

## **COVID-19 and your NEC3 construction contract: food for thought**

5 October 2020

*Note: The present article deals only with two aspects of the matter, namely the prevention and the change in the legislation that could qualify as compensation events in the NEC3 ECC. However, related compensation events could also arise under other clauses such as 60.1(2) or 60.1(4), and any works stoppage could result in termination of the contract (under R20, R21 etc.); these and other relevant topics, such as required actions, notifications etc. will be covered in articles to follow.*

### **Introduction**

If you have entered into an NEC3 construction contract before the outbreak (assuming that any contracts drafted thereafter include necessary changes/Z-clauses to address the issue, such as the proposed amendments published by the Construction Leadership Council on 14 July 2020<sup>1</sup>), by now you have probably reached an agreement with the other party on how to deal with the event contractually.

If not, or if provisions for any extended duration of the pandemic have not been agreed, you could be wondering what is the appropriate contractual approach moving forward.

This is an event that neither party could prevent and that an experienced contractor could not foresee at the Contract Date. It is generally accepted that such an event could be categorised as a "force majeure" event in other forms of contract (such as JCT where "force majeure" is included in the list of Relevant Events for delay).

### **Clause 19.1 (Prevention)**

Indeed, the NEC3 ECC standard conditions, seem to provide for such an event (we find the relevant term in the guidance notes only) in clause 19.1 (Prevention), where it is stated that:

*"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."*

Acknowledging the COVID-19 outbreak as an event which falls within the above description is only the starting point and it is not very simple either. The event must pass three tests for the clause to apply, two of which (that neither Party could prevent it and that an experienced contractor could not foresee, 3<sup>rd</sup> and 4<sup>th</sup> bullet points) should be common ground (a word of caution; the 4<sup>th</sup> bullet point would not be reasonably justified for contracts entered recently since the potential issues and persistence of the virus are now widely known).

For the third test (1<sup>st</sup> or 2<sup>nd</sup> bullet point), the Contractor, after notifying the event as a compensation event under clause 60.1(19) (unless a compensation event arises from the Project Manager giving an instruction on how to deal with the event as required by clause 19.1) should also justify how this event

has either stopped the Contractor from completing the works or stopped him completing the works by the date shown in the Accepted Programme, i.e. how it affected the planned Completion.

We have just encountered two possible contention points. First, the Contractor must demonstrate the delay (which means that it needs to show that the works on the critical path were delayed after absorbing any available float) and second, this has to be based on the Accepted Programme; what if the last Accepted Programme was "accepted" a few months ago and all subsequent submissions are under review or not agreed (not the way NEC3 is supposed to operate but a very realistic scenario)?

A third issue that arises, is whether the outbreak itself or its consequences (e.g. government measures to deal with the outbreak, unavailability of suppliers etc.) qualify as compensation events. A natural disaster would be a compensation event as it would possibly prevent the Contractor from completing the works, but the consequences of the COVID-19 outbreak so far are indirect (related mostly to the restrictions / social distancing and self-isolating measures, which affect the availability of resources and the way the works are conducted on site), unless the Contractor is deprived of its human resources by means of them getting sick and unable to work (which would also extend to its supply chain).

Even when, following improvement of the situation, sites are fully operational, these restrictions could possibly remain (with the necessary adaptations as regards site conditions) for an unspecified period.

The Construction Industry Council (CLC) published on 4 July 2020 Version 5 of its Site Operating Procedures<sup>2</sup> (SOPs) and keeps publishing updated guidance on specific matters such as the wearing of face coverings on site<sup>3</sup> (published on 29 September 2020), based on the latest Government guidance.

Arguably, the required safe systems of work would impact on the Contractor's programme and productivity, notwithstanding the additional costs pertaining to the increased HSE supervision, signage etc. Conversely, from the Employer's perspective, compliance with HSE regulations and guidance (as updated) could be (strictly) considered a Contractor's obligation.

### **Secondary Option clause X2 (Change in the law)**

In the last scenario, the Contractor could move away for the outbreak event itself and rather seek refuge in Secondary Option clause X2 (X2.1 - Changes in the law) provided it is included in Contract Data Part 1 of its Contract.

As set out in this clause, 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 as it is directly 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 (such as the Coronavirus Act 2020) that would constitute (directly or indirectly) the "change in the law" relevant to the works.

### **Assessment of the compensation event**

Even if the above hurdles were overcome, a compensation event was justified and the Project Manager had accepted it (or notified it in accordance with clause 61.1), when it comes to the assessment stage the Contractor would have to provide within its quotation details of how the Prices, the Completion Date and / or the Key Dates were changed or will be changed as a result of the event.

For the changes to be assessed on a forecast basis (clause 63.1 provides for the dividing date to be the date of notification of the compensation event or the date of the instruction) another problem would arise, as the duration of the outbreak or of the expected level of restrictions would still be unknown.



To make things more difficult, clause 62.3 requires the Contractor to provide its quotation(s) within three weeks of acceptance of the compensation event by the Project Manager (unless extension is agreed under clause 62.5).

A pragmatic approach from both the Project Manager and the Contractor with regards to assumptions would be of major importance. As such, the Project Manager could state a number of assumptions in accordance with clause 61.6 (e.g. with regards to the maximum expected duration, workforce levels, local restrictions etc.) which would, if corrected / adjusted later, qualify for another compensation event (clause 60.1 (17)).

### **Conclusion**

A lot of unknowns and moving parts in dealing with the consequences of a major unfortunate event. Perhaps clause 10.1 requiring the Employer, the Contractor, the Project Manager and the Supervisor to act "in a spirit of mutual trust and co-operation" could be of assistance, although it also states that they "shall act as stated in this contract".

For assistance, feel free to contact us at [info@pronea.co.uk](mailto: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.***

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- [1]: "CLC COVID-19: CONTRACTUAL DISPUTES & COLLABORATION GUIDANCE" (14 July 2020):  
<https://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/07/CLC-Future-proofing-Covid-19-Guidance.pdf>
- [2]: CLC's SOP V.5 (4 July 2020):  
<http://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/07/Site-Operating-Procedures-Version-5.pdf>
- [3]: CLC's Guidance of 29 September 2020 regarding the use of face coverings in construction:  
<http://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/08/The-Use-of-Face-Coverings-in-Construction-during-Coronavirus.pdf>