



BRODIES^{LLP}

USING NEC3- WHAT YOU NEED TO KNOW??



WELCOME

We have been asked to speak to you today about using NEC3 Contracts so as to manage these contracts effectively and avoid pitfalls!

This session is designed to be as practical as possible so please do ask any questions as we go along.



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“The knowledge base is excellent, the team is fully committed to the challenges. They provided sufficient resources and the turnaround time was quick”

Chambers and Partners 2013/14

PROGRAMME

WELCOME

SESSION 1

- Overview of NEC 3
 - NEC 3 suite of contracts and options
 - Key Clauses – including Z clauses
 - Contract assembly
-

SESSION 2

- Timelines
-

SESSION 3

Practical examples – interactive session, covering:

- Early Warning
 - Compensation Events
 - Payments/Withholding
-

QUESTIONS AND ANSWERS

NEC3 OBJECTIVES

Three specific objectives for the contract compared to existing standard forms:

- 1 Should be more flexible in its scope
- 2 should provide greater stimulus to good project management
- 3 should be expressed more simply and clearly

NEC3 FLEXIBILITY

- 1 When can it be used?
- 2 In what sectors?
- 3 What type of projects?

NEC3 GOOD MANAGEMENT

- 1 Clear and simple allocation of risk
- 2 Collaborative working
- 3 Risk reduction procedures

NEC3 CLARITY & SIMPLICITY

- 1 Short sentences
- 2 Plain English, avoiding jargon
- 3 Each clause stands alone- no cross referencing
- 4 Options clauses add to core clauses rather than alter and delete them

NOTES

NEC3 FAMILY

- NEC 3 Engineering and Construction Contract (ECC) and Subcontract (ECS)
- NEC 3 Professional Services Contract (PSC).
- NEC 3 Short Contract (ECSC) and Short Subcontract (ECSS).
- NEC 3 Adjudicator's Contract (AC).
- NEC 3 Term Services Contract (TSC).
- NEC 3 Term Service Short Contract (TSSC).
- NEC 3 Framework Contract (Framework Contract).
- NEC 3 Supply Contract (SC).
- NEC 3 Supply Short Contract (Services Contract).



NOTES

NEC3 BUILD UP

- Choose one of six main options on pricing mechanism – Option A-F.
- Include the nine sections of core clauses.
- Choose which dispute resolution option applies W1 or W2, Y(UK)1 or Y(UK)2.
- Choose which (if any) of them secondary option clauses applied.
- Not all secondary options can be used with the main options, eg X8-X11 appear in the PSC but not in the ECC; X19 only appears in the TSC.
- Include any additional (“Z”) clauses.

NEC3 MAIN OPTIONS

- Option A – priced contract with activity schedule, Lump sum price for the Works.
 - Lump sum may change if a “Compensation Event occurs or the Employer varies the Works”.
- Option B – priced contract with bill of quantities.
- Option C – target contract with activity schedule.
- Option D – target contract with bill of quantities.
- Option C & D are target price contracts.
 - If the Works cost more than the target price when complete, they share the “pain” of the cost overrun in pre-agreed proportions. Likewise if the Works are completed for less than the target price, the Contractor and Employer share the “gain” – pain share/gain share mechanism.
- Option E – cost reimbursable contract. The parties agree levels of the Contractor’s overheads and profit and the Employer pays the actual costs of the Works, plus agreed level of overhead and profit.
- Option F – management contract. Does not distinguish between construction management and management contracting.

The main options do not change the rest of ECC except to deal with pricing and payment. The main options are A,C and E.

NOTES

NEC3 CORE CLAUSES

- 1 General.
- 2 Contractor's main responsibilities.
- 3 Time.
- 4 Quality.
- 5 Payment.
- 6 Compensation events.
- 7 Rights to material.
- 8 Indemnity insurance and liability.
- 9 Termination.



NOTES

NEC3 SECONDARY OPTIONS

- W1 – Dispute Resolution.
- W2 – Dispute Resolution.
- X1 – Price adjustment for inflation.
- X2 – Changes in the law.
- X3 – Multiple currencies.
- X4 – Parent company guarantee.
- X5 – Sectional completion.
- X6 – Bonus for early completion.
- X7 – Delay damages.
- X8- Collateral warranty agreements
- X9 – Transfer of rights
- X10 – Employer’s Agent
- X11- Termination by the Employer
- X12 – Partnering
- X13 – Performance Bond
- X14- Advanced Payment to Contractor
- X15 – Limitation of Liability for design
- X16 – Retention
- X17 – Low performance damages
- X18 – Limitation of Liability
- X20 – Key Performance Indicators
- Y(UK)2 – HGCRA 1996 – Payment and suspension
- Y(UK)3 – Third Party Rights

NOTES

NEC3 CONTRACT DATA

- Identity of parties.
- Services.
- Scope.
- Language of the contract.
- Period for reply.
- Period for retention of documents.
- Access and access dates.
- Defects date.
- Adjudicators.
- Programme intervals.
- Weather measurements.
- Level of insurance.
- Key dates.
- Additional compensation events.
- Additional risks – a risk which is not expressly stated to be an Employer risk in the contract Data or Conditions of Contract (Clause 80) will be a Contractor risk.



