

May 2021

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No.5: Early Warnings & Liability For Not Notifying

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 6: Importance of an accepted programme every month/period

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 5 - Liability for not notifying early warnings

Most readers will be familiar with the early warning process under NEC contracts. In simple terms, if there is a potential issue that could affect time, cost or quality then either party should notify the other. The next progressive step is to have a meeting to discuss the potential implications and to agree actions to avoid or at least mitigate the potential effects. NEC4 has introduced some welcome changes around early warnings to enhance what was already a very good contractual mechanism. It should be noted that the early warning process is now section 15 of the NEC4 ECC contract rather than section 16 in NEC3.

Why has the name of the register changed under NEC4? The name of the register has been changed from "Risk Register" to "Early Warning Register". This is to make it clear that it is different from anything else people might have previously used as a "traditional risk register" on their projects. The content and purpose of traditional risk registers within the industry are different from what the NEC3 intended as their "Risk Register". Traditional risk registers that are used might include columns like cost impact, programme impact, likelihood/severity rating, mitigations measures, risk owner etc. This is serving a different purpose altogether, but you can understand why people thought it may be practical to merge their traditional risk register content with the NEC3 Risk Register. The NEC4 change in name should make it clearer that an "Early Warning Register" is different from anything else you might previously have used or called a "risk register". The Early Warning Register is a defined term in the contract that only specifies two specific columns to be shown. These are "the description of the risk" and "the action to be taken to avoid or reduce the risk". In addition, there should be practical administration columns, such as the early warning number (so each is unique), the date it was notified and a column to show status, i.e. is it now closed or is it remaining open (as an issue still to be discussed/actioned).

EWN No.	Date of Issue	Description of the risk	Actions to be taken to avoid/reduce risk	Action/response by when/who	Status (open/closed)
001	12/03	Not convinced that the Employers lighting scheme will give sufficient lux levels expected	Additional design check to be carried out by designer	Designer checked and confirms is (just) sufficient	Closed
002	15/03	Suspicion of additional asbestos behind main cladding	Remove high level panels to investigate (with out disturbing)	No asbestos found	Closed
003	23/03	Concern main control room is not big enough to house all of the electrical kit that is needed	Designers still finalising electrical design but to consider this	designers due to report back findings end of month	Open
004	02/04	May be additional cables in way of footprint of new building	Trial hole to be dug adjacent to existing manhole to see if exist	Contractor to carry out trial hole by end of week	Open
005	12/04	Contractor currently finding it difficult to procure quickly the specification of cladding panels identified	Continue to explore market, but also to consider an alternative material suggested	Contractor to continue to source, designer to consider alternative	Open

How often should early warning meetings be held? Under clause 15.2 the first Early Warning Register should be produced within one week of the starting date and the first meeting held within two weeks of the starting date. Subsequent meetings should be held at the new "early warning interval" which is identified within contract data (part 1) at tender stage. This is the frequency which the Client is envisaging will be useful for the early warning meetings to be held during the life of the project to discuss any issues that are current at that point in time. In addition, **either party** can always instruct the other to attend an additional meeting as required, if something specific has arisen that cannot wait until the next scheduled one.

2021 CALENDAR			
JANUARY	FEBRUARY	MARCH	APRIL
MAY	JUNE	JULY	AUGUST
SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER

What else has changed under NEC4 compared to NEC3 with regards to early warnings? The name of the meeting has been changed from the "risk reduction meeting" to the "**early warning meeting**". Clause 15.3 brings additional emphasis on the early warning meeting to review previous actions and decide any different actions that need to be taken and who should take them. It also now obligates the Project Manager to issue the revised Early Warning Register within one week of holding the early warning meeting.

How could a lack of early warning affect the Contractor financially? If something occurs that costs the Contractor additional money that is not their risk under the contract, they will notify accordingly as to what and why they believe this issue to be a compensation event. Whilst the Project Manager cannot say it is not a compensation event due to

the lack of an early warning, they can state that the quotation will only be assessed as though the Contractor had notified an early warning at that point in time (clause 61.5) if they feel one should/could have been raised. Considering that this lack of notification may have lost the Project Manager opportunity to mitigate the impact of the event on the Client. If a subsequent compensation event quotation is issued at say £60k, where the Project Manager considers that had the early warning been notified, they could have mitigated half of the resultant quote, they can then assess the quotation at half the cost, i.e. £30k. If they believe that all the cost could have been avoided, then it could be assessed at £0. Equally, had the early warning been notified as soon as the contractor became aware of the issue and nothing could have been done to mitigate the situation, then it should still be assessed at the full £60k. In addition to this with ECC options C-F (not options A/B) there are provisions for "disallowed costs" within the contract. One such disallowed cost within that defined term is "any cost materialising because the Contractor failed to notify an early warning the contract required them to give". Any such resultant cost could be disallowed altogether. This emphasises how important it is for a Contractor to notify early warnings as soon as they become aware of the issue to avoid losing their genuine entitlement.



Can the Contractor point to the Project Manager and say they could/should have notified the early warning if they feel they equally knew about the situation at the time? Whilst it is true that either party under clause 15.1 should notify an early warning, the sanction against the Contractor is much more specific under the contract. The Project Manager, even if they were aware, may not have been clear on the extent of potential ramifications. The onus therefore falls very much more with the Contractor to notify it and get it "on the table" to discuss.

Can a lack of early warning from the Project Manager affect the Client financially? It can, in the sense that if the Project Manager fails to notify an early warning about a potential issue, the Contractor is not going to be able to come up with mitigation ideas for something they did not know about. For example, if the Project Manager was aware of a potential late issue of Client design, by notifying an early warning to this effect means they can discuss with the Contractor the potential impact that this late design issue could have upon their programme. The Contractor may be able to point out the elements of the design that they need first to mitigate any delay, that might then provide the Client some time to produce the rest of the design. Without any such early warning, the late notice could result in a compensation event at a value that could have been avoided or at least mitigated by the Contractor.

How should you deal with a Client who does not seem to like receiving early warnings? If a Client/Project Manager appears to not understand the early warning process, then you need to try to educate them accordingly rather than simply not follow the process. Thankfully, this appears to be a much less common occurrence where a Client previously might have taken early warnings as a personal attack or considered it a purely commercial tool. The Contractor should be able to demonstrate through their conduct and words of their early warning notifications that they are just trying to raise the issue to be constructive, with a view of minimising or even avoiding a potential impact.



Summary: Early warnings and the associated Early Warning Register is a very proactive way of managing issues collaboratively to reduce any adversely impact they may have on the project. It is important that everyone on the project team understands both the intent and the mechanics of these clauses and so that they are used as a pro-active management tool as the contract intends. Lack of early warnings from either party could affect them financially.

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.