

MDA PRESENTS



FIRST AID FOR CONTRACTS



Third Edition – March 2018

NEC4: CONTRACTOR'S RISKS DEFINED

+ Author: Kelly Stannard

In keeping with our theme for this year, this article considers another one of NEC4's changes to the NEC3 Engineering and Construction Contract, namely the amendments to the risks provisions in clause 8 [Risks and Insurance].

Risk identification and management is vital in a construction project where materialisation of risks will lead to substantial financial implications. NEC4 has made some changes to clause 8 of the NEC3. Let's consider these changes to see whether NEC4 has made any progression in the risk clause arena.

What is a risk clause?

Construction projects involve numerous risks that can have dire consequences to the *Employer*, *Contractor* and the project should they eventuate.

To mitigate the potential negative consequences, risks are identified and managed through the risk, and related, contractual provisions.

A risk clause strives to achieve this objective by identifying likely risks, allocating such risks to either party and providing mechanisms to anticipate and, where possible, avoid the risk eventuating (i.e. the party best suited to / most capable of managing the allocated risk).

It is critical that the risk clause be drafted to provide certainty as regards which risks each party is liable for. If there is no certainty, the allocation and management of a resultant risk will have to be determined by the contract administrator or an adjudicator or arbitrator.

Risk clauses under the NEC

Clause 8 of NEC3 and NEC4 sets out the *Employer's* / *Client's* risks / liabilities respectively. Note that clause 8 addresses the allocation of risk for generally legal and insurable risks and does not address all construction risks, which are dealt with in other provisions of the NEC (e.g. the risk of delay to the works which is dealt with in clause 6 – compensation events).

NEC4 has changed the term "*Employer*" to "*Client*" and "*risk*" to "*liability*". For purposes of this article, I'll use the familiar terms – "*Employer*" and "*risk*" – for both contracts.

Both the *Employer's* and *Contractor's* risks have been amended. The amendments to the *Employer's* risks articulate the existing risks.

The broad *Employer's* risk - "*the fault of the Employer or a fault in his design*" - has been clarified in the following ways:

- The fault of the *Employer* now expressly includes any person employed or contracted by the *Employer* (except for the *Contractor*)
- A fault of the *Employer's* design has been defined to those contained in the Scope or in an instruction from the *Employer* changing the Scope.

Another change to the *Employer's* risks is the removal of "*wear*" in respect of:

- parts of the *works* taken over by the *Employer*; and
- the *works*, Equipment, Plant and Materials retained on Site by the *Employer* after a termination,

thus restricting the *Employer's* liability to "*loss of or damage*".

A new *Employer's* risk has been included in NEC4, namely loss of or damage to property owned or occupied by the *Employer* other than the *works*, unless the loss or damage arises from or in connection with the *Contractor* Providing the works.

The most notable change to clause 8, however, is to the *Contractor's* risks.

All the previous editions of the NEC have followed the same mantra – the *Employer's* risks are defined and all remaining risks (from the starting date until the Defects Certificate has been issued) which are not carried by the *Employer* are carried by the *Contractor*.

NEC4 replaces the catch-all provision by specifying the *Contractor's* risks as follows:

- Claims and proceedings from Others and compensation and costs payable to Others which arise from or in connection with the *Contractor* Providing the Works.
- Loss of or damage to the works, Plant and Materials and Equipment.
- Loss of or damage to the property owned or occupied by the *Employer* other than the works, which arises from or in connection with the *Contractor* Providing the Works.
- Death or bodily injury to the employees of the *Contractor*.

The possible consequences of these amendments

Upon comparing the defined risks of the *Contractor* with the insurances stated in the Insurance Table in clause 83, which are the insurances the *Contractor* is to provide, it becomes evident that the defined *Contractor's* risks are events for which the *Contractor* must provide insurance in terms of sub-clause 83.2. This begs the question whether the amendments are more form over substance.

A possible consequence of the refinement may be that the *Contractor's* risks are now limited to those defined, raising a level of uncertainty should an event occur which is not specifically stated as either an *Employer's* or *Contractor's* liability. By assigning all risks not listed as an *Employer's* risk to the *Contractor*, the previous versions of the risks clause in earlier editions of NEC were perhaps more certain in that no risk was left unassigned.

Conclusion

We do not believe that by defining the *Contractor's* risks as those ultimately covered by insurance, the NEC4 has made any changes to the substance of clause 8 of NEC3.

The risks of both the *Employer* and the *Contractor* listed in NEC4 are likely to cover most eventualities. However, if parties are concerned that a risk may arise in the context of their project that has not been allocated to a particular party by clause 8, those parties should consider assigning those risks in the contract data.

We'll have to wait for the implementation of NEC4 by contracting parties to see whether the changes made by NEC4 to the risks clause will have any substantial consequences and whether disputes will arise over the terminology of the newly defined risks. In the meantime, consultations with insurance brokers may be critical to ensure that all the defined risks are adequately insured.