

Snow and the NEC3 Standard Form of Contract

Planning for and assessing the impact of adverse weather

James Vernon, February 2009

Introduction

The recent severe winter weather throughout the UK has not only brought Health & Safety concerns for Project Managers, Site Supervisors and Contractors but will lead to an increase in contractual claims for delay and disruption in the next few months. The below sets out the operation of the relevant provision of the NEC3 Engineering and Construction Contract with regards to adverse weather conditions and a checklist for all parties (especially Project Managers) when entering in and operating under the NEC3.

The effects of adverse weather on a project's progress can include site closure, limiting the workable area of the site, reduction in working hours, reduction in the workforce if there are transport difficulties and impact on deliveries necessary to carry out the works. These may impact on the programme and/or cost of the project and must be dealt with by the Project Manager at the appropriate juncture. Under the NEC3 this will lead to a busy March!

The relevant core clauses of the NEC3

Before we consider what amounts to "adverse weather" under the NEC3 and in relation to Compensation Events, there are two clauses which can give rise to a notification of the potential impact of weather on the time and cost of a project and need to be carefully considered by the Project Manager.

A key element of the NEC3's ethos is to for proactive management and co-operation in the commission of a project. Under the Early Warning procedure, set down in clause 16, a Contractor or Project Manager can give an early warning by notifying the other of any matter which could increase cost or cause delay to the completion of the works/meeting a Key Date. Usually weather can not be accurately forecast to definitively come within the contractual definition of adverse weather under clause 60.1(13), however it is possible for such a notification to be made. If so, the Contractor and Project Manager must consider what steps can be taken in advance to reduce the potential impact of

the threatened weather. While this will not prevent a Compensation Event being notified on the occurrence of such weather, the impact on the programme and cost should have been minimised.

Weather conditions can also require Project Managers to make important Health & Safety decisions on site. If the Project Manager considers the site to be unsafe due to the weather amounting to a risk of personal injury and/or damage to property, an instruction to stop work can be issued to the Contractor in accordance with clause 34.1. Such an instruction will give rise to a Compensation Event under clause 60.1(4), with appropriate assessments for the effect on the time and cost of a project to be carried out. This may cause increased cost and/or delay to the Employer, but such an instruction may be the safest option and prevent any exposure from Health & Safety, personal injury and property damage claims. Ultimately the safety of the site and those working on it is paramount.

The NEC3 has a distinct Compensation Event arising from adverse weather (clause 60.1(13)). The approach to this Compensation Event is an objective one based on actual records, giving the parties greater certainty provided that the information in section 6 of Part 1 to the Contract Data is filled in accurately for the historic “*weather data*” and the necessary “*weather measurements*” are obtained.

The role of the Project Manager is to compare the recorded monthly weather measurements with the historic weather data for that month. Any such measurements that are above the data is an adverse weather condition and gives rise to a Compensation Event but only for the period of time the weather measurements exceed the weather data. For example, if the weather data records 2 days of snow lying at 9am for February and the weather measurements for February 2009 show 10 days of snow lying at 9am, the Compensation Event assessment is only to take into account the effect of the extra 8 days of snow.

Weather Data

The weather data sets an average figure for certain weather conditions as prescribed in Part 1 of the Contract Data (and added to as agreed between the parties and relevant to the particular project) at a certain location for each calendar month over at least ten years. This data is usually obtained from an independent weather authority and is for the closest location to the project. It should be noted that for an extended project site it is possible to divide it into areas and obtain weather data (and measurements) for each area.

Weather Measurements

The weather measurements to be obtained from an independent weather station, as detailed in the Contract Data, are:

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- Cumulative rainfall in mm;
- Number of days with rainfall of more than 5mm;
- Number of days with a minimum air temperature less than 0 degrees Celsius;
- Number of days with snow lying at a certain time (as defined in the Contract Data); and
- Any other measurements deemed appropriate for the project, for example wind speed.

As with the weather data, these measurements will relate to a prescribed location which is more than likely not to be the site but will be indicative of the actual conditions experienced on site and correlates with the location of the weather data.

Even though the comparison of daily records is required for some measurements, the norm is for the information to be received at the end of each calendar month. Therefore even though the Project Manager and Contractor may expect that adverse weather has occurred, this can not be confirmed until the measurements are received and the results compared with the weather data. On this basis the Compensation Event does not occur until the data is compared, not on the date of the adverse weather. However this should not stop the Project Manager advising the Employer that such a Compensation Event is likely and the ramifications of it and from co-operating with the Contractor to see if any mitigation steps can be taken to reduce the impact of the adverse weather on the programme and/or cost.

Immediate effects

In light of the weather experienced in the first two weeks of February 2009 most NEC3 contracts in operation will be subject to adverse weather Compensation Events when the measurements are received by Project Managers and Contractors at the end of this month. It is vital that the Compensation Event is notified and assessed in accordance with the procedure set down in core clauses 61, 62, 63, 64 (if the Project Manager has to assess) and 65. Given that effects of the adverse weather including days the site was closed, reduction in hours worked, reduction in workforce etc, the impact on the programme or the costs necessary to ensure that the existing programme is maintained should be ascertained as soon as possible once the measurements are received so that the weather has as little impact as possible.

Key points for parties to consider now and in the future regarding the weather under the NEC3

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The weather of February 2009 will impact on the averages in the weather data for future Februarys to be compared against and may result in adverse weather claims at this time of year falling in the future. However events in a single month should not be dismissed and lessons can be learned from the impact of the weather.

The Project Manager and Contractor must ensure that the section 6 of Part 1 to the Contract Data is filled out correctly, including that the place the weather is recorded is applicable to the location of the project and that any other relevant weather conditions are measured.

The weather measurements must be obtained monthly and a file note made of the comparison with the weather data even if no adverse weather occurred.

An accurate diary of the weather should be kept on the project so that the impact of all weather is recorded, such as effect on the workforce and impact on deliveries. This will aid the assessment of Compensation Events as and when they arise. It will also enable the Project Manager to ensure suitable resources are available to assess the Compensation Event once it occurs.

The Project Manager must ensure that the safety of the site is maintained and even if the weather may not amount to “adverse weather” under the NEC3 definition when the measurements are compared with the data, an instruction to stop work under clause 34.1 should be given to the Contractor if necessary and the resulting Compensation Event will then be dealt with as normal.

The procedures set out in the NEC3 are for the benefit of all parties to a construction project. Provided the correct steps are taken, unforeseen weather should not impact too greatly on the programme and costs of a project.

For any further queries regarding the impact of adverse weather on the operation of the NEC3 or in relation to the NEC3 in general, please contact James Vernon at j.vernon@beale-law.com and 0207 240 3474.