



SHEPHERD+WEDDERBURN

Compensation Events Workshop Scenarios (Q+A)

- 1. Various issues arise as contract works are progressed. First, the Employer gives an instruction changing the Works Information. Then, the Employer fails to allow access to part of the Site by the date shown on the Accepted Programme. Finally, in the last week of January and first week of February, heavy snowfall disrupts progress of the works on site. To what extent do these events give rise, in principle, to Compensation Events in terms of the Contract?**
 - 1.1. The Employer giving an instruction changing the Works Information gives rise to a CE in terms of Clauses 60.1(1).
 - 1.2. The Employer failing to allow access to part of the Site by the date shown on the Accepted Programme gives rise to a CE in terms of Clauses 60.1(2).
 - 1.3. Circumstances justifying a CE based on extreme weather are set out in Clause 60.1(13). There is a CE if “A weather measurement is recorded (i) within a calendar month; (ii) before the Completion Date for the whole of the works; and (iii) at the place stated in the Contract Data, the value of which, by comparison with the weather data, is shown to occur on average less frequently than once in ten years.”
 - 1.3.1. So in the first instance, the answer will depend on the facts – are the criteria in sub-para (13) satisfied?
 - 1.3.2. For the purposes of this example, let’s assume that taken together, the snowfall is exceptional, but taken separately, the snowfalls in January and February are not unusual, and certainly more common than 1 in 10 year events. In these circumstances, because the weather event does not all happen within one calendar month this would not give rise to a CE.
- 2. The snow returns in the last fortnight in November. The amount of snow that falls turns this into a 1 in 30 year event. Can the Contractor claim a CE in these circumstances?**
 - 2.1. Yes – in these circumstances, the Clause 60.1(13) criteria are met.
 - 2.2. **Discussion point** – The Guidance Notes (see page 71, para 60.1) contain some useful discussion on interpretation of this provision, and the sensible aim of NEC to move away from generalisations about “exceptionally inclement weather” to a much more measurable approach to weather events as a basis for claiming additional time/money.
- 3. What should the Employer do after issuing an instruction changing the Works Information?**
 - 3.1. Clause 61.1 – the Employer should notify the Contractor of the CE at the time of the communication instructing the change to the Works Information.
 - 3.2. At the same time, he should instruct the Contractor to submit quotations; and the Contractor should put the instruction or changed decision into effect.
- 4. What about the CE arising under Clause 60.1(2)? What steps should the Contractor take in relation to that event? What timescales does the Contractor need to bear in mind?**
 - 4.1. Clause 61.3 – The Contractor should notify the Employer of the event if he believes that the event is a compensation event.

4.2. Timing is crucial – see Clause 61.3 - if the Contractor does not notify a CE within 8 weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date, etc. unless the event arises from the Employer or the Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption.

4.3. Here, we are assuming none of these qualifications apply, so the onus is on the Contractor to provide the necessary notification within 8 weeks.

4.4. **Discussion point** – to avoid any argument about whether the Contractor has the obligation to notify a CE, and the risk of any claim for a CE being timebarred, in an ideal world a Contractor would notify of any issue it considers gives rise to a CE, even if it thinks the obligation to notify strictly speaking sits with the Employer.

4.4.1. What is your company's approach in these circumstances? Do you leave the Employer to notify CEs where that is what the contract seems to require? Or do you tend to notify any CEs you are aware of, whatever the contract says about the obligation to notify?

5. What does the contract say about the rights that accrue where a Compensation Event arises under the Contract?

5.1. Clause 63.4 – states that “The rights of the Employer and the Contractor to changes to the Prices, the Completion Date and the Key Dates are their only rights in respect of a compensation event.

5.2. So basically we are talking about entitlement to (i) money; and (ii) time.

6. Assessing Compensation Events and Early Warnings – the Employer raises an issue about the CE claimed by the Contractor under Clause 60.1(2). The Employer argues that in the circumstances, the impact of delayed access to Site is something for which the Contractor could have given an Early Warning under Clause 16. If the Employer succeeds with this argument, what options are available to it when assessing this CE?

6.1. Clause 63.5 – the Employer notifies the Contractor of his decision that the Contractor did not give early warning of a CE which an experienced Contractor would have given.

6.2. The CE is then assessed as if the Contractor had given an Early Warning.

6.3. In practice, this might include assessing the CE allowing for the effect of steps that might have been taken to mitigate the risk and therefore the time/money impact of the CE, even if failure to give an Early Warning means no such steps were taken.

7. Finally – back to programmes again, and Clause 32.1 states that any revised programme produced by a Contractor should show, amongst other matters, “...the effects of implemented compensation events...”. When does a CE become implemented?

7.1. See Clause 65.1 – a CE is implemented when: (i) the Employer notifies his acceptance of the Contractor's quotation; (ii) the Employer notifies the Contractor of his own assessment; **or** (iii) a Contractor's quotation is treated as having been accepted by the Employer.

7.2. Clauses 62.6 and 64.4 set out circumstances in which a Contractor's quotation can be treated as accepted – discuss the requirements of these clauses with your group.

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