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NEC and CLC Guidance for Dealing with the Effects of COVID-19 Under NEC3/4 Contracts

1.0 INTRODUCTION

1.1 This guidance relates to the impact of COVID-19 upon work under NEC4 contracts. The guidance is provided in respect of the NEC4 Engineering and Construction Contract (ECC), though would apply equally to the NEC4 Engineering and Construction Subcontract (ECS) subject to the relevant changes in terminology as required for the subcontract.

1.2 The guidance is also generally applicable to the NEC3 ECC and ECS, with notable differences outlined below. Extracts from the contract and Schedule of Cost Components are included at **Annex 1**, and some commonly asked questions with responses are given in **Annex 2**.

2.0 RELEVANT CONTRACT PROVISIONS

Act of prevention

2.1 An impact upon the works as result of COVID-19 is an act of prevention as described in clauses 19 and 60.1(19) if it fulfils the criteria identified in those clauses. Commonly the impact on the works will be the effect of restrictions to construction activities resulting from COVID-19 but it may also include issues in the supply of resources (for example, people, Equipment, Plant and Materials).

2.2 The criteria for an event to be a prevention event are set out in clause 60.1 (19) a copy of which is included in **Annex 1**. Any impact as a result of COVID-19 has to be considered in light of the requirement of this clause and each one of the requirements is considered below.

2.3 The event has to have a delay effect and the delay has to affect the critical path of the whole of the *works*, resulting in either preventing the *Contractor* from completing the *works* by the planned Completion Date, or stopping the *works* from ever being completed. In most cases the former situation will arise in respect of COVID-19.

2.4 If the delay only impacts a Key Date or a Section of the *works*, where secondary option X5 sectional completion is included in the contract, and this delay does not impact the planned Completion Date for the whole of the *works*, the event is not an act of prevention under NEC4. However, it is difficult to see a situation where, given the duration and extent of the impact of COVID-19 on the construction industry, this could occur.

2.5 It is evident that COVID-19 is an event that neither Party would have been aware of until its effect on work started to become evident in the spring of 2020 and is not an event that either Party could have prevented.

Project Manager's instructions

2.6 When an act of prevention occurs the *Project Manager* is required to issue an instruction to the *Contractor* stating how the event should be dealt with. The *Project Manager* will consult with the *Client* over the best way to deal with the event to suit the *Client's* requirements given that, as they will have to compensate the *Contractor* for the time and cost effects that flow from the event, the *Client* should be placed in charge of deciding the course of action the *Contractor* should follow. The *Project Manager's* instructions may also be covered by other clauses in the contract such as clause 34.1 - an instruction for the *Contractor* to stop or not start the works or a part of the works - or an instruction changing the Scope under clause 14.3.

2.7 Instructions to change the Scope could involve temporary or permanent measures such as compliance with guidance on social distancing on construction sites, which may only be applicable for a limited time and can be removed by a further change in Scope, or more permanent measures such as the installation of sanitation stations. Each change in Scope will be a compensation event that in terms of the Prices can be negative as well as positive.

Compensation events

2.8 An event which meets the conditions in clause 19 is a compensation event. In addition, there are other ways the event may be a compensation event.

2.9 Where the effects of the compensation event are uncertain or where the event has an ongoing effect, this is best dealt with by the *Project Manager* stating assumptions as part of the compensation event quotation process under clause 61.6. If any of the assumptions prove to be incorrect then that is a new compensation event which may lead to a reduction as well as an increase of the Prices (clause 60.1(17)).

2.10 If secondary Option X2 has been included in the contract, then any change of law in the country where the Site is located will be a compensation event. So, a change in the law to bring in measures to deal with the spread of COVID-19 which affects the *works* will be a compensation event. It should be noted that this will only apply to changes in the law of the country where the Site is located and not to changes in the law in other countries that may impact the *works* such as measures that lead to a delay in supplying Plant and Materials. Also, if measures brought in to limit the spread of COVID-19 in relation to construction sites were issued as guidance, they would not constitute a change in the law.

Evaluation of a COVID-19 Related Compensation Event

2.11 The methodology for evaluating a COVID-19 related compensation event is the same as that for any other compensation event.

2.12 The impact on time will be assessed by the effect of the event on planned Completion, including any sectional planned Completion Dates and / or Key Dates.

