

NEC4 Resolving and Avoiding Disputes

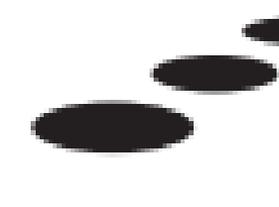
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Foreword

There is a real possibility that this book will do more good for standard form contracts than any other. Its theme is dispute avoidance; its approach, its tone, and its style is building-contractor-friendly. Forms of Contract are written by lawyers for building Buildings. Those two camps aren't always able to fathom each other. In the end the builder just gets on with building. Whether it is this or that contract document is all very well but spending time trying to operate contract clauses in the 'muck and bullets' of building something is, er, hmm, not a priority. It's only when a dispute breaks ground that building folk start rummaging the small print . . . dozens and dozens of pages in dozens and dozens of contract documents. It might even be that someone reaches for a textbook. Ah, then comes the lawyer stuff.

In 1991, came the '*New Engineering Contract*' ('NEC'). The NEC4 Edition was 2017. In all these years, the NEC folk have said that the intention is to operate NEC so as to minimise disputes. Marred by-the-way, say the two authors of this book, by '*Z clauses (having) gained a certain notoriety amongst NEC users, as they frequently used to skew the contractor's risk allocation between the Parties.*' So, the book has, at its heart, how to understand NEC, how to enjoy using it as a hand-book and yes, how to avoid, or at least reduce disputes. Dispute avoidance is, at last, gaining ground.

Tony Bingham
Arbitrator, Adjudicator,
Barrister at Law

Chapter 2

Communications

15. Introduction to communications

Communications are at the heart of all business transactions; the construction industry is no exception to this. All NEC contracts have communications requirements expressly set out with the aim that communication is undertaken efficiently and clearly. Unsurprisingly, communications or, more often the lack of them, play a significant role in contract disputes.

Many commercial contracts still use language suited to postal communications between the Parties and Others. In an era where email and other forms of electronic communication are now the norm, reliance on such drafting is inadvisable, given the likely non-compliance from day one.

For routine matters, the term ‘in writing’ doesn’t appear in the ECC.¹ Instead, the contract requires communications to be in a form that can be read, copied and recorded. The language refers to the functionality of the communication, not the format of its transmission. The focus on functionality continues throughout all NEC4 documents and the ECC is no exception.

We describe the various processes in the contract in later chapters, for example the assessment of payments and compensation events, so we will not cover communications for those processes in this chapter. But it is important for users of the contract to remain aware that all required communications (as opposed to those that are merely desirable) must be provided within a defined timescale. Some clauses contain express timescales, for example the *Project Manager’s* notification of the acceptance (or not) of a programme under Clause 31.3 must be communicated within two weeks. Where such a time period has not been specified in the *conditions of contract*, the *period for reply* will establish the time for a response. So the contract defines not only the functionality of the communication, but its speed too.

Disputes in all forms of contract tend to reflect the Parties’ actions and inactions. Many NEC processes rely on the protagonists’ timely actions. It is common to see allegations in all forms of dispute resolution that the *Project Manager*, *Supervisor* and *Contractor* have not communicated correctly. The NEC’s provisions enable the correct provision of communications to be proved or disproved.

Parties to disputes are often left to rely on less-than-perfect evidence to demonstrate that a communication was issued. Notwithstanding the requirements of Clause 13.1, many participants omit important communications and are left to seek out minutes of meetings, drawing transmissions and the like that were never intended to act as communications. Adjudicators are well used to seeing such documents dressed up by party representatives; typically, this is a sign that the correct form of communication was not issued.

NEC contracts separate notifications from other communications required by the contract. The term ‘notification’ is not defined, and the users of the contract are left to interpret the term themselves. While

Parties to any type of reimbursable arrangement will typically form different views on what payments are due under that arrangement. The ECC provides a detailed structure as to what is due and does it through the following provisions.

Clause 52.1

All the *Contractor's* costs which are not included in the Defined Cost are treated as included in the Fee. Defined Cost includes only amounts calculated using rates and percentages stated in the Contract Data and other amounts at open market or competitively tendered prices with deductions for all discounts, rebates and taxes which can be recovered.

Schedule of Cost Components

An amount is included

- only in one cost component and
- only if it is incurred in order to Provide the Works.

Simply put, if the *Contractor* incurs any costs that are listed in the Schedule of Cost Components (SCC), they will be reimbursed by the *Client*. Costs that are not listed will not be eligible for reimbursement. In outline, that sounds simple. But, as with many things in life, this differentiation will provoke differing interpretations in the minds of different people and we find that many disputes concern the reimbursement of costs that *might* be reflected in the SCC.

