

April 2022

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No. 16 – Quality Management and Managing Defects

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 Nr 17 – Should non-implemented compensation events be shown on a programme issued for acceptance?

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 Nr 16 – Quality Management and Managing Defects

NEC4 renamed section 4 of the contract “Quality Management” to give a clearer indication of the content of this part of the contract. The whole section has also been renumbered with section 40 now covering the requirements for a quality management plan, which was not a specific requirement in NEC3. This has been introduced at the beginning of section 4, so all the previous sections whilst broadly the same in name and content have been renumbered accordingly. It is mostly the Supervisor role that is involved in this section on the Client’s behalf, with only a couple of elements that the Project Manager has authority for any involvement.

Section 40 Quality Management System: There is now a formal requirement for the Contractor to comply with a quality management system. This would have generally been done anyway by most Contractors as part of their own internal governance, but the contract is now emphasising and obligating the requirement to do so. The Scope should state any specific requirements that the Client requires of such a quality management system. The Contractor should then take any specific requirements into account at tender stage to make sure any existing system they have meets the specific requirements that the Client has indicated. Both a quality policy statement and a quality plan must be issued for acceptance. The time within which they need to be submitted after the Contract Date (the date the contract comes into existence) will be stated in contract data 1. The only reason not to accept the policy statement or quality plan is that it would not allow the Contractor to provide the works in accordance with the Scope.

Any changes to the quality plan during the life of the project would similarly need to be accepted by the Project Manager. If at any point the Project Manager considers the Contractor is failing to follow their own quality plan, they may instruct the Contractor to correct the failure. For the avoidance of doubt, any such instruction would NOT be a compensation event.

Section 41 Tests and Inspections: Previously section 40 in NEC3, this section details the rules and processes to follow when tests and inspections are required. Obviously the tests and inspections required will be project specific and will be identified within the Scope. This section deals more with the general rules that any tests and inspections should follow, either as stated in Scope or required by any applicable law. The Contractor and Supervisor need to advise each other of tests and inspections before they are carried out and then share with each other afterwards any relevant results. The Supervisor needs to ensure that any tests or inspections do not unnecessarily delay the works otherwise that could lead to a claim of a compensation event (under 60.1.10) by the Contractor.



Section 42 Tests and Inspections before delivery: If the Scope states that any specific Plant and Materials have to be tested or inspected before delivery, they must not be brought into the Working Areas until the supervisor has notified to the Contractor that they have passed that test or inspection.

Section 43 Searching for and notifying Defects: Clause 43.1 is the only place in the contract that gives the Supervisor the power to issue an instruction to the Contractor. If the Supervisor has reason to believe that a defect may exist (that has since been covered up), the Supervisor can instruct the removal or uncovering of the works, to be able to see if a defect does exist or not. This will be at the Contractor’s cost if a defect is found. If no defect was found, the cost of exposing the works (and reinstating) will be a compensation event UNLESS the Supervisor was not given the chance to inspect before it was covered up in the first place. This section also obligates the Contractor and the Supervisor to notify to each other as soon as they become aware of a defect.

Section 44 Correcting Defects: Clause 44.1 clarifies that a Contractor should correct a defect whether or not the Supervisor has notified it. Any such defect should be corrected within the defect correction period which is identified in contract data part 1. There may be different defect correction periods for different types of defects. The defect correction period commences at Completion for those identified before Completion and commences when notified for Defects notified after Completion.

Section 45 Accepting Defects: Either party could propose to the other that the Scope is changed so that a defect is not corrected. This is much more likely to be suggested by the Contractor, who will have done something or installed something that in some way does not comply with the Scope. The Contractor can propose a saving in order to not to have to correct the defect, which the Project Manager can either accept or not accept. The Project Manager can not make their own assessment of the saving if they are not happy with it but can instead instruct the correction of the defect (which will normally prompt a rapid revised quotation from the Contractor to try to avoid having to correct the defect). In theory under this clause the Contractor could offer an earlier Completion Date as part of the offer to tempt the Client to accept the saving, but this is rarely (if ever) done, and it is the cost saving element that is almost always proposed as the lure. If the Project Manager accepts the quotation, they will also issue an instruction to change the Scope to reflect what has been done (which for the avoidance of doubt will not be a compensation event!).



Section 46: Uncorrected defects: If the Contractor is given access but does not correct the defect within the defect correction period, the Project Manager assesses the cost to the Client of having the defect corrected by Others and the Contractor will pay this amount in the next assessment. If the Contractor can not be given access to correct a defect then (subtly differently) the Project Manager assesses what it would have cost the Contractor to correct the defect, which again the Contractor will pay in the next assessment.

Disallowed Costs: For ECC options C-F where Disallowed Costs are a defined term, one of the disallowed elements is “the cost of correcting defects after Completion”. This does mean that the cost of correcting defects before Completion would be allowed. This does upset some Clients who may question why they should have to pay to correct ANY defects, although it is more balanced than it first sounds. With option C it means whilst the Contractor would be paid for correcting a defect before Completion, it would significantly eat into their “gainshare” which would have been pure profit, so would never be beneficial for them to deliberately allow any defects to occur. An additional disallowed cost listed is the “cost of correcting Defects caused by the Contractor not complying with a constraint on how it is to Provide the Works stated in the Scope”. This would be where the Contractor has ignored a specific constraint such as “use flight augured piles not driven piles due to vibration and potential damage to existing property”. If the Contractor ignored that and driven piles used did cause damage, then any resultant cost incurred by the Contractor would be disallowed.



Summary – The Supervisor carries out most of the duties associated with quality and defects on behalf of the Client. The only Project Manager involvement in this section is to 1) accept a quality plan, or 2) to accept a quotation saving for the Contractor not correcting a defect. A Contractor should obviously look to avoid creating defects in the first instance but any that do arise should be corrected at the earliest opportunity to minimise the potential for adverse financial or relationship issues developing.

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.