

Notices under the NEC Contract

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Introduction

- Course covering notice requirements under NEC contracts.
- Requirements for notices including:
 - content;
 - communication;
 - obligations;
 - timing;
 - result of failure to comply.

Introduction

- The NEC contracts were and are intended to be a radical departure from traditional construction and engineering contracts.
- NEC uses plain English and is intended to stimulate rather than frustrate good contract management.
- Contract is flexible – can be used across a wide variety of projects and sectors.

Introduction

- Intention is that, as far as possible, all issues are dealt with as they arise.
- The philosophy is that it is better (and cheaper) for parties to manage risk as it arises rather than after the event.
- NEC contracts, if used correctly, are supposed to be a risk management tool

Introduction

- Parties are therefore obliged to notify each other of any issues which may/will delay the project or increase the cost or impact on the quality of the Works.
- NEC does not allow for retrospective claims, which have traditionally been prevalent on UK construction projects.

Introduction

- The main notice provisions are around early warnings and notices of compensation events.
- The word notify / notice / notification is in the NEC contract circa 60 times.
- Main content of this course covers EWNs and NCEs, but also requirements for all notices.

Communication & Content of Notices

Communication – cl 13

What is required for notices to be valid?

- Clause 13.1:

“Each ... notification ... which this contract requires is communicated in a form which can be read, copied and recorded”

- Clause 13.7:

“A notification which this contract requires is communicated separately from other communications.”

Communication – cl 13

- Other than clause 13, the NEC does not give explicit requirements for the method of communication of notices.
- Be wary of Z clauses which may include additional requirements for the communication of notices.
- Always ensure compliance with any contractual requirements.

Content of Notices

Education 4 Ayrshire Ltd v South Ayrshire Council [2009] CSOH 146.

- Scottish case, not an NEC contract.
- Principles set out in this case have since been applied to disputes involving NEC contracts.

Content of Notices

Education 4 Ayrshire Ltd v South Ayrshire Council [2009] CSOH 146.

Contract required two notices, to be provided within 20 business days after C became aware of event :

- Notice of delay (cl 17.1); and
- Notice of claim for EOT and/or L&E (cl 17.6).

Content of Notices

Education 4 Ayrshire Ltd v South Ayrshire Council [2009] CSOH 146.

- C wrote a letter within 20 business days, stating it was a notice under cl 17.1;
- Letter did not refer to cl 17.6 and didn't provide details of a claim for EOT and/or L&E.

Content of Notices

Education 4 Ayrshire Ltd v South Ayrshire Council [2009] CSOH 146.

- C said letter provided adequate information to enable the reader to understand that it was a claim for EOT and L&E;
- Therefore C said the letter served as notice under clauses 17.1 and 17.6.

Content of Notices

Education 4 Ayrshire Ltd v South Ayrshire Council [2009] CSOH 146.

- Employer's position was that the letter could only be seen as a notice under cl 17.1 as it did not set out that it was a claim for EOT and / or L&E.

Content of Notices

Education 4 Ayrshire Ltd v South Ayrshire Council [2009] CSOH 146.

- Court favoured the Employer's position. The Judge said:

“Where parties have laid down in clear terms what has to be done by one of them if he is to claim certain relief, the court should be slow to seek to relieve that party from the consequence of failure.”

Communication & Content

- Significant amount of notifications required are by PM.
- If PM insists on compliance with clause 13, does contractor also insist on compliance by PM?
- Eg, in relation to notice of defects, PM is obliged to notify defects, they should do so in accordance with clause 13.

Communication & Content

- Ensure project team fully understands any contractual obligations regarding the communication and content required.
- Potentially use standard form – agreed with Employer / PM at the outset.
- Comply with any contractual requirements re timing / form / content of notices.

TEA / COFFEE BREAK

Early Warning Notices

Early Warning Notices

- Clause 16.1 (NEC3) and 15.1 (NEC4) requires the Contractor and PM to give early warning to the other of any event which may:
 - Increase the total of the Prices;
 - Delay Completion;
 - Delay meeting a Key Date; or
 - Impair the performance of the Works in use.

Early Warning Notices

- In NEC3, the Contractor may give an EWN to the PM of any other matter which could increase the total cost. In NEC4 either party may give this notice.
- Issues of time and/or quality of Works – obliged to notify irrespective of fault.
- Issues of money – only obliged to notify if it may lead to an increase to the Prices.

