ADDLESHAW GODDARD

A YEAR ON – NEC4 AND THE 'FINAL ACCOUNT'

- The new final assessment procedure in NEC4 explained.
- How this impacts on the resolution of disputes and assessment of changes, delays and additional works.
- Can an interim Compensation Event assessment be 're-evaluated' under NEC4?

A Conclusive Final Account?

As users of NEC3 will know, one of its unusual features was the provision of 'Interim only' payment provisions with no form of final account sweep up (as, say, with the main JCT forms). As well as changes to the interim payment procedures, NEC4 has now introduced a 'final account' whereby the Project Manager ("PM") makes a final assessment and certifies payment four weeks after the Defects Certificate (or 13 weeks from a termination certificate if there is a termination). In the event that he fails to do so, there are provisions whereby the Contractor can submit his own.

The NEC4 has added a new 'W3' dispute resolution option (a dispute avoidance board ("DAB")) and different dispute notification/referral requirements across all the dispute options depending on whether the dispute concerns the final assessment or something else. Whilst this sounds relatively straightforward, it is not. This is because the relevant dispute provisions are spread across different sections of the payment clauses and the specific 'W' dispute provisions. To add to this, there are different procedural requirements depending on the nature of the dispute, the option selected and the stage at which the 'dispute escalation' procedure has reached. Given that an incorrect step can now lead to a 'binding' final assessment and/or decision (that did not exist in NEC3), the fact that these provisions are open to misinterpretation could lead to serious consequences for a party unhappy with the other's final assessment.

For example, W2 provides for disputes to be referred to senior representatives or an adjudicator and then to the Tribunal (litigation or arbitration). W3 has a dispute avoidance board and then the Tribunal. W2 says nothing about any sanctions concerning the referral of disputes to the senior representatives or adjudication and simply requires a notice of dissatisfaction within 4 weeks of the adjudicator's decision to prevent it becoming binding. Likewise, W3 has no sanctions in relation to the DAB and has a similar simple notice provision in relation to the DAB decision.

However, in relation to final assessment disputes, the payment clause introduces a number of important additional requirements. Thus, if each of the various stages are not implemented within specified timescales, then the final assessment can become conclusive. Further, a disputed adjudication or DAB decision must actually be referred to the Tribunal within the specified time to prevent a binding position arising – a notice of dissatisfaction will not suffice. This means that to prevent an 'accidentally binding decision', a party must consider the nature of the dispute, which W provision is applicable, whether and to what extent one or more of the payment/assessment provisions applies, what dispute stages must be followed, the dispute stage that has been reached and applicable next steps.

Final Assessment and Compensation Events – a Retrospective Reassessment?

One other related point concerns what can actually be included in the final assessment. More particularly, can an earlier interim Compensation Event ("CE") assessment be 're-evaluated'? Keen followers of NEC may be familiar with the recent case of *Northern Ireland v Healthy Buildings (Ireland) Ltd* [2017] NIQB 43 which addressed the issue of CE assessment. In brief, NEC provides that CE's are assessed based on costs for works done and forecast costs for work/services not yet done as at the specified dividing date (the date of the instructed CE quotations that case) but this case concluded that this did not mean assessments of Compensation Events ("CE's") had to ignore actual costs when the assessment postdates the relevant works/services to which the assessment relates - in other words a retrospective as opposed to a prospective assessment could be done taking into account known costs information that may not have been available as at an earlier assessment date

Now that we have a final assessment process in NEC, does this mean that where a CE is disputed a party can rely on actual cost information at the late final assessment stage that has come to light even after a CE has, say, been assessed and implemented by the PM at an earlier stage of the contract?

One of the provisions under NEC3 that may have been relied upon to counter this position was clause 65.2 which provided that assessments of CE's:

> "*were not revised if a forecast upon which it is based* ***is shown by later recorded information to be wrong***" (emphasis added)

Whilst the meaning of 'later' was not entirely clear, this was often interpreted as meaning (at the latest) implementation (which is when quotations are agreed or assessed by the PM). However, under NEC4, this has been replaced by clause 66.3:

> "*the assessment of an implemented compensation event* ***is not revised except as stated in these conditions of contract***" (emphasis added)

As the 'conditions of contract' give adjudicators/tribunals wide powers to open up and revise any action/inaction of the PM, alter a matter that is treated as having been accepted or correct and place no restrictions on 'information', it could well be the case that the 'final assessment' could be used as a means to open up the entire account assessment - even where the contemporaneous assessment provisions (one of the core principles of NEC) have been followed and implemented.

What now?

One of the issues we have seen in the past under the NEC is parties adopting a 'wait and see' approach to CE assessment which is not the intention of its provisions and tends to increase the likelihood of disputes down the line. Whether the concept of a 'final assessment' increases this risk remains to be seen.

Who to contact

PAUL BARGE
Partner
0161 934 6493
0773 135 4626