

July 2022

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No. 19 – Dispute resolution process

Introduction

Training and development support is a key part of CECA's core offer for its membership and working in conjunction with GMH Planning it has delivered a programme of training events around the NEC Form of Contract across several CECA UK regions.

In addition to this training, a series of monthly NEC Contract Bulletins are being produced for both Contractors and Subcontractors to improve practical awareness on key topics within the NEC. The coverage, whilst not exhaustive, is intended as a general overview on some of the contractual principles to increase a wider understanding in support of more sustainable outcomes.

For the purposes of these bulletins a contractual relationship between a "Client" and "Contractor" is assumed. The same rules/principles also apply if the contractual relationship is between a "Contractor" and a "Subcontractor" and so the term "Contractor" will be used to describe both parties.

These bulletins are based on the latest NEC4 family of contracts, but the same principles and rules would apply where parties are engaged under an NEC3 form of contract.

Coming next month:

Bulletin Nr 20 - Contractors Managing Subcontractors

Please respond to Leone Donnelly should you require any further information on the CECA NEC4 Bulletins via e-mail: leonedonnelly@cecasouth.co.uk.

For further advice or guidance on the NEC details please visit www.gmhplanning.co.uk or contact GMH Planning Ltd by e-mail glenn@gmhplanning.co.uk.

NEC4 Contract Bulletin Nr 19 - Dispute Resolution Process

Despite the intent of both the principles behind and the contract processes embedded in within the NEC seeking to avoid disputes from occurring in the first place, there is some inevitability that they will occur on occasions given the nature of the construction industry. The ultimate sanction to resolve such a dispute would be adjudication, but there is a new formal interim step within NEC4 which can be taken first. There are also more general practical steps that can be taken by both Parties to resolve any such disputes without the need for the more formal adjudication.

Subjectivity within contract wording: The drafting of NEC contract clauses go a long way to avoid the subjectivity that tends to exist within other forms of contracts used in the construction industry. The NEC contract clauses are generally clear, concise and with numerous terms provided with specific definitions to establish what they mean. It is probably unrealistic to think any contract can have no subjectivity, or not at least without making it so wordy that it would become too cumbersome and impracticable to follow. NEC contracts are a good balance of being manageable whilst concise enough to limit the areas of potential argument in the majority of cases. However, there are examples where a degree of subjectivity still exist within NEC contracts and that are difficult to avoid, such as:



- risk within a compensation event quotation that the Contractor considers “has a significant chance of occurring”
- what would be considered an “unforeseen physical condition that would have had such a small chance of occurring it would have been unreasonable to have allowed for”
- what is “not practicable” when it comes to considering whether to accept a programme

In these situations, either party should just make it clear to the other how they believe they have been practical, transparent and realistic when making decisions in these instances.

Improvements to NEC4: The first steps to avoiding disputes is to take away subjectivity and any errors that may exist within the contract. NEC4 when it was launched was described as being “evolution rather than revolution”, providing subtle changes and improvements to the contract rather than an overhaul of contractual processes. Examples of areas that NEC4 has improved or tightened up on such processes are:

- clarification of how a compensation event should be assessed against the last accepted programme (see CECA bulletin 18 for further details)
- separation of obligation to act “as stated in the contract” and “in a spirit of mutual trust and cooperation” into separate clauses to make it clear that both need to be done (see CECA bulletin 14 for further details)
- reasons for rejection have to be stated “in sufficient detail to allow the Contractor to correct the submission” to avoid vague high-level reasons for rejection
- renaming of the “Risk Register” to “Early Warning Register” to clarify that it is different from traditional risk registers
- deemed acceptance process if the Project Manager fails to respond to a programme to ensure that they respond.

What is likely to end up in a dispute? The most obvious element would be the time or cost impact of a compensation event. If the Project Manager makes their own assessment of a Contractor’s quotation it is then “implemented”. This will confirm the Project Manager assessed effect upon both the change to the Prices and the Completion Date. If a Contractor does not agree with a Project Manager assessment of their quotation, the only way to overturn it would be through a dispute process within the contract.



