

September 2023

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No. 33 - Dictionary definitions versus contractual definitions

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 34 - Periods for response in NEC contracts

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.

NEC Contract focus month 33 - Dictionary definitions versus contractual definitions

Everyone knows that contracts and the rules within them are there to be followed by both parties. NEC contracts attempt to write the rules in a way that are easy to understand and are practical project management tools. They use certain words and language that mean something specific, but that could be different from a more traditional "dictionary definition" that people might be used to. This bulletin just picks out a few examples of how a contractual interpretation could be slightly different from a traditional "dictionary definition" that may otherwise be assumed.

Acceptance: There are numerous elements under the ECC contract where the Project Manager will be issued something by the Contractor "for acceptance". There is then an obligation on the Project Manager to accept or not accept that submission. Examples of such elements issued for acceptance would be design, programmes, subcontractors, revised activity schedule, alternative key people, changes to working areas. Any acceptance by the Project Manager does not mean that they will be taking on any liability should the submission contain anything that, for example, contradicts the Scope. This liability is clarified in clause 14.1 where it states that "Project Manager's acceptance of a communication does not change the Contractor's responsibility to Provide the Works or liability for its design". If the Contractor issues a design for acceptance and a grade of material stated does not meet part of the Scope, if the Project Manager accepts that design, that now does not become the Client's liability. It is the Contractor's obligation to submit a fully compliant design, and it is not the Project Manager's responsibility to go through that design in infinite detail to spot any errors. Acceptance means that the Project Manager did not see any reason not to accept it, on the basis that they assume it fully complies with Scope requirements.



Contractors may consider acceptance as a bit of a waste of time and what is the point if the Client is not taking on any liability by doing so? They should understand that contractually it is more about the chance for the Client to review the design to perhaps spot any errors, but also evaluate if they may want to change their mind at that point and instruct something different (which would then be a compensation event) rather than be expected to take on liability by accepting. It is also important to recognise that the contract generally uses the term "acceptance" and not "approval". The only time "approval" is used in the contract is in clause 27.1 where it states the Contractor "obtains design approval from Others where necessary".

Implemented: This term is used contractually to determine when a compensation event quotation has been finalised and is defined in clause 66.1. A compensation event quote is implemented either when the Contractor's quote has been accepted, or the Project Manager has made their own assessment, or it is treated as being accepted (following a period of non-response and a reminder of non-response by the Contractor). If works have been instructed by the Project Manager and a quote instructed under clause 61.2, the Contractor should be proceeding with the works at that point. The works may even be complete and operational before the quote has been agreed and could be thought of as therefore being "implemented" in a "dictionary definition" sense. This is not however the case contractually, and implementation is the agreement of the quote in terms of cost and time and not whether the works have yet been done.

Completion: This is defined as being "when the Contractor has done all the works as stated in the Scope to be done by the completion Date, and completed defects which would prevent the Client from using the works". It does not therefore need to be free of defects, but just in a condition that the Client can use the works. This is an important milestone to achieve particularly for the Contractor, as it will release half the retention if X16 has been used, take away liability of X7 delay damages and also trigger the defect date. Any minor defects that exist can still allow Completion to be certified and then the requirement to correct any defect is addressed within section 4 of the contract.



Acceleration: Acceleration contractually means bringing forward the Completion Date to meet an earlier date. If both Parties agree, the Project Manager can issue an instruction for an acceleration quotation and the Contractor will issue that quotation within three weeks. Within a further three weeks the Project Manager will either accept or not accept the quote. They can not make their own assessment of this type of quote and is a simple case of "offer and acceptance". If accepted, the Completion Date will come forward and the Contractor will be paid the amount agreed within the quotation. The delay damage liability will now be from the new Completion Date, and that liability should have been considered within the quotation.

If the Contractor is showing a planned Completion beyond the Completion Date and not for a reason that would be a compensation event, that would be the Contractor's liability. To speed up to mitigate that delay and bring forward the planned Completion may be viewed as "acceleration" in a "dictionary definition" sense, but from a contract perspective it is not. Acceleration is only when Completion Date is being brought forward earlier, not planned Completion.

Key Date: A Key Date is a very specific element within an ECC contract. If any exist, they will be stated in contract data part 1 and will describe the condition to be met, and the date by which they are to be met. Clause 25.3 confirms that cost incurred by the Client in carrying out work or paying Others in carrying out work is then recoverable from the Contractor i.e. undefined, unliquidated cost. This is very different to an X5 Sectional Completion that will attract defined ascertained delay damages as prescribed in X7. Anything that would be considered "key" should not be classified as a "Key Date" under the contract, and only those listed in section 2 of contract data as being key dates are "Key Dates"

Plant and Materials: Just a small point here when assessing elements of defined cost within the schedule of cost components(SCC) or short schedule of cost components(SSCC). An excavator has traditionally been known as "plant" in the civil engineering industry, where as under NEC, the heading of Plant and Materials within the SCC/SSCC are items intended to be included in the works. Excavators will therefor fall into the category of "Equipment" within the schedule of cost components which are items used in order to provide the works.

Summary: It is important to understand the specific contractual definition/interpretation of terms within the NEC contract that may be slightly different from a more traditional interpretation. Using a cloud based communication tool helps with this as the correct language is already built into the processes and proforma.