

LEGAL

Survey highlights mixed views on time bars for notifying compensation events



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An online survey of NEC users undertaken by my consultancy last year (see my articles in issues 105 and 106) showed that the industry has mixed views on NEC's eight-week time bar for

KEY POINTS

- It is generally believed around 80% of NEC compensation events arise from client/employer changes to the scope/works information, for which there is no time bar.
- For the remainder, NEC contractors and subcontractors need to notify a compensation event within eight weeks (seven weeks for subcontractors) to receive entitlement – even if the event flows from the client/employer side or the project manager.
- Nearly 40% of NEC users who responded to a survey last year believe time bars should be strictly enforced.
- NEC contractors and subcontractors should ensure they have systems in place for timely notification of compensation events to avoid the risk of being time barred under clause 61.3.

contractors notifying compensation events (seven weeks for subcontractors).

Of the 123 users who completed the online survey (24% clients, 50% contractors, 15% subcontractors and 12% consultants), only 39% said they agreed that late notification of compensation events from contractors and subcontractors should always be time barred under NEC core clause 61.3.

However, over three quarters of respondents (76%) agreed the 'higher party' – meaning the client/employer or project manager in an NEC3 or NEC4 Engineering and Construction Contract (ECC) and contractor in an NEC3 or NEC4 Engineering and Construction Subcontract (ECS) – should be lenient towards genuine late claims if it believed the other party had a genuine entitlement and had complied with the contract apart from giving the required notice.

Only a third of users (33%) agreed that higher party breaches and defaults should not be subject to a time bar. Finally, over half (58%) agreed that if both parties had fundamentally failed to comply with the contract, time bars should not apply.

Time-barring risk

In general terms, an NEC contractor or subcontractor can lose a genuine entitlement to compensation simply by failing to notify on time. The second part of clause 61.3 states that, 'if the

Contractor does not notify a compensation event within eight weeks of becoming aware that the event has happened, the Prices, the Completion Date or a Key Date are not changed unless the event arises from the *Project Manager* or the *Supervisor* giving an instruction or notification, issuing a certificate, changing an earlier decision' (NEC3 wording is broadly similar). Clause 61.3 is designed to act as a condition precedent to entitlement – if the contractor does not 'notify' in the requisite time, then it loses its rights to compensation.

However, the potential loss of entitlement does not apply to those events which follow an instruction from the project manager (or contractor in an ECS) to change the scope/works information (clause 60.1(1)). It is generally believed that about 80% of NEC compensation events flow through clause 60.1(1), so it follows that about 80% of compensation events can never be the subject of a time bar.

Of the remaining 20% that can be time barred, many of those events flow from failures by the project manager or client/employer (or contractor in an ECS), for example a failure by the project manager to reply to a communication (clause 60.1(6)) or a failure by the client/employer to provide agreed access (clause 60.1(2)). Some have therefore questioned why a project manager needs to be notified that they or the client/employer have failed to act according to the contract. On the other hand,

there are events such as the contractor encountering altered physical conditions (clause 60.1(12)), which are clearly more suited to notification from the contractor, being the party most likely to be aware – perhaps solely – of the event. However, NEC is clear in its own documentation as to what can and what cannot be time barred.

The survey also highlights an area my consultancy often encounters, that is parties not following contracts correctly and diverging from correct procedures. This includes project managers not issuing instructions, parties not communicating in the required timescales, disputes over what is and what is not changed scope/works information (altered constraints in particular), parties treating the whole compensation event process as 'on-account', and contractors not notifying a

compensation event when required to do so.

It would seem respondents to the survey had some sympathy with contractors (perhaps because half were contractors) who fail to issue the requisite notification when the project manager or client/employer fails to administer the contract correctly, or when both parties fail to follow NEC procedures. In these circumstances there is often a defence to a party trying to enforce the time-bar provisions, more often than not late in the project timeline when the strains of 'normal contracting' start to manifest themselves.

Advice for NEC users

NEC contractors and sub-contractors need to ensure systems are in place to avoid being time-

barred under clause 61.3. Key staff must be able to submit timely notifications of compensation events. They should make use of good commercial systems (e.g. digital contract management tools that can flag when contractual notices become due) and carry out good working practices. Systems are only as good as the people operating them after all.

A whole-team approach is also needed. The parties, project manager and supervisor should meet regularly and communicate regarding risk matters that have arisen where there is a potential for a compensation event. Early warning/risk reduction meetings should have a commercial presence as matters raised here often progress to becoming new instructions or changes to the scope/works information. ○