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SO CALLED "ONGOING" EVENTS UNDER THE NEC3 ECC

Author: Keenan Perry

Contractor's claims are broadly understood as an event or circumstance that occurs which will have the effect of costing more money, causing a delay or both. While these events can be instantaneous, very often they are what can be described as events of an ongoing nature.

Most standard form construction contracts make specific provision for these types of events. The method usually entails providing some form of monthly update while the particular event is ongoing and then submitting a final claim once the events have ceased.

Under the NEC3, Contractor's claims (which are termed "Compensation Events") are provided for in Clause 60. While Clause 60.1 lists a plethora of events that constitute Compensation Events, an important point to note when using the NEC3, which is very often misunderstood by Project Managers and Contractors alike, is that there is no such thing as a Compensation Event of an "ongoing nature" in the NEC3.

This article will highlight the nature of Compensation Events under the NEC3 and explain the manner in which an event of an ongoing nature is to be addressed and administered.

Ongoing Events

As a point of departure, a brief look at the NEC3 will reveal that there is no similar provision as those contained in FIDIC and GCC dealing with events of an ongoing or continuing nature. The fact that events of an ongoing nature are not expressly addressed in the NEC3 does not mean that there is no contractual mechanism for claiming for such events or that they are at the Contractor's risk but rather that the manner in which such events are administered and quantified differs from other forms of contract.

Contracts such as the GCC and FIDIC are "needs" driven. That is to say that the Contractor's relief and/or compensation are dealt with in terms of what the Contractor needs. For this reason, Contractor's claims are assessed once the event giving rise to the claim has actually ceased.

In terms of Clause 20.1 of FIDIC, the Contractor is required to give notice of the event or circumstance within 28 days of becoming aware, and submit a fully detailed claim within 42 days of becoming aware. If the events are of a continuing effect, however, Clause 20.1 provides the following:

a) *this fully detailed claim shall be considered as interim;*
b) *the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and*
c) *the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.*

The procedure for dealing with ongoing events under the GCC is much the same as FIDIC. Clause 10.1.1.3 of the GCC provides:

"If the events or circumstances relating to the claim are of an ongoing nature, the Contractor shall, in addition to delivering the said notice within 28 days, each month deliver to the Employer's Agent, in writing, updated particulars required in terms of Clause 10.1.1.1 and, within 28 days after the end of the events or circumstances, deliver his final claim."

The NEC, on the other hand, is "entitlement" driven. This means that the Contractor must show an entitlement to a claim (time and/or money) rather than a need. For this reason, Compensation Events, are (or should be) assessed and implemented as and when they occur prospectively, notwithstanding the fact that the particular event may not yet have ceased.

Only events listed in Clause 60.1 of the NEC3 will give rise to an entitlement on the part of the Contractor to a change in the Prices, the Completion Date or a Key Date. Unless the Employer tampers with the Clauses via the "Z" Clause, there are strict time periods applicable to the notification, quotations, assessment and implementation of Compensation Events. Briefly the process is as follows:

- The Compensation Event must be notified within eight weeks of the Contractor becoming aware of the Event (save for events arising from the Project Manager or Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption).[1]
- The Project Manager must respond within one week failing which, the Contractor may give Notice to the Project Manager and if the Project Manager still fails to respond, the event notified by the Contractor is deemed to be a Compensation Event and the Contractor shall submit quotations.[2]
- The Contractor has three weeks to submit quotations to the Project Manager and the Project Manager has two weeks to respond.[3]
- If the Project Manager fails to respond to the Contractor's quotation, the Contractor may give notice to the Project Manager (specifying which quotation the Contractor considers should be used) and if the Project Manager fails to respond, the Contractor's quotation is deemed to be accepted.[4]

While provision is made for submitting revised quotations and stating assumptions (which will be addressed below), it is clear that there is no provision in the NEC3 which states or even implies that the Parties must (or can) wait until a particular event has ceased before assessing the Compensation Event.

