

NEC3 : Compensation culture

28 February 2014 | By Jeffrey Brown, Steve Goodwin

The new NEC3 contract features mechanisms to change contract prices and completion dates, under certain circumstances. We look at compensation events



The latest edition of the NEC3 contracts was published in April 2013. A central feature of NEC3 is its “compensation events”. The mechanisms in clause 61 to 65 provide the ability to alter the contract price and/or change the completion date or key dates.

One of the most important clauses in the contract, and one that was amended in April 2013, is clause 61.3.

The clause states: “If the contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the prices, the completion date or a key date.”

A major difficulty arises if the contractor misses the eight week deadline and fails to provide notice. This is even more significant since the amendment, as the risk of failure now covers instances where the project manager “should himself have notified” the compensation event but didn’t.

Is the contractor to be denied the money and time to which he would otherwise be entitled? The answer is not straightforward.

Not every compensation event will be a breach of contract but every breach of contract will be a compensation event. Clause 60.1(18) includes “a breach of contract by the employer which is not one of the other compensation events in this contract” as a compensation event.

A failure to comply with clause 10.1, which compels the parties to act “in a spirit of mutual trust and co-operation”, will also be a breach of contract. A claim for a breach of contract will survive the eight week time limit. This is because clause 61.3 does not expressly exclude a claim for damages.

Anomalies may also arise in the case of named “employer’s risks”. An occurrence of an event that is an employer’s risk is a compensation event (clause 60.1(14)). In this situation there is a separately expressed obligation on the employer to indemnify the contractor against the “claims, proceedings, compensation and costs” (clause 83.1). The employer’s risks include for example “a fault of the employer or a fault in his

design". This again must give rise to a separate legal remedy in addition to the compensation event procedures.

Further issues arise when the wording of clause 61.3 is considered in detail. The first part of the clause states what the contractor is obliged to do and when he is obliged to do it. Unless the project manager has already notified the contractor, he has to give notice of an event which has happened, or which he expects to happen, if he believes the event is a compensation event.

Subjective words such as "expects" and "believes" create ambiguity. The second part of the clause deals with the consequence of a failure to provide notice (a time-bar provision).

The time-bar in clause 61.3 arises if there is a failure on the part of the contractor to "notify a compensation event within eight weeks of becoming aware of the event".

It can be difficult to prove the date of the contractor's awareness, which is of course a subjective test. It is also entirely possible for the contractor to be aware of an event on a different, and potentially earlier, date than when he "expects" or "believes" it to be a compensation event.

The wording, further, does not identify whether or not the reference to "event" is a reference to:

- the date when the event itself occurs;
- the date when the contractor believed the event was a compensation event or could be a compensation event;
- an event which may give rise to a compensation event is expected to occur.

If the first interpretation is preferred it would mean that a contractor could be time barred before he knows (or "believes") that he can claim.

If the third option is preferred a contractor may be time barred before the actual event itself has occurred. Neither of these two interpretations appear sensible but they may nonetheless be possible interpretations of clause 61.3.

The subjectivity of the words "aware", "believe" and "expect" could mean the contractor being time-barred before he "expects" and/or "believes" an event is a compensation event and perhaps even before the event itself has even occurred.

Without judicial clarification of the meaning of clause 61.3 and irrespective of any parallel rights to claim damages or indemnities, contractors would be well advised to notify all facts, past, present or future, which could conceivably be regarded as a compensation event.

This will add to the costs of operating the agreements for all parties which is not a process which the drafters of NEC3 would wish to encourage.

***Jeffrey Brown is a partner in the London office of Veale Wasbrough Vizards.
Steve Goodwin is director of GVE Commercial Solutions***