2.13 The change to the Prices will be assessed by the effect of the compensation event upon Defined Cost plus Fee. Defined Cost is assessed using the Short Schedule of Cost Components (SSCC) or the Schedule of Cost Components (SCC).

Working Areas

2.14 Elements of cost components 1 people, 2 Equipment and 5 charges can only be recovered if they are incurred within the Working Areas. Working Areas are the Site and other areas identified by the *Contractor* that are necessary to Provide the Works and used solely for work under the contract (i.e. not an area shared with work for another contract).

2.15 In respect of people there is a difference between how people are dealt with under the SSCC and the SCC in NEC4. The SCC (used on target and cost reimbursable contracts) provides for the *Contractor* to recover the cost of people who are normally based within the Working Areas even if they are not working within the Working Areas. This would cover, for example, people who are working from home. The cost of people who do not normally work in the Working Areas would not be recoverable by the *Contractor* if working from home.

2.16 In the SSCC (used on priced contracts) the cost of people can only be included in Defined Cost if they are working within the Working Areas.

2.17 In all main Options of the NEC3 ECC people can only be recovered when they are working within the Working Areas.

2.18 In respect of Equipment the *Project Manager* and the *Contractor* should discuss the most effective way to deal with Equipment within the Working Area as a result of COVID-19. If the *works* are to be stopped for a period it may be necessary to consider whether certain Equipment should be removed from the Working Areas and no longer form part of the Defined Cost.

Resource Utilisation

2.20 Costs can only be included in Defined Cost if they are incurred in Providing the Works as defined in clause 11.2(13).

2.21 In complying with the instruction of the *Project Manager* to suspend or stop work or a part of the works the *Contractor* will still be Providing the Works and incurring costs in doing so. If the effect of COVID-19 restrictions results in resources dedicated to the project not working for part of their time, their cost still forms part of Defined Cost.

3.0 Dealing with risk on future contracts

3.1 For contracts entered into post COVID-19, the provisions of clause 19 and compensation event 60.1(19) would not apply in the way described above. The test that “an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for it” would not be met. However, the continuing effects of the virus on the construction work cannot be forecast reasonably, and thus additional provisions should be added to the contract to ensure that the risk is appropriately allocated and managed.

3.2 This applies to both parties, such that the *Client* is not paying for a risk that may not occur, and the *Contractor* does not have to make an allowance for the cost of a risk it cannot with any certainty forecast. To address this, the contract should identify the level of restrictions, if any, which will apply at the start of construction and include an assumption as to when such restrictions are to be removed. The Prices provided for the construction work will, therefore, allow for any continuing effect of the virus but will not include a risk allowance based on “guesswork” as to what might happen in the future.

3.3 This would best be dealt with by an additional condition of contract – a Z clause. The clause would set out the constraints which were expected to apply at the start of construction and an assumption of the date when those constraints would be removed. The clause should give the *Project Manager* the power to instruct the *Contractor* on what action to take. It would include provision that any subsequent change to the *Contractor’s* method of working in responding to the effects of COVID-19 and

- resulting from the assumption being incorrect,
- an instruction of the *Project Manager*,
- further restrictions imposed by government or
- necessary to ensure the health and safety of the workforce and the public would constitute a compensation event.

3.4 The clause should provide that if the effect of the compensation event is to reduce the total Defined Cost, the Prices are reduced.

3.5 The compensation event procedure would then apply to any subsequent change. The *Contractor* would notify the event and if instructed, provide a quotation for the event. The procedures described above in relation to assumptions and evaluation of the event would apply.

3.6 These comments only apply to restrictions resulting from COVID-19. It may be that, in the future, some other virus appears and has a similar impact on construction. Clause 19.1 and compensation event 60 (1) 19 would apply to that event; the occurrence of one pandemic does not increase the chance of another one occurring.

Annex 1 - Extracts from the conditions of contract and Schedule of Cost Components

11.2(15) "To Provide the Works means to do the work necessary to complete the *works* in accordance with the contract and all incidental works, services and actions which the contract requires."

19.1 An event occurs which

- stops the *Contractor* completing the whole of the *works* or
- stops the *Contractor* completing the whole of the *works* by the date for planned Completion shown on the Accepted Programme, and which
- neither Party could prevent and
- an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for it.

