

March 2022

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No. 15 – Getting compensation events implemented (i.e. accepted)

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 16: Quality Management and Managing Defects

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 15 – Getting compensation events implemented (i.e. accepted)

Most people will be familiar with the lifecycle of a compensation event within an NEC contract. Compensation events are the opportunity for the Contractor to claim additional cost/time for something that has occurred that was not their risk under the contract. The compensation event process starts with “notification” which can be notified by either party. If a Contractor is notifying a compensation event, the Project Manager needs to respond with acceptance that it is one before the Contractor can progress to the next phase of “quotation”. The Contractor will produce and issue a quotation for acceptance, which then moves onto the next phase of “assessment” by the Project Manager. The Project Manager will either accept or reject the quotation, and if rejected will either request a revised quotation from the Contractor or state that they will assess it themselves. This will then lead to the conclusion of the process which is called “implementation”.

Should a Contractor proceed with the works prior to the quotation being agreed? A Contractor must obey an instruction given by the Project Manager in accordance with the contract (clause 27.3). If a Contractor has an instruction to install additional works that are not in the original Scope, they should commence with those works in advance of the quotation being agreed. It will not change how the compensation event is assessed, as clause 63.1 clarifies that the quotation is based upon the forecast Defined Cost of the work not done at the “dividing date” (the dividing date here being the date of the instruction). It is understandable for a Contractor to want to delay proceeding without first agreeing the quotation, but they do not have that contractual luxury. They may even incur delay damages if they delay commencing the instructed works such that they now exceed the Completion Date.



Dictionary versus contractual definition of implementation: The status of a compensation event being “implemented” has nothing to do when the physical works are carried out. It should not be confused with the dictionary definition of implementation which could be described as “the process of putting a decision or plan into effect”. The contractual definition of implementation is when the event has been agreed in terms of cost and time. If, for example, there has been an instruction to install additional pipework and a request for a quotation under clause 61.2 (NEC3 clause 61.1), then the Contractor should be proceeding with those works. If the pipework is installed and completed without the quotation yet being agreed, the event contractually is not considered implemented. If the quotation has been accepted but the pipework installation has not yet commenced, the event contractually “IS” implemented.

What should be included in the communication confirming implementation? The Project Manager should confirm the agreed cost of the event (i.e. change to the Prices) and also the agreed time effects on any Key Date(s)/Completion Date. It is also good practice to state what the revised total of the Prices and revised Completion Date is so that there is no room for any misconceptions. For example, if a compensation event has been agreed as £100k and a two-week movement in the Completion Date, the same correspondence could confirm that this changes the total of the prices from (say) £2m to £2.1m, and the Completion Date from 1st September 2022 to 15th September 2022. If a cloud-based system is being used for managing communications, such as Cemar, then the dashboard in the system will do this automatically once a compensation event is implemented to reflect the latest agreed change to prices or dates accordingly.

Could it be in the interest of someone to slow down the agreement of a compensation event? It should be in neither Parties interest to want this to happen. Both Parties should want to understand their respective liabilities in terms of cost and time as early as possible. Delaying the assessment and implementation of a compensation event should also not change how the event is assessed, as the compensation event is to be based on forecast Defined Cost at the point the instruction was given, or for all other events when the compensation event was notified. The contract does not say that compensation events are not based on actual cost if the works have been done and the quotation not yet agreed.



How can a compensation event quotation be agreed as quickly as possible? The Parties should ensure they follow their elements of the process in a timely manner and where possible quicker than the timescales permitted within the contract. The Contractor should notify, as soon as possible, when they become aware of what they believe to be a compensation event (rather than waiting up to eight weeks that the contract allows before it would be time-barred). The Contractor should present the quotation in a transparent, logical way to make it clear exactly what they are claiming for and why, also including a programme if the compensation event affects the remaining works. The Project Manager should then review that quotation as quickly as possible. If the response is non-acceptance, they should explain exactly what they disagree with to allow the Contractor to quickly revise and re-submit the quotation (unless the Project Manager decides to make their own assessment).

Summary – It should be in both Parties interest for every compensation event to become implemented so that both are very clear on their respective liabilities. Once a compensation event is implemented, it is clear what the agreed effect is upon both prices and contractual dates. The implementation should be clear and concise as to what it has been assessed at and concluded as soon as practicably possible.

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.