

# MDA PRESENTS



## FIRST AID FOR CONTRACTS



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### AMBIGUITY OR INCONSISTENCY UNDER THE NEC3

+ Author: Odette Potgieter

**We have recently been asked by two clients to provide opinions on ambiguity and inconsistency between the Works (or Service) Information and the Pricing Data under NEC3 contracts.**

For purposes of this article, the relevant facts are:

Our client entered a NEC3 Term Service Contract (Option A) with an Employer for the provision of certain services. The Price List of the agreement stated that all rates in the Price List excludes accommodation and transport of labour and Value Added Tax whilst the Service Information stated that the contractor must make provision for the supply of transport of the labour force.

Whilst the contractor was rendering the service, it was required to provide transport for the labour force to and from site.

In considering the effect of the ambiguity and inconsistency and the contractor's rights and/or entitlement (if any) to additional payment under the NEC3, we have a brief look the other standard form contracts.

#### Ambiguity and inconsistency under other standard form contracts

Clause 2.4 of the General Conditions of Contract for construction works (GCC), third edition, 2015, deals with ambiguity or discrepancy between contractual documents and provides for an obligation on the Employer's Agent to provide the necessary clarification or instruction. It states:

*"If compliance with any such instruction shall result in delay to Practical Completion and/or proven additional cost, the Contractor shall be entitled to make a claim in accordance with Clause 10.1."*

The FIDIC Conditions of Contract for Construction, Second Edition, 2017 (Red Book) similarly provides for the Engineer to issue an instruction. Clause 1.5 states:

*“If a Party finds an ambiguity or discrepancy in the documents, that Party shall promptly give a Notice to the Engineer, describing the ambiguity or discrepancy. After receiving such Notice, or if the Engineer finds an ambiguity or discrepancy in the documents, the Engineer shall issue the necessary clarification or instruction.”*

Clause 3.5 provides for the Engineer issuing instructions in accordance with the contract to the Contractor which may be necessary for the execution of the Works. Should an instruction constitute a Variation, clause 13.3.1 shall apply. Clause 13.3.1 allows for the contractor to claim an adjustment to the contract price.

#### The NEC3 Term Service Contract

The NEC3, and in this instance particularly the NEC3 Terms Service Contract, clause 17.1, states that:

*“The Service Manager or the Contractor notifies the other as soon as either becomes aware of an ambiguity or inconsistency in or between the documents which are part of this contract. The Service Manager gives an instruction resolving the ambiguity or inconsistency.”*

The mechanism under which a contractor can claim additional payment is under Core clause 6 – Compensation Events.

The NEC3 Guidance Notes for the Term Service Contract includes commentary on clause 17.1 which states:

*“This clause is intended to ensure that action is taken as soon as possible to deal with ambiguities and inconsistencies noticed in the contract documents. There is no stated precedence of documents. The Service Manager has the responsibility of resolving the ambiguity or inconsistency in the documents. An instruction to change the Service Information to resolve an ambiguity or inconsistency is a compensation event provided it is covered by subclause 60.1(1).”*

Clause 60.1(1) provides for the Service Manager giving an instruction changing the Service Information (and not the Price List).

In assessing a compensation event arising from an ambiguity and inconsistency and resulting in an instruction from the Service Manager changing the Service Information, it is assessed as if the Prices were for the interpretation most favourable to the Party which did not provide the Service Information<sup>1</sup>.

As can be seen from the above, all clauses under the NEC3 dealing with an ambiguity and inconsistency alluded to it being resolved by an instruction changing the Service Information – only in this instance will a contractor be entitled to claim additional payment.

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<sup>1</sup> See clause 63.9

However, considering the above facts of our matter, the Service Information did not need to be changed but the Price List.

Clause 54.1 of the NEC3 expressly states that “*Information in the Price List is not Service Information.*” The Guidance Notes’ commentary in respect of this clause states that “*the Price List is only a payment document. It cannot be used to determine what the Contractor is to do or what service he is to provide*”. This is correct, particularly in circumstances where the Price List does not include an item which is described in the Service (Works) Information – in such instance the Contractor will have no contractual entitlement to claim additional time and/or money. However, under the set of facts stated above, the circumstances are different.

The Price List contains an express provision which is inconsistent with that of the Service Information – even though the recommended way of dealing with this would have been for the contractor/s to raise this at tender stage and requested clarification, this is unfortunately not the case. We were faced with advising client, after it commenced incurring costs by providing transport for which it has not price, on a solution. With a clear ambiguity and inconsistency between the two documents forming part of the contract and with no contractual recourse/entitlement to the Contractor we considered alternative options, one of them being a rectification of the Contract. To do this, one will have to approach the court and demonstrate, *inter alia*:

- The written document does not reflect the

common intention of the parties correctly;

- That there is an intention by both parties to reduce the common intention to writing;
- That there is a mistake in drafting of the document, whether a bona fide or intentional error.

The success of this application cannot be guaranteed.

Another alternative is for the Contractor and the Employer to agree to a formal amendment to the contract which will allow for a price for transport to be included as part of the Price List.

The facts/circumstances leading to this opinion is unique. In most instances, which was the case under the second opinion we had to provide, the Contractor simply price the Price List without considering the Service/Works Information. It is important to pay attention to the Service/Works Information when pricing the Price List to ensure that adequate provision is made for all required services and works. This is because a contractor’s overriding obligation is to Provide the Works (or Service) in accordance with the Works Information (or in this instance the Service Information) – it is under no obligation to do things if it is not in the Works/Service Information.