Early Warning Notices

- Party giving notice is required to do so “...as soon as either becomes aware...” of the matter (wording is the same in NEC3 and NEC4).
- Obligation appears to be subjective knowledge – notice is required as soon as the party becomes aware, not when they should have become aware.

Early Warning Notices

- Provision of an EWN is not a condition precedent to entitlement (unlike NCEs).

BUT

- If an experienced contractor could have given an EWN, cl 63.5 (NEC3) and 63.7 (NEC4) allow the PM to assess the CE as if an EWN had been given.
- Options C to F - costs incurred because of failure to issue EWN are disallowed.
- Objective knowledge of matter?

Early Warning Notices

- Important to clarify – there is no direct link between EWN and NCE.
- An issue which leads to an EWN may not lead to an CE, and a CE may occur for which no EWN is required.
- Is the obligation subjective or objective? If in doubt, notify.

Notice of Compensation Events

Compensation Events

- The CE procedure contains the Contractor's only contractual rights to claim additional time and/or money.
- The CE provisions require notification by one party or the other, or either, depending on how the CE arises.
- Failure to comply can lead to loss of right to claim for time and/or money.

Compensation Events

Compensation Event arises (cl 60)



Notification (cl 61)



Quotation (cl 62)



Assessment (cl 63 & 64)



Implementation (cl 65)

Compensation Events – cl 60

Clause 60.1 sets out the compensation events. There are three types of CEs:

- Those arising from PM / Supervisor doing something e.g. giving an instruction;
- Those arising from PM / Supervisor / Employer failing to do something e.g. not allowing access; and
- Those that are fault neutral e.g. weather.

Obligation to notify depends on which of the above category the CE falls under.

Clause 61

Notifying CEs

Notifying CEs – cl 61

Clause 61.1 (NEC3) states:

“For CEs which arise from the PM or Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption, the PM notifies the C of the CE at the time of that communication. He also instructs the C to submit quotations, unless the event arises from a fault of the C or quotations have already been submitted. The C puts the instruction or changed decision into effect.”

Notifying CEs – cl 61

- NEC4 wording is different (split between two clauses), but effect is the same.
- Clause 61.1 deals with CEs arising from actions of the PM / Supervisor. Time bar at clause 61.3 is not applicable.
- Obligation on PM to notify the CE is mandatory as is the obligation to instruct C to submit quotation.

Notifying CEs – cl 61

Therefore, if CE arises from PM / Supervisor “... *giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption...*”, at the time of the relevant communication, PM should:

- Notify C that it constitutes a CE; and
- Instruct C to submit a quotation.

If PM fails to do so, the PM is in breach and C should notify PM of the breach.

Notifying CEs – cl 61

Clause 61.3 (NEC3) states:

“The C notifies the PM of an event which has happened or which he expects to happen as a CE if

- the C believes that the event is a CE and*
- the PM has not notified the event to the C.*

If the C does not notify a CE 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 unless the event arises from the PM or the Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption.”

Notifying CEs – cl 61

- NEC4 wording is slightly different, one potentially significant change.
- Clause 61.3 deals with CEs arising from fault neutral events and from failures of the Employer / PM / Supervisor.
- Obligation on C to notify the CE is mandatory, as the time bar at clause 61.3 applies.

Notifying CEs – cl 61

Clause 61.3 (NEC3) states:

“The C notifies the PM of an event which has happened or which he expects to happen as a CE if

- the C believes that the event is a CE and*
- the PM has not notified the event to the C.*

If the C does not notify a CE 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 unless the event arises from the PM or the Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption.”

Notifying CEs – cl 61

- Notification can be prospective (before the event) or retrospective (after).
- Case law suggests obligation to notify arises when C becomes aware that event is a CE.

Notifying CEs – cl 61

Clause 61.3 (NEC3) states:

“The C notifies the PM of an event which has happened or which he expects to happen as a CE if
- the C believes that the event is a CE and
- the PM has not notified the event to the C.

If the C does not notify a CE 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 unless the event arises from the PM or the Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption.”

Notifying CEs – cl 61

- Obligation to notify arises when C holds the belief that an event is a CE.
- The obligation to notify does NOT arise automatically when the event occurs.
- This is an important distinction, although advice always is – if in doubt, notify.

