Disputes under NEC

In the last of a series of four articles on common areas of dispute and how to avoid them, **Ron Nobbs** and **Charlotte Heywood** of Stephenson Harwood LLP provide their tips on managing NEC infrastructure contracts

In our experience, most UK rail infrastructure projects are let under the NEC suite of contracts. Indeed, in November 2018, Network Rail announced that its £1.8 billion framework for digital train control systems on the East Coast main line will be let under NEC4. Perhaps in part due to the lack of reported cases and its stated goals of 'mutual trust and cooperation', NEC is viewed by many as the form of contract most likely to avoid disputes. However, disputes still arise regularly and there are a number of common pitfalls that can catch both employers and contractors out. In this article we set out our tips on how to avoid some of these major pitfalls.

Background to NEC

The ethos behind NEC is collaboration – working together in good faith and encouraging real-time project management in order to identify and manage risk to avoid disputes arising so far as possible. The contracts are written in plain English, using short clauses and the present tense. There are a number of forms of NEC contract, the most commonly used for rail infrastructure projects being the Engineering and Construction Contract, which itself has six options depending upon how the contract is let.

It starts at the beginning

Future proofing against disputes starts at negotiation stage. Many of the issues that lead to problems in the life of the contract are as a result of drafting problems. NEC contracts are constructed from core clauses, main options and secondary options (X, Y and W clauses) and bespoke amendments (Z clauses).

A common problem is the insertion of Z clauses at the back of the contract that are unclear, based on wording from other standard form contracts and which contradict the clauses contained in the main agreement. This leads to arguments as to which clause should apply. All Z clauses should be: (i) clearly worded; and (ii) consistent with the remainder of the contract.

Issues also arise with the drafting of the Scope (previously called 'Works Information' under NEC3). This will not normally be reviewed by lawyers at drafting stage, but it can have a significant impact on issues such as design responsibility and can create conflict with the rest of the contractual provisions.

To avoid this: (i) the Scope should be carefully reviewed by the legal and commercial teams together to ensure that any legal implications are properly understood and dealt with in the body of the contract; and (ii) a priority of documents clause should be included as a Z clause to make it clear which document takes priority in the event of conflict.

Design and coordination

A common cause of disputes is the scope and extent of the Contractor's design and coordination responsibilities. It is crucial that this is made clear at drafting stage and that both parties understand the extent of their obligations. In relation to design, under core clause 20.1 the Contractor is obliged to provide the Works in accordance with the Scope. If the Scope contains a fitness for purpose obligation, then the Contractor will be required to meet that obligation.

We have seen a number of cases where the Contractor did not appreciate that it was required to meet a fitness for purpose obligation under the Scope. Confusion can be caused as to what standard the Contractor must comply with where the contract also includes secondary option X15.1, which imposes the lesser duty of reasonable skill and care. This can be addressed by: (i) clear amendments to clause 20.1 if a fitness for purpose obligation is required; and (ii) ensuring that there are no inconsistencies between the different parts of the contract.

Z clauses relating to the Contractor's obligations to coordinate its works and integrate its design with others are also common in rail infrastructure contracts. Poorly drafted clauses can however lead to problems as to interpreting what 'coordination' actually means. This can be a particular issue in relation to station refurbishment works, where the Contractor needs to coordinate new systems such as fire and communications systems with the existing systems and therefore requires cooperation from the Employer. Coordination responsibilities must be clearly defined at negotiation stage and the relevant clauses then drafted unambiguously.

In-life management

The NEC ethos of real-time management creates a very significant administrative

burden which often leads to disputes if a party does not understand the requirements or does not have sufficient resources to comply with them. This is particularly the case where one party is sophisticated and deliberately bombards the other with contractual notifications. If the relevant clauses requiring notification are not complied with, significant adverse consequences will follow. To avoid this, ensure that: (i) adequate resource levels are provided to administer the contract; and (ii) training is provided so that everyone involved fully understands what is required and the consequences of failing to comply.

Early warning

Under clause 15.1 both the Contractor and the Project Manager are required to give an early warning notice (EWN) as soon as they become aware of any matter that could cause delay, increase cost, or impair the performance of the works in use.

These notices are then included in the Early Warning Register (the 'Risk Register' under NEC3). The parties are then required to cooperate in order to try to mitigate the risk. There are consequences for the Contractor in failing to give an EWN in that, if the matter that is the subject of the EWN then becomes the subject of a Compensation Event (CE), the Project Manager can assess the impact of the CE as if the Contractor had given an EWN (i.e. taking into account the mitigation that would have taken place had an EWN been given and reducing the Contractor's entitlement).

