



Technical

The Cold War : NEC3 and Adverse Weather Conditions

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1. December 2010 was the coldest December in 100 years. Ramskill Martin issued its article *"Delays Caused by Adverse Weather Conditions"* by way of its email dated 13 December 2010 titled *"SNOW PATROL - CONTRACTUAL NOTICES"*. This article provides an update which focuses on the NEC3 suite of contract.
2. Standard forms of contract apportion the risk of bad weather in very different ways.
3. In GC Works contracts weather is not listed as a Relevant Matter and all risks associated with the weather are passed down to the Contractor.
4. In the JCT 2011 Standard Form of Contract *"exceptionally adverse weather conditions"* is listed as a Relevant Event (clause 2.29) but weather is not a Relevant Matter. This means that extensions of time can be awarded, giving relief from liquidated damages, but giving no entitlement to any loss and expense. The contract does not define *"exceptionally adverse"* and there is limited case law on its meaning. This leaves room for arguments and disputes. If the weather is *"exceptionally adverse"* the Architect/ Contract Administrator estimates its effect and makes a decision on a *"fair and reasonable"* basis. The JCT approach is subjective and any claim for additional time will need to be persuasive.
5. The NEC3 suite of contracts deal with weather in a very objective way. The first stage in the process is to calculate if and how much of the adverse weather occurring in each calendar month is a Compensation

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Event. A Compensation Event occurs when a weather measurement is recorded that exceeds the average 1 in 10 year value and it is only the difference between the actual and average 1 in 10 year value that is used in the assessment of the Compensation Event. The NEC3 suite sets out how the difference should be calculated. Once it has been calculated that a Compensation Event has occurred its effect on the programme and any entitlement to additional time and money is assessed.

6. This article explains the main steps in the NEC3 suite in relation to adverse weather and considers some practical issues.

Is the Adverse Weather a Compensation Event?

7. The NEC3 suite sets out Compensation Events at clause 60.1. The Compensation Event for weather is defined at clause 60.1(13) as occurring when:

“(13) A weather measurement is recorded

- *within a calendar month,*
- *before the Completion Date for the whole of the works and*
- *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.

Only the difference between the physical conditions encountered and those for which it would have been reasonable to have allowed is taken into account in assessing a compensation event.”

8. As the last part of this clause makes very clear, it is *only the difference* between the actual weather recorded and the average 1 in 10 year value that is considered when assessing the Compensation Event.
9. The NEC3 suite explains how the difference is calculated.

Weather Data (The Past Weather)

10. The Contract Data, if properly completed, will state which weather station the historical weather data is to be taken from and which weather service is to provide the data (for example the Met Office or Meteo Group). The weather data should be obtained from the weather service and weather station that are defined in the Contract Data.
11. The NEC3 Guidance Notes explain that the provisions for weather in the ECC were developed in consultation with the Met Office so it would be difficult for anyone to disagree with the Met Office's method of calculating the average 1 in 10 year value.

Weather Measurements Recorded (The Actual Weather during each Calendar Month of the Project)

12. The Contract Data sets out the weather measurements that are to be recorded during the project and specifies the location where the recordings are to be taken. The default weather measurements are:
 - *“The cumulative rainfall (mm)*
 - *The number of days with rainfall more than 5 mm*
 - *The number of days with minimum air temperature less than 0 degrees Celsius*
 - *The number of days with snow lying at Hours GMT”*
13. Several weather services, including the Met Office, provide monthly summary sheets that show, for each of the default weather measurements, the amount recorded during that particular month of the project and the average 1 in 10 year figure. This enables a comparison of figures to determine if a Compensation Event has occurred during each calendar month.
14. If the recorded weather during the calendar month is not worse than the average 1 in 10 year value then, in that case, there is no Compensation Event. In these circumstances there can be no entitlement to additional time or money for any delays caused by the weather that month.

Assessing the Compensation Event

15. The Compensation Event for weather (clause 60.1(13)) is assessed in the same way as any other Compensation Event.
16. The effect of the Compensation Event on time and money needs to be assessed and demonstrated by the Contractor who prepares a quotation.
17. The assessment will be carried out after the delaying event has occurred which means that the actual impact of the adverse weather in excess of the average 1 in 10 year value will need to be assessed using the Accepted Programme.
18. [Click here](#) to view our article “*NEC CONTRACTS – PRICING – MANAGING – RECOVERING THE COST OF CHANGE*”, for more information on the process of dealing with a Compensation Event.

