Frequently asked questions on the impact of COVID-19 on NEC4 contracts

May 7, 2020

Contractors in the UK construction industry have been reviewing their contracts to consider what protection they provide in the context of projects impacted by the COVID-19 crisis. Here, we look at whether standard-form NEC4 engineering and construction contracts (NEC4 contract) contain protections for UK contractors in relation to the COVID-19 outbreak, focusing on whether there is protection available under standard change in law provisions and under acts of prevention.

We look primarily at un-amended NEC4 contracts but similar actions apply under other NEC contracts. As NEC4 contracts are often heavily amended, specific amendments should be reviewed to identify whether different protections apply.

A. What is the definition of "law" and does it include health and safety laws, guidance or policy?

1. There is no definition of "law" under the NEC4 contract. The standard forms refer to "applicable law", although this is not a defined term.

2. The contract data will specify the law which governs the contract but, often, the NEC4 contract will be amended to identify expressly what constitutes "applicable law". For projects that are located in England and Wales, the governing law would typically be that of England and Wales. We discuss in paragraph 2 whether recent changes to government guidance and enacted legislation constitute a change in law for the purpose of NEC4 contracts.

3. The Health and Safety at Work etc Act 1974 (the HSWA) is an important piece of legislation relating to the construction industry and applies to all construction activities taking place within the UK, as well as in certain offshore locations. The HSWA imposes a general overarching duty on both the client and the contractor to ensure the health, safety and welfare of all employees and others affected by the works, which includes construction workers working on projects under the client's/contractor's control, so far as is reasonably practicable.

4. The Construction (Design and Management) Regulations 2015 (CDM Regulations) also form a key part of the health and safety legislation affecting all construction projects. The CDM Regulations impose obligations on the...
client and the principal contractor with respect to ongoing construction works. It is a criminal offence to fail to comply with the HSWA or the CDM Regulations, with potential liability for corporate entities and their directors and officers.

6. The client must make suitable arrangements for managing the project, including the allocation of sufficient time and other resources. Arrangements will be deemed suitable if the client ensures that the construction work can be carried out without risks to the health or safety of any person affected by the project. Accordingly, the client should ensure that the principal contractor is taking account of government and industry guidance. Guidance has been issued in relation to operating construction sites during the COVID-19 outbreak, which we report on below. Contractors should take account of this guidance, including implementing the latest version of the Site Operating Procedures, to reduce the risk of transmission of the virus.

7. The Health and Safety Executive’s (HSE) most recent guidance (as at the date of this article) can be found here. It includes specific guidance on when social distancing must be implemented, the use of PPE, shared facilities and transport to/from site.

8. One of the roles of the principal contractor is to co-ordinate the work of the construction phase of a project involving more than one contractor (including sub-contractors) so that the project is carried out in a way that secures the health and safety of all employees and anyone affected by the works.

9. The principal contractor is also responsible for organising co-operation between contractors, including successive contractors on the same construction site. Accordingly, the principal contractor must ensure that contractors starting on different stages of the project communicate and co-ordinate with each other, assess the behaviour of other contractors on site and the impact that the contractors are having on the overall safety of the project and others. The principal contractor should adopt measures aimed at reducing any risks of infection, including following guidance on social distancing. Further, the principal contractor must co-ordinate implementation by the contractors of applicable legal requirements for health and safety, and therefore must ensure that work is properly planned and completed safely and in accordance with the latest government and industry guidance in respect of COVID-19.

B. Where there is a change in law, to what relief, if any, is the contractor entitled?

1. Secondary option clause X2 states that changes in the law of the country in which the site (as defined in the Contract Data) is located is a compensation event if that change occurred after the date of the contract. Note that option X2 must be selected within the contract data for this to apply.

2. Where there has been a change in law and option X2 has been selected in the contract data, this will be at the client’s risk. The contractor will be entitled to an extension of time to the key dates, completion date and/or an increase in the prices (or reduce them in appropriate circumstances, i.e. if defined cost is reduced).

3. If selected, option X2 would cover governments notifying mandatory restrictions on movement of goods and people, which have caused shortages and delays, may have resulted in the temporary closure of construction sites, and which have been brought in after the date of the contract.

4. However, where governmental and industry action has come in the form of guidance which is not mandatory, this will not be deemed to be a “change in law” for the purposes of the NEC4 contract. The nature of the guidance differs slightly between England, Scotland and Wales.

