

MDA CONSULTING



FIRST AID FOR CONTRACTS



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NEC: CAN A COMPENSATION EVENT THAT HAS BEEN IMPLEMENTED BE REVISITED BY THE PARTIES SO THAT THE IMPACT OF THE COMPENSATION EVENT CAN BE REVERSED UNDER THE NEC 3 PROFESSIONAL SERVICES (“PSC”) CONTRACT?

Introduction

In this edition of the First Aid for Contracts we will examine whether a correctly implemented compensation event under the NEC3 Professional Services Contract (PSC) can be reversed owing to the Employer changing his mind or under any other similar circumstance.

Discussion

Clause 60.1 of the NEC 3 PSC Contract sets out 12 compensation events that are applicable to the main options of the NEC 3 PSC.

In the NEC 3 PSC, the compensation events follow a set procedure through clauses 60-63 and 65, taking the journey from compensation event occurrence, to Notification, Quotation, Assessment and finally Implementation.

This question of revisiting or reversing the compensation event is of interest to us for three reasons:

1. it reinforces the importance of correctly invoking compensation events;
2. it makes clear the absolute necessity that if the effects of the compensation event are too uncertain, assumptions must be made by the Employer on which the Consultant can base his assessment of the effect of the compensation event.; (clause 61.6)
3. The forecast upon which the compensation event is based cannot be revisited if it is subsequently found to be wrong. (clause 65.2)

Reversal of the Compensation Event under the PSC

In the scenario under review, the compensation event has gone through the entire process, and has been implemented. Sometime later, the Employer said that he had had a change of heart and now believed the reason for the compensation event was part of the consultant’s obligations under the PSC and that he wished to reverse the compensation event.

The short answer to this proposition, of reversing the compensation event (by the means of simple reversal), is no.

The implementation clause 65.2 states:

“the assessment of a compensation event is not revised if a forecast upon which it based is shown by later recorded information to be wrong”

When a compensation event is ‘implemented’ it means it is finalised and cannot be changed by the Parties, It can only be changed by the Adjudicator¹ under specific circumstances that we will discuss hereunder.

David Thomas QC, in Keating on NEC3 states in confirmation of this statement that:

“If it turns out that the Project Managers assumptions were wrong, the Project Manager is under an obligation to notify a correction. This notification is itself a compensation event and its effects. This is the only circumstance in which the Project Manager is empowered to reassess the compensation event. In all other circumstances where the Project Manager wrongly predicts the time or cost consequence of a compensation event, there is no contractual mechanism for reassessment. This is the effect of clause 65.2...and resort would be needed to dispute resolution.”²

The learned author states further that:

“The only possibility for a change to an assessment after implementation is in a case where the Project Manager has invoked clause 61.6 at the time he instructs the Contractor to submit quotations”³

and in conclusion that:

“The clear intention of the authors of the NEC3 is that this should be the only exception to the general rule state in clause 65.2; that an assessment is not to be revised if a forecast on which it is based is later shown to be wrong.”⁴

Despite the fact that the above extracts are commentary on the general NEC3 Engineering and Construction Contract, the principles remain the same, and Keating on NEC3 specifically makes provision for this when providing commentary on the PSC⁵.

Can a Compensation Event be Reversed under Option Clause W1 Dispute Resolution-Adjudication?

Disputes are notified and referred to the Adjudicator in accordance with the Adjudication table. Under the scenario under discussion, of the Employer attempting to reverse the compensation event, the Employer can only refer disputes in accordance with the last two rows of the adjudication table, as shown below:

ADJUDICATION TABLE

Dispute about	Which Party may refer it to the Adjudicator?	When may it be referred to the Adjudicator?
A quotation for a compensation event which is treated as having been accepted	The Employer	Between two and four weeks after the Employer’s notification of the dispute to the Consultant, the notification itself being made not more than four weeks after the quotation was treated as accepted
Any other matter	Either Party	Between two and four weeks after notification of the dispute to the other Party

In the situation where a quotation for a compensation event which is treated as being accepted, is referring to the default situation under clauses 62.2 and 64.4 and does not apply here.

¹Evans, S. NEC3 Compensation Events – A Practical Guide. <http://www.stevencevans.com/nec3-compensation-events-a-practical-guide/>

²Thomas, D QC. 2012. Keating on NEC3. Sweet and Maxwell: London, United Kingdom. Page 269.

³Thomas, D QC. 2012. Keating on NEC3. Sweet and Maxwell: London, United Kingdom. Page 297.

⁴Thomas, D QC. 2012. Keating on NEC3. Sweet and Maxwell: London, United Kingdom. Page 514.

⁵Thomas, D QC. 2012. Keating on NEC3. Sweet and Maxwell: London, United Kingdom. Page 514 and 536.

A compensation event comes about as a result of an action or inaction of the Employer. Only the Consultant (in accordance with the first two rows of the adjudication table) can declare a dispute on these causes of dispute.

Conclusion

The conclusion must be that a compensation event cannot be changed or reversed once it has been implemented.

Even where the the Employer, in having forecast the effect of the compensation event, states assumptions about the event in his instruction to the Consultant on which the Consultant is to base its quotation, when those assumptions prove to be wrong, another compensation event is instituted by the Employer in order to correct the error. (Clause 61.6 read with Clause 60.1(7)).

Only the Contractor can take an implemented compensation event to Adjudication and the Adjudicator then exercises his powers under clause W1.3 (5) to open up and review any action or inaction of the Employer.

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