

# MDA CONSULTING



## FIRST AID FOR CONTRACTS



**Fifth Edition - May 2013**

### **NEC 3: THE WHOLE TRUTH AND NOTHING BUT THE TRUTH – PART 1**

#### **Introduction**

The purpose of this article is to identify the differences between the NEC3 and other standard form construction contracts in respect of its approach to, and application of, the Employer's risks listed in Clause 80.1

[Employer's risks] and how this approach and application differs from all other traditional construction contracts.

In the construction industry most Employers and Contractors are of the opinion that the NEC3 favours the Contractor and is drafted in such a way to benefit the Contractor. However, this is not entirely correct and Clause 80.1 provides a good example of a more balanced risk sharing between the parties.

#### **Clause 80 – Employer's Risks**

Clause 80.1 makes provision for and lists the risks that will be carried by the Employer. These are risks which would ordinarily be insurable by the Employer and include the risk of third party claims and the risk of damage or loss to the works, plant and materials. This clause makes further provision for the Employer to, prior to the signing of the contract, introduce additional Employer's risks by

Clause 80.1 of the NEC is somewhat different from other Employers Risk clauses found in other construction contracts in common use and provides a good example of a more balanced approach to risk sharing between the parties.

amending and adding such in the contract data .

There are both unusual risks listed, and an unusual allocation of such risks under, in Clause 80.1, which are not typically found in the other traditional / standard form of construction contracts, for example, the fact that the Contractor carries the risk for loss of or damage to the works even after takeover by the Employer. The fourth bullet point of Sub-Clause 80.1 states:

*“Loss of or wear or damage to the parts of the works taken over by the Employer, except loss, wear or damage occurring before the issue of the Defects Certificate*

*which is due to*

- *a Defect which existed at take over,*
- *an event occurring before take over which was not itself an Employer's risk or*
- *the activities of the Contractor on Site after take over.”*

This provision is somewhat tempered by the fact that the Employer is responsible for any damage / wear and tear caused by him after take over.

#### **Clause 81 – Contractor's Risks**

Save to state in Clause 81.1 that: *“From the starting date until the Defects Certificate has been issued, the risk which are not carried by the Employer are carried by the Contractor”,* the NEC3 makes no provision for the risks that will be carried by the Contractor.

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### **The Inter-Relation Between Clauses 60.1(14) and 80.1**

The NEC3 contains no cross-referencing or hierarchical significance between particular provisions and often gives rise to interpretation issues. Clause 60.1(14) is a good example of such an interpretation “issue” which is capable of two interpretations, one being a broad interpretation and that “*Employer’s risks*” can mean any risks of the Employer, or secondly, “*Employer’s risks*” being the Employer’s risks as per Clause 80.1.

The judge in *Anglian Water Services Ltd v Laing O’Rourke Utilities Ltd* [2010] EWHC 1529 (TCC) made the following comment which indicates that the way the NEC3 is drafted might be problematic and lead to interpretation issues: “*No doubt this approach to drafting has its adherents within the industry but...from the point of view of a lawyer, it seems to me to represent a triumph of form over substance.*” This suggests that the plain meaning of the contract should be taken into account and that users of the contract should not try and second-guess the meaning of the contract.

Given this approach the second interpretation is the correct interpretation and is most likely to succeed.

As Clause 80.1 lists the Employer’s risks which are events that may cause loss or damage, or result in third party claims. These events do not automatically constitute compensation events and it is submitted that only if these events impact the defined cost of the work and the time needed to carry it out, will they be considered as compensation events.

It is important to differentiate, and to remember, that the Employer’s risks deal with the risk of loss or damage to the works and third party claims and do not deal with delays to the works or claims for additional financial compensation. Although there is some causal connection between Clause 80.1 and Clause 60.1 [compensation events] in that if an Employer’s risk occurs the Contractor may be entitled to claim the time impact and accordingly the concomitant defined cost that he will need to remedy the damage to the works.

The strict interpretation of Clauses 60.1(14) and 80.1 will highlight that Employer’s risk is not the event itself but the loss or damage caused by the underlying event, therefore, if a delay is caused by a event, the delay itself it is not a compensation event and does not entitle the Contractor to additional time or money but the damage or loss caused (if it has an impact on the price or time required) by that particular event, will be the event giving rise to compensation.

### **Clause 82 – Repairs**

In most circumstances Clause 82 is applied incorrectly by Employers, Project Managers and Contractors and they are unaware of the way they should actually make use of this clause and how this clause operates.

Under this clause the Contractor needs to promptly replace loss of and repair damages to the works, plant and materials until the defects certificate has been issued and/or unless the project manager instructs the Contractor otherwise. Most importantly this obligation continues beyond completion of the works and only expires upon the issue of a defects certificate. In other words, the risk of loss or damage to the works remains the Contractor’s risk until the issue of the defects certificate.

### **The Misconception of the Purpose of the Risk Register**

The NEC3 includes the following tools, which do not alter the risk profile under Sub-Clause 80.1, but that deal with the management of risk:

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- i. the risk register;
- ii. early warnings; and
- iii. risk review meetings.

These are used to manage risk and not to amend the risk allocation prescribed by Clause 8.

### **Suggestions for Contracting Parties**

#### **1. Risk allocation:**

Contracting parties, in some circumstances, confuse the topic of risk allocation and risk management under the NEC 3. Additional Employer's risks may be introduced into the contract data as permitted under the final bullet point of Clause 80.1, but the actual management of the risks (when they arise) are managed under the early warning provisions of the contract. Any amendment to Clause 80.1 should be very carefully considered as it may result in undesired consequences.

#### **2. Risk Management**

The NEC 3 provides for a risk management process and risks are entered into the risk register. The risk register, as defined in Sub-Clause 11.2 (14) contains, at minimum, a description of the risk, and a description of the action to be taken to avoid or reduce the risk as discussed and agreed at the risk reduction meeting.

#### **3. Contractor's Pricing**

Contractors should ensure that contracts under the NEC3 are properly priced to ensure that they are covered in respect of their obligations under Clause 82.

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