



Welcome to the February edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue we discuss the problems commonly encountered in NEC3 and provide possible solutions.

Insight

NEC3: problems and solutions

This is the first of a three-part series on NEC3.

In this 32nd issue of *Insight*, I will discuss the problems that are commonly encountered in NEC3 and provide possible solutions. Parts two and three of the series will come later in the year and will address the practicalities where the contractual process is not followed by the parties, and suggested amendments to NEC3 respectively.

Placing NEC3 in context

The construction industry is moving towards greater collaboration between all parties during the design, construction and handover stages of projects, and this is being driven by more appropriate procurement methods which encourage collaboration (such as the CIOB's Complex Projects Contract 2013), and BIM.

The NBS National Construction Contracts and Law Survey 2013 reported that of those in the construction industry who had used collaboration, the most common form of collaboration was a contract that included an ethos of "mutual trust and co-operation". It will therefore come as no surprise to hear that NEC is now the second most commonly used standard form after the JCT suite, and that its use has increased slightly since 2012.

NEC3 deals with collaboration at Core clause 10.1. Core clause 10.1 provides that:

"The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in the spirit of mutual trust and co-operation."

Despite the wording of Core clause 10.1, disputes do arise. Historically, very few have reached the courts but there has been a slight change over the past year or so in that NEC3 has started to become the subject of judicial comment, which might suggest that the collaborative approach that the draftsmen of NEC3 sought to achieve is not completely fool proof.

What disputes arise most frequently under NEC3 and how might they be resolved?

Compensation events

The evaluation of compensation events (which are the equivalent of variations under other standard forms) tends to be one of the most contentious areas of NEC3 and probably provides the greatest scope for a dispute.

Compensation events are described in clause 60.1(12) and include situations where the Project Manager gives an instruction changing the Works Information (i.e. a variation); the

Employer not permitting access to the site on the dates shown in the Accepted Programme; time limits not being complied with (for example, the Supervisor does not reply to the Contractor within the requisite time limit); adverse weather conditions and the works being suspended.

The difficulty that tends to arise in regard to Compensation Events is the requirement at clause 61.3 for notice to be given by the Contractor to the Project Manager within eight weeks of the Contractor becoming aware that it considers an instruction to constitute a Compensation Event (unless the Project Manager confirms otherwise). In default of the Contractor providing such notification, the Contractor will not be entitled to any alteration in the Price, Key Date or Completion Date under clause 61.3 unless the Project Manager should have notified the Contractor that a Compensation Event had arisen but did not.

The problem

There is therefore a rather confusing double requirement for notification by the Contractor and Project Manager. In very busy projects, notifications, quotations for notifications and correspondence requiring confirmation of notifications and quotations can mount up and become a very onerous administrative task if not well managed. On a worst case scenario, they have the potential to cause projects to collapse if the Project Manager becomes completely swamped.

Possible solutions

- Make sure you notify the other parties to the contract of any problems and discuss possible solutions with them as early as possible, ideally face to face if you can, to preserve a good working relationship.



Insight

- If you are faced with bulk requests relating to notifications, do not ignore them. Respond promptly (with a holding letter if necessary) and if time is against you, provide a date by which you will provide a detailed considered response. Your detailed response should include full reasons why a notification is not considered to be a Compensation Event and deal with any issues you might have in relation to quotations.

It should be noted that whilst these suggested solutions are not fully compliant with the contractual requirements as to notifications and quotations, they are consistent with the basic requirement under NEC3 for the parties to act in a spirit of co-operation and partnering, and might avoid a dispute arising provided that both parties act reasonably.

Definition of completion

NEC3 deals with completion at clause 11.2(2) in the following terms:

“Completion is when the Contractor has

- *done all the work which the Works Information states he is to do by the Completion Date and*
- *corrected notified Defects which would have prevented the Employer from using the works and Others from doing their work.*

If the work which the Contractor is to do by the Completion Date is not stated in the Works Information, Completion is when the Contractor has done all the work necessary for the Employer to use the works and for Others to do their work.”

The problems

As drafted, the clause does not require the works to be fully complete and the Works Information might identify work falling short of all of the works which the Contractor is to complete by the completion date. Thus, completion can still occur even though work is still outstanding, and any patent defects can be rectified after Completion provided that they do not affect the Employer's or Others' use of the works.

Disputes are most likely to arise if the Works Information lacks detail or is unclear, in which case there will be no reliable benchmark for determining what stage the works must have reached in order to be ready for completion.

Even if the Works Information is relatively clear, there remain two further difficulties.

First, at what stage can it be identified that the Contractor has done all the work necessary for the Employer or Others to use the works? Does full or partial use satisfy the test?

Secondly, there is no express provision which states by when any further work should be completed, in which case a term is likely to be implied into the contract that the work should be completed within a reasonable period of time after completion. However, what might constitute a reasonable period of time will be a matter of fact and therefore also has the potential to become contentious.

A possible partial solution

The best approach is probably for the Employer to use option X5: Sectional Completion. What is required for completion for each section should be identified and each section should

have its own sectional completion date. If there is any further work to be completed by the completion date, then this should appear, with an appropriate completion date for any further work.

Conclusion

Whilst NEC3 is far from a model form of contract, disputes can be (and probably are, given the relatively scant judicial authority on NEC3) avoided provided (i) NEC3 contracts are well managed by those who are experienced in contracting under the NEC form, (ii) sufficient resources are directed towards contract administration and (iii) both parties adopt a common sense approach and acknowledge the spirit of NEC3.

The minute one of the parties' positions becomes entrenched, any partnering ethos that might once have existed will undoubtedly go by the wayside, in which case one of the solutions offered above might come into play, or the parties might choose to adjudicate or conclude a negotiated settlement in order to settle their differences.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston. lkingston@fenwickelliott.com. Tel +44 (0) 207 421 1986

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