Assessing Compensation Events

As mentioned above, the Contractor is required to provide a quotation (or quotations) for Compensation Events which must set out the proposed changes to the Prices and the delay, if any, to the Completion Date and/or Key Dates.[5]

Clause 63.1 provides:

"The changes to the Prices are assessed as the effect of the Compensation Event upon

- *The actual Defined Cost of the work already done,*
- *The forecast Defined Cost of the work not yet done and*
- *The resulting Fee"*

Clause 63.3 provides:

"A delay to the Completion Date is assessed as the length of time that, due to the Compensation Event, planned Completion is later than planned Completion as shown in the Accepted Programme."

There are two crucial aspects to take note of here: Firstly, is the significance of the Accepted Programme. The delay the Completion Date is measured against the Accepted Programme. Under the NEC3, the Programme must be revised and accepted by the Project Manager in regular intervals as prescribed in the Contract Data.[6] Therefore, if the Accepted Programme does not represent reality, the Compensation Event will nevertheless be assessment according to that Accepted Programme, usually to the detriment of the Contractor. If there is no Accepted Programme, then the Project Manager will make his own assessment of the Compensation Event[7], again, usually to the detriment of the Contractor.

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1 Clause 61.3

2 Clause 61.4. Note that the Contractor may agree to a longer period.

3 Clause 62.3

4 Clause 62.6

5 Clause 62.2

6 See Clauses 31 and 32, in particular Clause 32.2.

7 See Clause 64.2

Secondly, is that when preparing and submitting quotations in respect of Compensation Events that would otherwise be termed "on going", the Contractor is required to make a "prediction" of the effect that the Compensation Event will have on the Prices and the Completion Date.

Clause 63.1 describes costs in respect of two categories of work, namely, work already done and the work not yet done. The "predictions" relate to the Defined Cost of the Work not yet done but it is important to understand what constitutes "work not yet done". The switch date (or date dividing the work already done and work not yet done), is the date on which the Compensation Event was notified, unless the Compensation Event arose from the Project Manager or Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption, in which case the switch date will be the date of that communication. [8]

The effect of the final paragraph of Clause 63.1 is that the forecast Defined Cost and/or the time for completion of the work not yet done is assessed from the switch date (the date of notification of the Compensation Event in most cases), and not from the date on which the assessment is actually being undertaken.

In other words, the Contractor is required to predict (or forecast) the effect on the Defined Cost and/or the time for completion of the work not yet done from the aforesaid switch date, and there is no contractual mechanism to continuously update or revise his quotation as work continues.

This prediction can either be to the Contractor's benefit or to his detriment. While the Contractor is entitled to include a risk allowance by virtue of Clause 63.6, it is very difficult to make an assessment (or prediction) and include a risk allowance when the extent and severity of the "ongoing" events are not known. An example of such an event would be the Contractor encountering unknown physical conditions.[9]

The NEC3 makes provision for circumstances like this by enabling and obliging the Project Manager to make assumptions. If the effects of the Compensation Event are too uncertain (as would be the case with unknown physical conditions), the Project Manager must state assumptions in his instruction to the Contractor to submit quotations.[10] The Contractor must then base his quotation (assessment of the Compensation Event) on the Project Manager's assumptions and if the assumptions turn out to be incorrect, the Project Manager must notify the Contractor of a correction of the previous assumptions.

8 See Clause 63.1

9 Clause 60.1(12).

10 See Clause 61.6

An assessment of a Compensation Event is not revised or corrected if the forecast underlying said assessment turns out to be incorrect. This places an inherent risk on the Contractor if he underestimates the effect of the Compensation Event but it also highlights the importance of the Project Manager providing assumptions. The Project Manager is required to correct assumptions that turn of to be wrong, and that notification of the correction constitutes a Compensation Event by virtue of Clause 60.1 (17).

Conclusion

The manner in which the NEC3 makes provision for events of an ongoing nature may seem foreign or even counterintuitive, however, it is crucial that the Project Manager and the Contractor understand the procedure and comply with their obligations in respect thereof.

When submitting quotations in respect of Compensation Events, making predictions of the effect of an event that has not yet ceased can be difficult and carry a certain degree of risk on the part of the Contractor. The Contractor, however, can mitigate such risks by including a risk allowance allowed by virtue of Clause 63.6 and by basing his assessments on the Project Manager's assumptions. The Contractor has the right to insist that the Project Manger provides assumptions, which are essential when dealing with events of an ongoing nature.

11 See Clause 65.2.