

MDA CONSULTING



FIRST AID FOR CONTRACTS



Ninth Edition – September 2017

THE NEW ENGINEERING CONTRACT – FOURTH EDITION (NEC4)

+ Author: Barry Herholdt

THE NEW ENGINEERING CONTRACT FOURTH EDITION (NEC4): CHANGES OF NOTE: PAYMENT CLAUSE PROPOSED UNDER THE NEW SUITE

“Cash flow is the life blood of the building industry”. So said Lord Denning in a series of Court of Appeal decisions during the 1970’s and the same observation is true to this day.

On 22 June 2017, 12 years after the NEC3 was first published, the NEC4 was released at a launch conference in London. The NEC4 contract suite, contains enhancements of the NEC3 aimed at aligning the contract with business best practice and providing better methods and solutions to satisfy industry demands.

One of the more significant changes (or possibly risks, that contractors should be aware of), is the question of the procedure to be followed when applying for payment.

In this article, we review and comment on the procedure to be followed when applying for payment assessments under NEC clause 50.1 and how the NEC4 differs from the NEC 3rd Edition .

Clause 50.4 of the NEC3, provides that *“In assessing the amount due, the Project Manager considers any application for payment the Contractor has submitted on or before the assessment date.*

The Project Manager gives the Contractor the details of how the amount due has been assessed.”

In the context of clause 50.4 stated above, and the words “any application for payment”, there was never an express requirement under the NEC3 for the contractor to submit a formal application for payment. Although, we noted over the years that some Contractors did so nevertheless, either as a matter of habit or because they prefer to provide better substantiation as to the amount due. Under the NEC3, the onus is on the Project Manager to make the assessment of the amount due, and then to give the Contractor details of how the amount due has been assessed.

Therefore, a formal application for payment does not add any status under the NEC3, because it is not a contract requirement. The Project Manager considers “any application” for payment submitted “on or before the assessment date”. If there is no application, then the Project Manager carries out his own assessment, based on any documentation available as received from the Contractor, or of the activities or work that has been carried out, depending on the contract option used.

What is different with the NEC4?

The NEC4 requires whenever payment assessments are to be made it is now a requirement for the Contractor to submit an application for payment by the assessment date.

The NEC4 clause 50.2 provides that “The Contractor submits an application for payment to the Project Manager before each assessment date setting out the amount the Contractor considers is due at the assessment date. The Contractor’s application for payment includes details of how the amount has been assessed and is in the form stated in the Scope. In assessing the amount due, the Project Manager considers an application for payment submitted by the Contractor before the assessment date.”

NEC4 clause 50.4 then further states:

“If the Contractor does not submit an application for payment before the assessment date, the amount due at the assessment date is the lesser of

- *the amount the Project Manager assesses as due at the assessment date, assessed as though the Contractor had submitted an application before the assessment date, and*
- *the amount due at the previous assessment date.”*

If no formal application is made by the Contractor which would set out the amount the Contractor considers is due, the Project Manager will nevertheless proceed to carry out its own assessment, but can then provide a less favourable assessment of an amount due, which will place the Contractor in a difficult cash flow situation.

In circumstances where payment is due to the Employer (he is now called the Client under the NEC4), the Project Manager proceeds and makes an assessment, followed by certification for payment to the Client.

Whether the NEC4 additional requirement will work or not, we are of the view that the Contractors that currently submit formal applications under the NEC3, despite it not being a requirement, will not find the changed requirement burdensome. It may be a challenge at the outset of the NEC4, and something new to get used to for those not currently applying for payment formally. However, we do not see that it will be received with too much objection.

We do predict that some first-time users of the NEC4, where Contractors who are not familiar with the new NEC4 contract provisions and not properly trained on it, might be caught off guard initially.

Until then, we look forward to seeing how the NEC4 is received in the industry, and we will discuss and bring the various changes accompanying the NEC4, to your attention over the months to come in future First Aid for Contracts articles.