

Covid-19 resurgence: Compensation events under the NEC3 Professional Services Contract

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Introduction

Ahead of the restrictions and measures due to the recent resurgence of the pandemic in the UK and globally, it is critical that parties already in a NEC3 Professional Services Contract (PSC) (as in all contracts) communicate and establish ground rules for managing the continuous change.

Professional services contracts are often affected by the outbreak and the imposed restrictions as much as the construction contracts; apart from the cases where the Consultant needs to be present on sites (for management, supervision, meetings, inspections, site office work etc.) and is often the intermediary between the Employer and the contractors / suppliers (when undertaking the role of the Project Manager), the Consultant's work is dependent on the project's progress and any impediment has a direct impact on the Consultant's operations and cash flow.

Although by now, the parties must have already dealt with the pandemic issues, there could be cases where they have not done so or have not allowed for the possibility of resurgence / second wave. Appropriate guidance with regards to the contracts has been published by the Construction Leadership Council and the NEC, however, this article draws the attention to certain clauses of the NEC3 PSC that could be utilised to deal with the pandemic; it is also critical that any contract amendments / Z-clauses are always taken into consideration.

Early warning

The early warning is the first formal step for the Consultant to engage with the Employer in order to address any potential or upcoming matter. It is notified by either Party under clause 15.1 and could refer to any matter that could

- increase the total of the Prices or the Employer's total cost;
- delay Completion, change the Accepted Programme or delay meeting a Key Date; and
- impair the usefulness of the *services* to the Employer or affect the work of the Employer, an Employer's contractor or another consultant.

Evidently, the early warning is not restricted to issues that relate merely to the Consultant – Employer relationship, but expands further to the Employer's costs and interaction with other parties.

The Employer (or its agent) is obliged to enter the notified matters in the Risk Register, which is later updated and revised by the decisions made within the risk reduction meetings that both Parties can instruct each other to attend. In the risk reduction meeting, the proposals for avoidance or mitigation of risk are made, solutions and actions are decided (including the action owner), and the Risk Register is updated accordingly.

A change in the Scope, if decided within the risk reduction meeting, is recorded in the Risk Register and the Employer instructs the change at the same time the revised Risk Register is issued (clause 15.4).

This would also constitute a compensation event under clause 60.1(1) which should be notified by the Employer.

The early warning and the risk reduction meeting should not be considered commercial functions (although the early warning notification by the Consultant for a matter which later becomes a compensation event, plays a vital role in its assessment, clauses 61.5 and 63.5 refer) but rather tools for achieving collaboration, clarity and direction.

As such, early warnings and risk reduction meetings are essential in dealing with the impacts (or potential impacts) of the pandemic.

Notification of compensation event

Clause 61.1 obliges the Employer to notify a compensation event (and instruct quotations) when this is arising from issuing an instruction, changing an earlier decision or correcting an assumption. According to the NEC3 PSC Guidance Notes, this would normally apply to compensation events under clause 60.1 (1), (4), (7) and (9). As we will see later on, (1) and (4) could pertain to the pandemic.

In accordance with clause 61.3, the Consultant notifies the Employer of an event that has happened or is expected to happen, as compensation event if

- the Consultant believes that the event is a compensation event and
- the Employer has not notified the Consultant of the event

List of compensation events

Clause 60.1 contains a list of 12 items that are compensation events. Some of these could relate (directly or indirectly) to the pandemic:

- (1): An instruction from the Employer changing the Scope as a result of the outbreak; e.g. the Employer could be considering Scope reduction or modifications so as to adjust to the current or projected conditions or requirements.
- (2): The Employer does not provide access to a person, place or thing; that could be a unilateral decision by the Employer due to operational restrictions (e.g. access to the site, social distancing measures restricting the number of people / desks allowed in the Employer's offices where the Consultant's staff are working or access to a software platform / document management system).
- (3): The Employer does not provide something as shown in the Accepted Programme; a delay in the issuance of a permit or in the provision of information could be an indirect result of the pandemic and / or restrictions imposed.
- (4): The Employer instructs to stop or not to restart any work or to change a Key Date; given the uncertainty of the severity or duration of the outbreak, the Employer could consider such an action.
- (5): The Employer or Others¹ do not work within the times or conditions stated in the Accepted Programme or the Scope respectively; this could relate to issues similar with (2) and (3) above, provided that there is an impact to the Consultant's costs, Completion or meeting a Key Date.
- (11): The event stops the Consultant completing the *services* or stops the Consultant completing the *services* by the date shown in the Accepted Programme and which

- (i) neither Party could prevent,
- (ii) an experienced consultant, at the Contract Date², would have judged to have such a small chance of occurring that it would have been unreasonable to allow for, and
- (iii) is not one of the other compensation events stated in the contract.

