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Prevention is Cheaper than Cure

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As they say in the classics, "Prevention is cheaper than cure": When construction eventually kicks-off post 'lockdown', facing an already volatile industry and the existence of hungry communities – what remedies are available to consider under the NEC4 contract?

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Our struggling construction industry is now further faced with the potential disastrous impact of the coronavirus Lockdown. This labour-intensive industry, central to the Governments economic recovery plan, will in all probability, suffer substantial job losses whether due to companies that cannot meet their financial commitments or worse still, as a result of being wound-up and liquidated.

The Lockdown is also having an extremely adverse effect on communities and people are hungry.

For the fortunate construction organisations that are able to see the Lockdown through and survive, when returning back to the construction projects, it is suggested that it will be highly likely that the fight for survival will reignite and desperate communities living close to project sites will invade the sites demanding work opportunities. There is the potential for this being worse than it was previously.

Although articles have been published dealing with the NEC3 form of contract and how this form deals with community unrest it appears appropriate and relevant to discuss the measures available to the Parties under the NEC4 contract.

The NEC4 contract form is not yet as popular as the NEC3, but it is only a matter of time before the NEC4 contract will become the standard form to be used in preference to the NEC3.

When a construction site gets disrupted and/or is brought to a halt by the community (or its representative business forum), the remedies available to the Contractor must be triggered by submission of the various notifications required in terms of the Contract within the time periods, where prescribed. Failing which, the Contractor risks being time-barred or having some of his Defined Cost disallowed.

The NEC4's early warning provision is contained under clause 15. Similarly worded to the NEC3, it states that as soon as either party becomes aware of any matter which could impact the prices, delay completion, delay meeting a Key Date or impair performance of the works, a notification should be submitted by the Party becoming aware of such impacting event.

Some bespoke forms of contracts and/or special conditions have been noted to include a condition that the submission of an early warning notice is a condition precedent (i.e., a mandatary prior submission) to a compensation event notice.

The NEC standard core clauses do not provide for this. An early warning of a matter for which a compensation event has previously been notified is not required. The purpose of raising the early warning is firstly, to make the other party aware of the event, which will then create the opportunity for better management and mitigate the effects of the community intervention (in the example under discussion). Secondly the Parties then attend an early warning meeting as instructed by either in terms of clause 15.2.

Furthermore, if the Contractor does not give an early warning and the Project Manager notifies this omission, when assessing the Compensation Event the Project Manager is empowered to deduct amounts (Disallowed Costs) that would have been saved had an early warning been given.

We know from the experience of the Aveng Strabag JV working on the Mtentu bridge and the criticism concerning their dealings with the community, arising from the subsequent court action, that the Parties should proactively engage with the surrounding communities and deal with their concerns, grievances and demands. In this way, it may be possible to fend off community interventions on the site.

Alternatively, these concerns, grievances and demands could become the subject of early warnings.

Clause 15.3 *inter alia* states:

"At the early warning meeting, those who attend co-operate in

- ..
- *seeking solutions that will bring advantage to all those who will be affected,*
- *deciding on the actions which will be taken and who, in accordance with the contract, will take them, …"*

It is suggested that it is industry best practice for the Contractor and the Project Manager at the early warning meeting, to consider mitigating actions and/or solutions on how to deal with the threatening/ disruptive event.

Thereafter together with the Community Liaison Officer (CLO), in a different forum, to convene meetings with the community leaders/ business forum members that could be the cause of any potential unrest. Depending on the outcome of this community meeting, the early warning meeting can be reconvened to decide on the actions to be taken and by whom.

Further to note is that representatives from business forums have no right or entitlement to raise any demand to be provided with a copy of the tender/ contract documentations. Whilst it is appreciated that such demands are invariably enforced by the threat of violence, Clause 29.1 provides that "*The Parties do not disclose information obtained in connection with the works except when necessary to carry out **their duties** under the contract*". Clause 29.2 states that a Party can make information of the works public, only "*with the Client's agreement*". Considering the aforesaid, the site representative could be guilty of a material breach of the Contract, if this clause is disregarded.

In circumstances when a project gets disrupted by a community business forum or by any other community unrest event, which results in the Contractor stopping the work, the Contractor can rely on clause 19 (an event beyond the control of either of the parties and which stops the work) and this gives rise to an entitlement to a compensation event under clause 60.1(19).

Under the provisions of clause 19, when faced with an event that neither party could prevent and one which an experienced Contractor could not 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*". As stated, such event is a compensation event. This entitlement is not reliant on the Project Manager giving such an instruction.

Clause 60.1(19) provides:

"*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, and*
- *is not one of the other compensation events stated in the contract*".

The remedy available to the Contractor, is to be paid the defined cost incurred as a result of the event and to be granted an extension to the date for completion.

Unfortunately, due to the frequent occurrence of these sorts of circumstances, it has become common for Employers to raise the defence to a clause 60.1(19) compensation event, that the Contractor, being an experienced Contractor, would have judged at the Contract Date that Community intervention had a very high chance of occurring and that the Contractor cannot rely on this remedy.

This reinforces our advices that the Contractor and Project Manager proactively discuss and consider the possibilities going forward. An experienced non-contentious legal advisor can provide expert advice in this regard.

It has been generally accepted that any community unrest event (i.e. strikes, riots etc.), is an Employer's risk. Accordingly, the Contractor should in principle, be indemnified from any damages or losses arising therefrom. Compensation event clause 60.1(14) deals with events that are the "*Client's liability*" (known under previous editions of the NEC as "*Employer's risk*").

Prior to settling the terms of the contract, it would be advisable to list such additional events and /or conditions as additional Client liabilities under clause clause 80.1 in the Contract Data.

Some clients in the industry have already made changes in the Z Clauses included into the Contract, placing a more onerous risks on the Contractors on how to deal with events such as the unrest caused by business forums and limiting the Contractors remedies when these events occur.

The year of 2020 started with the South African media still hot on the topic of community business forums (otherwise labelled, the 'construction mafia'). This was then quickly overshadowed, a month and few weeks later on the eve of 23 March 2020, when a global pandemic became our reality and President Ramaphosa announced a nationwide Lockdown in an effort to curb the rapid spread of the Covid-19 pandemic (the coronavirus).

At the time of preparing this article, numbers already circulated in media sources that approximately 84 projects with a total estimated value of R42 billion have been affected by the actions of business forums.

Come the end of the Lockdown, with life returning to "normal", this observer has hopes that the construction industry will kick-off again to pick up broken pieces. It should be encouraged that going forward, all stakeholders return with a change in mindset, with a "lets work together" approach as opposed to a "them and us" mentality. We can only hope!

Let's share our knowledge and experience and remember - **Prevention is cheaper than cure.**