



# NEC CONTRACTS AND COVID-19 GUIDANCE

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## USING THIS DOCUMENT

**In light of the Coronavirus (COVID-19) outbreak, our teams have received a number of questions from Clients and Contractors, regarding the treatment of contractual issues arising from the pandemic.**

The impact of this virus may give rise to a range of foreseeable and unforeseeable construction-related risks. At Scape, we recognise that parties will want to agree appropriate contractual arrangements using the clauses contained within the Scape framework and the NEC.

To assist with these decisions, we have produced this short assessment and hope that you will find it to be useful.

# INTRODUCTION

**NEC does not treat compensation events as an allocation of blame, rather a recompense for the occurrence or forecast occurrence of risk(s) allocated to the Client under the Contract.**

Any risk that is not specifically identified as being attributed to the Client, is borne by the Contractor.

Scape believes in remaining within the confines of the NEC contract as most appropriate.



# CONTRACTUAL CLARIFICATIONS

Therefore, NEC 4 ECC contract issues that emerge in relation to the Coronavirus, can be dealt with via the following routes:

**1** Under most circumstances we believe that Coronavirus and the impacts associated with it would be classified under Clause 60.1(19), as an event which stops the Contractor from completing the works either in total or by the planned Completion Date on the Accepted Programme.

Such an event would still have to 'pass' the criteria identified in **Clause 61.4**, which includes not being the fault of a Contractor. Under the circumstances of Covid 19 this could include taking insufficient protective measures under a Contract entered into after the extent of the virus had become known.

# CONTRACTUAL CLARIFICATIONS

2

The Client's existing liabilities detailed in **Clause 80.1** include strikes, riots and civil commotion as well as radioactive contamination.

There is no reference to contagions and pandemics, as such an event would be presumed to be covered under **60.1(19)** and therefore a Compensation Event.

3

For Contracts entered into since the start of the virus, it would have been possible to include the event and/or its impacts as an 'additional compensation event' via the Contract Data.

Under the NEC4 ECC this would have been enacted as a compensation event via Clause **60.1(21)**.

Under the NEC3 ECC the same clause would be included as 'additional Employer's risks' in the Contract Data Part 1 and the event would be **60.1(14)**.

# CONTRACTUAL CLARIFICATIONS

## 4

The NEC's ECC Secondary **Option X2 (Changes in the Law)** also initiates a compensation event following a change in the law of the country in which the Site is located, for example a law to restrict free-movements such as a total lock down.

Such a change is only considered if it occurs after the Contract Date. An event of this nature would still have to 'pass' the criteria identified in Clause 61.4, in particular in having a time and/or cost impact.

Clients are advised to familiarise themselves with **Clause 19 – Prevention**. This requires the Contract's Project Manager to give an instruction, as to how an event – which stops the Contractor completing the works or completing the works by the planned Completion shown on the Accepted Programme.

**Clause 19** requires this delay or obstruction to be present and adds a further test that requires the event to be one that neither party could prevent and an experienced Contractor would have judged to have had such a small chance of occurring, that it would have been unreasonable for it to have been allowed for.

# COMPENSATION EVENTS

**NEC compensation events are designed to be implemented once an agreement has been reached to the forecast/actual impact on costs and the programme.**

The lack of clarity on the duration and the impact of the COVID-19 virus means that clients and their advisors may want to consider applying the NEC's provisions for assumptions to any assessments of a compensation, **Clause 61.6**.

For example, a Project Manager's instruction for a compensation event quotation could include assumptions on the timescales of impact to be included.

If it became obvious that the assumption(s) were no longer correct e.g. a longer period of quarantine was required, a second compensation event could be initiated using **60.1(17)**. At this time greater knowledge of time and cost impacts would be known.

If a site was closed down with equipment off-hired and no other cost impacts foreseen, the compensation event would only consider impacts on key dates and planned Completion on the Accepted Programme.

## MITIGATING EXPOSURE

**Crucially, Client's entering into contracts should consider the likelihood for works to be delayed or stopped by the virus to have a significantly higher chance of occurring than before.**

They should work with their advisors and Contractor to discuss appropriate solutions to mitigate exposure to this risk wherever possible.

Now more than ever before all contract risks need to be identified, analysed and appropriately allocated through the contract's risk management mechanism

# REPLACEMENT CLAUSES

When using other forms of NEC ECC and PSC contracts, the following clauses replace those referenced earlier in this document:

NEC 4 ECC	Subject	NEC 3 ECC	NEC 4 PSC	NEC 3 PSC
19	<b>Prevention</b>	No change	18	18
60.1(14)	<b>Additional Client liability</b>	No Change	60.1(9)	n/a
60.1(17)	<b>Corrects an assumption</b>	No Change	60.1(10)	60.1(10)
60.1(19)	<b>Unforeseen/unpreventable delay/stoppage</b>	No Change	60.1(12)	
60.1(21)	<b>Addition Compensation Events</b>	n/a	60.1(16)	n/a
61.4	<b>Compensation Event 'test'</b>		No change	
61.6	<b>Using assumptions</b>		No change	
80.1	<b>Client liabilities</b>	No change	n/a	
X2	<b>Changes in Law</b>		No change	

The nature of the service provided under NEC 3 and 4 PSC contracts means they do not include a reference to strikes, riots etc under Employer/Client liabilities under Clause 80.1, although the NEC4 PSC does allow additional Client liabilities to be added within the Contract Data Part 1 before entering into the contract.



IF YOU HAVE ANY QUESTIONS,  
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