

18 March 2020

---

## Covid-19 issues and NEC4

Queries have been raised about how to deal with the impact on NEC contracts that may be caused by the prevention and containment measures being instigated to control the spread of the coronavirus. This note is aimed at explaining the ways in which the NEC4 contracts deal with this matter. The guidance is given in relation to the Engineering and Construction Contract (ECC), but similar actions apply under the other NEC contracts. This advice is given in relation to the standard wording in NEC4 contracts. If modifications have been made, the contract should be reviewed to check whether the guidance given here still applies.

The impact of the virus will vary between different countries, and affect contracts in different ways. The main problem is likely to be the unavailability of resources, primarily people but also Plant and Materials or Equipment. An early warning of the issue should have been given by either the *Contractor* or the *Project Manager* at the time, so that early discussion about the potential impacts could be held in advance, and mitigation measures identified. As the impact of the virus develops, and restrictions which affect the works, further early warning meetings should be held.

Governments in some countries have imposed specific restrictions on movement of people and goods. In this case, if the Site is located in that country and if Option X2 – changes in the law – has been incorporated into the contract, those restrictions would be a compensation event and the impact would be assessed in accordance with the contract.

In the most severe cases, where work has had to be stopped or suffers delay, because of the virus, clause 19 – prevention – may well apply. The situation could arise when people have been prevented from working on the contract or Plant and Materials or Equipment cannot be obtained due to restrictions on movement. These restrictions may have been applied in another country where essential Plant and Materials or Equipment were being sourced. It would be difficult to argue that, in such an extreme case, the *Contractor* could have anticipated the issue and have allowed for it. If the impact stops the whole of the *works* being completed by the date for planned Completion shown on the Accepted Programme, or being completed at all, then the provisions of this clause apply and the *Project Manager* should take control of dealing with the matter.

An event which passes this test will also be a compensation event under clause 60.1(19). Instructions issued by the *Project Manager* to deal with the matter are likely also to be compensation events, through a change to the Scope, stopping or not starting work or other events identified in clause 60.1.

It should be noted that the test in clause 19 is fairly strict. It is not sufficient that the *works* or a *section* of the *works* is delayed, the delay must impact the date of Completion of the whole of the *works*. A delay which does not impact the critical path of the programme or that can readily be overcome would not meet that test. It should also be recognised that clause 19 and the

corresponding compensation event only applies in the case of delay, and do not apply where the only impact of the virus on the contract is an increase in cost.

Where the effect of the virus is having or is going to have a significant impact on the work in the contract, it would be sensible for the *Project Manager* to manage the effects of the virus on the works in the interests of the *Client*. That may mean the *Project Manager* instructing the *Contractor* to stop work or changing the Scope in some way to overcome the difficulties encountered. Clause 19 has been written specifically to make the *Project Manager* take control, but whether or not the effect of the virus meets the limitations in this clause, the *Project Manager* should consider whether or not it would be sensible to issue instructions dealing with the matter. This would allow the *Project Manager* to control the time and cost effect of the virus on the contract.

Under the NEC4 Term Service Contract, which does not contain clause 19 or the corresponding compensation event, the same approach for early warning and proactive management by the *Service Manager* should be followed. The Parties should work together in accordance with clause 10.2 to best address any impact on the delivery of the *service* due to the coronavirus. Whilst the Short Contracts do not include clause 19, they do include the early warning procedure and (with the exception of the NEC4 Term Service Short Contract) provide for the event being a compensation event. This emphasises the point that the *Client* should be actively managing the effects of the virus to ensure that actions taken are in the best interest of the project.