NEC4 use of Senior Representatives: There is now the facility within contract data for both Parties to name senior representatives at tender stage. The intent is that if both Parties agree, any dispute will first go to those named

representatives to try to resolve before going to adjudication. Under option W each party submits to the other their statement of case within one week of the notification of the dispute. The Parties present their case (limited to ten sides of A4 content) and have as many meetings as necessary over the following three weeks to produce a list as to what has been agreed. The Project Manager and Contractor put into effect the issues agreed by the senior representatives.

Adjudication: If the matter is not resolved by senior representatives or the parties decide not to take that route, then the matter can be referred by either party to the other with a brief description of the matter they wish to take to adjudication.

If no Adjudicator is named in contract data, the Parties can agree an adjudicator jointly or go to the Adjudicator nominating body (named in contract data 1) who will appoint one within four days. If the Adjudicator is named in Contract Data, a copy of the notice is sent to them. Within three days the Adjudicator will confirm if they are able or unable to decide the dispute. Within seven days of giving notice, that party provides a copy of the information on which it relies along with any supporting information. Within fourteen days

of the original notice either party provides any further information to be considered by the Adjudicator. This period can be extended if Adjudicator and Parties all agree. The Adjudicator decides the dispute and informs the Parties within twenty-eight days of the matter being referred. The Adjudicator may in the decision allocate the Adjudicator's fees and expenses between the Parties, based on who they found in favour of. The next stage beyond that would be taking the Adjudicator's decision to Tribunal but that has to be notified within four weeks of the Adjudicator's decision otherwise the original decision is legally full and final.



Potential stigma around adjudication: Unfortunately, there are reservations about going to adjudication. Its use is not necessarily considered in the context that it was intended to be. Instead, perceived as a challenge that will create an adversarial atmosphere between the parties. Considered likely to damage to relationships both on the current project and for the contractor's future opportunity rather than being seen as a mechanism to address a simple "professional difference of opinion". This is a position that collective our industry needs to address.

When should a matter be taken to adjudication? This can (and should) be done at any stage during the life of a project, despite the tendency that historically such issues have saved until the end of the project to resolve. It would be much easier to decide closer to the time that any issues occurred, rather than to wait and look back historically (when people originally involved at the time may have moved on and records may or may not prove adequate in verifying the true picture). To try to resolve numerous issues at the end of the project in one big global claim/dispute does not normally go well and can often be very protracted and drawn out with less certainty for either party on the outcome. By assessing and dealing with issues for adjudication as they arise, the Parties to the contract will become more informed and this lead to changes in behaviours and effectiveness in addressing future issues that may occur.

Other ways of resolving disputes: There are also of course some basic things you can do to try to resolve the dispute from escalating in the first place:

- **Talk to each other!** The contract does not prohibit talking and only allowing formal notifications between the Parties. Sit down, talk and listen to each other so both Parties are clear on the respective arguments. Both can then try to explain their viewpoints and consider their own strengths or weaknesses in their understanding of the contractual rules to try to resolve amicably.
- **Follow the rules of the contract in the first place!** Many disputes arise where the rules of the contract have not been followed or understood in the first place. Everyone working on the project should be trained in the principles of the contract and also the specific nuances of this project i.e. Z clauses as to how it may have been amended. Consider joint project training on the contractual rules so that all Parties are hearing and understanding the same rules from the beginning.



Summary – Whilst disagreements between two Parties on a construction project may arise from time to time a collective understanding and adherence to the rules of the contract from the outset will help limit this. Try talking and explaining your relative positions on any issues and listening to each other to try to agree a way forward. Do not be afraid to utilise the NEC4 mechanism of senior representatives to look independently to see if they can reach an agreement. Ultimately, if it really is something that can not be resolved at project or senior representative level then do not be afraid to use adjudication. Try not to see this as being a confrontational or aggressive process but simply a means of how to resolve a professional difference of opinion between two Parties.

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