

# MDA PRESENTS



## FIRST AID FOR CONTRACTS



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### **NEC UNDER WHAT CIRCUMSTANCES CAN THE PM RELY ON BULLET THREE OF CLAUSE 61.4 THAT THE EVENT WILL NOT AFFECT THE PRICES, COMPLETION OR MEETING A KEY DATE?**

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Clause 61.4 of the NEC3, reads as follows:

*“If the Project Manager decides that an event notified by the Contractor*

- *arises from a fault of the Contractor*
- *has not happened and is not expected to happen,*
- *has no effect upon Defined Cost, Completion or meeting a Key Date or*
- *is not one of the compensation events stated in this contract*

*he notifies the Contractor of his decision that the Prices, the Completion Date and the Key Dates are not to be changed.*

*If the Project Manager decides otherwise, he notifies the Contractor accordingly and instructs him to submit quotations”.*

The remedy available under the NEC3 to change Prices, Completion Date or meeting a Key Date is through compensation events. Compensation events are events which often arise through no fault of the Contractor and which may have an effect on the cost of the work, or the time for completion. This may affect the prices, key dates or the completion date and could result in the Contractor becoming entitled to either an increase in time, or money, or both.

Clause 60.1 details 19 events including, inter alia, delayed access, instructions to carry out additional work, adverse weather, ground conditions, etc. This is not a closed list and may be amended by deletions or additions in the additional conditions of contract (option Z).

Events which are not attributable to any fault on the part of the Contractor will, in most instances, entitle the Contractor to be compensated for any change the event has on the Prices and the Completion Date or a Key Date under the contract.

The NEC4 includes as one of the compensation events 60.1(14) - a '*Client liability*' (this is called an '*Employer's risk*' in NEC3). The *Client* liabilities are listed in clause 80.1 and can similarly be amended in the Contract Data. If a *Client* liability event occurs, it is a compensation event and so the *Contractor* is, save for the instances mentioned below, compensated for the time and cost impact on the works.

NEC4 also includes 60.1(21) "Additional compensation events stated in Contract Data part one" to enable the *Client* to retain specific risks.

This list of events is critical to risk allocation. If an event is a compensation event, the Contractor is compensated for the effect of the event on the time and cost or competing the works (unless the event was due to a 'fault' of the Contractor). If an event is not a compensation event the Contractor is deemed to have priced for it.

Hence the Project Manager may find that an event, due to it being a Contractor's risk, will have no effect on the Defined Cost, Completion or the meeting of a key date. By way of example if the contractor's specialised equipment breaks down, such delay may not be claimed as a compensation event and accordingly will not have any effect on the defined cost, completion or meeting a key date. Similarly if such an event occurs concurrently with another delay

that is a compensation event but the equipment breakdown is the dominant event and its impact is more adverse on the project this would result in a finding from the Project Manager that there is no effect on the defined cost, completion or meeting a key date.

In addition, an event is assessed with regard to its impact on the programme. The Contractor will need to show how the delay impacted its programme. The float in the programme would need to be fully depleted before there can be an extension of time claim. Hence the Contractor must clearly demonstrate the effect of the event on the programme else this is another situation where the Project Manager will find that the event, will have no effect on the defined cost, completion or meeting a key date

The NEC4 also includes a fifth bullet point under clause 61.4 as follows:

*"has not been notified within the timescales set out in the conditions of contract"*

This is in reference to the time bar provisions included in clause 61.3.

Clause 61.3 stipulates the procedure by which the Project Manager and the Contractor must notify the other of a compensation event. Clause 61.3 reads as follows:

*"The Contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if:*

- *The Contractor believes that the event is a compensation event; and*
- *The Project Manager has not notified the event to the Contractor.*

*If the Contractor does not notify such an event within eight weeks of becoming aware of the event, he is not entitled to any change in the Prices, Completion Date or Key Date, unless the Project Manager should have notified the event to the Contractor but did not”.*

The consequence of a failure to comply with Clause 61.3 is that the Contractor loses his right to claim a change in the Prices or the Completion Date. By virtue of this clause, the Contractor’s entitlement will be ‘time barred’. Hence even where the event is a compensation event, a failure to timeously notify, will result in the Project Manager relying on the third bullet point of clause 61.4 (and/or the fifth bullet of NEC 4).

A key factor in notifying a compensation event is the event is deemed to arise only when the Contractor believes an event to be a compensation event. However, the eight week period commences from such awareness of the event, so timing of notice of a compensation event is key to the Contractor being compensated for the effect of such event.

It is however to be noted that the so called ‘time bar’ will not apply to those events which the Project Manager should have notified to the Contractor but did not. This exception was elucidated in the case of *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited*<sup>1</sup>. Lord Justice Girvan, found that by

the Employer imposing a more onerous sampling obligation on the Contractor, the Employer had changed the Scope which was a compensation event pursuant to clause 60.1(1) of the NEC3 PSC. The court held that the eight week time period to notify the compensation event did not apply as the Employer should have given notice of the instruction but did not. Hence although the Contractor’s notice was issued after the eight week period, in fact some four months later, it was held not to be time-barred.

Aside from the above, sub-clause 61.3 serves as a condition precedent and provides a complete defence to an Employer of any claim for time or money by the Contractor not submitted within the required eight week time period.

The English Courts have taken a strict line in interpreting such condition precedent clauses. In the case of *Multiplex Construction v Honeywell Control Systems*<sup>2</sup>, Mr Justice Jackson held as follows:

*“Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent”.*

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1 [2014] NICA 27

2 [2007] EWHC 447 (TCC)

Hence a Contractor must always adopt an extremely pro-active approach in administering the contract and where there is a possibility that an event may be a compensation event, it should be notified as soon as possible. This will prevent future possible disputes as to notification and the timing thereof.

Should a Contractor notify late or fail to notify at all and the Employer fails to take the point that clause 61.3 operates as a time bar, this will allow a Contractor to argue that the Employer waived its entitlement to rely on strict compliance of the notification clause. Bar such a stroke a luck, the time bar serves to extinguish any possible claim the Contractor would have, but for his failure to timeously notify.

Contractors must therefore familiarise themselves with the compensation events available under the contract and practice efficient contract administration, to ensure that compensation events are properly identified and thereafter properly notified to the Employer otherwise the Contractor will find itself carrying expenses it did not budget for, ultimately leading to erosion / depletion of its profit margin. Employers must likewise ensure full compliance with the NEC3 compensation event procedure, otherwise the Employer will face a similar fate as that of Northern Ireland Housing Executive.