November 2023

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No. 35 - Common misconceptions associated when administering NEC contracts

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 36 - Payments

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 35 - Common misconceptions associated when administering NEC contracts

There are some common misconceptions held by individuals or even whole project teams that wrongly assume how a particular clause or process should be understood and managed contractually. This bulletin will identify a few of these misconceptions that appear to have slipped into the industry and explain what the contractual interpretation should be:

Matters for Early Warning Register and associated liability: There is space at tender stage in both contract data part one and part two for either Party to state matters to be included in the Early Warning Register. This does not allocate who owns the risks but is simply to make sure they are "on the table" early to discuss upon project commencement and to try to minimise the impact they could have. Either Party stating an item for the register will not assigning liability in the process, as the contract would ascertain whose risk that particular item would be.

Contractor assumptions within quotations: The contract allows for Project Manager assumptions to be stated under clause 61.6 to minimise the risk the Contractor would otherwise have to assess within the quotation. These assumptions can then be revisited as a new compensation event if they turn out to be incorrect (60.1(17)). There is a tendency for Contractors to put their own assumptions into compensation event quotations and then thinking that if the quotation is accepted that they can then revisit their own assumptions. However, there is nowhere in the contract that states that a Contractor assumption can be revisited, and nowhere that states that by accepting a quotation with Contractor assumptions that these become Project Manager assumptions if accepted. The Contractor can propose assumptions for the Project Manager to confirm back in writing before the quotation is submitted, otherwise the Contractor should simply price the risk within the compensation quotation.

X7 Delay Damages not being included within the contract: If X7 is included it means that there are ascertained damages stated in contract data as to how much the Contractor will be charged per day for exceeding the Completion Date (and/or sectional Completion Dates if these are included under X5). It may be viewed by some that not having X7 would simply mean that there is no liability, but this is not contractually the case at all. In the UK if there are no ascertained damages in a contract it means that they "are at large" and could legally be claimed separately at whatever costs a client incurs. Where the Client is trying to make it clear they do not intend to charge delay damages and do not wish the Contractor to price that risk, X7 delay damages should be included but stated as being say £0 or £1/day. That makes it clear the damages are ascertained and there would be no other legal recourse for claiming additional cost.

Lack of response to something issued for acceptance: It could be assumed that if a Project Manager does not respond within the contractual timescale to a submission that is being issued for acceptance then it can be taken as being accepted (i.e. deemed accepted) but this is not the case. There are two processes (programme and compensation events) where failure to respond can lead to the Contractor notifying that there has been no response, and after a further period (one or two weeks) where that item would now be treated as having been accepted.

For all other matters, it would simply be a compensation event that the Project Manager has not responded within the timescale (60.1(6)), and any impact that has caused would be fully recovered as part of that compensation event quotation. For example, if design is issued for acceptance and not responded to within the period for reply, the Contractor will have to stop with any subsequent activities, and any impact that delay has on the Contractor as a result will be recoverable within a resultant compensation event quotation.

Acceptance of something by the Project Manager means a shift in liability: Many people seem to think that a Project Manager acceptance of something means more than it really does. If a Project Manager accepts a design submitted by the Contractor, it is on the basis that it fully complies with the Scope. It is not the Project Manager's responsibility to go through the design and check every element to ensure that it fully complies. If that

accepted design turns out not to comply with something in the original Scope, this will still be the Contractor's liability/ responsibility to correct, and they cannot simply hide behind the fact the Project Manager accepted the design. Clause 14.1 makes it clear that Project Manager acceptance does not change the Contractor's responsibility to "Provide the Works or liability for their design".

Another example would be a Project Manager accepting a Contractor's programme. If a programme is accepted that shows planned Completion beyond Completion Date, it does not mean the Project Manager is accepting liability and that the Completion Date can be moved as a result. Only an implemented compensation event can move the completion Date to a later date, and in the meantime the Contractor will be liable for delay damages under X7 unless they can prove through the compensation event process the reason they are running late is not their liability.

Quotations being assessed based on actual cost if quotation not yet agreed: Another very common misconception is that if a quotation has not yet been agreed/implemented and the works have already been done, then the quotation assessment should revert to "actual cost". This is not contractually correct at all, and clause 63.1 makes it clear on how this should be assessed. It states that the quotation should be based upon:

- the actual Defined Cost of the work done by the dividing date,
- the forecast Defined Cost of the work not done by the dividing date and
- the resulting Fee.

This means that most compensation events should be based upon forecast and not actual. If the Contractor for example states that the works took ten days (and can prove so through diary sheets and records), it has no bearing on the assessment if the Project Manager judges that the output that should/could have been achieved was only five days (or say six days accounting for risk). Equally, the Project Manager cannot review a quotation after the event and remove a risk that did have a significant chance of occurring that they can now see didn't happen. This clause is designed to ensure that Contractors work optimally and timely to achieve any compensation event in a way that minimises cost and time impact to the project. It should not be in either Parties' interest to slow the quotation process down thinking that it would lead to a different assessment that may be more advantageous to them. The benefit of hindsight should not come into the equation as it should be based on reasonable forecast at the "dividing date".

Project Manager instruction not something that a Contractor can directly claim money against: Some instructions that a Project Manager may give would have to be separately notified that they are a compensation event if they are for a reason listed in clause 60.1 for being one. Obvious examples that would be a compensation event are an instruction to change the Scope, or an instruction to stop work (assuming not due to the Contractor's fault). However, not all instructions given by the Project Manager will be something the Contractor can claim money for. The Project Manager could instruct the Contractor to remove someone from site as they are acting unsafely (clause 24.2) or instruct them to comply with their own quality plan (clause 40.1). Such instructions would not lead to a compensation event.

Having to reply to an early warning: There is no contractual obligation to reply to an early warning. The intent is that the matter is discussed at an early warning meeting and the resultant action recorded within the Early Warning Register and there is no need to respond separately. Unfortunately, many of the established cloud-based systems used in the industry to manage the flow of communications do not help with this misconception. Many of those systems indicate that the early warning should be responded to within the period for reply. It then shows as a late action on that system if this is not responded to, and either party must write a response just to close the action (or accept that the late action in this case does not matter and simply ignore it). It would be much more useful if these systems adjusted this element to simply require the actions to be recorded in the action column of the Early Warning Register.

Does an early warning have to be notified before a compensation event can be notified? The simple answer is no. If an event is already an issue (and is a reason for being one under 60.1) then the Contractor can/should notify a compensation event. There is no point in notifying an early warning for something that is already known to be an issue and there is nothing that can be done about it.

What it means to act in a spirit of mutual trust and cooperation: We have dedicated a whole bulletin to this question (no. 14) which covers this topic in full, but in simple terms neither party should stop following the rules of the contract with a view that they must do this to be considered to be acting "in a spirit of mutual trust and cooperation". An obvious example is a Contractor should not follow a verbal instruction simply on the basis that they feel they have to do that just to maintain a good relationship. Neither Party should be expecting the other not to follow the very rules that they have both signed up to by entering into that contract.

Summary: Contractual rules need to be understood and then administered. This will require ongoing education of project team members and people calling out things that they believe not to be contractually correct.

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