5. The Health Protection (Coronavirus, Restrictions) Regulations 2020 (the Coronavirus Regulations) are a response to the rapidly-evolving and developing situation and contain the rules relating to movement restrictions and business closures, and enable the police to take action necessary to enforce the new restrictions. The Coronavirus Regulations, which came into force in England, Wales and Scotland on 26 March 2020, are supplemented by directions, guidance and advice and will continue until terminated by direction of the Secretary of State. Businesses subject to restrictions or closure include restaurants, bars, cinemas, theatres, banks and shops selling non-essential goods, but the Coronavirus Regulations do not require the closure of all construction sites. People
must work from home where they can unless absolutely necessary. This is not an option for those working within the construction industry where working from home is not possible.

6. On 30 March 2020, the Construction Leadership Council (CLC) issued advice to contractors and clients on the temporary suspension of sites to ensure that any closures could be achieved as safely as possible. In addition, the CLC has issued Site Operating Procedures (SOP) which are based on Public Health England guidance. The most recent version (version 3) was updated on 14 April 2020. The latest version of the CLC's guidance states that there is a serious risk of enforcement action by the HSE if a site is not consistently implementing the measures set out by Public Health England. The CLC guidance is not legally binding, but may be helpful to industry participants in ensuring they are meeting their health and safety obligations in the new circumstances.

7. The HSE has also published guidance on certain matters affected by COVID-19, which explain where the HSE has adapted its approach. This includes:

   a. Guidance on social distancing, keeping businesses open and in-work activities during the coronavirus pandemic.
   b. RIDDOR reporting of COVID-19 – whilst there is again no change in law here, the HSE clarifies that, if there is reasonable evidence that someone diagnosed with COVID-19 was likely exposed because of their work, you must report this as an exposure to a biological agent using the case of disease report. An example of a work-related exposure to coronavirus would be a healthcare professional who is diagnosed with COVID-19 after treating patients with the virus.
   c. Regulating occupational health and safety during the coronavirus outbreak – here, the HSE has explained its adapted regulatory approach, taking into account the coronavirus risks. Among other things, it has suspended its targeted inspection activity of high-risk industries that are not in the major hazard sector and paused its offshore oil and gas and onshore chemical, explosives and microbiological industry inspection activities so duty holders have time to overcome immediate pressures.

8. We are aware that some clients have chosen to direct the closure of sites. In this circumstance, this could trigger a different form of compensation event, entitling the contractor to an extension of time to the key dates, completion date and/or an increase in the prices (or reduction, in appropriate circumstances, i.e. if defined cost is reduced) under clause 60.1(2). A change in law need not be established. In these circumstances, contractors will wish to document carefully the time and cost impact of such closures in order to support claims for compensation events.

**England**


2. Notwithstanding the advice from the CLC, the Secretary of State for Business, Energy and Industrial Strategy (BEIS) wrote to the construction sector on 31 March 2020 to confirm that continuing work on construction sites is consistent with the Chief Medical Officer’s advice.

3. The government has also reiterated that construction sites have not been asked to close, so work on construction sites can continue provided that the sites are being operated safely, in adherence to the Public Health England guidance and in compliance with the SOP. Neither the guidance nor the procedures specify a mandatory shutdown of construction sites.

4. As such, the Coronavirus England Regulations are highly unlikely to trigger the change in law provisions under the NEC4 contract as they do not impose a statutory obligation forcing construction sites in England to close.

**Scotland**


2. In guidance dated 6 April 2020 based on the CLC’s SOP, the Scottish Government confirmed that, if a worker on site is diagnosed with COVID-19, construction sites must cease all operations until a cleaning and disinfectant
programme has been completed in accordance with Health Protection Scotland and IOSH guidelines. On this same day, the Scottish Government issued an accompanying news release, which stated that “work on construction sites, unless it is for essential projects, should stop immediately, as confirmed in new guidance for the construction industry. The guidance makes clear that work on construction projects should cease unless it is supporting crucial work during the coronavirus (COVID-19) pandemic”.

3. The position in Scotland goes further than the position in England. However, whilst the guidance has been issued by the Scottish Government, there does not appear to be a legislative basis requiring the closure of construction sites in Scotland. As such, the guidance does not have binding legal status.

Wales


2. In Wales, new rules to protect construction workers during the COVID-19 outbreak were implemented on 7 April 2020. The guidance was issued under regulation 7A of the Welsh Coronavirus Regulations.

