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FIRST AID FOR CONTRACTS



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NEC: Claims Protection

Introduction

The NEC3 makes provision for the Project Manager to give an instruction to the Contractor that changes the Works Information. It is seldom an action that is carried out without agreement by the Employer.

The Works Information specifies and describes the works the Contractor has to perform as well as the constraints on how the Contractor provides it.

Clause 14.3 allows the Project Manager to instruct such a change. The Contractor is required to obey such instruction¹ and is to put such instruction into effect immediately.²

Such an instruction amounts to a compensation event³ and the Contractor can claim for an extension to the completion date and/or an increase in Defined Cost.

In theory, when a Project Manager issues an instruction that changes the Works Information, the compensation event procedure is relatively easy to

Can the Contractor rely on the past to protect him for a claim in the future? A Contractor's failure to satisfy a condition precedent might not be the death knell it appears to be...

follow and execute. However, as we are all well aware, practice is very different to the theoretical and it seldom works out that way.

In large projects the Project Manager often works with a number of staff that are involved in the day to day running of the project and are delegated various responsibilities. Often the Contractor will receive instructions from the Project Manager's staff.

Clause 14.2 allows for the Project Manager's responsibilities to be delegated and in doing so, the Project Manager must notify the Contractor of this delegation. Clause 13.1 provides that any notification is to be communicated in a form that can be read, copied and recorded.

The NEC envisages that the Project Manager notifies the Contractor in writing when his responsibilities have been delegated. This written notification is tantamount to a condition precedent in that the Contractor shouldn't carry out any instruction that changes the Works Information unless (a) the instruction is in writing and (b) the instruction came from the Project Manager or the Project Manager's staff whose delegation has been notified to the Contractor in writing. Failure to comply with this condition precedent would prevent the Contractor from notifying a compensation event.

In theory this is still straightforward and can be easily followed however, what happens in a situation where the Project Manager has not formerly delegated his

¹Clause 27.3

²Clause 61.1

³Clause 60.1(1)

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authorities to his staff in writing but has done so through his actions and/or verbally in a meeting or on site? Will the resulting instruction by his staff to change the Works Information amount to a Compensation Event under clause 60.1(1)?

On a strict interpretation of the contract, this instruction would not amount to a compensation event in terms of clause 60.1(1) and the Contractor would not be able to claim for an increase in Defined Costs and/or an extension to the time for completion. The condition precedent has not been fulfilled.

Generally where a Contractor seeks to recover time or money for a “variation”, he must show that he has fulfilled any condition precedent necessary in terms of the contract.⁴ The purpose of such a clause is to ensure that the Employer is properly informed of the effect of “variations” and to provide a method for monitoring the cost and time effects of the project.⁵

This seems manifestly unjust that the Contractor is to be out of pocket and/or behind schedule in a situation where the Project Manager knew about the instruction and the Employer benefited therefrom and simply because there is no written delegation of authority.

The courts have recognised this problem in its 1939 judgment of *Bank v Grusd*⁶ and has come to the Contractor’s aid. This case is based on contract in a construction context:

1. The owner and building contractor verbally agreed to the performance of extra work not specified in their written contract in exchange for a reasonable price.⁷
2. However, their written contract provided that no extra work was to be done except with the owner's written authority.⁸
3. The purpose of this clause was to protect the owner from unilateral variations of the contract by the building contractor by limiting the parties' rights to verbally vary the contract.⁹
4. The building contractor duly performed the extra work, but in the heat of the construction had failed to obtain written authority.¹⁰
5. Relying on the terms of the written contract, the owner seized the opportunity not to pay.¹¹

This situation arises far too often and in the majority of instances the Contractor forgoes his entitlement to extra costs and/or time.

The court held that where additional work outside of contractual specifications is performed without the full knowledge of the owner, reliance on such a clause would not be wrong;¹² the clause operates to protect the owner

⁴PC Loots “Loots Construction Law and Related Issues” 1995 pg 450

⁵Loots pg 451

⁶1939 TPD 286

⁷Supra at 288

⁸Supra at 287.

⁹Supra at 288.

¹⁰Supra at 287.

¹¹Ibid.

¹²Ibid

from just such an occurrence. However, where an owner knowingly agrees to additional work, he cannot rely on the technical point that it was not agreed to in writing in order to avoid paying for the work which benefits him;¹³ such would be tantamount to fraud.

Despite this judgment being handed down in 1939, this decision has never been overruled and is still applicable today.

Therefore, the Contractor can rely on this judgment to institute a compensation event for a change in the Works Information, provided the Employer was aware of and benefited from the instruction but simply relied on a technical error to reject the compensation event. Reliance on this technical error amounts to a fraudulent defence by the Employer.

Although there is some protection to the Contractor in the above situation, it is still preferable for the Contractor to insist on all instructions from the Project Manager to be placed in writing and for a written notice of delegation to be provided should the instruction come from someone other than the Project Manager.

The Contractor is encouraged to err on the side of caution when receiving instructions that change the Works Information.

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¹³Ibid