

NEC3 - THE RISK REGISTER AND CONTRACTUAL RISKS

- ▶ When tendering under the NEC3 ECC, Employers may include a preliminary risk register in their ITT documentation.
- ▶ This can help prospective contractors assess the risks underlying the project, and submit more accurate bids.
- ▶ However, could a preliminary risk register alter the contractual allocation of risk under clauses 80.1 and 81.1?

What is it about?

The risk register is one of several tools under the NEC3 ECC for managing risk. It is intended to be used to identify the inherent risks on a project, and record what actions should be taken to avoid or reduce those risks.

Including a preliminary risk register within ITT documentation can help prospective contractors understand the risks underlying a project, and tailor their bids accordingly. However we occasionally see preliminary risk registers that go beyond the minimum requirements envisaged by the NEC3 ECC, and this can cause confusion amongst the prospective contractors.

During a recent tender process we were asked to consider a preliminary risk register which, in addition to the usual list of risks and actions to be taken, assigned responsibility for each risk and action as between the parties. One of the interested parties queried whether this was intended to alter the contractual allocation of risk under clauses 80.1 and 81.1.

Why does it matter?

The Employer's contractual risks are listed under clause 80.1, and clause 81.1 provides that all other risks are carried by the Contractor until the defects certificate is issued. Importantly, under clause 83, each party indemnifies the other against events which are at its risk.

The risk register is a practical project management tool, and any time or cost consequences of risks or actions listed in the risk register should generally fall outside the indemnities under clause 83, and instead be addressed through the other contract mechanisms (e.g. as compensation events). There is however some ambiguity around the application of clause 83, although this is outside the scope of this article.

The difficulty lies in the final entry of clause 80.1, which allows additional Employer's risks to be specified in the Contract Data. In order to include a preliminary risk register in its ITT documentation, an Employer will often append or refer to the risk register in the Contract Data. If that risk register then purports to assign responsibility for any risks or actions to the Employer, it could be argued that those items are Employer's risks under clause 80.1 and fall within the indemnity under clause 83.

Now what?

There is a broad consensus amongst legal commentators that the risk register operates at a practical level, and is not intended to alter the contractual allocation of risk under clauses 80.1 and 81.1. However, notwithstanding that the contract was first published over 10 years ago, there remains little case law on the NEC3 ECC and there is therefore some uncertainty on this point.

Employers looking to include a preliminary risk register within their ITT documentation should therefore be clear on what is intended: both in their dealings with prospective contractors, and in the contract terms. Where a preliminary risk register will also allocate responsibility between the parties, it is prudent to amend the contract to clarify that items in the risk register are not Employer's risks under clause 80.1.

The team at Addleshaw Goddard LLP will be happy to discuss the above with you. Please contact Joe Wilkinson or Mike Trodden.

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