

NEC early warnings – the need for a more positive perception



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At a recent seminar a colleague and I were discussing the merits of the NEC early warning mechanism. He noted the changes made 10 years ago to clause 16 in the NEC3 Engineering and Construction Contract (ECC), especially those altering the phrase 'early warning' to 'risk reduction'. Certainly it seems odd that the clause title remained as 'Early warning' whereas I have always considered (and lectured others) that the emphasis is more on reducing risk.

If you type 'early warning' into Google expecting to find pages of information and informed discussion relating to NEC and more specifically the ECC early warning clause 16, you will be disappointed. The first two pages of results read like a list of disaster movie catchphrases: tsunami, disaster reduction, fraud, severe weather, dementia, production collapse, exam marking fiasco, diabetes, global meltdown, swine flu and so on.

For the past 15 years or so of my professional career I have come across so many companies and individuals who have had difficulty with the NEC early warning and compensation event mechanisms, in particular the use of early warnings. Some of the comments I have heard over the years, and I am sure all readers will recognise some of these, make me shudder.

- 'Your early warning is rejected' – from a project manager.
- 'Every time you sneeze you send in an early warning' – from a project manager.
- 'Let's not send in this early warning, it will upset the client' – from a commercial director.
- 'I thought this contract was about partnering and keeping it friendly, why are you submitting claims all the time?' – from an employer.

Word association

Potentially the problem lies in word association. Word association, in this context, is basically the unreflective and immediate human response to a given word or set of words. Type 'warning' into online dictionary Wordnik.com and you get the following definitions.

- 'An intimation, a threat or sign of impending danger or evil.'
- 'Advise to beware, counsel to desist from a specified and undesirable course of action.'
- 'A cautionary or deterrent example.'
- 'Something, such as a signal, that warns.'

So which of these descriptions best emphasises the intent of NEC contracts? More importantly, which do NEC users think best describes the intent?

Time for some analogous thinking. An air-raid siren is a type of early warning; it is a sign of

impending danger or threat so falls into the first and fourth definitions above. A guardian angel could be said to be another type of early warning, guiding and guarding whomsoever is lucky enough to have one, giving warning to those who believe in them. They perhaps fall into the second and third definitions above.

So which of the options do NEC users normally associate with the word 'warning'? We are bombarded daily with negative associations of the word, such as veiled warnings, profit warnings and warnings about global warming. As such I believe it is the air-raid siren analogy which more readily addresses our initial and basic instincts.

It may be therefore that our basic human instincts and unreflective thoughts are actually counter-intuitive to NEC contracts; a prejudice to bad news demonstrably causing individuals to react negatively to NEC's 'jewel in the crown' early warning procedure. I am sure the NEC drafters would prefer users to consider words such as 'opportunity', 'mitigation', 'facilitation' or 'prevention' when using the early warning mechanisms.

So yes, I think word association has a part to play in understanding why, for some reason, it occasionally goes wrong.

Buddha and 'bergs

Let me turn your attention to Buddha just for a moment. According to a report in the *New Scientist*, committed Buddhists have been found to have an unusually active left prefrontal lobe in their brains; the lobe that is associated with positive emotions, good morals, foresight, planning and self-control.

Buddhist meditation apparently brings about a radical change in perception; the Buddhist literally sees a different world from the 'bad or mediocre man'. Is it too much for us to heed Buddha's warning that greed, hatred and delusion drive most human beings and are the sources of all suffering?

I mentioned disaster movies earlier on so let us also consider the lesson learned from James Cameron's *Titanic*. Course corrections are far easier when you have time to make small adjustments; it is too late when you are close to the iceberg.

The purpose of this article is to give NEC users a little more insight into what is possibly happening on a fundamental and human level. When we attend the annual NEC seminar and hear how NEC delivers on its promises, how project after project succeeds where others fail because it has mechanisms in place that deal specifically with risk, it is easy to assume that every project is like this. This is not the case.

Fundamentally what NEC contracts encourage most (in this context) is the concept that contracting parties warn one another about impending bad news. This is not necessarily

contentious bad news, but information about events which could increase the prices or delay completion, which delay meeting a key date or impair the performance of the works. The parties can then do something about it, setting in motion a course of action that will prevent, or at least diminish, the risks and the resultant costs or delays that inevitably follow the event.

Duty to warn

The concept of openness, of warning one another, is relatively new to the construction industry, especially as a contractual obligation. The duty to warn was always a concept that arose in the law of torts in limited circumstances, indicating that a party will be held liable for injuries caused to another, where one party had the opportunity to warn the other of a hazard but failed to do so. But, from a practical and day-to-day perspective, this duty had limited impact upon construction professionals.

NEC elevated the obligation to warn to one of fundamental importance, recognising this by the introduction of a specific clause in the contracts and making that obligation considerably broader in scope than other contracts may have done in the past.

The NEC basis is one of foresight; the word 'could' in ECC clause 16.1 recognises the requirement to look out for 'potential' problems, directly contrasting with provisions in other standard form contracts which appear reactionary in nature, to events that have already happened.

In a future revision of NEC, I would like to suggest the following changes in the light of the above.

- Change the title ECC clause 16 to 'Risk reduction'.
- Call an early warning a 'risk reduction notice' and remove all reference to early warnings.
- Consider making provisions to incentivise the process, for instance a contractor's early warning that saves the project financially could be shared; specifically in non-target cost contracts or target cost contracts that have limited pain-share provisions.
- Remove any linkage between early warnings (risk reduction notices) and compensation events, so that users do not confuse the two.

I think these measures will improve NEC contracts, helping to diminish if not entirely remove the negative attitude of some parties.

All too often NEC users are confusing the vital and genuine need for project risk reduction with the commercial needs of the contractor to make money, though it is rarely done with devious intent and purpose.

Perhaps we need to insist as an industry that only Buddhists are allowed to be NEC project managers! ☺