

NEC 4- What's New?

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NEC 4- the headlines

- Evolution, not revolution
- First published 24 years ago!
- Good time to stand back and look back as well as forward
- Some clients loved it from outset; others used it and abandoned it

NEC 4- key changes

Definitions- some important changes

Good faith concept extended

Design obligations and defect correction

Payment- subtle changes

Compensation events

Eot's and programmes

NEC 4- definitions/concepts

- Works Information becomes
Scope
- Employer is now
Client
- Risk Register is now
Early Warning Register
- concept of “dividing date” when assessing effect
of CE on time to completion

Further duties on PM

A number of deeming provisions if PM does not respond within timescales

Approved Programme- PM must notify acceptance/non-acceptance within contractual time limit –deemed accepted

Assessment of final account within 4 weeks of Defects Certificate- if not Contractor can run process

Compensation Events – NEW

- For time taken to prepare a quotation as instructed by Employer where Employer decides not to proceed
- New ones to be listed in contract data
- It remains a condition precedent to give CE notice in 8 weeks unless from Employer instruction
- What about “deemed” instruction?

Late notification of CE?

- Usual starting point for 8 weeks -when the party became aware of event or circumstance?
- Cl 61.3- if 8 weeks are missed there is no entitlement to a change to Completion Date; Prices or Key Dates
- NEW-PM must now notify Contractor of any failure to notify within the timescales- previously PM could arguably not reject on that ground – see original cl 61.4

Late Notification of CE- is it redeemable?- New cl.61.4

- If the PM fails to reply to the Contractor's notification of a CE within the time allowed the Contractor may notify the PM of that failure. If the failure continues for a further two weeks after the Contractor's notification it is treated as acceptance by the PM that the event is a CE and an instruction to submit quotations.

Assessing delay/effect of a CE

- Cl. 63-introduction of concept of “dividing date”
- Previously, delay assessed as “length of time that completion is later than **planned Completion as shown on the Accepted Programme**”
- May not be current especially if ongoing delays SO

Assessing Delay/EOT

- NEW-Accepted Programme “current at the dividing date”
- Dividing date is date of PM instruction or otherwise date of notification of CE
- When assessing delay only those operations which the Contractor has not completed and which are affected by the CE are changed. (cl.63.5)- is this enough?

Defects and contractor's risks

- Defects – NEC3 and 4 have same definition
- Contractor has obligation to correct defects until end of *defect correction period*
- Different approach to other standard forms as the DCP is just a number of weeks from notification of that defect or Completion, if defect notified pre-Completion.
- The DLP equivalent is the *defects date* e.g. one year; two years after Completion

Design obligations and defect correction

- *NEC 3 – X15- the Contractor is not liable for Defects in the works due to his design so far as he proves that he used reasonable skill and care to ensure that his design complied with the Works Information*
- *NEC 4- X15- the Contractor is not liable for a Defect which arose from its design unless it failed to carry out that design using the skill and care normally used by professionals designing works similar to the works.*

Design obligations and defect correction

A Defect is a part of the works

- not in accordance with the Scope or
- A part of the works designed by the Contractor.. not in accordance with.. the Contractor's design which has been accepted by the PM

NEW in X15- removal of burden of proof on contractor

No longer “reasonable skill and care”

Design Obligations and Defect correction

- What about Defects where Contractor states they are not its responsibility?
- Contractor's obligation is still to correct (cl. 44.1)
- Tucked away in Option X15- the Contractor's design- is it only limited to design defects(?) is the provision that

If the Contractor corrects a Defect for which it is not liable under this contract it is a CE

Risks clause amended

- Risks and Insurance now renamed “Liabilities and Insurance”
- Contractor’s risks definition altered- no longer “catch all”
- the risks which are not carried by the Employer are carried by the Contractor
- See new Clause 81.1- specifies the risks

Interaction with insurance provisions

To what extent does Contractor have liability for damage over and above that covered by CAR policy?

Subject of a Scottish court judgment – SSE v Hochtief (2015)

New – Cl. 82- each party liable to other for costs incurred as a result of an event for which that party is liable

Payment provisions

- It relies upon a Contractor application now
- previously PM had to certify every month regardless of whether an application had been made
- assume this change is to give the Contractor the benefit of its payment applications constituting a payment notice – section 110B(4) of HGCRA

Payment provisions – introduction of final account

- A final assessment by PM 4 weeks after defects certificate issued- no need for contractor application for this to happen
- If PM misses that date Contractor may issue its own assessment
- Does not specify what is to happen if that is disputed – assume it goes to DRP

Disputed Final Assessment

- 4 weeks to take to DR from assessment
- This can be to Senior Representative or Adjudicator
- 4 weeks to take adjudicator's decision to tribunal
- All with view to closing down financial aspects

Changed Final Assessment

This is changed to reflect an adjudicator's decision which has not been referred to tribunal within four week period.

Conclusions

- A good number of changes between the Editions
- Some to reflect standard or current practice and others to close down loopholes worthy of close examination
- The Contract has gone gender neutral- no “he’s or she’s”- only “it”

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