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THE CONTRACTOR'S ENTITLEMENTS WHEN THE EMPLOYER BREACHES ITS STATUTORY DUTIES UNDER THE NEC3: ENGINEERING AND CONSTRUCTION CONTRACT

+ Author: Zodwa Malinga

Clause 8 of the NEC ECC apportions risks between the Employer and the Contractor. Clause 80.1 sets out risks that are borne by the Employer under the contract. It provides:

"The following are Employer's risks.

- Claims, proceedings, compensation and costs payable which are due negligence, breach of statutory duty or interference with a legal right by the Employer or by any person employed by or contracted to him except the Contractor"*

An example of statutory duties incumbent on an employer that was an Organ of State would be the obligations that emanate from the Standard for Contract Participation Goals for targeting Enterprises and Labour through Construction Works Contracts

published by the CIDB Board on 10 November 2017 ("the standard for CPGs") in terms of section 5(2) of the Construction Industry Development Board Act 38 of 2000.

The standard for CPGs states that:

"All construction contracts above a prescribed tender value will then be subject to an assessment of compliance with best practice standards and guidelines published by the Board."

In accordance with these statutory requirements, a contractor is obliged to sub contract a prescribed percentage of its work (for CIDB level 9 this is normally 30%) to CPG Contractors.

Prior to specifying the percentage of CPGs in the Contract Data, the Employer must perform a feasibility study to verify that the CPG can realistically be achieved in the targeted area as well as setting up systems and compiling data bases of available resources. This includes setting up dispute resolution procedures. This exercise is essential in ensuring that the contractor's CPG obligations can be met and implemented in a trouble free manner.

Very often problems arise because the Employer has not complied with these statutory obligations and the contractor is delayed and incurs costs as a result.

The Contractor has recourse under these circumstances to the compensation event clause 60.1(14).

Accordingly, the Contractor would be entitled to recover his Defined Cost. This is calculated using the Shorter Schedule for Cost Components ("SSCC").

The practical application of the SSCC entails an assessment of the effect of the compensation event on the works and identifying the components of cost for which the contractor must be paid. The SSCC identifies the costs that can be claimed for people, equipment, plant, materials, charges, manufacture and fabrication, design and insurance.

The defined cost is intended to compensate the Contractor for costs incurred in the normal course of his business. However clause 80.1 anticipates the recovery of *Claims, proceedings, compensation and costs payable which are due negligence*, and these will

not be recoverable under the Shorter Schedule of Cost Components.

It appears that for this reason, the Employer is obliged to indemnify the Contractor in the event that these costs are incurred. Clause 83.1 provides:

"Each Party indemnifies the other against claims, proceedings, compensation and costs due to an event which is at his risk"

For instance, a Contractor may incur costs in defending itself if met with a claim or proceedings by a third party for losses incurred as a result of an Employer's breach of statutory duty. These costs would not be recoverable using the SSCC.

In accordance with an indemnification, the indemnifying party holds the other Party harmless from the effects of the indemnified event.

A Contractors ability to recover losses under the NEC 3 Contract is limited to the compensation event process and accordingly, the kinds of costs that are anticipated by these clauses cannot be recovered as compensation events.

So how can they be recovered?

McInnis has advanced the submission that the indemnity and the compensation events procedure should be treated as alternative and a clear election must be made in respect of the remedy on which the contractor intends to rely.¹

We have identified the shortcomings of the compensation events procedure which renders the idea of an election impractical. Does the indemnity fill the lacuna left by the shortcomings?

The NEC3 does not provide a procedure by which the contractor can invoke its indemnity. By implication, the circumstances under which it must be invoked will determine the applicable procedure. For instance, if the Contractor is sued by a third party then it may invoke Rule 13 of the Uniform Rules of Court (the Third Party Procedure). This procedure may be invoked:

“Where a party in any action claims as against any other person not a party to the action (in this rule called a “third party”) that such party is entitled, in respect of any relief claimed against him, to a contribution or indemnification from such third party” (Rule 13(1)(a)).

The Contractor would have to issue and serve a notice - which acts as a pleading to the third party (i.e., the Employer). The notice must state the nature and grounds of the Contractor’s claim and the relief claimed. It must also be accompanied by the pleadings in the action.

The notice effects a joinder of the Employer as a party to the proceedings. Rule 13 allows a party that has been provided with an indemnity under a contract to join the indemnifying party to the action claim for the performance of the obligation under the contract.

On the other hand, if the contractor incurs or has incurred costs due to the event then it would have to demand payment of the amounts incurred as it would if the Employer had failed to make payment of amounts due under the contract. This would be by way of a letter of demand addressed to the Employer. If the Employer fails to make payment in accordance with the demand, then the Contractor would proceed to court for an order for specific performance (i.e., that the court order the Employer to perform in terms of the indemnity provision of the contract).

The omission in the NEC3 has been addressed in the NEC4. Clause 82 of the NEC4 provides for the recovery of costs instead of an indemnity. The obligation is clearly assigned to the Employer in clause 82.2 which states that:

“Any cost which the Contractor has paid or will to Others as a result of an event for which the Client is liable is paid by the Client”.

¹ Dr A McInnis “The New Engineering Contract: A legal commentary” (2001) page 442.