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Covid 19 issues and NEC contracts in South Africa

Proclamation of National State of Disaster & Restriction on the Movement of Persons and Goods ¹

As a result of the COVID-19 pandemic, a National State of Disaster for South Africa was proclaimed on 15 March 2020 by the Minister of Cooperative Governance and Traditional Affairs in terms of the Disaster Management Act, 2002. Government Gazette No 43096 of 15 March 2020 contained Notice 313 wherein the Declaration of a National State of Disaster appeared.

After the proclamation of the National State of Disaster, Regulations were published in many separate gazettes.

Government Gazette No 43148 of 25 March 2020 contained Notice No R.398. The definition of *lockdown* appeared under Section 8 under "CHAPTER 2, Subsection 11A". Restriction on the *movement* of persons and goods appeared under Section 8 under "CHAPTER 2, Subsection 11B".

Implementation of Notice No R.398 became effective on 23:59 on Thursday, 26 March 2020, and the implementation was to stay effective until 23:59 on Thursday 16 April 2020 but has been extended by the State President until end of April 2020.

Outcome for the engineering and construction industry.

As we are all aware this has resulted in mandatory closure of many construction sites, or difficulties for contractors obtaining Plant and Materials as well as obtaining Equipment to carry out work. Furthermore, the Lockdown and distancing provisions have affected not only construction personnel but also supervisory staff, and all built environment professional staff involved in ongoing projects.

Relief in terms of NEC contracts.

At times like these, affected organisations look to their contracts of supply for what happens next as well as any relief that may be available to them in terms of their contracts.

This document is designed to give guidance to those organisations employed under any of the NEC family of standard form contracts.

Anyone using the information provided in this document does so at their own risk, and the authors do not accept any responsibility whatsoever for the interpretation and use of the information provided here.

¹ Reproduced with permission from the SAICE publication, "Dealing with the effects of COVID-19 in the ambit of the SAICE Suite of GCC Contracts"

COLLABORATIVE PROJECT STRATEGIES

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Guidance issued by owners of NEC, the Institution of Civil Engineers

The NEC office at the Institution of Civil Engineers in London is monitoring the Covid 19 situation continuously and making guidance available in the form of statements and videos on its web page www.neccontract.com. Here is the first statement and there is a video on the same web page explaining the statement.

Although the statement relates to NEC4 contracts, the issues under NEC3 contracts are very similar. The situation for both NEC3 and NEC4 contracts is discussed in more detail after the statement.

“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 new restrictions 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 does 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 (except for 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.

(end of statement)

Further statements and supporting videos will be issued on www.neccontract.com from time to time.

Note: The term "prevention" is used in NEC contracts rather than terms like force majeure or vis major used in other forms of contract. Rather than try to identify such events, NEC uses the approach, "if an event occurs which stops the Contractor"

How the works contracts ECC3² and ECC4³ deal with the effects of Covid 19

The procedures under ECC3 are very similar to ECC4 with the differences noted in the following summary of actions.

The first action is for either the *Project Manager* or the *Contractor* to notify an early warning in terms of clause 15 in ECC4 (clause 16 in ECC3) and call an early warning meeting⁴.

At the early warning meeting, use a collaborative approach to explore the implications of Covid 19 and the new Regulations on the *Contractor's* Providing the Works (as well as possible commitments which the *Employer* is to meet on the *Contractor's* Accepted Programme). Depending on the chosen *conditions of contract*, agree on the actions to be taken and who in terms of the contract will take them. There are three main possible courses of action

1. An instruction to stop work in terms of clause 34 could be given by the *Project Manager* who should then notify a compensation event in terms of clause 61.1. If he does not notify a compensation event, the *Contractor* should notify in terms of clause 61.3. Once the Lockdown ends the *Project Manager* can give an instruction to re start work.

² NEC3 Engineering and Construction Contract, April 2013

³ NEC4 Engineering and Construction Contract, June 2017

⁴ This should have been done as soon as possible after President Ramaphosa announced the lock down measures on Monday 23rd March 2020 or when the Regulations governing it became known.

