Northern NEC People Conference – 7th November

Myths, misconceptions and misunderstandings around NEC4 contracts

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- provide training/consultancy to the industry for anyone administering NEC contracts
- we carry out numerous contract reviews and project workshops up and down the country so see and hear firsthand issues that are happening across the industry
- today we will share some of those issues with you to raise awareness and try and encourage change where necessary

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https://gmhplanning.co.uk/nec-downloads/nec4-common-misconceptions/

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- Overview and introduction
- Payments
- Primary & secondary options
- Programme
- Quality / defects
- Responsibilities
- Terms and communications

CECA Bulletin 35 – Common misconceptions associated when administering NEC contracts

CECA NEC4 Bulletin

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.

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Z clauses

- these are changes to the standard form of contract
- they are necessary to suit the particular type of project or sector of the industry
- recent survey poll in our NEC People LinkedIn group showed that only 11% of people had ever worked on an unamended contract
- Z clauses are not in themselves a bad thing – but some clauses that get written are a bad thing!

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Clients:

- think about and challenge if a Z clause is necessary – what is trying to be achieved that the contract does not already cover
- if a Z clause is to alter the risk profile - at what cost will that be?
- follow the principles of the contract in terms of clarity, word count and contractual language
- flowchart any proposed amendments to ensure they work and do not create ambiguities
- show tracked changes! - increasingly not the case

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Contractors

- read Z clauses (and amended contracts) at tender stage to understand what has been changed and how that alters risk profile – get help where necessary
- challenge any ~~rubbish~~ clauses you would not be wanting to have to price (before you sign!)
- don't have a set of generic Z clauses you always pass down to Subcontractors (other than ones that are absolutely necessary for internal governance)

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Regular frustrating amendments:

- 17.1/63.10 - amendments to make ambiguities in Client Scope a Contractor risk
- 60.1 - deletion of 60.1(12/13) to make ground conditions and weather a Contractor risk
- 11.2 - Good Industry Practice introduced as a defined term
- 11.2(26) - additional disallowed costs
- 61.3 - making all compensation events time barred, not just the ones a Contractor is obliged to notify
- deletion of deemed acceptance loops for compensation event quotations leavings things open ended
- NEC4 Z clauses that use the words “he” and “his”
- deletions to elements in schedule of cost components
- introducing concurrency as a term and a vague process

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2023 Z clause of the year award

Runner up and winner from this year's awards:

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Rely Upon Information

Rely Upon Information means the information and data (but not any opinions or interpretation of such information and data) identified as being Rely Upon Information in Contract Data Part One.

17.2 – The Contractor warrants that it has reviewed and scrutinised, save for any Rely Upon Information, the Scope and the Site Information prior to the Contract Date, exercising Best Practice with a view to identifying any mistake, ambiguity, inconsistency, inaccuracy, discrepancy or omission that is contained in the Scope or the Site Information .

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17.1 – Resolving ambiguities (ECS)

- 17.1/63.10 (summarised) – ambiguity resolved in favour of the party that did not create the ambiguity.
- The Subcontractor makes a proposal to the Contractor as to how to resolve, and the Contractor gives an instruction resolving, any ambiguity or inconsistency referred to in clause 17.1 unless it is resolved by operation of clause 17.2.
- Where the Contractor instructs the Subcontractor to resolve the ambiguity or inconsistency by not implementing the most onerous possible outcome, then a compensation event arises and (for the avoidance of doubt) the Prices are reduced accordingly, otherwise the instruction does not give rise to a compensation event.

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Cloud-based systems

- help generate and monitor the general flow of communications on a project
- instant audit trail of who raised what/when
- timescales automatically triggered
- set authority levels as to who raises/ accepts communications
- standard pro-forma set up that help trigger/prompt the correct contractual clauses, and provide consistency
- greater visibility to everyone on the project
- automated reporting can be generated
- encourages good behaviours
- efficiencies all round – time/cost

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Cloud-based systems

- now common place between Client and Contractor, but still less used between Contractor and Subcontractor where arguably it is even more necessary to encourage the discipline and transparency needed
- all communications needs to be in that portal to create the transparency and auditability necessary i.e. not some contractual communications still on emails in parallel to the cloud-based system
- seen examples of projects even where agreement of compensation events is done offline over period of weeks/months and then only put into the cloud-based system when it is agreed – why??

