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FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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NEC: Strikes under NEC 3 – Are They Covered by Clause 19 (Prevention) in the Contract?

Introduction

“Those unions that enjoy the right to strike have no guarantee that sacrificing their jobs and their livelihood will result in victory but they nevertheless engage in lengthy strikes, not because they are assured of winning but because they are determined to fight.”
— quoted by William Burrus (A previous union official, American Postal Workers’ Union (APWU), from the early 1970s).

Very often, if you do the math, strikers do not recover enough in the following year of employment, from the increase in wages that finally gets agreed, to cover the loss of income that they incur during the currency of the strike. It must be concluded therefore, that strikers are striking for striking sake and not for any material improvement in their take home pay.

Strikes are a regular occurrence within the South African construction mining and engineering industry, which usually result in the parties, be it the employer or contractors sustaining losses to time and/or money, not to mention the lost of income suffered by the striking workers.

Strikes under the NEC3 – Foreseeable or not foreseeable? Contractors can claim damages caused to plant and works, but what about delay and related costs?

These strikes inevitably result in extension of time claims and attempts by the contractor to recover the costs incurred as a result of such strikes.

A case in point are the Eskom Medupi and Kusile projects which have been impacted by numerous protected and unprotected strikes, adding further delays to the completion of the power units in a country that struggles to meet its electricity demand.

An amended FIDIC red book governs these projects. FIDIC’s force majeure clause attempts to deal with strikes¹, however there is always uncertainty whether the Contractor will be successful in its claim.

In this article we look at the NEC3 standard form contract to see how it deals with strikes and what the rights of the parties are under these circumstances.

The clause expressly dealing with Strikes in the NEC3 is core clause 80.1 which provides that *“Loss of or damage to the works, Plant and Materials due to...strikes, riots and civil commotion not confined to the Contractor’s employees...”* This risk is an employer’s risk and the Contractor would be entitled to claim for the loss or damages sustained.

It should be emphasized that this clause is dealing solely with “damage” to the works as opposed to pure delay to the “progress” of the works.

¹SEE CLAUSE19.1 (III) this clause is only effective if people other than the contractors own workers are striking.

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For this type of event, the Contractor should give notice under clause 61.3 of a compensation event under clause 60.1(14) being a compensation event which is an Employer's risk as stated in the Contract. In the assessment of the Compensation Event under clause 63, both the cost of remediation to the damaged work as well as the time required to carry out this work should be allowed for.

What does the Contractor do if the date for completion has been jeopardized as a result of strike action that stops the work and/or delays completion and the Contractor requires an extension of time. Can he claim an extension of time? What about the associated costs involved?

Clause 60.1, Sub clause (19) deals with prevention and states that:

“(19) An event 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*
- *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.”*

Although this clause doesn't specifically provide for strikes, it does however provide for events which stop the contractor from completing the works by the date shown on the accepted programme, with the proviso that neither party could prevent this event and an experience contractor would not have anticipated that it would have occurred.

In a sense, it deals with matters similar to those categorized as '*force majeure*', in contract forms such as FIDIC which events and circumstances are beyond the Contractor's and Employers control.

We cannot ignore the fact that this prevention clause is open for wide interpretation.

Is it possible and or reasonable for any contractor to foresee and allow adequately for an event like strikes, assuming that it would be entitled to claim from the Employer in the event of such a risk occurring?

A common argument raised by Employers' representatives (Engineers, Project Managers and Principal Agents) is that each year in approximately July a strike is inevitable (the strike season). Since Marikana, unions have adopted a negotiate and strike simultaneously strategy, whereas previously strikes only occurred when negotiations broke down. So the question must be asked, strikes are inevitable and therefore entirely foreseeable?

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So strikes during the “strike season” may be predictable and may not fall squarely and in their entirety into clause 60.1 (19) of the NEC. Strikes at other times almost certainly do however in this commentators opinion, fall full square into this clause.

In his commentary as editor of “*Keating on NEC3*” (first edition), David Thomas’, interpreted the use of the word “*stop*” suggesting that “*there must be no realistic way that the completion of the works can be achieved on time or at all*”. Thomas further states that, “*The event must also be one that an experienced contractor would not have allowed for*”. Thereafter, the Project Manager must make a judgment call as to what an experienced contractor would have considered unlikely to occur and therefore that , it would have been unreasonable to have allowed for it.

Taking the above into account, it remains important that the contractor still provides a notice in accordance with clause 63.1, as soon as possible, and in any event within eight weeks of the commencement of the strike, in the case of a claim under clause 60.1(19) and within eight weeks after damage to the work occurs where a claim under clause 60.1(14) is contemplated ,or the Contractor will lose its right to claim time and financial compensation.

In conclusion, and applying the conduct required by clause 10.1, the project manager must decide whether compensation event has occurred. The obligation is placed on all parties to act fairly and in “*a spirit of mutual trust and co-operation*”. The occurrence of strikes cannot be prevented and it might be well foreseeable, but their duration, taking into account the negotiations accompanying the strikes, is not foreseeable.

Accordingly, strikes at times other than the “strike season” should be allowed in their entirety.

For strikes occurring during the “strike season”, a fair decision would be to share the risk by awarding a lesser extension of time, so that the foreseeable duration should be borne by the contractor and the unforeseeable portion, by the Employer.

The award of Defined Costs would follow suit.

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