

COVID-19 and your NEC3 construction contract; is it too late?

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Introduction

Almost fifteen months since the first lock-down and having already gone through two waves and changing restrictions, it would safe to state that the industry is well prepared going forward, in relation to this matter.

For most projects affected by the outbreak, if not all, the contracting parties should have by now adapted to the new normal as regards to testing, protective measures and methods of site working, working from home etc. by adjusting their programmes and cost estimates to reflect the past, current and future resulting delays and/or disruptions.

However, a significant portion of the contractual complications that were created since the beginning of the outbreak are probably still under consideration or unresolved; further, for contractors who have not submitted a claim by means of notifying a compensation event, one could argue that it is too late but such an argument would be, under certain circumstances, flawed.

We discuss below the applicability of certain clauses in relation to the pandemic and to the time restriction set out in clause 61.3.

The exception to the time-bar

In accordance with clause 61.3, if the Contractor notifies a compensation event more than eight weeks after being made aware of it, is not entitled to a change in the Prices, the Completion Date or a Key Date, unless the compensation event arises from the Project Manager or the Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption – in such a case the Project Manager is obliged to notify the compensation event and the time-bar does not apply.

Although the above exception seems to be very limited in its application, the NEC3 ECC Guidance Notes already give us seven compensation events, namely 60.1(1), (4), (7), (8), (10), (15) and (17) that result from an action or inaction of, and should be notified by, the Project Manager. In the same, it is also stated that it is important for the Project Manager to notify such events whereas if not “...he may leave the Employer open to late claims from the Contractor...”.

Clause 19.1 (Prevention)

It is arguably the most discussed NEC3 clause in relation to the pandemic under which:

"If an event occurs which

- *stops the Contractor completing the works or*
- *stops the Contractor completing the works by the date shown on the Accepted Programme*

and which

- *neither Party could prevent and*

- *an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it,*

the Project Manager gives an instruction to the Contractor stating how he is to deal with the event."

The difficulties arising under this clause have been examined in our last year's article¹ and the applicable compensation event from those listed in clause 60.1 is (19).

The interesting and at the same time challenging aspect of this clause is that it obliges the Project Manager to issue an instruction on how to deal with the event. Provided that such an instruction has not been given, the provision could potentially render any time-bar restrictions pursuant to clause 61.3 unenforceable; admittedly, clause 61.3 refers to an instruction which is given by the Project Manager or Supervisor, however if that instruction was not given although it should have been, the decision in the case of *Northern Ireland Housing Executive v Healthy Buildings*² (regarding an NEC3 Professional Services Contract) could provide valuable aid to the Contractor.

Secondary Option clause X2 (Change in the law)

Provided that Secondary Option clause X2 (X2.1 - Changes in the law) is included in Contract Data Part 1 of the contract in question, a change in the law of the country in which the Site is located is a compensation event if it occurs after the Contract Date. Any new legislation regarding the measures / restrictions for tackling the outbreak would qualify as a compensation event provided that it is affecting the construction operations.

However, published Government guidance could not easily qualify as a "change in the law" in accordance with X2.1 (or even as a state statute, ordinance, decree, regulation or by-law of a local authority as clarified in the NEC3 ECC Guidance Notes for this clause), and one would have to identify Government new legislation that would constitute (directly or indirectly) the "change in the law" relevant to the works.

If the above hurdles are overcome, the compensation event under this clause should be or have been notified within the eight weeks set out in clause 61.3.

Other compensation events

Clause 60.1 contains a list of 19 items that are compensation events. Some of these could relate (directly or indirectly) to the pandemic:

- (1): An instruction from the Project Manager changing the Works Information 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 allow access to and use of a part of the Site by the later of the *access date* and the date shown in the Accepted Programme; that could be a unilateral decision by the Employer due to operational restrictions.
- (3): The Employer does not provide something which it is to provide by the date 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 Project Manager gives an instruction to stop or not to start any work or to change a Key Date; given the uncertainty of the severity or duration of the outbreak, the Employer (through the Project Manager) could consider such an action.

- (5): The Employer or Others³ do not work within the times showed in the Accepted Programme or conditions stated in the Works Information or carry work in the Site that is not stated in the Works Information; this could relate to issues similar with (2) and (3) above, provided that there is an impact to the Contractor's costs, Completion or meeting a Key Date.
- (16): The Employer does not provide materials or facilities as stated in the Works Information; such an issue could arise if the Employer could not provide the above due to the outbreak or to the restrictions imposed because of it.
- (18): A breach of contract by the Employer which is not one of the other compensation events; any breach of the Employer (or of the Project Manager being its agent) resulting from the outbreak, would qualify.
- (19): If prevention is justified as set out above; the outbreak should have been proven to be an event which:
 - stopped the Contractor completing the works; or
 - stopped the Contractor completing the works by the date shown on the Accepted Programme,and which
 - neither Party could prevent;
 - an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it; and
 - is not one of the other compensation events stated in the contract.

Conclusion

Clearly, when the exception of clause 61.3 applies (and provided there are no amendments/Z-clauses to the contrary), it is not too late for a contractor to notify a compensation event that arose from the pandemic, either directly or indirectly; although each case will be considered on its merits, contractors should not be discouraged if the other party has deliberately avoided the issuance of an instruction required by the contract as case law could come to their rescue.

Hopefully, in most cases, parties will enter (if not already) in good faith discussions and common sense will prevail.

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

The above article is for general information and discussion purposes only. It does not constitute, and should not be used as a substitute for, legal or professional advice. The law or facts may have changed since the date of this article.

[1]: See our article published on 5 October 2020:
<https://www.pronea.co.uk/articles>

[2]: *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited [2014] NICA 27*, can be found at:
<https://www.judiciaryni.uk/judicial-decisions/2014-nica-27>

[3]: Others are people or organisations who are not the Employer, the Project Manager, the Supervisor, the Adjudicator, the Contractor or any employee, Subcontractor or supplier of the Contractor, as defined in clause 11.2(10).