

## PRACTICE

# Defining a changed 'decision' in clause 60.1(8) compensation events



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## KEY POINTS

- NEC4 ECC clause 60.1(8) says there is a compensation event if a project manager or supervisor changes a previously communicated decision.
- However, the word 'decision' is not defined so potentially could relate to any conclusion, resolution, determination, commitment, or choice.
- Also, supervisors do not make decisions in a standard ECC unless provided for in the Scope, but this needs to be done with care as they cannot make decisions that change the Scope.

Clause 60.1(8) of the NEC4 Engineering and Construction Contract (ECC) states there is a compensation event if: 'The Project Manager or

the Supervisor changes a decision which either has previously communicated to the Contractor'. While this appears to use NEC's clear and simple

language, it is not quite as straightforward as it seems.

## Defining a decision

Firstly, the word 'decision' is not defined in NEC. The following clauses (in NEC4) include the word 'decision' or a derivative of it: 15.3, 25.3, 30.2, 50.1, 50.9, 61.5 and 64.1. Clauses 11.2(25), 61.4, and 61.6 can also be added to the list when using NEC3 ECC.

At a first glance, a compensation event which potentially recompenses a contractor for a changed decision requires a contractual decision to be made in the first instance. But whether an

actual decision, or a derivative of it, is required to trigger the event is unclear.

A decision could mean a conclusion, a resolution, a determination, or a commitment. Indeed, the act of deciding something could be as broad as in any given situation when a choice has to be made. For example, it could be said a project manager chooses to issue an instruction or determines the value of the work at the due date.

NEC is normally quite precise in the language it uses to describe the actions parties are required to take, such as: communications are 'submitted', early warnings are 'notified', works are 'instructed', and completions are 'certified'.

But if contractors started giving the word 'decision' in clause 60.1(8) its broadest meaning (correct or not), project managers could be exposed to undue notifications of compensation events. Clients should therefore perhaps consider stating in the contract that 'decision' means one that is formally required within the contractual framework.

## Supervisor decisions

It is also worth noting that in a standard ECC there are no decisions (given its narrowest meaning) that a supervisor has to make. However, these supervisor decisions could be

drafted into the scope, such as, 'the Contractor does not start excavation for Block B until the Supervisor has decided that Block A is excavated properly, is ready and can be built upon'. If the decision to move onto Block B was communicated by the supervisor, and then reversed (or 'changed') by the supervisor, that in theory could give rise to a clause 60.1(8) compensation event.

However, enabling supervisors to make decisions needs to be done with care as they cannot make decisions that effectively change the scope. Only a project manager can do this, which would then trigger a clause 60.1(1) compensation event. ○