

# NEC3: The Time Bar on Compensation for Contractors

by Aurelia Russo

## Compensation events

Provided the contractor is not at fault, compensation events give the contractor a right to claim against its employer for time and money. The contractor may be compensated for any effect the event has on the Prices, the Completion Date, or a Key Date.

The list of compensation events is set out at clause 60.1, and it is advisable for any contractor new to the NEC3 form to familiarise itself with these events, as they are thought to provide the only avenue for compensation where the events described occur.

However, note that additional Z clauses can be implemented to amend the compensation events by reducing or extending the list. Clause 60.1 must be read in light of any amendments to understand the contractor's true position in relation to compensation.

It is widely believed that the listed compensation events are exclusive. This means that a party may be unable to claim outside of the contract, at common law or otherwise, for any breach already described as a compensation event.

## The time bar

The purpose of the time bar on compensation events is to ensure that parties do not have to deal with such claims long after they have arisen. The time bar acts to prevent a contractor from validly notifying a compensation event which he should have notified sooner.

Clause 61.3 provides that, if the contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is simply not entitled to compensation under the contract.

This limit on the time allowed for notifying compensation events removes the contractor's right to a change in the Prices, the Completion Date, or a Key Date, which means that the benefit of the compensation event to the contractor is lost.

The time bar essentially exists in favour of the employer, as it places a restriction on the contractor's right to compensation.

Contractors should always check the Z clauses (amendments) to the contract, as employers often reduce the eight week time limit to four or even two weeks. Reducing the time limit increases the employer's chance that the contractor's right to compensation will be lost.

### When does the time start to run?

The contract states that time starts to run when the contractor becomes aware of the compensation event. But what does this actually mean in practice?

There is no clear law on what constitutes “awareness” in the NEC3 context. This can be useful for a contractor who wishes to extend the time period for notifying a compensation event by starting the clock on the latest possible date.

It could be that a contractor is only aware of the compensation event once its full extent has been realised. For example, if an employer fails to grant access to the site in accordance with the access dates, it could be said that the contractor is only fully aware of the extent of this event once access is granted, and the whole period of delay can be calculated. In this sense, for every day that the employer fails to grant access, the compensation event is effectively ongoing.

Conversely, the employer is likely to interpret awareness of any compensation event as being the date on which it became clear to the contractor that such an event would occur, starting the clock as early as possible. To use the same example, the contractor would be aware of the compensation event once it is informed that access will not be granted, even before the access dates have expired and before the failure to grant access has actually occurred.

The TCC gave some guidance on this point in relation to the JCT form in the case of *WW Gear Construction Limited v McGee Group Limited [2010]*.

Mr Justice Akenhead considered that there are three points at which the time limit may start to run for notifying an event which the contractor wishes to be compensated for:

1. The date on which it becomes apparent that the project will be affected;
2. The date on which it should reasonably have become apparent that the project will be affected; or
3. The date on which the project actually was first affected.

This is useful guidance for contractors in considering when the time limit under the NEC3 form may commence.

There is, however, certainly room for dispute here, so the best way for a contractor to ensure its notices of compensation events are not time barred is to issue them as soon as possible, and early warning notices help to keep this on foot.

### When does the time bar not apply?

The time bar does not apply to compensation events 1, 4, 7, 8, 10, 15 and 17. These are events which the employer is required to notify, but the contractor is also entitled to notify them too.

This means that should the employer fail to notify one of these events, it may receive late claims from the contractor who is not restricted by the time bar.

Contractors should note these events, and always consider whether the circumstances potentially giving rise to a claim could fall under any one of the above. The use of any of these compensation events by the contractor helps to avoid a dispute over whether its compensation claim is time barred.

#### **Time bar tips for contractors**

- Check any Z clauses for a reduction to the eight week time limit, or changes to the list of compensation events.
- Always consider whether the circumstances could be covered by events 1, 4, 7, 8, 10, 15 or 17 as these events are not time barred where the employer fails to notify.
- Keep on top of issuing early warning notices.
- Issue notices of compensation events as soon as you become aware that the Prices, the Completion Date, or a Key Date may be affected.

[The statements made in this article are applicable to the NEC3 form only at the time of writing.]