

# Suspending work under NEC4 ECC



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Clause 34 of the NEC4 Engineering and Construction Contract (ECC), entitled 'Instructions to stop or not start work', is split into two parts: an initial instruction and a subsequent instruction.

The initial part of the clause gives the project manager the right to instruct the contractor to stop or postpone any work. The subsequent part says the project manager can instruct the contractor to re-start or start any work, or can remove the work from the scope. The option to remove was added to clause 34 in NEC4, though in NEC3 the project manager can still do this via clause 14.3.

NEC users should note there are potentially serious consequences if the project manager does not issue the subsequent instruction.

## Reason for initial instruction

There are no reasons stated under clause 34.1 as to why the project manager may give the initial instruction to stop or postpone work. The cause leading to such an instruction is nevertheless important and may be categorised as follows

- fault of the contractor
- fault of the client
- neither of the above.

The reason is significant because it determines consequential actions under the contract, so the project manager should state the basis of such an instruction to enable resolution of any possible dispute at an early stage before associated contractual actions potentially compound the situation.

## Compensation events

The project manager's initial instruction under clause 34 is a compensation event under clause 60.1 (4). The project manager should make an assumption as to the length of time the work will be stopped or postponed (clause 61.6) when notifying the compensation event and instructing the contractor to submit quotations. This will allow the contractor to make a realistic and sensible assessment.

Where the reason for the initial instruction was due to a fault of the contractor, the project manager would not request a quotation but instead state this as part of the compensation event notification (clause 61.2). If the project

manager provided reasons with the initial instruction, then these should be repeated with the compensation event notification for consistency.

A subsequent instruction to remove work from the scope would be a further compensation event under clause 60.1 (1). However, a subsequent instruction to re-start work is not linked to a corresponding procedure under the contract unless a project manager's assumption was stated when instructing the contractor to submit a quotation. This is because the event fits into neither clause 60.1(1) nor 60.1(4), and any associated costs would need to be included with the previous quotation for the initial instruction.

## Termination rights

Where a subsequent instruction is not given by the project manager within 13 weeks of an initial instruction under clause 34, this may provide parties with the right to terminate under clause 91.6. However, this right would only occur where the initial instruction related to substantial work or all work, though 'substantial work' is open to interpretation.

The reason for the initial instruction determines which party has the right to notify termination and the associated reason for termination (clause 91.6). Essentially the client can terminate if it was the contractor's fault and vice versa. Following notification of termination by either of the parties, the project manager issues a termination certificate (clause 90.1) if the notification is valid.

## Partial re-start or remove

Following an initial instruction to stop work, there may be a circumstance where the project manager requires only part of that work to re-start.

NEC4 does not expressly provide for the situation although it is presumed that the project manager would have to instruct the re-start of all the postponed work with a simultaneous instruction to stop the applicable part. This approach at least allows consequent procedures to be appropriately administered.

## Disallowed cost

If ECC target cost and cost-reimbursable options (C, D or E) are used, the matter of disallowed cost may need to be considered in

advance of an instruction by the project manager, especially relating to resources not used to provide the works.

The project manager and contractor would be wise to agree which critical or key resources are required to be retained prior to and during any period of stoppage.

## Timing of instructions

Although an initial clause 34 instruction to stop or postpone work may be given at any point in time, the project manager is advised to discuss the timing with the contractor to consider mitigation of costs, health and safety measures, and any particular security arrangements.

It may be more appropriate for an initial instruction to relate to a specific point of progress rather than point in time, for example, to stop once certain activities have been completed. This would be of particular benefit on ECC Option A (priced contract with activity schedule) as it would apply an appropriate 'cut off' point, simplifying the contract administration.

## Defining the work

An initial clause 34 instruction should also be clear in precisely stating what work it actually relates to. The clause simply uses the term 'work', presumably so as not to limit the scope of any such instruction. The defined term 'Provide the Works' also uses the term 'work' although this expressly incorporates, 'all incidental work, services and actions which the contract requires' (clause 11.2(15)).

If a clause 34 instruction simply states 'all work' this could include, for example, submission of programmes for acceptance (clause 32.2), submission of forecasts of total defined cost (clause 20.3) and submission of applications for payment (clause 50.2). Clearly there are certain requirements that must continue, such as provision of stated insurances (clause 83.2), but this highlights the importance of clarity and definition with this, or any other, instruction given in accordance with the contract.

## Conclusion

Clause 34 does not operate in isolation and could lead to unintended consequences if the entire process is not carefully considered in advance by the project manager prior to giving an initial instruction to stop or postpone work.

Perhaps one way to reduce the risk of unintended consequences might be to notify an early warning to the contractor and discuss any proposed clause 34 instruction at an early warning meeting. ○