



10 Misconceptions when Operating NEC4 Contracts

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Speaker

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Introduction

10 common misconceptions when operating NEC4 contracts

Slides are based on the NEC4 Engineering and Construction Contract (ECC) but most are applicable to all NEC4 main contracts

Misconceptions can in some cases lead to unnecessary *additional conditions of contract* – Z clauses

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NEC Principles

Clarity & simplicity	Ordinary language - minimal legalistic phrases Minimised subjective phrases Reasons for decisions stated
Flexible	Multidisciplinary Modular form International application
Stimulus to good contract management	A set of management procedures
Mutual trust and cooperation	Leading to reduced disputes and better outcomes

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1. Fault of the *Contractor*

Is the event one of the events listed as a compensation event (60.1, 60.4, X2, etc)

If so, will the *Contractor* be compensated for the effect of the event?

Clause 61.2, 61.4 state that the *Contractor* will not be compensated if the event arises from a fault of the *Contractor*

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1. Fault of the *Contractor*

- For example, the *Project Manager* issues an instruction to stop work due to unsafe Site operations by the *Contractor*

- Instruction issued under clause 34.1

- The event is a compensation event (60.1(4))

- As the event arose from a fault of the *Contractor* there is no change to the Prices, Completion Date or Key Dates (61.2 / 61.4)

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2. *Project Manager's* instructions (PMI)

What is a PMI?

Is there a clause that allows PMI's to be issued?

Is there a limit on what can be instructed via a PMI?

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2. *Project Manager's* instructions (PMI)

- *Project Manager* can instruct
 - a change to the Scope or a Key Date (14.3)
 - how to deal with an act of prevention (19.1)
 - attendance at an early warning meeting (15.2)
 - submission of the design of Equipment (23.1)
 - the removal of a person (24.2)
 - a revised programme to be issued (32.2)
 - the *Contractor* to stop or not start any work and start or restart work (34.1)

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2. *Project Manager's* instructions (PMI)

- *Project Manager* can instruct
 - the *Contractor* to correct a failure to follow their Quality Plan
 - a quotation for acceleration, accepting a Defect, compensation event or proposed instruction to be issued (36.1, 64.1)
 - how the *Contractor* is to deal with an object to value or historical or other interest (73.1)
 - a change to the Bill of Quantities (B/D (60.6)
 - X10, X22, X29 additional instructions can be issued

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2. *Project Manager's* instructions (PMI)

- *Project Manager* instruction = a compensation event
 - An instruction to change the Scope (60.1(1))
 - An instruction to stop or not start any work or to change a Key Date (60.1(4))
 - An instruction to deal with an object of value or of historical or other interest (60.7(7))
 - An instruction to change the Bill of Quantities (60.6)
 - An act or prevention is a compensation 60.1(19)
 - *Supervisor* instructs the *Contractor* to search for a Defect (43.1. 60.1(10))

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3. Compensation event 60.1(1) – change in Scope



A COMPENSATION
EVENT UNDER 60.1(1)
- INSTRUCTION TO
CHANGE THE SCOPE
UNDER CLAUSE 14.3



ONLY THE *PROJECT
MANAGER* HAS THE
POWER TO CHANGE
THE SCOPE



IT CANNOT BE
CHANGED BY THE
CONTRACTOR, EVEN IF
NECESSARY TO
PROVIDE THE WORKS



NOTIFY AS AN
IMPOSSIBLE
REQUIREMENT (17.2)

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4. Not Allow the *Contractor* To Provide the Works

- Clause 26.2 “a reason for not accepting the Subcontractor is that the appointment **will not allow the *Contractor* to Provide the Works**”
- To Provide the Works defined in clause 11.2(15) “means to do the work necessary to complete the *works in accordance with the contract* and all incidental work, services and actions which the contract requires

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4. Not Allow the *Contractor* To Provide the Works

- In accordance with the *Scope, conditions of contract, etc*
- Include requirements in the *Scope*
- The *Project Manager* has the power to change the *Scope* – not the *conditions of contract*

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5. Failure to comply with the Accepted Programme



DOES THE
CONTRACTOR
HAVE TO COMPLY
WITH THE
ACCEPTED
PROGRAMME?



THEY DON'T
AND THEY
WON'T



PROCEED
REGULARLY AND
DILIGENTLY
WITH THE
WORK?



DRIVER TO
COMPLETE ON
TIME IS MONEY

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6. Force majeure v liabilities

- Replace prevention (clause 19 / 60.1(19)) with force majeure
- Understood by the legal profession, but who manages the contract?
- Force majeure is wider than prevention
- Prevention must cause delay not just increase costs

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6. Force majeure v liabilities

- Check overlap with clause 80.1
- *Client's* liabilities (clause 80.1) are also compensation events
- They include war, strikes, riots, civil commotion, etc.

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7. Disallowed Cost



Disallowed Cost v allowed cost



Disallowed Cost is an allowable cost that does not have to be paid



Z clause to extend the definition of Disallowed Cost

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8. Provide the Works in accordance with the Scope

Clause 20.1 *Contractor Provides the Works in accordance with the Scope*

Defect – a part of the *works* not in accordance with the Scope..

The *works* being the asset being created not how the asset is to be created

If the *works* are not being done in accordance with the Scope – early warning, instruct the *Contractor* to stop work

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8. Provide the Works in accordance with the Scope

- Z clause amendment - Provide the Works using good industry practice or the like
 - What does this term mean - understood by the legal profession, but who manages the contract?
 - Subjective, open to debate, allows for an argument to be raised!
 - Does this fit with NEC principles
 - Lazy drafting – Scope should be clear and concise
 - Each Party should take the risk in the documents they produce

9. Stated reasons for non acceptance



The *Project Manager* replies to a communication submitted or resubmitted by the *Contractor* for acceptance. If the reply is not acceptance, the *Project Manager* states the reasons



Compensation event - The *Project Manager* withholds an acceptance ... for a reason not stated in the contract (60.1(9))



If Z clauses or acceptances require acceptance from the *Project Manager*, unless reasons for non acceptance are stated, any non acceptance will be a compensation event

10. Site Information

- Does the *Project Manager* have the power to change the Site Information?
- The Parties could agree to change the Site Information, but this would be pointless
- Does the *Contractor* Provide the Works in accordance with the Site Information?
- The *Contractor* Provides the Work in accordance with the Scope

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10. Site Information

- What is the purpose of the Site Information
- The only purpose the Site Information serves after the Contract Date is as part of the process to determine if the *Contractor* is entitled to a compensation event for unforeseen physical conditions
- No need to include Z clauses to state the *Contractor* does not rely on the Site Information etc. as they don't
- If you Z clause out compensation event for unforeseen physical conditions delete Site Information

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