Notifying CEs – cl 61

Clause 61.3 (NEC3) states:

“The C notifies the PM of an event which has happened or which he expects to happen as a CE if

- the C believes that the event is a CE and*
- the PM has not notified the event to the C.*

If the C does not notify a CE 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 unless the event arises from the PM or the Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption.”

Notifying CEs – cl 61

- If PM has not notified CE following the giving of an instruction or certificate etc, C notifies PM of CE.
- Last part of clause means that time bar does not apply to those notifications by C in circumstances when PM should have notified.
- Again, if in doubt, notify.

Notifying CEs – cl 61

Clause 61.3 (NEC3) states:

“The C notifies the PM of an event which has happened or which he expects to happen as a CE if

- the C believes that the event is a CE and*
- the PM has not notified the event to the C.*

If the C does not notify a CE 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 unless the event arises from the PM or the Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption.”

Notifying CEs – cl 61

- Clause 61.3 is a condition precedent to entitlement.
- If notice is not given, any claim for time or money will be time-barred.
- If in doubt, notify.

Notifying CEs – cl 61

Northern Ireland Housing Executive v Healthy Buildings Ltd [2013] NIQB 124

- Courts in Northern Ireland dealt with when the obligation to notify arises.
- The Court said that “...*the proviso to the time limit clause must refer to the notice of compensation event rather than notice of the instruction.*”

Notifying CEs – cl 61

Northern Ireland Housing Executive v Healthy Buildings Ltd [2013] NIQB 124

- Court said that C's obligation to notify arises on becoming aware that an event is a CE.
- Becoming aware that an event is a CE therefore starts the clock for the time bar.

Notifying CEs – cl 61

Northern Ireland Housing Executive v Healthy Buildings Ltd [2013] NIQB 124

- Court also said that if E doesn't notify a CE when issuing an instruction, it can't rely on the time bar, even if E's belief was genuine that event wasn't CE

Clause 61.3 - NEC3 v NEC4

Clause 61.3 (NEC3) states:

“...If the C does not notify a CE 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 unless”

Clause 61.3 (NEC4) states:

“ ...If the C does not notify a CE within eight weeks of becoming aware that the event has happened, the Prices, the Completion Date or a Key Date are not changed unless...”

Notifying CEs – cl 61

Clause 61.4 states that PM must respond to C's NCE within one week / an agreed longer period. Valid reasons for rejection are if CE:

- *arises from a fault of C,*
- *has not happened and is not expected to happen,*
- *has no effect upon Defined Cost, Completion or meeting a Key Date or*
- *is not one of the CEs stated in this contract*

Otherwise, PM instructs C to submit quotations.

Notifying CEs – cl 61

- Cl 61.4 also says that if PM does not notify their decision, C may notify PM of its failure.
- Failure by PM to reply to this notice is treated as
 - deemed acceptance that the event is a CE, and
 - an instruction to submit quotations.

Other Notices

Main 'other' notices relate to deemed acceptance in the CE procedure.

- Clause 62.6 – notification of PM's failure to reply to C's quotation;
- Clause 64.4 – notification of PM's failure to assess a CE within timescale.

Contrast with FIDIC

FIDIC Notices

- Clause 20.2.1 requires a Notice of Claim to be given “...*as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance...*”
- Failure to comply leads to loss of entitlement (subject to notification by Engineer within 14 days).

FIDIC Notices

- Clause 20.2.4 requires a “fully detailed Claim” to be given within either 84 days after the claiming Party became aware, or should have become aware, of the event or circumstance (or within other period agreed by parties)
- Fully detailed Claim had four elements

FIDIC Notices

Fully detailed Claim has four elements:

- Description of event or circumstance;
- Contractual / other legal basis for claim;
- All contemporary records;
- Detailed supporting particulars.

Notably, only failure to provide the second element within the 84 day period leads to loss of entitlement

FIDIC Notices

- Obligation to notify is objective in FIDIC;
- OHL v GoG – obligation to notify arises when knowledge of effect of event is known, rather than event itself;
- Court said “...*can see reason why it should be construed reasonably broadly, given its serious effect on ... otherwise good claims...*”.

Scenarios

Questions?

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