Prevention under the NEC Contracts
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When reviewing the second edition in preparation for its update, the NEC panel recognised that we had no provisions to deal with what are commonly called "force majeure" situations. These are significant, unexpected events causing major problems to the project.

An example might be when a bolt of lightning set fire to the building shortly before completion. Although the repair work may be covered by insurance, the consequences of delayed completion are not. Without relief under the contract, the contractor could end up paying damages for late completion of the work. Most contracts have provision for granting extensions of time in such situation, but the NEC did not. We decided we should include some such provisions within the third edition.

When researching how contracts dealt with force majeure, we found a variety of techniques had been used. Most of them, we concluded, were drafted in a way that gave rise to substantial uncertainty in their operation. We needed to avoid such poor drafting in our contract, which meant looking at the issue with a fresh approach.

We decided we needed to make provision to two cases. The first was when the event prevented the work being completed on time. This should be a strict test - not simply a matter of delay. The second case, arguably not needed but included for consistency, was when the event prevented the work being completed at all. In both cases, we had to define the event in a way which excluded the normal risks one would expect on a Project. In addition, we believed it was essential that the Project Manager controlled the situation and made decisions on how to deal with the event.

We eventually decided to draft two clauses. The first - clause 19 - gave the Project Manager the authority to give instructions when the event occurred. The second was to provide for compensation for the event within clause 60. Clause 19 defines the event by three tests. The event must pass all three to meet the provisions of this clause.

The first Test is that the event must either be one which stops the contractor from completing work by the completion date, or be one which stops him completing the work absolutely. The test for completing work on time is a fairly strict - it is not sufficient to show that the contractor has been delayed and that it will be expensive or difficult to make up the delay. If additional resources are needed to overcome the delay, they must be mobilised. To meet this test, there must be no reasonable way of completing the works on time. To stop the contractor completing the work at all, something must have happened to the site which means the project cannot under any circumstances be completed. An example might be a contract for fitting out a building which has been destroyed by fire.

The second Test is that the event must be one which neither party could prevent. Acts or inaction of the Employer or the Project Manager acting on his behalf do not count - these have to be dealt with under other provisions of the contract. Again, this is a fairly strict test - There is nothing that could reasonably have been done to prevent the event.

The third Test is that it would have been unreasonable for an experienced contractor to have allowed for the event. The wording provides a similar foreseeability test to that used for ground conditions. This makes it clear that the matter is a risk issue - should the contractor have made provision for the event?

If such an event has occurred than the Project Manager gives an instruction. He may decide to abandon the work because the project is no longer viable - the Employer terminates under the contract. He may decide to change the work to overcome the problem – a change to the Works Information. A third option is to allow progress to be delayed until the event is overcome, and accept a delay to completion. Whatever action the Project Manager takes, the event itself is a compensation
event, and in addition the instruction of the Project Manager changing to the Works Information would be a further compensation event.

Note that, unlike other construction contracts, the NEC provides for both time and cost effects to be dealt with. Other contracts simply protect the contractor against delay damages. This follows the standard NEC approach for assessment of compensation events – the Project Manager must decide on the balance between time and cost. Note that in many cases, the cost may be covered by insurance, in which case it would be excluded from the assessment of the compensation event. Note also that compensation only arises if the event is not covered by one of the other compensation events.

An example of a "prevention" event might be when a ship carrying a transformer to site sinks; a replacement cannot be obtained in time to meet the completion date for the power station. The risk of the loss of transformer was small, and it would have been unrealistic to expect the contractor to take, or the employer to have paid, for the necessary mitigation measures for the risk - building a second transformer when only one was needed.

An example of an event which fails just about every test for "prevention" is the insolvency of a key sub-contractor.

- It is hardly likely to prevent completion absolutely, and only in extreme cases - final late finishing trades for example - could it cause a delay which could not be overcome.
- Appointing a sub-contractor who did not have solvency problems (or not subcontracting it at all) could have prevented the event.
- There is clearly always the risk of sub-contract or insolvency, and an experienced contractor has must allow for it. Should the risk of insolvency stopping work not be included in the Risk Register? One would expect to see management techniques (risk reduction actions?) operated to avoid the likelihood of a delay to the project.
- Note also clause 26.1. If the contractor sub-contracts work, he is responsible for providing the works as if he had not sub-contracted. It is difficult to see how the contractor could ever make a case for compensation for the insolvency of a sub-contractor in light of this clause.

In conclusion, clause 19 provides the Project Manager with increased powers to deal with an unexpected event which prevents one of the employers' key objectives - completion on time - being met. The contractor is entitled to compensation for the event, together with compensation for the time and cost effect of complying with instructions of the Project Manager. The tests for meeting this clause, and recovering compensation, are quite strict and are likely to rule out all but the most significant events.

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