traditional forms of contracts, such as FIDIC or bespoke contracts, tend to allocate risks disproportionately toward contractors, without providing a fair mechanism for sharing risks or issuing early warnings. As a result, contractors are not encouraged to report potential risks early, causing disputes to escalate into formal claims or litigation. The NEC's emphasis on documenting processes and maintaining a risk register offers a collaborative approach to risk management, allowing parties to identify and mitigate risks early, thus reducing the likelihood of disputes. In fact, these mechanisms could greatly improve project outcomes, particularly in areas like cost overruns and delays in hydropower or infrastructure projects. Documenting these processes would also enhance accountability and provide a clear record for resolving disputes. A shift toward NEC would significantly improve the effectiveness of the construction industry in Nepal, leading to more successful project delivery while minimizing conflicts.

Risk Management

Clause 16.1 states that the Risk Register is a document that records identified risks, their impacts, and the actions required to manage them. The Risk Register is updated regularly to reflect new risks and changes in the management of existing risks. According to this clause, a Risk Register must be established and updated to identify risks, assess their consequences, and outline the actions required to manage those risks. This ensures that any hazards are identified, documented, and controlled throughout the project. Frequent updates to the Risk Register allow for the identification of emerging risks and adjustments to management strategies, thereby enhancing transparency, communication, and informed decision-making. Clause 16.1 contributes to the overall performance of the project by reducing the impact of risks and providing a structured method for risk management.

Clause 16.2 emphasizes that the Risk Register is updated regularly to reflect new risks and changes in the management of existing risks. The Risk Register documents the status of risks that may affect the project's objectives, identifying and assessing the risks, and recording them. It includes the risk description, impact assessment, risk owner, proposed mitigation measures, status updates, priority ranking, and dates of identification and updates. The Risk Register is updated regularly to include new risks or modifications to the management of existing risks, ensuring that it remains relevant and accurate throughout the project. This facilitates proactive risk management, enhances transparency, and allows for real-time assessment of the project's risk profile, including emerging risks and adjustments to management strategies.

The Project Manager, appointed by the Employer, is responsible for updating the Risk Register to ensure that risk management remains neutral and centralized. The Project Manager validates the inclusion of new risks, assesses them, and coordinates with the Contractor, Employer, and other stakeholders. Entries in the Risk Register may be subject to validation or certification during regular project meetings. The Risk Register is updated at regular intervals, usually aligned with project meetings or when a new risk is identified, or an existing risk changes significantly. The frequency of updates can also be specified in the contract, based on the complexity and dynamics of the project. The Risk Register is kept under the custody of the Project Manager, though it must always be accessible to the relevant parties, including the Contractor and Employer, either through a shared project management system or in a secure location. This approach fosters collaboration and order, minimizing disputes and enhancing project efficiency.

Dispute Resolution Procedures

Clause 92 outlines the Dispute Resolution process. Clause 92.1 states that if a dispute arises, the parties must first attempt to resolve it through discussion and negotiation. Clause 92.2 provides that if the dispute cannot be resolved through discussion and negotiation, the parties must refer the dispute to an adjudicator. The adjudicator's decision is binding unless it is revised by agreement or through a formal dispute resolution process. Initially, the parties engage in discussion and negotiation to reach a mutually agreeable solution, which reflects NEC's emphasis on mutual trust and cooperation. If the dispute cannot be resolved informally, it is referred to an independent third party for prompt resolution. The two-tier system minimizes delays and costs associated with disputes, allowing the project to continue with minimal disruption. The initial discussion and negotiation phase aligns with NEC's philosophy of fostering partnerships and minimizing adversarial interactions, while the adjudication process ensures that unresolved issues are decided quickly by an independent expert. In Nepal, however, recent revisions to public procurement laws have removed similar provisions, citing concerns about project delays caused by lengthy dispute resolution processes. If these provisions were reintroduced into local law, they could enhance dispute resolution in public procurement projects by facilitating early settlements and promoting continued trust between the parties.

Clause 92.3 allows the parties to agree to refer the dispute to arbitration or litigation if they are not satisfied with the adjudicator's decision. The NEC contract clause 92, "Dispute Resolution," provides a structured approach to resolving disputes among parties. First, the parties engage in communication and negotiation to amicably settle the dispute. If these efforts fail, the dispute is referred to an adjudicator, whose decision is binding unless revised by mutual agreement or through another dispute resolution process. The clause also opens the possibility of arbitration or litigation if necessary. Clause 92 reduces project disruptions, preserves professional goodwill, and facilitates problem resolution through fair and effective dispute resolution procedures.

Dispute Avoidance Board (DAB)

The NEC contract implements an active conflict avoidance and resolution process through either single adjudication or a Dispute Avoidance Board (DAB). The choice between these two mechanisms depends on the complexity and scale of the project. A single adjudicator is more suitable for smaller projects or those with less frequent or less complex disputes, as it provides a binding decision quickly. On the other hand, a DAB is a proactive mechanism introduced at the start of a project, which helps prevent disputes through periodic site visits, continuous communication, and the ability to resolve emerging disputes informally. When formal disputes arise, the DAB will make binding decisions. These mechanisms align with the NEC's ethos of collaboration, trust, and efficiency. While the single adjudicator offers a focused solution for simpler cases, the DAB provides sustained support and proactive dispute prevention for large, multi-year, or international projects. Ultimately, the NEC approach enables effective conflict management while maintaining strong project relationships and keeping projects on schedule.

