

PRACTICE

Typical routes to an NEC dispute and how users can avoid them



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KEY POINTS

- Disputes occur in NEC contracts for various reasons – but most can be avoided by following the contract and acting in a spirit of mutual trust and co-operation.
- Prior to tender, clients and contractors should spend sufficient time to ensure their contracts are drafted as accurately and as simply as possible.
- All parties need to ensure their staff and advisers understand and follow NEC procedures properly and at all times. This includes keeping the accepted programme up to date and notifying compensation events early.

NEC contracts are all about collaboration and mutual respect between the parties. If each party respects the other, and both cooperate for the good of the project, then there should be very few disputes. But in reality, various factors – including commercial pressures, lack of experience and human error – mean that disputes in NEC contracts can and do occur.

Fortunately, most disputes can be resolved quickly and cheaply by the parties themselves or can be dealt with via adjudication. Option W2, for use in the UK, requires disputes to be resolved by adjudication first – such that very few NEC disputes reach the UK courts.

Based on the author's 16 years of managing a consultancy that deals primarily with NEC disputes and dispute avoidance, this article addresses some of key factors lead to disputes and how these can be avoided.

Poorly drafted contracts

The phrase, 'failure to prepare is preparation for failure,' has never been more apt when applied to the drafting and checking of NEC contracts. All NEC clients and contractors and their advisors are therefore strongly advised to give sufficient thought and effort to contract drafting.

First, care needs to be taken to ensure the scope (works information in NEC3) is accurate and representative of work to be done. This then needs to be followed by detailed considerations regarding constraints upon that work, such as other third parties in the works area, statutory body works and restrictions on the timing of the works.

Poorly drafted scopes, contract data that is incorrectly filled in (or not filled in at all), confusing and often contradictory appendices, and an abundance of additional Z clauses that nobody understands (including the drafter's own team), will often lead to disputes later in the project. NEC contracts should be drafted as accurately and as simply as possible.

Failure to follow procedures

NEC contracts are procedural in nature, requiring

parties to follow specified processes and act in a particular way. There are however mechanisms in NEC to depart from procedures where necessary – for example clause 62.5 that allows longer timescales for compensation event quotations.

Computer-based systems help many NEC users with contract administration. NEC procedures are built into the software, which enables users to be reminded and notified when certain actions are required. Without such a system, great care must be taken to ensure compliance with NEC procedures.

Many disputes arise because parties and individuals try to apply their experience and knowledge gained on contracts other than NEC. Despite believing they have adhered to good practice, it is often different from what NEC demands. NEC users therefore need to understand exactly what the contract demands and put that knowledge into practice on their projects.

Lack of NEC experience

There are many standard forms of contract in use today, plus many more bespoke contract forms that hold themselves out as standard forms but in fact are not. Construction professionals working on NEC contracts therefore need to understand the differences between NEC and other standard forms as well as the numerous amended versions.

But this is not easy. One day they could be administering, for example, an amended JCT contract and the next they are working on a standard or amended NEC project. This requires a certain dexterity. NEC is not the same as JCT or any other form, amended or not: the procedures are different, the notice requirements are different and the contractual framework is different. Everyone working on an NEC contract needs to understand the contract and the effect of any amendments, and then apply it correctly.

Lack of accepted programme

The programme is at the heart of every NEC contract and is essential to successful contract management. The programming procedure is twofold.

First, the contractor (or subcontractor in subcontracts) produces, often with the assistance of the project manager (or main contractor), a programme for acceptance. This is effectively a snapshot of the progress on the project and a 'best guess' on the likely progress of the remainder of the works at that time. Second, the project manager (or main contractor) accepts the programme or rejects it for one of the reasons in clause 31.3. If accepted, the programme becomes the accepted programme. By repeating this process at regular intervals, usually

monthly, the accepted programme is continually updated.

Disputes often arise when events cause delay but the delay period cannot be ascertained or agreed between the parties. A continually updated accepted programme will reduce (if not eliminate) the likelihood of disagreement on delay periods, though both parties should not underestimate the programming resource required to achieve this.

Failure to issue required 'notice'

Compensation events that do not originate from a project manager or supervisor (or main contractor in a subcontract) issuing an instruction or notification, or from issuing a certificate or changing a decision, are required to be notified by the contractor (or subcontractor) (clause 61.3). Contractors under the standard form have 8 weeks to notify such an event after becoming aware it happened (7 weeks for subcontractors).

Failure to do so can lead to a time bar, causing the contractor (or subcontractor) to forfeit its rights to a change to the prices, completion date or a key date. Not surprisingly, this can lead to a dispute, especially in circumstances where perhaps there were genuine mitigating reasons for non-compliance. If a contractor (or subcontractor) needs to issue a notice, it should do so without delay.

Summary

In summary there are various ways in which NEC contracts can result in disputes, though parties can generally resolve these directly or through adjudication rather than going to court.

From the outset of any NEC project, clients and contractors should take more care than they otherwise might think is reasonable in the contract preparation phase. They will not regret this initial financial outlay. Once a project is underway, if one or both parties decide to depart from NEC procedures – and there may be valid reasons for this – it should be recorded clearly in writing. Generally, only parties to a contract may alter the contract terms by agreement.

When it comes to programming, parties involved administering NEC contracts should collaborate. They should work together continually to create and implement programmes that will be accepted and become the accepted programmes. In this regard, they should also ensure they resource their NEC projects appropriately.

Finally, NEC contractors (or subcontractors in subcontracts) should notify events as early as possible. They should remember that the 8 week period (7 weeks for subcontractors) for notification of compensation events is the limit – not a target.

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