

# MDA PRESENTS



## FIRST AID FOR CONTRACTS



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### PROPOSED INSTRUCTIONS UNDER THE NEC3 AND HOW IT DIFFERS FROM THE NEW NEC4

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*“Go ahead and proceed with the additional work as quoted. We will get the quote and verbal instruction formally approved by the Employer in due course and issue it to you.”*

*“Given the already tight time constraints on this project, we cannot risk further delay...please proceed”.*

**Sounds familiar? I think we have all been there, and we all know that these circumstances occur frequently on sites that we are involved on.**

#### **NEC3**

One of the most frequent causes of confusion both from the Contractor, the Project Manager and the

Employers perspectives is clause 61.2 of the NEC 3. This clause deals with a request for a quotation for a proposed instruction or a proposed change. The clause states:

*“The Project Manager may instruct the Contractor to submit quotations for a proposed instruction or a proposed changed decision. The Contractor does not put a proposed instruction or a proposed changed decision into effect.”*

This clause has been revised (for the better we would suggest) under the recently published NEC4, which we will deal with later in this article.

Emphasis is placed (in the above quoted clause 61.2) on the last sentence and further on the word “proposed”. This means that the contractor is not obliged to proceed with any further action once he has submitted his quotation for the proposed instruction or changed decision.

It is also important to understand that an instruction to submit a quotation under sub-clause 61.2 is different from an instruction to submit a quotation under *inter alia* sub-clause 61.1, when a compensation event arises under the provisions of the contract and has been notified as such by one of the Parties.

The intention of sub-clause 61.2 is that the Project Manager wants to establish the cost implication and perhaps the programme implications of implementing the proposed change.

These are high risk circumstances for both the Contractor and the Project Manager and it should not be taken lightly when the Contractor is preparing its assessment of the cost and time implications of a proposed change, and the contractor must endeavour to prepare and submit a proper commercial quotation<sup>1</sup>. Should the proposed instruction later change into an actual contractual instruction from the Project Manager, you do not want to risk proceeding on an under-priced quote. This would place the contractor at a financial risk. Alternatively, if the quotation is over priced a decision may be made not to proceed based on unrealistic inaccurate information.

A scenario to be considered further is, what is the contractor to do if the Project Manager has requested a quote under sub-clause 61.2, which was submitted, but after a protracted period of time, the contractor receives Project Managers instruction to proceed based on the previous quote submitted. The NEC3 does not deal with this situation.

There is a real likelihood that prices that the quotation was based on or perhaps sub contract arrangements could have fallen away (based on the usual requirement that these prices have to be accepted during a limited period of validity). The quotation that the contractor supplied previously would no longer be viable or achievable at the prices quoted.

Under these circumstances, the contractor is entitled to bring this to the attention of the Project Manager, under clause 60.1(6) notifying a second Compensation Event to cover the increase in cost that will now be incurred in carrying out the original scope of work of the proposed instruction or a proposed changed decision that will be incurred as a result of the delay in giving the go ahead to proceed.

This is an unacceptable situation both for the Project Manager and Employer who may have difficulty making the decision to proceed in the time for reply (normally two weeks) as well as for the contractor who now has more administrative work to do.

## NEC4

This observer's conclusion, as well as one of the stated objectives of the NEC drafting team, was to incorporate best industry practice into the NEC4. How then, has this clause been changed in the NEC4, recognising the difficulties that the industry (both here in RSA and elsewhere where the NEC is in use?

Proposed changes are now dealt with in a discrete clause 65, which states the following:

*"65.1 The Project Manager may instruct the Contractor to submit a quotation for a proposed instruction. The Project Manager states in the instruction the date by which the proposed instruction may be given. The Contractor does not put a proposed instruction into effect."*

So, the first obvious improvement in this clause in the NEC4, is that the Project Manager is obliged to state the date when the proposed instruction may be given where in the NEC 3 there is no such requirement.

Clause 65 goes further and states:

*"65.2 The Contractor submits quotations for a proposed instruction within three weeks of being instructed to do so by the Project Manager. The quotation is assessed as a compensation event. The Project Manager replies to the Contractor's quotation by the date when the proposed instruction may be given. The reply is*

- an instruction to submit a revised quotation including reasons for doing so,*
- the issue of the instruction together with a notification of the instruction as a compensation event and acceptance of the quotation or*
- a notification that the quotation is not accepted.*

*If the Project Manager does not reply to the quotation within the time allowed, the quotation is not accepted.*

*65.3 If the quotation is not accepted, the Project Manager may issue the instruction, notify the instruction as a compensation event and instruct the Contractor to submit a quotation."*

It is clear from the NEC4, that the drafters of the contract sought to minimise the confusion and potential time wasting that existed under the NEC3. Under the NEC4, reciprocal obligations are placed on the parties to carry out their obligations within stipulated times and provides three options for a reply by the Project Manager. In failing to reply to a quote within that period of time, has the effect that the quote is not accepted. Therefore, the contractor's quotation automatically becomes null and void and the Project Manager must then instruct the contractor to "re-submit" its quotation upon notifying an instruction as a compensation event.

The wasted cost in providing what in effect might be a budget setting exercise is also addressed by clause 60.1 (20) which entitles the contractor to be paid for the cost of preparing the assessment of the effect of the proposed change.

Comparing the NEC3 and NEC4, it can be concluded that the NEC3 standard form contract has been enhanced by the changes discussed (as well as others that will be dealt with in future issues of the FAFC) now contained in the NEC4.

With the lack of availability of new work in the current market place, it may be some time before the construction in South Africa adopts the NEC4. Once this new form has become the standard (and this should be endorsed by the CIDB), this will have benefit to the role players in the industry.

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<sup>1</sup> See Keating on NEC3 1st edition, authored by David Thomas QC at paragraph 7-073, pp 257