The *Project Manager* gives an instruction to the contractor stating how the event is to be dealt with.

60.1(17) The *Project Manager* notifies the *Contractor* of a correction to an assumption which the *Project Manager* stated about a compensation event.

60.1(19) An event which

- stops the *Contractor* completing the whole of the *works* or
- stops the *Contractor* completing the whole of the *works* by the date for planned Completion shown on the Accepted Programme, and which
- neither Party could prevent and
- an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for it.

61.6 If the effects of a compensation event are too uncertain to be forecast reasonably, the *Project Manager* states assumptions about the compensation event in the instruction to the *Contractor* to submit quotations. Assessment of the event is based on these assumptions. If any of them is later found to have been wrong, the *Project Manager* notifies a correction.

63.2 The *Project Manager* and the *Contractor* may agree rates or lump sums to assess the change to the Prices.

W1.1 (1) A dispute arising under or in connection with the contract is referred to the *Senior Representatives* in accordance with the Dispute Reference Table. If the dispute is not resolved by the *Senior Representatives*, it is referred to and decided by the *Adjudicator*. A Party may replace a *Senior Representative* after notifying the other Party of the name of the replacement.

W2.1 (1) If the Parties agree, a dispute arising under or in connection with the contract is referred to the *Senior Representatives*. If the dispute is not resolved by the *Senior Representatives*, it is referred to and decided by the *Adjudicator*. A Party may replace a *Senior Representative* after notifying the other Party of the name of the replacement.

Schedule of cost components

People 1 The following components of

- the cost of people who are directly employed by the *Contractor* and whose normal place of working is within the Working Areas and
- the cost of people who are directly employed by the *Contractor* and whose normal place of working is not within the Working Areas but who are working in the Working Areas, proportionate to the time they spend working in the Working Areas.

Annex 2 – COVID-19 Questions

Question	Answer
<p>I gave notice of compensation event under clause 60.1 (19) as soon as I found that restrictions due to COVID-19 was likely to cause substantial difficulties in working. The <i>Project Manager</i> rejected the notice on the grounds that I should have allowed for it in my prices. Since I was awarded the contract well before anybody knew it was a problem, I don't see how I could have allowed for it.</p>	<p>In the UK, allowing for the effects of an unknown pandemic such as COVID-19 is not something that an experienced contractor would normally judge necessary to allow for. Whilst it is always possible to project that at some time in the future such an infection might occur, it would be unreasonable to expect a contractor to allow for it as its timing and impact is entirely unpredictable.</p>
<p>I gave notice of a compensation event under clause 60.1 (19) as soon as I found that restrictions were being placed on what I could do on site. The <i>Project Manager</i> has rejected my notice on the grounds it was issued out of time. The <i>Project Manager</i> claimed that I should have issued the notice when the World Health Authority notified COVID-19 as a pandemic. Is that correct?</p>	<p>The compensation event under clause 60.1 (19) is an event which stops the contractor. A notice by the World Health Organization does not of itself stop any work. The compensation event must be notified by the <i>Contractor</i> within eight weeks of becoming aware that the event has happened. This must be an event which causes delay to the works which meet the criteria in 60.1 (19), such as restrictions being imposed by law or by the necessity to adopt significant safety measures.</p>
<p>The <i>Project Manager</i> has rejected my notice of a compensation event under clause 60.1 (19) on the grounds that I will be able to make up any delays later by reprogramming and changing resources. This appears unreasonable as I will have to incur significant additional cost, assuming that it is possible to make up delays.</p>	<p>Although the <i>Contractor</i> has a duty to mitigate any delay under the contract, the distinction must be made between the ability to avoid a delay - such as by resequencing of work - and dealing with the effect of the event - for example by increasing resources to make up for lost time. In the case of COVID-19, with the overall effect uncertain, it is difficult to see how any delay could be avoided.</p>



