

July 2021

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No.7: Instructions from Project Managers and associated delegation of powers

Introduction

Training and development support is a key part of CECA's core offer for its membership and working in conjunction with GMH Planning it has delivered a programme of training events around the NEC Form of Contract across several CECA UK regions.

In addition to this training a series of monthly NEC Contract Bulletins are being produced for both Contractors and Subcontractors to improve practical awareness on key topics within the NEC. The coverage, whilst not exhaustive, is intended as a general overview on some of the contractual principles to increase a wider understanding in support of more sustainable outcomes.

For the purposes of these bulletins a contractual relationship between a "Client" and "Contractor" is assumed. The same rules/principles also apply if the contractual relationship is between a "Contractor" and a "Subcontractor" and so the term "Contractor" will be used to describe both parties.

These bulletins are based on the latest NEC4 family of contracts, but the same principles and rules would apply where parties are engaged under an NEC3 form of contract.

Coming next month:

Bulletin Nr8: Programmes submitted with compensation event quotations

Please respond to Leone Donnelly should you require any further information on the CECA NEC4 Bulletins via e-mail: leonedonnelly@cecasouth.co.uk.

For further advice or guidance on the NEC details please visit www.gmhplanning.co.uk or contact GMH Planning Ltd by e-mail glenn@gmhplanning.co.uk.

NEC4 Contract Bulletin Nr7 - Instructions from Project Managers and associated delegation of powers

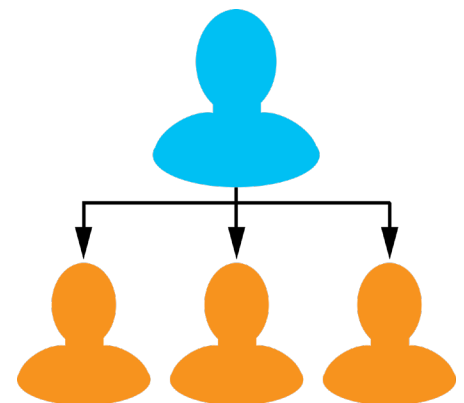
The Project Manager under the NEC Engineering and Construction Contract is the person administering the contract on behalf of the Client. They are required to issue notifications/instructions to the Contractor and accept submissions from the Contractor. The Project Manager is also the only person who is contractually able to issue an instruction to the Contractor that is a change to the original Scope. The name of the Project Manager will be stated in contract data. Under the Engineering and Construction Subcontract, there will be an equivalent person named from the Contractor team to administer that role with the Subcontractor.

What instructions can the Project Manager give? The Project Manager can instruct the Contractor for a multitude of different reasons within the contract. The only contractual reason that the Contractor can refuse an instruction is for something that is illegal or impossible. Any instructions that change the Scope will be a compensation event, unless it is an instruction in order to accept a defect, or an instruction to change the Scope provided by the Contractor (1) made at the Contractor's request or (2) in order to comply with the Scope provided by the Client.

Are all instructions from the Project Manager compensation events? No – there are several instructions that the Project Manager could give that would never give rise to a compensation event, e.g:

- Clause 15.2 – an instruction to attend an early warning meeting
- Clause 24.2 – an instruction to remove a Contractor's person from site
- Clause 32.2 – an instruction to submit a revised programme
- Clause 40.3 – an instruction to correct a failure to comply with their quality plan
- Clause 60.1(1) – an instruction to change Scope provided by the Contractor that does not comply with the original Client Scope

Can anyone else issue an instruction to change the Scope? No, this can only be done by the named Project Manager, unless they have formally delegated any of their powers under the contract. Under clause 14.2 the Project Manager may notify (in writing) to the Contractor that they are delegating any of their actions, and that named person would then have those specific power(s) that have been delegated. The delegation may well be only for specific duties of the Project Manager rather than duties, and may be for a specific period of time only (for example to cover holiday periods). For any duties that have been specifically delegated, either the Project Manager or the named delegate fulfil that duty under the contract.



Are verbal instructions a valid form of communication? **NO THEY ARE NOT.** Any instruction from the Project Manager (or delegated person) must be in a form that can be read, copied and recorded (clause 13.1) and separate from other forms of communication (clause 13.7). In this age of modern technology, there is no excuse not to be able to give such an instruction either via a cloud-based system if being used or even as a minimum via an email. If a Contractor receives a verbal instruction that is a change to the Scope, they should not proceed with that instruction until confirmed in writing by the Project Manager. A Contractor could notify an early warning if they think the Project Manager wants to change the Scope that has not yet been instructed, which should then bring an action to confirm if indeed that change in Scope is required.



Some people seem to consider that a verbal instruction has to be followed to comply with clause 10.2 obligation to “act in a spirit of mutual trust and cooperation”. However, that is not the case and ignores clause 10.1 which states that they should “act in accordance with the contract”, and clause 13.1 that states “all communications have to be in a form that can be read, copied and recorded”. The requirement of acting in a “spirit of mutual trust and cooperation” should not be leveraged simply when people want to stop following the rules of an NEC contract. Any instruction should be in writing so that it is clear what has been instructed and when. Clause 20.1 requires the Contractor to “Provide the Works in accordance with the Scope” so until an instruction is given that changes the Scope, the Contractor should be working to the original Scope that was tendered for.

Are there any exceptions as to when a verbal instruction should be followed? Only if it is to do with health and safety. No one should refuse an instruction to act safely however that is given. That would be the only contractual exception.

Some people say: “all well and good, but in the real world...” Make this your real world! Do not just accept “but that is just how we do things on our job, where we trust each other”. No Project Manager should have an issue with a Contractor who simply requires the Project Manager to follow the rules that the Client chose and asked the Contractor to sign up to in the first place. A refusal to follow a verbal instruction should not be questioning anyone’s morals or integrity, but a desire to mutually make sure that the Contractor is doing exactly what the Client wants them to with no room for ambiguity or misconception. Being “contractual” is just part of the process in complying with the “Contract”.

Does a Contractor have to follow an instruction for additional works not in their Scope if the quotation has not yet been agreed? Yes, if this additional works has been instructed and notified as a compensation event under clause 61.1 then the Contractor is obliged to proceed with that instruction in parallel with following the compensation event quotation process. Clause 63.9 requires the Contractor to “react competently and promptly to the event”. If the Contractor does not proceed until the quotation is agreed, they may well now be delaying the overall planned Completion beyond the Completion Date which would be their liability for delay damages if that occurred. Whilst a Contractor may consider they are “working at risk” by not getting the quote agreed first, they are really only working at the risk that the Project Manager may assess the quotation lower than what the Contractor prices. If the Contractor is adamant the implemented compensation event has been assessed incorrectly then there is the dispute process within the contract to follow. Under NEC4 the first step would be to allow the named senior representatives to see if they can reach a resolution, otherwise the next step would be adjudication.

Summary – Ensure that no one follows a verbal instruction to change the Scope until it is confirmed in writing. The instruction should either be from the named person in Contract Data 1 or someone who has had delegated powers communicated to the Contractor in writing.