Example 5.5 Schedule of Cost Components

- *Branded clothing.* The only clothing shown in the SCC that can be paid for is 'protective clothing'. If a *Contractor* wants its people to wear branded clothing, isn't that a matter for them? The *Contractor* may respond by claiming that all clothing on a construction site is protective, given the risk of skin cancer from exposure to the sun or similar conditions caused by exposure to, say, cementitious materials.
- *Use of a road sweeper or vehicle wheel wash* by the *Contractor* to help maintain good relations with the local community. Where this provision is prescribed by the Scope then it is clearly necessary to Provide the Works, a condition precedent of any activity qualifying for reimbursement in the SCC. But what if the Scope is silent on the issue of keeping the adjacent roads clean? Is the use of a wheel wash necessary? The *Contractor* will say that it is, but the *Project Manager* may argue otherwise.
- *Bonuses paid to people.* These are recognised in the SCC, but you must remember that any cost reimbursed must have been necessary to Provide the Works. On one occasion, we saw a significant bonus paid by the *Contractor* to a member of staff, ostensibly for her good work on the project in question. On being given documentary evidence of the payment of the bonus, the *Project Manager* saw, in the letter sent to the woman by her firm's chief executive, that the bonus reflected her 'many good years of service' to the company. In other words, the bonus was not wholly connected with the current project and therefore there was no reason why the current *Client* should fund all that bonus. On another occasion, a *Contractor* purchased a modest amount of takeaway food and drink from a well-known global fast-food restaurant to sustain a gang of concreters who had necessarily worked late one evening after a delay in their work. The *Contractor* claimed the reimbursement of this amount as a bonus; the *Project Manager* saw things differently and declined to certify that amount.

60.1(2)

The *Client* does not allow access to and use of each part of the Site by the later of its *access date* and the date for access shown on the Accepted Programme.

Access to the Site is clearly necessary for most construction projects even if, say, design and fabrication activities are taking place elsewhere. Note the distinction between the Site and the Working Areas; this compensation event only refers to the Site.

This compensation event reinforces the need to get two things right.

- The Contract Data needs to contain the *access date(s)* and the *Client* needs to be able to honour them.
- The Accepted Programme must be administered properly so that the existence of a compensation event can be demonstrated. *Access date(s)* and the date(s) for access need to be shown on the programme, as can be seen from Clause 31.2. The *Contractor* should show this information and the *Project Manager* should ensure that the dates are compliant before accepting the programme. Where Sites are subdivided into different sections, each with its own *access date*, further complications can arise. If a number of dates are to be used, the parts of the Site to which they refer must be spelt out clearly.

Example 6.1

A regional municipal waste collection and treatment project required *works* on 52 Sites. Six were major treatment plants, the remainder were local household recycling centres. Each Site had its own access issues and planning challenges. Some Sites were leased, while some relied on third-party land for access. The potential for access-related delays was therefore significant.

Delays were encountered. But the prior hard work of the Parties ensured that the identification and assessment of these issues was not over-complicated. The contract required that the *Contractor* and *Project Manager* utilised the same software for programming. The Contract Data contained clear descriptions of each location, together with the appropriate *access dates*.

The two Parties monitored progress against each date and when access would be needed. Using different levels of granularity in the programmes allowed each individual delay to be assessed at a local level and for the project overall. No disagreements were encountered because of the way the contract documents had been drafted and of how the *works* were managed in a collaborative manner.

Clause 60.1(3)

The *Client* does not provide something which it is to provide by the date shown on the Accepted Programme.

reminder in later adjudication or at the *tribunal*, this record, as opposed to a loosely worded communication, will assist in demonstrating that the *Project Manager* was properly reminded.

The time periods in the compensation clauses are generally fixed and each situation is unique. Therefore, we can expect quicker responses in some situations and slower responses in others. The contract allows for the extension of time periods

- for the *Project Manager* to reply to the *Contractor's* notification of a compensation event (Clause 61.4)
- for the *Contractor* to submit a quotation (Clause 62.5)
- for the *Project Manager* to reply to the quotation (Clause 62.5).

Extending the time allowed under Clause 62.5 requires the additional time to be agreed by the *Project Manager* and the *Contractor* before the original time period has expired. If you must extend the time allowed for, say, a three-week period, then don't wait until day 20 to do so. You are far more likely to gain the consent of someone else if you ask early on. Remember when asked to consent to an extension that you may be the one asking next time, so agree to more time if the programme allows.

70. Dealing with compensation events in adjudication and at the tribunal

Where the Parties cannot agree on the assessment of compensation events then adjudication, and possibly the *tribunal*, will become the next options. Of course, there is the possibility of mediation and the role of the *Senior Representatives*, which we describe later in this book.

Where a Party wants to dispute the assessment of a compensation event it may do so.

- **Clause W1.1(4).** Either Party may dispute a decision of the *Project Manager*; it may refer the dispute to the *Adjudicator* within four weeks of the Party becoming aware of the decision. This phrase seems difficult to establish. When did someone become aware? That's possibly difficult to establish, so the referring Party might need to establish, through a document audit trail, when the responding Party became aware. We think that this clause would be easier if it referred to when the referring Party had been notified of the compensation event. But this clause refers to a wider set of issues, other than just compensation events, hence the looser wording.
- **Clause W1.1(4).** The *Client* can dispute the circumstances of a compensation event communication being treated as accepted. This must be done within four weeks of the communication being treated as accepted.
- **Clauses W1.3(7) and W2.3(7).** The *Adjudicator* must assess issues of cost and time caused to the *Contractor* in the same way as a compensation event is assessed. In other words, the *Adjudicator* must act in the same way as the *Contractor* and *Project Manager* should have acted earlier.
- **Clauses W1.4(2) and W2.4(2).** Where the *Adjudicator's* decision still leaves a Party dissatisfied, that Party must issue a notice of dissatisfaction to the other Party within four weeks of being informed of the *Adjudicator's* decision.
- The *tribunal* then deals with the dispute that is referred to it, which may be the entirety of the *Adjudicator's* decision or just a part of it.