

Briefing: Prevention under NEC3 contracts

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This is the third of a series of briefings prepared by the NEC panel to help clients, consultants and contractors in their understanding of the NEC approach when using NEC contracts. This briefing explains how NEC deals with a significant, unexpected event which prevents the work being completed on time.

1. INTRODUCTION

The NEC3 suite of contracts, unlike the first and second editions, includes provisions for dealing with what are commonly called *force majeure* situations. These are significant, unexpected events causing major problems to a project that prevent it from being completed on time, or at all.

An example might be when a bolt of lightning sets fire to a building shortly before completion. Although the repair work may be covered by insurance, the consequences of delayed completion are not. Without relief under the contract, the contractor could have to pay damages for late completion of the works.

Most engineering and construction contracts have provision for granting extensions of time in a 'prevention' situation but earlier versions of NEC contracts did not. The NEC panel decided to include such provisions within NEC3.

When researching how other contracts dealt with *force majeure*, the panel found that most were drafted in a way that gave rise to substantial uncertainty in their operation. A fresh approach was needed.

The NEC panel decided to make provision for two cases. The first is when the event prevents the work being completed. The second case is when the event prevents the work being completed on time: this is a strict test, it is not simply a matter of delay. In both cases, the event has to be defined in a way that excludes the normal risks one would expect on a project. In addition, it was considered essential that the project manager controls the situation and makes decisions on how to deal with the event.

Three core clauses were drafted to set out how such a situation should be managed. The first, clause 19 in the NEC3 Engineering and Construction Contract, gives the project manager the authority to give instructions when a prevention event occurs. The second, clause 60.1(19), provides a

corresponding compensation event and the third, clause 91.7, a corresponding reason for termination.

2. PREVENTION EVENT DEFINED BY THREE TESTS

Clause 19 defines the prevention event by three tests. The event must pass all three to meet the provisions of this clause.

The first test is that the event must either be one which stops the contractor from completing work absolutely, or be one which stops the contractor from completing the work by the completion date. To stop the contractor completing the work at all, something must have happened to the site which means the project cannot under any circumstances be completed as specified in the contract. An example might be a contract for fitting out a building that has been severely damaged by fire. The test for completing work on time is a fairly strict one; it is not sufficient to show that the contractor has been delayed and that it will be expensive or difficult to make up the delay. If additional resources are needed to overcome the delay, they must be mobilised. To meet this test there must be no reasonable way of completing the works on time.

The second test is that the event must be one which neither party could prevent. Acts or inaction of the employer or the project manager acting on the employer's behalf do not count; these have to be dealt with under other provisions of the contract. Again, this is a fairly strict test: there is nothing that could reasonably have been done to prevent the event.

The third test is that it would have been unreasonable for an experienced contractor to have allowed for the event. The wording provides a similar foresee-ability test to that used for physical conditions in compensation event (12) in clause 60.1. This makes it clear that the matter is a risk issue.

An example of a genuine prevention event might be when a ship carrying a transformer to a power station site sinks and a replacement cannot be obtained in time to meet the completion date. The risk of the loss of the transformer is very small, and it would have been unrealistic to expect the contractor to take, or the employer to pay for, the necessary mitigation measures for the risk. It would have been unreasonable to expect the contractor to have built and separately shipped a spare transformer.

3. PROJECT MANAGER'S OPTIONS

If a genuine prevention event has occurred, then the project manager gives one of three instructions.

- (a) Abandon the work because the project is no longer viable, and follow the termination procedures.
- (b) Change the work to overcome the problem, which is a change to the works information.
- (c) Allow progress to be delayed until the event is overcome, and to accept a delay to completion.

Whatever action the project manager takes, the event is a compensation event. Any change to the works information (under the second option) would be a further compensation event.

NEC contracts are unusual in that they provide for both time and cost effects to be dealt with, whereas other contracts simply protect the contractor against delay damages. Following the standard NEC approach for assessing compensation events, the project manager decides on the balance between time and cost. In many cases the cost may be covered by insurance, in which case it would be excluded from assessment of the compensation event. Compensation only arises if the event is not covered by one of the other compensation events.

4. SUBCONTRACTOR INSOLVENCY EXCLUDED

It is worth noting that an example of an event which fails the clause 19 test for prevention is the insolvency of a key subcontractor, for the following reasons.

- (a) A subcontractor's insolvency is unlikely to prevent completion absolutely and, only in extreme cases such as final late finishing trades, could it cause a delay which could not be overcome.

- (b) Appointing a subcontractor which did not have solvency problems (or not subcontracting it at all) could have prevented the event.
- (c) There is clearly always a risk of subcontractor insolvency and an experienced contractor must allow for it and include the risk of insolvency stopping work in the risk register. Certainly one would expect to see management techniques (risk-reduction actions) operated to avoid the likelihood of a delay to a project.
- (d) According to clause 26.1, if a contractor subcontracts work, it is responsible for providing the works as if it had not subcontracted. It is difficult to see how a contractor could ever make a case for compensation for the insolvency of a subcontractor in light of this clause.

5. CONCLUSION

Clause 19 of the NEC3 Engineering and Construction Contract provides the project manager with increased powers to deal with an unexpected event which prevents one of the employers' key objectives, namely completion on time, being met.

The contractor is entitled to compensation for the event, together with compensation for the time and cost effect of complying with instructions of the project manager.

The tests for meeting clause 19, and recovering compensation, are quite strict and are likely to rule out all but the most significant events.

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