

Partnership in progress

Alison Horner, Partner with MacRoberts, explains why timely notice of compensation events lies behind a well managed NEC 3 contract.

When the New Engineering Contract (NEC) was first published in the early nineties, it was seen by some as a breath of fresh air, whilst the drafting style led to grave reservations in others.

The third edition of the contract, NEC 3, was published in 2005 and although NEC has gradually been accepted in the construction industry, some unease still lingers around it for many, not least because of its perceived complexity, particularly in relation to its handling of issues such as compensation events.

The contract provisions for the management of compensation events are often cited as an illustration of the fundamental aim of NEC3 - the promotion of good project management and dispute avoidance. Yet, many observers believe the current provisions may have actually increased the likelihood of disputes. NEC3 states the project manager should notify the contractor of compensation events arising from the giving of instructions or changing of earlier decisions at the time when he gives the instruction or changes the decision. Where this applies, the contractor must submit a quotation for the time and cost of the compensation event.

Otherwise, the contractor must notify the project manager of an event which has happened or which he expects to happen, if he believes the event is a compensation event and the project manager has not already notified the event.

Crucially, if the contractor does not notify a compensation event within eight weeks of becoming aware of it, he is not entitled to a change in the prices, the completion date or a key date, unless the project manager should have notified the event to the contractor, but did not. This is often referred to as a "drop dead clause" - for obvious reasons!

Although there may be some scope for the contractor, who has been caught unawares by the time limit, to argue he was in fact not aware of the event until a later stage, quite what evidence may be required to prove this is unclear. There may also be more argument over whether certain events ought to have been notified by the Project Manager - as, if so where he fails to notify, the eight week time limit does not apply.

The second edition of NEC actually only allowed for notification within two weeks of the event, but due to less than clear drafting, there was doubt over what happened if the contractor missed the two-week period. This has been put beyond doubt in the third edition.

Whether the third edition has improved the position or not, is open to debate.

The employee will obviously want as much notice as possible of potential claims so that appropriate action can be taken in mitigation and to prevent a plethora of retrospective claims as often happens under the JCT forms.

However under both NEC2 and NEC 3, an "early warning" procedure clause already requires each party to serve an early warning notice as soon as it becomes aware of any matter that could increase the prices, cause delay or impair the performance of the works in use. When determining the contractor's entitlement to time or money as a result of a compensation event, the project manager will take into account any breach of the early warning obligations by the contractor.

So there is an existing incentive for contractors to notify potential problems early and many would argue that the eight week cut off is in fact unnecessary.

One thing is clear, for successful operation of the compensation event procedures, timely notification of compensation events by the contractor or, where appropriate, the project manager is a pre-requisite.

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