

# Drafting an instruction to change the scope on an NEC project

## The impact of changing the scope under NEC

WHEN drafting any form of construction contract, along with all the terms, it is essential to include a comprehensive description of the work expected to be completed by the party undertaking the work. Anything less may lead to ambiguities, inconsistencies and even disputes between the parties about what the exact requirements are/were. More commonly, it will result in the employing party needing to instruct a change to ensure the work that is required is clearly identifiable and captured within the contract.



The New Engineering Contract (NEC) is similar to any other contract in that respect. Clause 20.1 under the NEC4 Engineering and Construction Contract (ECC) states:

*“The contractor provides the works in accordance with the scope.”*

Under NEC, any work not provided ‘in accordance with the scope’ will likely be treated as a defect and this will need correcting at the contractor’s cost (commercial arrangement dependent upon several factors including which main option, before/after completion) unless agreed otherwise under clause 45. To clarify, a defect would not only be for work that is incomplete or incorrect, but also for any additional work that was not properly instructed.

Although complying with clause 20.1 is a main responsibility of the contractor, this clause is just as important to the party that writes the scope as this clause stipulates that the contractor is to do as the scope states. If the scope is not written clearly or is ambiguous in any way, there is potential for divergence between the client’s requirements and the work provided.

However, it is possible the client may not have a clear and detailed vision of the works it requires at the start of a project, or it may even change its mind about something during the course of the works and therefore the scope may need amending. Clause 14.3 gives the project manager (on the client’s behalf) this authority as it states:

*“The project manager may give an instruction to the contractor which changes the scope or a key date.”*

Instructing a change to the scope should be treated just as importantly as when drafting the original scope. The instructed works will become scope and it therefore requires a level of detail that is also clear and unambiguous and should provide the contractor with no doubts about what is being asked. Failure to provide clear instructions could lead to further amendments being required. Clause 27.3 requires the contractor to obey such an instruction and typically, although not always, such an instruction will lead to a compensation event under clauses 60.1(1), (4) or (7) which may change the prices, and key dates or the completion date.

Many construction contracts contain numerous pages of detailed scope, including drawings and specifications, yet when it comes to instructions to change the scope, it is common to see a single line or two on one piece of paper. It is very unlikely that an instruction to change the scope that contains a single line or two will provide the contractor with the level of detail required to ensure the scope is clear and unambiguous, particularly on a project with a degree of complexity. That's not to say that a simple one liner is always insufficient, however a common dispute between parties stems from where an instruction has been identified but its requirements are unclear.

## **What should be included in an instruction?**

If there is a requirement to change the scope, the drafting of an instruction should be considered carefully. Firstly, the language that is used should be in keeping with the NEC – clear, simple, and in plain English. The instruction should provide the basic information of the change. This may be as simplistic or as detailed as necessary although this is likely to be determined by the significance of the change. For example, it may be a simple change to a drawing which only requires detail of the revised drawing number and the detail of what has changed. Alternatively, it could be a major change to a whole section of the works which requires a significant level of detail, multiple updated drawings and specifications. In this latter scenario it would not be advisable to simply instruct the contractor to work to the new drawings and specifications without providing supplementary information.

If an instruction is to replace or amend any existing scope, the instruction should detail precisely what part of the existing scope is to be replaced or amended and the new description that is to be inserted. If this is not done it could result in the newly instructed scope being an addition to any existing scope and is likely to create an ambiguity. For example, should the client want to change a 3m section of wall from block to brick, the instruction should not simply say that the contractor is to install a 3m section of wall made out of brick. This could result in the contractor needing to build two 3m walls – one out of brick and one out of block – as this is what the scope requires. The instruction should clearly set out the 3m block wall is not required and this is to be replaced with a 3m brick wall.

## **Other information**

Other information that should be considered for inclusion within an instruction includes any restrictions or constraints that may be placed upon the works. For example, can the works only be carried out at night? Do the works have to comply with any noise restrictions? Will there be other trades working in the area that should be considered? Providing this level of detailed information will enable the contractor to consider how it will undertake the works with a higher degree of accuracy. This is likely to be reflected within the quotation, which in turn is likely to have a greater deal of certainty.

In most circumstances a project manager's instruction will lead to a compensation event for the contractor. They will also be instructed to submit a quotation for this under clause 61.2, unless the 61.2 bullet point conditions apply. A clear and concise instruction that provides sufficient detail will only assist the contractor in providing an accurate and robust compensation event quotation. The more comprehensive the information the project manager can provide the better, as this will enable the contractor to fully understand the magnitude of the additional works – allowing them to price accordingly.

Should the instruction not be very clear or provide insufficient detail, it is likely that the contractor will either provide a quotation that is higher than it may have been as they may have to include for significant risk to deal with any uncertainties, or alternatively, the quote may not be reflective of work that the client actually wants. The latter could result in a future dispute as the contractor may not have allowed for works that the client had anticipated and the contractor may seek additional time and money should it have 'under-priced' the quotation.

A useful clause for the project manager at this stage is clause 62.1 which allows the project manager, following discussions with the contractor on ways to deal with the compensation event, to instruct the submission of alternative quotations. For example, an instruction for additional work may be satisfied by using timber or by steel. The project manager could instruct the contractor to provide a quotation for both options.

Similarly, if the project manager has uncertainty on the effects or risks associated with a change, clause 61.6 provides that the project manager states assumptions about the compensation event in the instruction to submit quotations. The contractor can then base its quotation on these assumptions which is likely to give greater certainty to both parties about what is expected as a result of the change.

If an instruction is unclear, it is open to interpretation which ultimately could come down to the interpretation of the courts, should it get that far. Disputes can manifest in cases where quotations are open to interpretation as they do not reflect accurate requirements of the works to be carried out. Compensation events are a common area of dispute on NEC contracts as parties often disagree on the value and time elements that are quoted to undertake any changes to the scope. The risk of the above can be greatly mitigated if an instruction is clear from the outset.

## **Communication**

It is also worth remembering that under NEC an instruction is a form of communication and in order for it to be valid it must comply with the provisions set out under clause 13. Should any instruction not comply with these provisions, there is the potential that it will not be valid. However, the key word here is communication and it should not be understated that the most successful of projects are founded on good communication between the parties who deal with issues and change proactively.

The NEC deals well with events prior to them occurring with the early warning notice and early warning meeting procedures. Post-event, it is worth considering holding similar compensation event meetings between the parties to discuss instructions and even quotations together before they are submitted to each other. This way there is likely to be less ambiguity or uncertainty on what is required by the contractor. The project manager may also receive a quotation in line with their expectations – a win-win for all parties involved, as well as satisfying the actions as required under clause 10.2.

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Andy Inchmore, Consultant Surveyor, GVE Commercial Solutions

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