Question	Answer
<p>Stating that they are because the impact of COVID-19, the <i>Project Manager</i> has given instructions which interfere with how I was intending to carry out work. What authority does the <i>Project Manager</i> have to direct how I carry out work on Site, and am I entitled to additional compensation as a result?</p>	<p>Under clause 19.1, the <i>Project Manager</i> is required to give instructions on how to deal with the event. This allows the <i>Project Manager</i> to control the balance between time and cost resulting from the event, and this will normally interfere with how the <i>Contractor</i> intended to carry out the <i>works</i>. These instructions will usually take the form of constraints on how the <i>Contractor</i> provides the <i>works</i> and would constitute changes to the Scope. These are compensation events, and to achieve the best balance between time and cost it would be sensible for the <i>Project Manager</i> to discuss with the <i>Contractor</i> different ways of dealing with the event. The <i>Project Manager</i> can request quotations based on different approaches to mitigate delay or cost.</p>
<p>The <i>Project Manager</i> has not given any instructions under clause 19 but has accepted my notice of a compensation event for COVID-19 under clause 60.1 (19) and has instructed me to provide a quotation. Current restrictions will create difficulties for me which I can price, but how do I allow for the time when these restrictions will apply? Do I need to give a new notice of compensation event if restrictions are changed?</p>	<p>Under clause 61.6 the <i>Project Manager</i> is required to state assumptions if the effects of the compensation event are too uncertain to be forecast reasonably. When instructing a quotation, therefore, the <i>Project Manager</i> should have stated how to deal with the uncertainty. In the absence of an assumption by the <i>Project Manager</i>, the <i>Contractor</i> can only provide a quotation on the basis of the current restrictions continuing and provide a fresh notice of compensation event if further restrictions are applied later. It would be helpful to discuss with the <i>Project Manager</i> whether a quotation on the basis of stated assumptions would be preferable.</p>
<p>I am having difficulty in providing the detailed records and substantiation required by the <i>Project Manager</i> of all of the costs incurred, particularly in terms of the cost of people. Am I able to use estimated prices instead?</p>	<p>Clause 63.2 includes the option for the <i>Project Manager</i> and <i>Contractor</i> to agree to determine the effect on the Prices by agreeing rates or lump sums to be used. This allows for amounts to be calculated and included in a compensation event that do have to be determined based on Defined Cost plus Fee, providing flexibility in how to assess the costs the <i>Contractor</i> may encounter as a result of the event.</p>

Question	Answer
<p>In the absence of any clear direction from the <i>Project Manager</i>, I provided a quotation based on certain assumptions that I made. The <i>Project Manager</i> rejected my quotation and made an assessment. This is based on certain assumptions, which have proven to be incorrect. Do I need to give notice of a new compensation event?</p>	<p>Under clause 61.6 the <i>Project Manager</i> is required to notify a correction of an assumption which is found to have been wrong. This is a compensation event under clause 60.1(17). If the <i>Project Manager</i> has not notified this as a compensation event, the <i>Contractor</i> should do so under clause 61.3.</p>
<p>The <i>Project Manager</i> has refused to give any instructions to deal with issues arising due to the outbreak of COVID-19 and has rejected my compensation events on the grounds that I should have allowed for its impact. What steps can I take to recover the cost I am incurring and avoid paying damages for late completion?</p>	<p>It appears there is a dispute and you have reached the stage where the <i>Client</i> needs to become involved in seeking to resolve the matter in one way or another. The contract includes in clause W1.1 or W2.1 depending on which option is incorporated, providing for <i>Senior Representatives</i> to initially attempt to resolve the dispute. Whilst this is not mandatory under option W2, it is useful step to take in advance of referral to an adjudicator. It may resolve the issue or at least clarify the matters to be referred to adjudication. If the <i>Senior Representatives</i> do not resolve the dispute, they will produce a list of issues which can then be referred to adjudication for resolution. Further reference to the <i>tribunal</i> can be made by either Party if they are dissatisfied with an adjudicator's decision.</p>
<p>The <i>Project Manager</i> has instructed me to submit a quotation for a compensation event resulting from restrictions imposed due to COVID-19 but has not stated any assumptions about when restrictions will be removed or changed. How can I prepare a quotation without that knowledge?</p>	<p>In the first instance, the <i>Contractor</i> should point out to the <i>Project Manager</i> that in the absence of assumptions, the quotation must take account of the impact of the constraints placed on the works continuing until Completion. That is likely to result in the agreement of a set of assumptions which can be used for a more appropriate quotation.</p>