



NEC CONTRACT: IS THE DECISION IN NORTHERN IRELAND HOUSING EXECUTIVE V HEALTHY BUILDINGS (IRELAND) LTD [2017] NIQB 43 OF RELEVANCE TO THE ASSESSMENT OF A COMPENSATION EVENT UNDER THE NEC ENGINEERING AND CONSTRUCTION CONTRACT?

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There has been much press over the last six months about the Northern Ireland High Court decision in *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd [2017]*. As it is the first time a court has considered retrospective assessment, it is possible that parties to the NEC3/4 will be quick to rely on the decision. However, being a decision of the Northern Ireland Courts, and, although the decision is of persuasive authority, how does the decision actually relate to parties using the NEC3/4 in England and Wales?

The Employer, Northern Ireland Housing Executive (“NIHE”), awarded two contracts to the Consultant, Healthy Buildings (Ireland) Limited (“Healthy Buildings”) to provide asbestos survey services. The contracts both utilised the June 2005 edition of the NEC3 Professional Services Contract, and Option G (Term contract) was selected.

The court was asked to determine whether:

1. “the assessment of the effect of the compensation event [is] calculated by reference to the forecast Time Charge or the actual cost incurred by the consultant;” and
2. “actual costs [are] relevant to the assessment process in Clauses 60 to 65”.

The compensation event chronology was not in dispute, but for completeness is summarised below, together with the relevant contract clause:

Relevant Clause	Compensation Event Chronology
<p>Clause 20.2</p> <p>"The Employer may give an instruction to the Consultant which changes the Scope or a Key Date."</p>	<p>10 January 2013</p> <p>NIHE gave Healthy Buildings an instruction during a meeting.</p>
<p>Clause 60.1(1)</p> <p>Compensation event:</p> <p>"The Employer gives an instruction changing the Scope."</p>	
<p>Clause 61.1</p> <p>"The Employer notifies the Consultant of the compensation event at the time of giving the instruction...(and)... instructs the Consultant to submit quotations."</p>	<p>10 January 2013</p> <p>NIHE did not notify Healthy Buildings of the compensation event nor instruct Healthy Buildings to submit quotations.</p>
<p>Clause 61.3</p> <p>"The Consultant notifies the Employer of an event which has happened or which he expects to happen as a compensation event...within eight weeks of becoming aware of the event...unless Employer should have notified the event to the Consultant but did not."</p>	<p>21 May 2013</p> <p>Healthy Buildings notifies NIHE that the instruction of 10 January 2013 is a compensation event.</p>
<p>Clause 61.4</p> <p>"If the Employer decides...(that an event notified by the Consultant is a compensation event)...he notifies the Consultant accordingly and instructs him to submit quotations."</p> <p>The Employer should notify his decision within either:</p> <ul style="list-style-type: none"> • one week of the Consultant's notification or • a longer period to which the Consultant has agreed. 	<p>19 August 2013 and 22 October 2013</p> <p>NIHE instructs Healthy Buildings to submit quotations.</p>
<p>Clause 62.3</p> <p>"The Consultant submits quotations within two weeks of being instructed to do so by the Employer."</p>	<p>29 August 2013 and 31 October 2013</p> <p>Healthy Buildings submits quotations to NIHE.</p>
<p>Clause 62.3</p> <p>"The Employer replies within two weeks of the submission. His reply is...a notification that he will be making his own assessment"</p>	<p>14 November 2013 and 21 November 2013</p> <p>NIHE rejects Healthy Buildings' quotations and assesses the effect of the compensation event as zero.</p>

For both the Employer and the Consultant, the method of assessing the defined cost of a compensation event is determined by Clause 63.1, which states:

“The changes to the Prices are assessed as the effect of the compensation event upon

- the actual Time Charge for the work already done and
- the forecast Time Charge for the work not yet done.

The date when the Employer instructed, or should have instructed, the Consultant to submit quotations divides the work already done from the work not yet done.”

Therefore, under a strict interpretation of the contract, the forecasted element of a compensation event is not determined by the date that the quotation is submitted but, rather, when the Employer instructed, or should have instructed, the Consultant to submit quotations. Importantly, the Professional Services Contract does not stipulate an alternative method of assessment if the works have already been undertaken.

It is worth noting that the NEC3 April 2013 Professional Services Contract guidance notes, which were published after the two contracts in this case were awarded, go further than the previous edition in attempting to explain the rationale for the switch date:

“Clause 63.1 pinpoints the date when there is a switch from recorded Time Charge to forecast Time Charge included in a quotation. This ensures that whoever is making the assessment of the compensation event, that assessment is based upon the same principles. Therefore neither the Consultant nor Employer can choose the switch date in order to suit their own purposes.”