A common mistake is the assumption that, if an EWN is given, then a Notice of Compensation Event (NCE) does not need to be given in relation to the same facts. This is incorrect – whilst an EWN is not required if a NCE has been given, on the face of the wording of clause 61.3, an NCE is required regardless of whether an EWN is given as a failure to do so will result in the Contractor being unable to recover any additional time or money in relation to the particular issue.

Compensation Events – Notice

A frequent cause of disputes is the notification and deemed acceptance of CEs. There is often confusion as to which party is to give the NCE. Under clause 61.1 the Project Manager must give notice if the CE arises out of an instruction or notification, or the issuing of a certificate or changing of an earlier decision.

Under clause 61.3 the Contractor must give notice of an event that has happened or which is expected to happen as a CE if the Contractor believes the event is a CE and the Project Manager has not notified the event to the Contractor.

If the Contractor fails to notify within eight weeks of becoming aware that the event has happened, the Contractor is time-barred from recovering any time or money in relation to the CE. It is therefore absolutely crucial that the Contractor ensures that notice is given within the required timeframes. Disputes often arise as to when the Contractor actually became aware of the event happening and it is important that Contractors are on top of all of the relevant facts to ensure that notice is given at the right time (for example if the Employer fails to do something within the required timescale under the programme).

Notice Requirements

A common issue is a failure to follow the notification requirements of the contract properly, particularly on long-term contracts where the parties have developed 'usual' practices that do not comply with the strict contractual requirements. The notice requirements are contained at clause 13 and notice for each issue must be given: separately, in writing, to the right person, and to the right address.

Problems also arise due to the use of project communication systems as, under clause 13.2, a communication has effect when it is sent via that system. We have seen many project communication systems that have numerous complicated requirements as to how notice should be given, resulting in arguments that notice has not been properly given because, for example, the right drop down box was not selected or where the notice was given by email because the communication system was broken.

In order to avoid technical disputes in this area it is essential that the Scope clearly sets out the requirements of the communications system in relation to notices and that all users of the system are fully trained.

Compensation Events – deemed acceptance

There are strict timetables for dealing with CEs after notice has been given and severe consequences if such timescales are not complied with:

If the CE was notified by the Project Manager, then such notification should include an instruction to provide a quotation If the CE was notified by the Contractor, then the Project Manager must respond in one week (or such longer period as may be agreed). The response may reject the NCE or accept it and instruct the Contractor to submit a quotation

If the Project Manager fails to reply to the NCE, then the Contractor can notify the Project Manager of that failure (albeit there is no prescribed timescale for doing so). If the Project Manager does not then respond to the prompt notice within two weeks, the NCE is deemed accepted and the Contractor is deemed to be instructed to submit a quotation

The quotation should set out the Contractor's assessment of the time and cost implication of the CE and must be provided within three weeks of the instruction The Project Manager then has two weeks in which to respond to the quotation either accepting it, instructing the Contractor to submit a revised quotation, or notifying the Contractor that the Project Manager will be making the assessment

If the Project Manager does not respond to the quotation within two weeks, then the Contractor can again notify the Project Manager of that failure and, if the Project Manager does not respond to the prompt notice within two weeks, the quotation is deemed accepted.

Whilst the ethos of NEC depends upon getting issues dealt with promptly, we often find that CEs are not actioned in accordance with the contractual requirements. Even if NCEs are given, the process often then stalls with both parties being in technical breach of the contract in failing to respond or prompt as applicable, for example where the quotation has been submitted late, but the Project Manager has failed to respond to it.

In such circumstances the contract is silent as to whether the quotation is valid and a prompt can be given. This can make unpicking the legal position in subsequent disputes challenging. The best way to avoid this is to ensure that the requirements of the contract are properly complied with.

Record keeping

If disputes arise, the best tip we can give as to how to put yourself in the best possible position to resolve them, is to ensure that comprehensive records are kept. All instructions and agreements should be recorded contemporaneously in writing, otherwise the parties have to rely on the recollection of witnesses.

Records are also critical to proving entitlement – so ensure that you put systems in place to capture costs and update them as required. For example, if you are dealing with a claim arising out of a track access issue, keep records of the failure to provide access, the time period that access was not provided for, the number of people unable to work and the associated cost.

Top tips for avoiding disputes

In summary, our top tips to avoid disputes under NEC are: (1) get the drafting right; (2) ensure adequate administrative resource and provide training; (3) make sure everyone understands and follows the notice provisions and procedures in relation to EWNs and CEs; and (4) keep detailed written records.

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