2. If Option X2 "Changes in the law" applies, the *Contractor* can notify a compensation event in terms of clause 61.3 in ECC4. In ECC3 this is the job of the *Project Manager*. The changes in the law could be the new or revised Regulations issued in terms of the National State of Disaster.
3. If secondary Option X2 has **not** been selected, or an instruction to stop work has not been given, the *Project Manager* should utilise clause 19 Prevention by giving an instruction to the *Contractor* how the Covid19 event is to be dealt with. Whilst the prevention event is itself a compensation event per clause 60.1(19), the *Project Manager's* instruction may result in further compensation events, such as a reduction in the scope of work. Alternatively, the *Contractor* can notify compensation event 60.1(19) which relates to the prevention event. It must be stressed that some employers / clients add conflicting Z clauses that upset the intention of the prevention clause and this advice would need to be reviewed in such cases.

It should be noted that the allocation of risk due to a prevention event differs as between ECC3 and ECC4. Essentially, the trigger for the event in ECC4 is its effect on planned Completion of the whole of the *works* only, whereas under ECC3 the trigger is the effect on completing the *works* which could include a *section* as well as the whole of the *works*.

Assessing time and cost

With the proclamation of the National State of Disaster, resulting in the Lockdown for a defined period the *Contractor*, after discussions with the *Project Manager*, can assess the effects of the event for the period up to end of April 2020. The *Project Manager* can still use clause 61.6 to make assumptions about the event in his instruction to the *Contractor* to submit quotations. These assumptions could be in the form of providing separate quotations for the effects of Covid 19 before and then during the Lockdown event.

Any further extensions of the Lockdown can be catered for by a new compensation event.

Quotations and implementation then proceed as required by clauses 62, 63, 64, 65 and 66.

How the short works contracts ECSC⁵ and ECSS⁶ deal with the effects of Covid 19

Although the short contracts do not have a prevention clause, the prevention event is provided for by being one of the listed compensation events. There is also a provision for the *Employer / Contractor* to instruct the *Contractor / Subcontractor* to stop work and deal with the effects of it as a compensation event.

The Term Service Contract (TSC3⁷ and TSC4⁸)

The same approach for early warning and proactive management by the *Service Manager* should be followed. In both editions

- a change in the law of the country in which the Affected Property is located is a compensation event if secondary Option X2 has been included in the *conditions of contract* and
- the *Service Manager* can use a stop work instruction which becomes a compensation event.

⁵ NEC3 and NEC4 Engineering and Construction Short Contract

⁶ NEC3 and NEC4 Engineering and Construction Short Subcontract

⁷ NEC3 Term Service Contract April 2013

⁸ NEC4 Term Service Contract June 2017

The NEC4 Term Service Contract does not contain clause 19 Prevention or the corresponding compensation event in the core clauses. 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.

Under the NEC3 Term Service Contract, if secondary Option X19 applies and work is administered in terms of a Task Order, compensation event X19.10(6) deals with the impact of prevention on completing a Task by the Task Completion Date.

NEC3 and NEC4 Term Service Short Contract

In both contracts there are no clauses dealing with prevention, but the *Employer / Client* can issue a notice to stop work and proactively deal with the effects as a compensation event.

The Professional Service Contract (PSC3⁹ and PSC4¹⁰)

The situation under the PSC contracts mirrors that under the ECC contracts, with just different clause numbers in some cases. The three options of dealing with the effects of Covid 19 through the use of secondary Option X2 (if it applies), the suspension of work clause or prevention apply in the same way as in ECC contracts.

NEC3 and NEC4 Professional Service Short Contract

In both contracts there are no clauses dealing with prevention, but the *Employer / Client* can issue a notice to stop work and proactively deal with the effects as a compensation event.

The NEC3 and NEC4 Supply Contracts

The same provisions as in the other main contracts are available in both NEC3 and NEC4 Supply Contracts, thus:.

- The *Supply Manager* can stop work and restart again later, dealing with the matter as a compensation event.
- If Option X2 has been selected a change in the law of the country stated in the Contract Data is a compensation event.
- Prevention is dealt with in core clause 19 and compensation event 60.1(15) but only applies to stopping Delivery if the event occurs during transport of the *goods* to the Delivery Place.

We are grateful to Peter Higgins, Chairman of the NEC4 Contract Board for his valuable contribution in the drafting of this paper.

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⁹ NEC3 Professional Services Contract April 2013

¹⁰ NEC4 Professional Service Contract June 2017