Notices to the Project Manager

19. In the NEC3 suite some of the provisions relating to payment and changing the Completion Data are conditional upon notice being given to the Project Manager *within* 8 weeks of the Contractor becoming aware of the event (see clause 61.3). If notice is not given then the Contractor will lose its right to any additional time or money therefore the Contractor should give notice as soon as it is aware of the weather measurements.

Practical Issues and Criticisms of NEC3

20. Some practical issues and criticisms that should be considered are described below:
 - The default provisions in the NEC3 do not include for every type of weather condition, however, space has been left in the Contract Data for more weather measurements to be added.
 - The NEC contract is commonly used for major infrastructure projects like railways, pipelines and highways/motorways where the site can be many miles long and where the weather conditions will vary over the length of the site. In these circumstances the site can be divided into areas and appropriate weather measurements and weather data can be used for each area.

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- The compensation event is concerned with weather occurring only at the place stated in the Contract Data. This location may have significantly different weather conditions to that on the site especially if the place stated in the Contract Data is a long way from the site or if the site is in an exposed location, for example, on the coast or in a remote or mountainous area.
- The weather measurements are based on calendar months and each month is considered as a discrete period. In reality adverse weather may overlap 2 calendar months. This could mean that the weather measurements recorded in each calendar month do not exceed the 1 in 10 year average values even though the run of bad weather could itself be exceptional.
- The progress of works on the site could be affected by different types of weather conditions. The NEC3 contract makes no allowance for the combined effect of different weather conditions causing delays during one calendar month.

Which Days of Adverse Weather are Taken into Account when Assessing the Compensation Event?

21. The NEC suite of contracts say that a Compensation Event is when:

"A weather measurement is recorded within a calendar month ... the value of which, by comparison with the weather data, is shown to occur on average less frequently than once in ten years."

22. A few commentators have put forward the suggestion that it is only the days when these “*extra*” measurements are recorded (not those when measurements were previously recorded) that give rise to a possible entitlement. So, if the sixth measurement was recorded on a non-working day, it is only the later days which can be considered. There would then be no entitlement because it caused no delay even though the earlier 5 measurements were on working days and did cause a delay.
23. Most commentators and practitioners disagree with this approach saying that the weather and the effect of all weather events should be considered over the entire month. The NEC has explained that the measurements are intended to show the weather over an entire month and not on an hourly or daily basis.

Summary

24. The NEC methodology for deciding whether a Compensation Event has occurred is very rigid. This means that there is little, if any, scope for the Project Manager or a third party to exercise any discretion or judgment if, for example, weather occurs that is just inside the average 1 in 10 year value. The Contractor or Employer cannot later argue that what they agreed in the Contract is not fair. It is important that the parties understand how the risks are apportioned before they enter into the Contract.
25. It should be remembered that the Contractor is in no worse position than it would be under a GC Works contract where it bears all of the risks associated with adverse weather.
26. The weather should be monitored as the Works progress so that the Contractor is in a position to submit notices to the Project Manager within the strict time limits so that the effects of the Compensation Events on time and cost can be assessed.
27. The NEC approach provides certainty of outcome which should reduce the scope for argument. However, there could be disagreement about the assessment of the effect of the Compensation Event. Programmes should be properly prepared to demonstrate the risk and include time risk allowances where necessary!

Article by: David Tatham (BSc (Hons), MSc, LLB, MCIArb, ICIOB),
(david.tatham@ramskillmartin.co.uk)

<p>Sheffield</p> <p>The Annexe 260 Ecclesall Road South Ecclesall Sheffield S11 9PS</p> <p>Tel – 0114 230 1329 E-mail – frances.sawicki@ramskillmartin.co.uk</p>	<p>London</p> <p>Adam House 7-10 Adam Street London WC2N 6AA</p> <p>Tel – 020 7520 9295 E-mail – clive.ramskill@ramskillmartin.co.uk</p>
<p>Birmingham</p> <p>Birmingham Business Park 4200 Waterside Centre Solihull Parkway Birmingham B37 7YN</p> <p>Tel – 0121 481 2381 E-mail – clive.ramskill@ramskillmartin.co.uk</p>	<p>Manchester</p> <p>3 Hardman Street Manchester Lancashire M3 3HF</p> <p>Tel – 0161 932 1535 E-mail – nick.cheetham@ramskillmartin.co.uk</p>
<p>Head Office The Annexe 260 Ecclesall Road South Sheffield, S11 9PS UK</p> <p>Tel – 0114 230 1329</p>	