

23 March 2020

Guidance

Construction and Engineering Industry Coronavirus – (COVID-19) – NEC 3 and 4 [ECC]

- 1 This note addresses some of the key issues in relation to Coronavirus (COVID-19) (“COVID-19”) in relation to the NEC3 (2013) and 4 Engineering and Construction Contract (ECC). The focus of this note is advising on contracts that have already been entered into.
- 2 Please note that this a fast moving evolving event and there are likely to be further updates in due course. We will issue a revised note following any updated guidance from the government.
- 3 The four key considerations are:
 - 3.1 instructions;
 - 3.2 claims for delay;
 - 3.3 payment provisions; and
 - 3.4 termination.
- 4 For information as to the position regarding insurance, please click [here](#). The view of the market is that unless COVID-19 is referred to in the policy (which is unlikely) it is not covered.
- 5 Please note that NEC3 and 4 [ECC] contain slightly different wording in relation to some of the relevant clauses. To distinguish these, the NEC4 wording is highlighted in yellow and the NEC3 wording in green

Claims for Delay

- 6 Both NEC3 and 4 provide at clause 19 that:

If an event occurs which

- stops the Contractor completing **[the whole of the works]** **[the works]** or
- stops the Contractor completing **[the whole of the works]** **[the works]** by the date **[for planned completion]** 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

- *the Project Manager gives an instruction to the contractor stating how [the event is to be dealt with] [he is to deal with the event]*

6.1 Project Managers need to be aware that they may have to give an instruction. They should be careful about the wording of any such instruction.

7 Early warning

7.1 The Contractor and the Project Manager give an early warning by notifying the other as soon as either become aware of any matter which could:

- *increase the total of the Prices*
- *delay Completion*
- *delay meeting a Key Date or*
- *impair the performance of the works in use*

7.2 Many contractors have already given Early Warning Notices in relation to COVID-19.

7.3 Once such a notice has been given, then an Early Warning Meeting under NEC4 or a Risk Reduction Meeting under NEC3 should take place. More to follow on this in due course.

8 Compensation Events

8.1 NEC3 and 4 provide, at clause 60.1, for compensation events (which is the route by which a contractor may seek time and money for delay).

8.2 Clause 60.1.19 is the compensation event which is being mentioned the most often in relation to COVID-19. Its wording is similar to clause 19 referred to above. It states:

“An event which

- *stops the Contractor completing the whole of the works [the works] or*
- *stops the Contractor completing the whole of the works [the works] by the date for planned completion [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 this contract*

- 9 For a contract that was entered into before COVID-19 became the issue it is today and of course provided the Contractor is actually stopped from completing the whole of the works (or the works) or completing the whole of the works or the works by the date of planned completion or the date shown on the Accepted Programme, then it is likely that a Contractor is entitled to a compensation event under clause 60.1.19.
- 10 There will be a further note in due course as to what steps are required to be taken by both the Project Manager and the contractor if there is a claim for a compensation event.

Payment provisions

- 11 All parties should ensure that all notices required under the contract are issued on time. This is especially important for the Client/Employer in relation to both payment.
- 12 If the Contractor makes an application for payment (which could include loss and expense for delay resulting from COVID-19), which the Client/Employer does not agree with then it must serve a payment notice and/or pay less notice within the timeframe required (which is very tight). If the employer fails to do this, the Contractor will be entitled to recover the amount it applied for and could launch what is known as a 'smash & grab' adjudication. Project Managers should be alert to this. Of course under NEC there is provision for the Project Manager to correct an incorrectly assessed amount due in a later payment certificate, but that of itself would not prevent a successful 'smash & grab' adjudication.

Termination

- 13 There are three potentially relevant termination events:
- 13.1 Clause 91.5
- 13.2 Clause 91.6; and
- 13.3 Clause 91.7

Clause 9.15

- 13.4 This clause states:

Either Party may terminate if the Parties have been released under the law from further performance of the whole of the contract (R17)

- 13.5 As things stand at the moment it is unlikely that this clause can be invoked

Clause 91.6

- 13.6 This clause states

"If the Project Manager has instructed the Contractor to stop or not to start any substantial work or all work and an instruction allowing the work to re-start or start or removing work from the Scope has not been given within thirteen weeks,....."

- *either party may terminate if the instruction was due to another reason (R20)*

13.7 Project Managers need to be aware of the potential implications under clause 91.6 of instructing the Contractor to stop work or not to start substantial work. This is especially relevant in relation to clause 19 (see paragraph 5 above).

Clause 91.7

13.8 The third clause, clause 91.7 is a ground which is only available to an employer who wants to terminate. That clause states:

The **[Client]** **[Employer]** may terminate if an event occurs which

- stops the Contractor completing the **whole of the works** **works** or
- stops the Contractor completing the **whole of the works** **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 to have allowed for it.

13.9 This is something that the Client/ Employer may want to consider.

14 There are of course cost consequences of termination. These will be dealt with in a subsequent note.



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