Provided that the Contract Date precedes the date of the outbreak³ and the Parties have not dealt with this clause yet (highly unlikely but possible), if the Consultant can demonstrate the impact to the Accepted Programme, then the tests for the clause could be satisfied.

The Consultant should be wary of the eight-week time bar stated in clause 61.3; since the Consultant became aware of the pandemic around March 2020, the eight weeks to notify the event have elapsed by end of May 2020 or earlier. The options below should be considered, provided that the Employer has not given an instruction, changed a decision or corrected an assumption with regards to the event (in which case the time bar does not apply):

- If the so-called “second wave” or “resurgence of Covid-19” is considered a separate event which the Consultant was made aware of around September 2020 (the exact date must be ascertained), the Consultant is within the timeframe allowed.
- Clause 18.1 (Prevention), where 3 of the 4 tests set out in clause 60.1(11) apply, states that the Employer “...gives an instruction to the Consultant stating how he is to deal with the event.” That imposes an obligation to the Employer which needs to be adhered to, and in which case (upon issuing the instruction and thereafter) the Consultant is no longer time-barred from notifying the event.

Change in the law (secondary Option X2)

If secondary Option X2 applies, then recent changes in secondary legislation regarding the restrictions to tackle the outbreak could qualify as compensation events, provided that these changes have impact (directly or indirectly) on the Prices, the Completion Date or a Key Date.

Published guidance by the Government or other authorities would probably not fall within the interpretation of “change in the law”. The NEC3 PSC Guidance Notes state that “*For the purposes of the clause [X2.1] the law includes a national or state statute, ordinance, decree, regulation (including building or safety regulations), by-law of a local or other duly constituted authority and other delegated legislation.*”

Employer’s response and assumptions

It is imperative that the Employer, when accepting a compensation event related to the pandemic and instructs quotations under clause 61.4, also states assumptions as provided for in clause 61.6, which states (emphasis added):

“If the Employer decides that the effects of a compensation event are too uncertain to be forecast reasonably, he states assumptions about the event in his instruction to the Consultant to submit quotations. Assessment of the event is based on these assumptions. If any of them is later found to have been wrong, the Employer notifies a correction.”

As with the beginning of the outbreak, it is still uncertain how much and for how long the outbreak will continue to impact society and industries, including construction. The Parties should agree a baseline

in relation to which the compensation event will be quoted; it could refer to certain levels of staff availability, duration, local restriction levels and measures etc.

The usefulness of this clause is that, upon the assumption being proven wrong (e.g. the pandemic restrictions imposed last longer than allowed for), a new compensation event could be notified by the Employer (or the Consultant in the absence of the former's notification) which would fall under clause 60.1(9) where "*The Employer notifies a correction to an assumption which he has stated about a compensation event*".

Following steps

Upon the Employer's acceptance of the compensation event, the Consultant submits its quotation under clause 62.3 based on the assumptions stated by the Employer, and the latter will respond either by accepting the quotation or instructing a revised one or notifying that it will make its own assessment.

Admittedly, potential problems or contentions could be encountered at the assessment stage. However, if the assessments refer to an agreed baseline (assumptions), the dispute risks will be significantly reduced and the outcome will depend on the Parties' communication and willingness to co-operate.

For assistance, feel free to contact us at info@pronea.co.uk

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[1]: Others are anyone other than the Employer, the Consultant, the Adjudicator or employees, suppliers or Subconsultants of the Consultant as defined in clause 11.2(7).

[2]: Contract Date is defined in clause 11.2(4) as the date when the contract came into existence

[3]: There could be a contention regarding the date that an experienced consultant could have reasonably foreseen the impact of the pandemic, especially as the Contract Date gets closer to March 2020