Identification and Analysis of Risks and Liabilities of 'Good Faith' Clauses to a Contractor

The "Good Faith" clauses in NEC contracts expose contractors to significant risks and liabilities, particularly regarding financial and operational stability. While these clauses encourage transparency and cooperation, they can present challenges due to their ambiguity and the potentially unreasonable expectations they create.

The Good Faith duty requires transparency and cooperation, which may result in unclear responsibilities. Contractors may struggle to define the scope of their duties, leading to disputes about whether they have fulfilled their obligations under the Good Faith standard (Hughes, Champion, & Murdoch, 2015). For example, if a contractor's actions are deemed to breach the standard of good faith, they could face legal action or fines, thereby increasing their financial exposure (Smith, 2017). Additionally, Good Faith clauses may bind contractors to responsibilities that extend beyond the original scope of the contract, leading to expectations for additional work or addressing unforeseen issues for which they were underpaid (Baker & McKenzie, 2020). If these additional commitments fall on the contractor, they may be exposed to performance claims or financial distress (Furst & Ramsey, 2018).

Another critical concern is the impact of Good Faith clauses on risk distribution. According to McKenzie (2019), these clauses may obscure the original agreements regarding risk, which can increase a contractor's exposure. Ambiguity in risk distribution can lead to contractors incurring unexpected costs or liabilities, increasing their economic exposure and sometimes resulting in disputes over risk management (Turner, 2020).

The principle of Good Faith in NEC contracts is central to ensuring fair and equitable distribution of risks between employers and contractors. It requires both parties to act honestly, transparently, and cooperatively, avoiding conduct that undermines the contract's purpose or exploits ambiguities. This principle ensures that risks are allocated to the party best equipped to manage or mitigate them, fostering collaboration and trust. In Nepal, public procurement laws identify specific risks for both parties, such as unforeseen site conditions, delays in site access, design defects, scope variations, and third-party delays. Risks borne by the contractor include those related to construction methodologies, material and labor shortages, subcontractor performance, health and safety standards, and defective workmanship. Good faith ensures that neither party imposes excessive risks on the other, maintaining a balanced approach. Clear definitions of Good Faith and associated risks in contracts will enhance understanding and fairness, reducing disputes and improving project outcomes in Nepal.

From an administrative perspective, adhering to Good Faith standards can be costly and time-consuming. Contractors may be required to invest additional resources in paperwork, communication, and compliance, potentially leading to cost overruns (Gordon & Thomas, 2021). This added financial burden may reduce the contractor’s profitability, especially if the customer is unwilling or unable to reimburse these costs. Furthermore, disputes arising from discretionary interpretations of Good Faith clauses could lead to costly litigation or arbitration (Jones, 2018). These disputes could strain contractor resources and delay project completion. There is also a risk of abuse, where project managers or clients may exploit the Good Faith clause to impose additional work or unfavorable conditions on the contractor for inadequate compensation (Wright & Foster, 2022). This could result in disputes and litigation if the contractor feels pressured to accept terms not pre-agreed upon.

In Nepal's construction sector, the interpretation of Good Faith may shift the burden of contingencies, such as material price escalation or delays caused by the contractor's inefficiency, onto the employer. Contractors may argue that Good Faith requires the employer to accept extensions or cost adjustments for delays resulting from poor planning or mismanagement. Similarly, contractors may invoke Good Faith to seek leniency in enforcing quality standards, arguing that strict compliance undermines cooperative relationships. Misunderstandings often arise from vague definitions of Good Faith or inadequate contractual advice. In Nepal, disputes commonly stem from ambiguities in risk allocation or expectations of goodwill in project enforcement. To mitigate these risks, contracts in Nepal should clearly define what Good Faith entails and what it does not. Additionally, providing training and raising awareness among contractors about NEC principles will help ensure that all parties are aligned with the contract’s intentions.

Critical Discussion of the Use and Interpretation of ‘Good Faith’ Clauses

Due to varying legal traditions and practices across countries, "good faith" clauses in contracts are used and interpreted quite differently. In many common law countries, including the US and the UK, "good faith" is typically associated with fair dealing rather than the establishment of obligations. For example, in the United States, "good faith" is often defined as conducting business honorably and not undermining the objective of the contract. However, the principle of freedom of contract may limit the application of good faith (Miller, 2019). In contrast, civil law systems such as those in many European countries tend to incorporate "good faith" more fundamentally into the framework of contract law. This approach often imposes greater burdens on parties to act in an open and cooperative manner (Hollander, 2020).

The use of "good faith" clauses is further complicated by their interaction with other contract elements, such as payment conditions and performance duties. For example, a "good faith" clause may require the parties to engage in open discussions about payment issues or delays in performance duties when the contract has specific terms on these matters (Miller, 2019). Similarly, in contracts with strict performance conditions, "good faith" may temper the interpretation of a party’s obligations or whether non-compliance with those conditions is acceptable.

