

## PRACTICE

# Notifying compensation events and time bars: a fairer approach needed



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## KEY POINTS

- Time-barring a contractor's right to compensation for an event caused by the client may be seen as unfair.
- Client teams should be aware of most potential compensation events without being notified, perhaps with the exception of unexpected physical conditions encountered by the contractor.
- Acting in a spirit of mutual trust and co-operation, project managers should encourage contractors to notify compensation events before the time bar or notify it directly themselves.

NEC's eight-week time-bar in clause 61.3 (seven weeks for subcontractors) for notifying compensation events is a much debated and often controversial topic (Goodwin (2020), Goodwin *et al.*, (2022)). Time barring a contractor's (or subcontractor's) right to claim compensation due to an event that was their client's contractual risk may be seen as unfair.

A typical scenario goes like this: the client is supposed to provide access to the contractor by a certain date but fails to do so. The contractor is contractually bound to notify the client of a compensation event but fails to do so within eight weeks. The client, having caused the detriment, enforces the time bar and extinguishes the contractor's right to compensation.

## Pros and cons of time bars

Many in the construction industry would find the above scenario unfair – however, according to a survey my firm undertook in 2019, 39% of NEC users would not. The oft-cited defences are twofold. The first is that the contract dictates how the parties will conduct their business so that is how the parties must act. The parties have agreed to such a mechanism, whether deemed unfair by one party or not.

The second defence is that claims for compensation should be dealt with by the parties at or near to the time they occur, notwithstanding the early warning process. The party causing the detriment would thus have an opportunity to mitigate some, or all, of the consequences of the action, or non-action, if it were able to do so. The time bar, in effect, forces the issue to be dealt with at or near to the time of the event.

But equally there is no safety net or justice for the party suffering detriment that has been, perhaps unintentionally or unwittingly, caught by the time bar. While it could be argued that a client causing detriment to a contractor should not lose out if it really did not know the contractor had suffered – and was not made aware of this in good time – the reality is that, in most cases, the client (via its project manager) would know or should know it was in default and liable for the resultant costs.

As an extreme example, a client knowing it is in default could simply sit back and let the contractor miss its opportunity to notify a compensation event and therefore suffer

financially. On the other hand, there is nothing stopping the client's project manager from notifying the event directly. Following the second defence above, the client could kick-start the contractual process and force the issue to be dealt with at or near to the time of the event. The notification triggers an evaluation and assessment process which can, if necessary, be a self-assessment if the project manager so decides.

## Client team should be more aware

The compensation events listed in clause 60.1 that could be the subject of a time bar under clause 61.3 are (2), (3), (5), (6), (9), (11), (12), (13), (14), (16) (18) and (21). The others are not because they are due to instructions, notifications, certificates or decisions by the project manager or supervisor.

Of those that could be time-barred, all but (12) on physical conditions and (13) on weather conditions arise from a failure or breach on the part of the client, project manager, supervisor or others, all of which are – or should be – under the control of the client or its team. As such, there can be no reasonable argument that the client team was not aware of the circumstances giving rise to one of these compensation events. One caveat here is that the project manager may not be aware of some of the client's risks under (14) on client liabilities

As to (13) on weather conditions, the event is triggered by analysis between actual weather data and recorded weather data, which the contractor administers, so it could be argued the project manager would not know whether the weather

thresholds had been exceeded. However, it would be highly unlikely for the project manager to be unaware of extreme weather conditions on site that might give rise to a compensation event.

That leaves only one compensation event for which it could be reasonably argued that the client team might not immediately be aware of – (12) on unexpected physical conditions encountered by the contractor on site.

## Conclusion

NEC contracts require mutual trust and co-operation and have an ethos of sound and proactive project management. They promote collaboration between the parties as a key driver to project success and emphasise the importance of risk management. Among all this positivity and fairness, the time-bar clause is somewhat of an anomaly.

It is argued here that the only compensation event where there is solid and sound argument for compensation event notifications to be subject to a time bar is for unexpected physical conditions.

In most other cases, the client team should be aware there is a potential compensation event and, in the required 'spirit of mutual trust and co-operation,' they should ensure the contractor notifies before the time bar or notify it directly themselves.

## References

- Goodwin S (2020) Survey highlights mixed views on time bars for notifying compensation events *NEC Users' Group Newsletter* 107 (July) pp 10–11.
- Goodwin S, Woodridge-Irving A and Broome J (2022) The mismatch between 'belief' and 'awareness' in clause 61.3 *NEC Users Group Newsletter* 116 (January) pp 8–9.

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