3. The guidance states that the two-metre social distancing rule will apply to any workplace, including all outdoor spaces and all businesses. This means that construction companies will have to take reasonable measures to ensure the two-metre rule is being maintained between workers on sites. The guidance also states that there are instances where working from home is not possible, including in relation to construction sites.

4. As with the Coronavirus England Regulations, there appears to be a grey area in terms of whether the guidance issued under the Welsh Coronavirus Regulations constitutes a change in law under an NEC4 contract, but if the two-metre rule cannot be maintained and the site must be shut down, then it may be possible to raise this argument.

5. The Welsh guidance does not go as far as the Scottish guidance in addressing the issue of site closures where a worker contracts COVID-19.

6. If, irrespective of all reasonable measures, it is not possible to adhere to the two-metre social distancing requirements for a construction site and this results in a site closure, the parties to the NEC4 form of contract should use the early warning mechanism as soon as possible in order to mitigate any effects of such closures.

7. Below, we summarise the position in each of England, Scotland and Wales:

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<thead>
<tr>
<th>England</th>
<th>Scotland</th>
<th>Wales</th>
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<tbody>
<tr>
<td>Advice on temporary suspension of sites issued on 30 March 2020 by the Construction Leadership Council</td>
<td>Government has issued guidance stating that work on construction sites can continue, provided that the sites are being operated safely.</td>
<td>Guidance issued under regulation 7A of the Welsh Coronavirus Regulations states two-metre social distancing rule applies to any workplace, including all outdoor spaces and all construction sites.</td>
</tr>
<tr>
<td>Secretary of State for BEIS wrote to the construction sector on 31</td>
<td>The Health Protection (Coronavirus, Restrictions) (Scotland) Regulations 2020 enacted on 26 March 2020.</td>
<td>No legislative provision requiring the</td>
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<td>Guidance issued on 6 April 2020 stating non-essential construction projects should stop immediately and construction sites must cease all operations if a worker on site is diagnosed with COVID-19.</td>
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England | Scotland | Wales
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March 2020 to confirm that continuing work on construction sites is consistent with the Chief Medical Officer’s advice. | closure of construction sites in Scotland. | closure of construction sites in Wales.
There is no mandatory requirement for shutdown of construction sites. |  | 
No legislative provision requiring the closure of construction sites in England. |  | 

8. The guidance issued by each government remains non-binding and, whilst it is clearly intended that it should be followed, it is not a legally enforceable obligation to do so.

9. Where there has been closure of a site, the parties should use the early warning mechanism as soon as possible in order to mitigate any effects of such closures. If the project manager issues an instruction to the contractor to stop or not start works in accordance with clause 60.1(2), which is as a result of a site closure, this could trigger a different form of compensation event.

C. Can the Contractor claim that a force majeure event or event of Prevention has arisen?

1. The NEC4 contract contains a list of specific compensation events at clause 60.1, but these do not include force majeure, although they include a similar concept of “Prevention” (which is commented on in detail in paragraph 4 below). The compensation events include:
   a. events which are stated to be client liabilities in the contract;
   b. acts of Prevention which stop the contractor completing the whole of the works or delay completion beyond the planned completion date, as detailed in paragraph 4; and
   c. additional compensation events stated in part one of the contract data.

2. There are additional compensation events elsewhere within the NEC4 contract including those that arise from client breach and client risk events.

3. It is unlikely that COVID-19 risk or similar issues will be included as client liabilities in the standard NEC4 contract. However, contractors should carefully review their contracts to check whether any negotiated position provides them with protection.

4. Contractors should remember that they are subject to an eight-week time bar in which to notify the project manager of an occurrence of a compensation event. If the contractor fails to notify within this time, they will not be entitled to a change in the prices, the completion date or a key date.

D. What does the Contractor need to demonstrate to claim an event of Prevention has arisen and what relief applies if it can do so?

1. As mentioned in paragraph 3, the NEC4 contract does not contain a provision expressly identified as “force
majeure”. However, clause 19.1 (Prevention) provides that if an event occurs which:

a. stops the contractor from completing the whole of the works, or delays completion beyond the planned completion date;
b. neither party could prevent; and
c. an experienced contractor would have judged at the contract date to have such a small chance of occurring that it would have been unreasonable to have allowed for it,

the project manager gives an instruction stating how the event is to be dealt with.