Additionally, in the event of an adjudication, the NEC3 April 2013 Professional Services Contract guidance notes, direct the adjudicator to “use this switch date when assessing compensation events.”

At paragraph 43 of the *NIHE V Healthy Buildings* judgement, Deeney J stated that “(a) refusal by the consultant to hand over his actual time sheets and records for work he did during the contract is entirely antipathetic to a spirit of mutual trust and co-operation.” A reference to the employer’s failure to act in the spirit of mutual trust and co-operation, by issuing the relevant notifications on time, is conspicuous by its absence.

Deeney J goes on to conclude that Clause 63 contemplates “a situation where the employer complies with the contract”. In the absence of such compliance, Deeney J applies “business-like interpretation” to the contract, so that actual cost and time incurred by the consultant can be used to support the claim for compensation.

Quoting from *Bwlfa v Pontypridd [1903]* where an arbitrator had to decide whether the assessment of compensation for the temporary, enforced sterilisation of minerals, Deeney J asks:

“why should I shut my eyes and grope in the dark when the material is available to show what work they actually did and how much it cost them?”.

The court found in favour of NIHE, and directed that Healthy Buildings should make available all “relevant documents in its possession, custody or power relating to the actual costs incurred and time spent by it as a result of and following the employer’s instruction.”

ANALYSIS

1. Proactive Management

The ethos of the NEC suite of contracts is centred around the proactive management of issues, including the identification and assessment of compensation events.

NIHE did not comply with its responsibilities under the contract in this regard and, following this decision, Employers and Project Managers may be encouraged to delay the acceptance of a quotation, or employ seemingly legitimate tactics such as continually instructing the contractor or consultant to submit revised quotations, until the financial effects of a compensation event are known, in an effort to reduce costs. Such behaviour may increase the likelihood of disputes crystallising.

2. Management of Risk

A further question that arises from this decision, is how risk is managed and apportioned. Clause 61.1 specifies that the contractor or consultant shall put “the instruction or changed decision into effect” once the employer requests quotations. It is a reality that the works to which the compensation event relate, are often commenced prior to the agreement of the changes to the Prices. In the absence of an implemented compensation event, the contractor, or consultant, is therefore, proceeding with the works without risk being properly apportioned between the parties. This may lead to a situation where a risk does occur, with the employer or project manager wanting to revert back to a quotation based on forecasts, as this may now provide the lower cost option.

The wording of the NEC suite of documents is such that consistency can, and should, be maintained so as not to benefit either party unduly.

3. The relevance and practicality to NEC3 or NEC4 Engineering and Construction Contract

It is significant that the contracts in this case are both let under Option G, where the Price for Services Provided is based on the Time Charge, which is essentially the amount of time spent working multiplied by the rates included in the contract. The Consultant is contractually

obliged under clause 52.2. to keep “accounts and records of his Time Charge”.

Whereas, the Engineering and Construction Contracts which utilise Option A or Option B do not contain a similar requirement, and none of the options under this form of contract requires the Contractor to apportion each and every cost incurred to the activity schedule or bill of quantities item, or compensation event, to which it relates. To do so would be a time-consuming and expensive exercise. In the absence of such requirement, a request from the Project Manager may be stretching the obligation to act in mutual trust and co-operation too far.

It is therefore questionable as to whether a contractor is contractually obliged to keep, or would even be able to make available, the records of actual cost for each and every compensation event. To avoid any doubt, a clear requirement could always be inserted as a Z Clause.

CONCLUSION

There has been much debate amongst users of the NEC suite of contracts, over whether compensation events should be priced prospectively or retrospectively if the works have already been carried out.

Whilst not binding in England and Wales, this case does provide long overdue guidance as to how the Courts of England and Wales may assess compensation events in similar scenarios. However, it remains unclear whether parties involved in a live contract, that have failed to follow the mechanism under clause 63.1 and 63.3, should follow the same logic, or continue to submit quotations on forecasts thereafter. Perhaps a middle ground in the situation faced in the above case, is to apply the contract to the letter and thus use prospective approach as intended (i.e. forecast defined cost and/or delay to a Key Date or planned Completion Date), and then use sample records of actual resource deployment and cost to sense check the results of the prospective assessment.

If you require any advice, please contact your nearest DGA office.

MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

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