

January 2022

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No. 13 – Notifying early warnings and notifying compensation events

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 14: Spirit of mutual trust and co-operation

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 13 – Notifying early warnings and notifying compensation events

NEC Early warnings and compensation events are two of the most fundamental processes that exist within the NEC family of contracts. Both processes start with a notification but all too often these can be misconstrued with people notifying the wrong situation on the wrong contractual form. This bulletin will explain the scenarios as to when each notification should be used, and the potential practical and financial consequences of getting these wrong.

What is an early warning? Either party should notify each other as soon as they become aware of a matter that could impact (in simple terms) time, cost or quality. The idea is that the matter then gets discussed at an early warning meeting to consider what the risk is and what measures could be put in place to avoid or mitigate the impact of that situation. The emphasis for an early warning is that it is something that might or could be an issue, and that there is the potential to do something about it before it happens.

When should an early warning be notified? The contract states that the early warning should be notified as soon as either party becomes aware of the issue.

What are the consequences of not notifying an early warning? Applicable to all contract options, if the issue is subsequently notified as a compensation event, and if the Project Manager believes that an early warning could have been given and wasn't, they can state that fact when requesting the quotation and proceed to assess the compensation event as though the early warning had been given. That means that the Project Manager can assess the compensation event quotation at a lower value where they believe they could have mitigated some of the resultant cost had the early warning been notified. It is therefore very important that Contractors notify such early warnings to avoid the possibility of compensation events in the future being assessed unnecessarily lower.



In the instance where a Project Managers does not notify an early warning to the Contractor, they are by default losing the opportunity for the Contractor to help mitigate the Client's potential issue. This may have avoided a compensation event from occurring altogether, or at least been a situation that could have been mitigated to a lower commercial outcome for the Client.

What is a compensation event? A compensation event is something that the Contractor can claim additional cost and/or time, for something that has occurred that was not their contractual liability. For something to be a compensation event the Contractor must prove under which clause of the contract makes it one, the main valid reasons for which are listed within clause 60.1 of the contract. Compensation events are for matters that are already an issue or are already known that will be an issue in the future, so very different from an early warning.

When should a compensation event be notified? If the compensation event results from an instruction from a Project Manager, they should notify it is a compensation event at the time of instructing the quotation (clauses 61.1/2). The Contractor can otherwise notify a compensation event if they believe it to be one, and the Project Manager has not notified (clause 61.3).

What are the consequences of a Contractor not notifying a compensation event? Under clause 61.3, if the Contractor fails to notify a compensation event within eight weeks of becoming aware of the event, they lose the right to claim cost or time for that event (unless it is one of the reasons that the Project Manager should have notified but didn't). Examples of events that the Contractor would be time-barred for would be: lack of access under 60.1(2), unforeseen physical conditions under 60.1(12) and worse than "1 in 10 year" weather event under 60.1(13). In most instances it should be pretty clear when those events first occurred and how long eight weeks would have been from that point.

This prevents the Contractor from getting to the end of a project and then presenting numerous other claims of compensation events that the Client did not have the opportunity to consider or account for during the project. The

eight weeks should not be considered that onerous to a Contractor when you consider all that needs to go into the notification is a description of what the risk is, and why it is a compensation event.

What are the consequences of notifying an early warning instead of notifying a compensation event? If something is already known to be a compensation event, then it should not and does not need to be notified first as an early warning. A Contractor may consider that by notifying the early warning, they then can never be time-barred for notifying a compensation event, but this is not correct. If something could be a potential issue, the matter should be notified as an early warning. If two weeks later that issue has an adverse impact on the contract (which is not an item that is the Contractor's risk), the Contractor should then notify it separately as a compensation event. If it is an event that the Contractor is obliged to notify, they would be time-barred if they did not notify it within eight weeks of it becoming an issue, even though the early warning was notified two weeks previous when it was a potential problem.



Summary – It is important to understand the different situations as to when each type of notification should be issued. For matters that could be an issue that have the potential to be avoided or mitigated, then it should be notified as an early warning. For matters that are already an issue and not the Contractor's risk, then they should be notified as a compensation event. The Project Manager could (and should) be notifying certain compensation events themselves rather than relying on the Contractor to always start the process. There are practical and commercial implications to either party for not notifying the correct notification at the correct or opportune time.

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.