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Communications

- clause 13.1 confirms that all communications are to be in a form that can be read copied and recorded
- yet still we see and hear of people following verbal instructions

why?

- because surely in a "spirit of mutual trust and cooperation", they must do it to keep the Client happy right?

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Communications

- 10.1 states the Parties act as stated in the contract
- 13.1 states that any contractual communications need to be in a form that can be read copied and recorded
- if it is urgent – then urgently put it in writing!
- and no, before you ask CVI's are not ok either!
- Whilst Contractor obliged to obey an instruction (27.3), they have to be

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Instructions

Whilst *Contractor* obliged to obey an instruction (27.3), they must be:

- an instruction in the contract (e.g., not an instruction to accelerate)
- from the right person (e.g., not an instruction to change the Scope from the Supervisor or Client)
- and it has to be in a form that can be read, copied and recorded (i.e., in writing and in cloud-based system referenced in Scope)

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Cloud-based systems

- another practical problem with some systems is the use of a “general communication” form (gc)
- these then get used (and abused) for things it wasn’t intended e.g. instructions being masked as advice, revised drawings being issued etc
- shouldn’t even need such a form as all contractual communications are issued under a particular clause of the contract and should have its own natural home within these systems

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Programme and compensation events

- we have heard already today from the Project Manager presentation that getting programmes and compensation events is still problematic
- there needs to be further education to try and avoid these issues as who do they benefit at the end of the day?

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Accepted Programme

- the Accepted Programme should be the key management tool for any project and NEC has much more detail than any other form of contract in terms of content and the requirement to regularly revise and have formally accepted
- still frequently see projects going months without acceptance – who does this benefit, what liability are they taking on by accepting?
- Project teams need to ensure that they get round the table to ensure an accepted programme each period is achievable which should then benefit both parties
- Contractors need to remember this same process should exist with their Subcontractors and vet their ability to do this at tender stage rather than resign themselves to fact they will not get this from them

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Compensation events

- still the case that numerous projects don't keep on top of these and many take months (or even years!) to agree – again who does this benefit?
- we have suggested for NEC5 the requirement for a regular compensation event meeting like there already is for early warnings
- we see delaying agreement of compensation events – whose interest to do so? Some people seem to think it changes assessment to actual, but it doesn't as compensation events should be assessed based on forecast Defined Cost at the dividing date (63.1)
- another common misconception is Contractor putting assumptions into quotations thinking these can be revisited if the quote is accepted – but it is only Project Manager assumptions that can

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Lack of programmes with compensation event quotations!

- clause 62.2 states that if the programme for remaining work is altered by the compensation event, the Contractor includes the alterations to the Accepted Programme in the quotation
- therefore, a majority of quotations should probably have an accompanying programme
- this is not a programme that will ever become the Accepted Programme, but just issued to help the quotation be understood

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Early Warnings

- still some misunderstanding of the early warning process and people getting offended by them being issued
- early warnings and the associated register should be seen as a positive management tool
- Early warnings do NOT deal with liability – just what is the issue and what could be done about it
- early warnings do not have to be responded to, but the actions discussed and agreed/recorded in the Early Warning Register (some cloud-based systems don't help with this by seeming to indicate early warnings should be responded to within the *period for reply*)
- it is also not a requirement to notify an early warning before notifying a compensation event

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Project Managers

- Project Managers seem concerned sometimes on liability they are taking on by accepting something e.g. programme or design – which clause 14.1 clarifies
- Project Manager instruction is not something a Contractor can claim money against – only if a Contractor can convert it into a compensation event is it something that is recoverable

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Summary

- NEC contracts continue to evolve and so should we as individuals and companies
- continued education and communication is key to improve contractual knowledge
- be a disruptor – call out bad contractual practice at tender stage and on your live projects (in a professional manner)
- Consider joint workshops during your projects to make sure processes
- use forums like our LinkedIn NEC People group as a space to share knowledge and question elements

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Thanks for listening

Any questions,

or does anyone have other examples of common misconceptions that they experience?

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