2. The project manager has an overriding duty to promote the spirit of mutual trust and co-operation which underpins the NEC4 suite of contracts. The project manager is therefore required to act in an independent, impartial and fair manner. In its role, the project manager will carry out duties on behalf of the client, including giving instructions in respect of the works, and making decisions such as deciding the completion date. Accordingly, if the criteria for Prevention are met, the project manager must issue an instruction in accordance with clause 19.1.

3. For contracts pre-dating the news of the COVID-19 outbreak, it should be straightforward to argue that an experienced contractor would have judged the likelihood of such a risk arising as small. However, for the remaining tests to be met, there is a high bar and the question of whether or not it has been met will be fact-specific. In particular:

a. the guidance that construction sites can remain open, but with additional operational restrictions, is likely to make it particularly difficult to demonstrate that the whole of the works cannot be completed, as some elements will often be able to progress whilst implementing appropriate working practices;
b. a delay beyond the planned completion date will be fact-specific for each project, i.e. depending on what stage of the overall programme the project has reached;
c. Prevention may be possible to some degree through the implementation of working practices that still allow for progress to be made on the project; and
d. foreseeability is an issue in assessing whether Prevention has arisen – for contracts entered into subsequent to the widespread impact of the COVID-19 outbreak becoming known, this could also preclude any claim that Prevention applies.

4. If the above criteria are met, then the contractor will be entitled to a compensation event, provided that it follows notification requirements and is within the eight-week time bar provisions. This will entitle the contractor to an extension of time to the key dates, completion date and/or an adjustment to the prices.

E. What happens if the event of Prevention continues beyond 13 weeks?

1. Under clause 91.7, where an event of prevention is forecast to delay completion of the whole of the works by more than 13 weeks, the client may terminate the contract. If the contractor wishes to avoid termination by the client, it must ensure that completion is not delayed by more than 13 weeks by taking measures to mitigate delay and/or accelerate the outstanding works. Alternatively, the contractor could seek to vary this timeframe now, as part of discussions regarding the event of prevention, but this would be down to the parties to agree.

2. If the client terminates the contract under clause 91.7, the client may complete the works and use any plant and materials to which it has title, as well as using any equipment to which the contractor has title to complete the works. The contractor must promptly remove the equipment from the site when notified.

3. In the absence of default by the contractor or the client, either party may terminate the contract if the project manager has instructed the contractor to stop (or not start) the works for more than 13 weeks under clause 91.6. If the client terminates the contract under clause 91.6, the client is entitled to complete the works as specified in paragraph 5.2 above. The contractor is entitled to leave the working areas and remove the equipment if it terminates the contract in accordance with clause 91.6.
4. The amount due on termination as a result of termination by the client or by either party, as detailed above, includes:
   a. the amount due assessed as for normal payments;
   b. the defined cost for plant and materials:
      i. within the working areas; or
      ii. to which the client has title and the contractor has to accept delivery;
   c. other defined costs reasonably incurred in expectation of completing the works;
   d. any amounts retained by the client;
   e. a deduction of any un-repaid balance of an advanced payment; and
   f. the forecast cost of removing equipment from the site.

5. No additional sums to the client or contractor are due in relation to the balance of the works.

6. Main options C and D include additional provisions relating to payment on termination to reflect works priced on a target cost basis. The contractor's share is assessed by the project manager after certifying termination.

F. What about early warning notices?

1. The NEC4 contract contains early warning notice provisions within clause 15. The contractor and project manager have an express obligation to give early warning to the other as soon as either become aware of any matter which could increase the total of the prices, delay completion, delay meeting a key date or impair the performance of the works in use.

2. Failure by a contractor to give an early warning where an experienced contractor could have done so will be taken into account by the project manager in assessing any compensation event arising out of the same event.

3. Although the early warning system under NEC4 contracts is predominantly a management tool, given the uncertainties around the ongoing implications of COVID-19, contractors are advised to give an early warning in order to both manage the situation on the project and prevent avoidable losses which it may not otherwise be possible to recover through compensation event provisions.

4. In addition, if the contractor chooses to notify the project manager of a compensation event, it must ensure it does so within eight weeks of the compensation event occurring.

G. Conclusion

There are numerous provisions within an un-amended NEC4 contract which a contractor can rely upon as a result of the impacts of COVID-19. Nonetheless, the emphasis under all forms of NEC4 contracts will be for the contractor, client and project manager to act in a spirit of mutual trust and co-operation and work together collaboratively to mitigate any such adverse effects of the pandemic.

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