

# MDA CONSULTING



## FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

**Fifth Edition – May 2014**

### **NEC3: A VERBOSE SILENCE UNDER THE NEC3**

#### **Introduction**

So you have submitted your first or maybe your revised programme, as required of you in terms of Clause 31.1 or 32.2 of the NEC3 ECC, but you've heard nothing from the Project Manager.

What should you make of this silence?

Clause 31.3 states:

“Within two weeks of the *Contractor* submitting a programme to him for acceptance, the *Project Manager* **either accepts the programme or notifies the Contractor of his reasons for not accepting it.**”  
[Writer's emphasis]

The interpretation of this Clause, commonly accepted in the industry, is that, should the Project Manager not notify her/his rejection of the programme, it is deemed accepted.

Clause 11.2(1) defines the Accepted Programme as “the programme identified in the Contract Data or...the latest programme accepted by the *Project Manager*.”

The programme identified in the contract data will, therefore, be superseded by any subsequent programme accepted by the Project Manager.<sup>1</sup>

Can the Project Manager's silence be deemed to be acceptance of the programme?

In terms of Clause 13.1 “[e]ach instruction, certificate, submission, proposal, record, **acceptance**, notification, reply and other communication which this contract requires is communicated in a form which can be read, copied and recorded.” [Writer's emphasis]

A silence cannot be read, copied or recorded and, therefore, cannot constitute an acceptance<sup>2</sup>. Could this silence then be deemed to be a rejection of the programme?

Clause 31.3 requires the rejection of the programme to be done by way of notification<sup>3</sup> and must, therefore, also be capable of being read, copied and recorded.<sup>4</sup>

<sup>1</sup> D Thomas QC, Keating on NEC3 (First Edition), Sweet and Maxwell, London, 2012, page 115 para 2-010

<sup>2</sup> D Thomas QC, Keating on NEC3 (First Edition), Sweet and Maxwell, London, 2012, page 105 para 4-026

<sup>3</sup> D Thomas QC, Keating on NEC3 (First Edition), Sweet and Maxwell, London, 2012, page 105 para 4-026

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Further, such a rejection would not comply with Clause 31.3, as the Project Manager is required to notify the Contractor of her/his reasons for not accepting the programme. If the Project Manager does not accept a programme for any reason other than that listed in Clause 13.3, then this is a compensation event under Clause 60.1(9).<sup>5</sup>

What then is the solution?

Clause 13.3 states that “[i]f this contract requires the *Project Manager*, the *Supervisor* or the *Contractor* to reply to a communication, unless otherwise stated in this contract, he replies within the *period for reply*.”

If “[t]he *Project Manager* or the *Supervisor* does not reply to a communication from the *Contractor* within the period required by this contract” then this is a compensation event in terms of Clause 60.1(6), giving rise to an entitlement to a change to the Prices or to the completion date.<sup>6</sup>

The difficulty, unfortunately, will arise in proving that this delay has caused any disruption to the works or extra cost, although this could possibly arise where your revised programme requires others to “provide information or other things at an earlier date than the previous Accepted Programme.”<sup>7</sup>

**By Michelle Kerr**

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<sup>5</sup> D Thomas QC, Keating on NEC3 (First Edition), Sweet and Maxwell, London, 2012, page 104 para 4-026

<sup>6</sup> D Thomas QC, Keating on NEC3 (First Edition), Sweet and Maxwell, London, 2012, page 242 para 7-025

<sup>7</sup> D Thomas QC, Keating on NEC3 (First Edition), Sweet and Maxwell, London, 2012, page 238 para 7-016

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