Hollander (2020) emphasizes that, when "good faith" applies to specific provisions of a contract, clear definitions should be established to avoid ambiguity and potential future litigation. "Good faith" provisions offer several benefits, such as fostering a candid and cooperative working relationship that can reduce the risk of disputes and promote a more harmonious contract performance (Smith, 2018). They can also encourage constructive problem-solving and improve communication, both of which are particularly useful in complex projects. However, the disadvantages include the ambiguity and subjectivity of the term, which can lead to disputes over whether a party has acted in "good faith." Due to this subjectivity, parties may find it difficult and costly to prove their adherence to the "good faith" principle, which can increase the expenses of litigation or arbitration (Baker & McKenzie, 2020).

A comparison with other standard forms of contracts demonstrates how different systems address the issue of "good faith." For example, the FIDIC contracts incorporate "good faith" elements in a codified manner, emphasizing courtesy and cooperation during the contract's execution (FIDIC, 2017). On the other hand, the NEC contracts embed "good faith" more subtly, focusing on cooperative procedures rather than explicit terms (Hughes, Champion, & Murdoch, 2015). In the UK’s JCT contracts, "good faith" often exists in the form of specific, clearly defined obligations rather than as a broad principle (JCT, 2022). In Nepal, the Standard Bidding Documents (SBD) for public procurement contracts contain provisions that imply "good faith," such as employers being obliged to provide timely access to the site, issue approvals, and make payments. Contractors, in turn, must meet quality standards, timelines, and health and safety requirements. However, the interpretation and implementation of these provisions in Nepal lack the clarity seen in the JCT contracts, and disputes often arise due to ambiguities in risk allocation or inadequate documentation. To improve understanding and application, contracts in Nepal could benefit from clearer language and more structured mechanisms, similar to the JCT contracts. Additionally, introducing express provisions on "good faith" that address issues like problem-solving for unforeseen site conditions or updating risk registers could foster a more collaborative project environment and bring local practices closer to international best practices, reducing disputes caused by misunderstandings or ambiguity.

Conclusions and Recommendations

Conclusion

The NEC is a collaborative and proactive contract designed for the management of construction projects. It aims to promote cooperation, openness, and risk-sharing among parties. Developed by the Institution of Civil Engineers, NEC contracts are intended to create an environment in which early warnings of issues, clear communication, and mutual support are prioritized to ensure project success. The contract framework is designed to resolve issues as they arise, before they escalate into formal disputes, thus improving efficiency, reducing costs, and maintaining better relationships between the parties. However, the inclusion of "good faith" clauses in NEC contracts introduces complications. The broad and often ambiguous scope of these clauses can place significant financial and operational pressure on contractors.

The interpretation of "good faith" clauses varies across legal systems, with common law jurisdictions tending to treat good faith as a principle of fairness, while civil law jurisdictions integrate it more directly into the contract law framework, placing greater demands on parties to act cooperatively. Comparing NEC contracts to other contract forms, such as FIDIC and JCT, reveals different approaches to incorporating "good faith." NEC focuses on collaboration and minimizing adversarial relationships through mechanisms like early warning systems and risk registers, while other forms of contracts may provide clearer and more specific obligations related to "good faith."

In Nepal, public procurement practices tend to be more adversarial, with unclear risk allocation and contract interpretation. Adopting NEC mechanisms could transform procurement practices, building trust, reducing dispute costs, and improving project timelines. In order to enhance the understanding and application of "good faith" clauses in Nepal's construction contracts, clearer definitions and structured provisions should be introduced, similar to those in the JCT contracts. This would encourage collaboration, improve risk management, and reduce disputes caused by ambiguities in contract terms.

Recommendation

Public procurement in Nepal should be refined by incorporating elements of the NEC's collaborative approach, including structured risk management tools, clear contractual expectations, and early dispute resolution mechanisms. To facilitate this, training and capacity-building programs should be implemented to help stakeholders understand and effectively apply NEC principles. Legislative reforms introducing NEC mechanisms would create a legal environment that supports proactive conflict management and ensures equitable risk distribution. This paper recommends the following specific actions:

- Draft contracts with clear definitions of good faith obligations and clearly outline the responsibilities of all parties.
- Introduce a requirement for periodic, mandatory updates to risk registers, enabling the identification and collaborative management of emerging risks.
- Design and deliver training programs for all contractors, clients, and project managers to ensure they understand NEC principles and practices.
- Establish standard processes for documented communication to guarantee transparency and accountability throughout the project.
- Implement a system for written notifications of potential issues, ensuring timely resolution before escalation.
- Impose an obligation for parties to negotiate and mediate any disputes before proceeding to adjudication or arbitration.
- Integrate NEC-like clauses into Nepalese law, including collaborative principles, proactive problem-solving, and fair risk allocation.
- Promote partnership contract models that shift away from adversarial frameworks and toward more cooperative project delivery approaches.
- Establish monitoring and evaluation mechanisms to assess the effectiveness of good faith principles during project delivery.

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