NOTES

NEC3 WORKS INFORMATION

- Works information is information which either:
 - Specifies and describes the works; or
 - States any constraints on how the Contractor Provides the Works.

And is either

- In the documents which the Contract Data states it is in; or
- In an instruction given in accordance with this contract.

Vitally important document BUT the source of many disputes.

UNDERSTANDING ITS IMPORTANCE

- The *contractor* **designs** the parts of the *works* which the **Works Information** states he is to design (Clause 21.1)
- **Completion** is when the *Contractor* has done all the work which the **Works Information** states he is to do by the Completion Date...(Clause 11.2(2).
- A **Defect** is part of the *works* which is not in accordance with the **Works Information**...(Clause 11.2(5))
- The *Contractor* acts in accordance with the **health and safety requirements** stated in the **Works Information** (Clause 27.4)



NOTES

WORKS INFORMATION - WHAT SHOULD IT COVER?

- Technical info/specifications/drawings which describe the *works*
- Completion – what is required?
- Design responsibility and design procedures
- Health & Safety requirements
- Tests/inspections
- State who is providing what (services; equipment etc)
- Detail the activities of Others within the Working Areas
- Use by Employer pre-Completion without take-over occurring
- Programme issues

WORKS INFORMATION – SENSE CHECK...

- Make sure language use consistently with contract provisions, particularly if using standard specifications
- Clear delineation of responsibilities
- If incorporating other documents do so explicitly
- Understand the difference between the *Employer's* Works Information and the *Contractor's*

NOTES

THE PROGRAMME

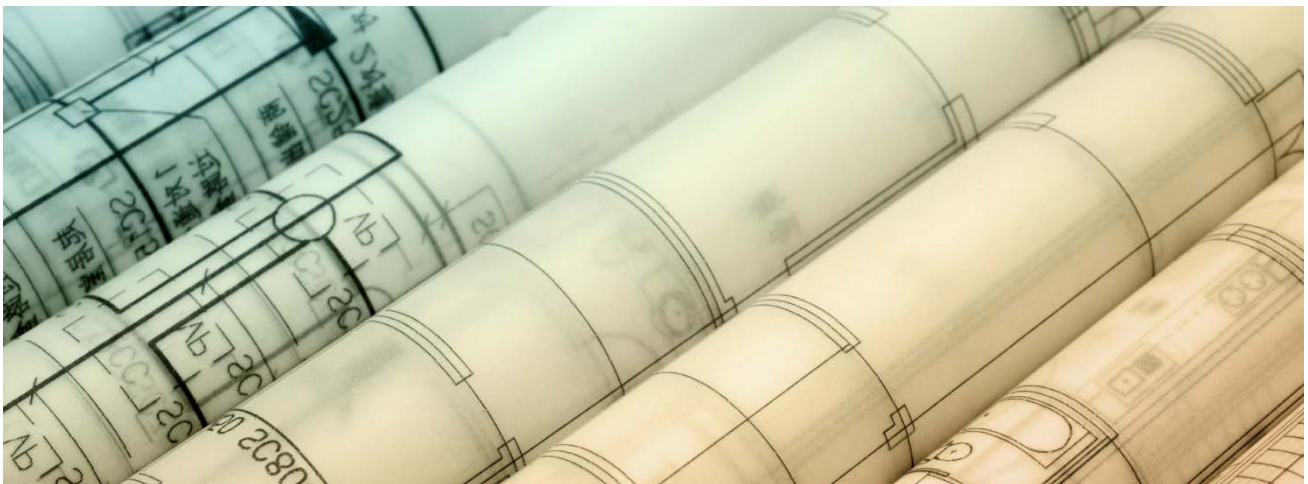
- Contractual significance, Clause 31 and 60.1(2), (3), (5)
- Supposed to be updated regularly (at the intervals stated in the Contract Data)
- Financial penalty if no programme submitted, Clause 50.3
- Key Dates and Condition and “carry out the Works in accordance with the Works Information”.



NOTES

NEC3 Z CLAUSES

- Project & Client specific requirements.
- Order of precedence of documents.
- PM resolves ambiguities and inconsistencies by instruction which may give rise to a Compensation Event.
- Consider whether Compensation Events should be amended or restricted – when preparing Sub-Contractors make sure position in Sub-Contract is back to back with the main Contract.
- Intellectual Property.
- Assignment.
- Collateral Warranties.
- PI Insurance Contract.
- Provisional sums not dealt with in core clauses.
- Requirement to comply with minimum statutory requirements and clear statement of minimum standards to apply to materials, goods and workmanship. Should be dealt with in Works Information but include in Z clauses to prevent omission as an oversight.



NOTES

NEC3 - TERMINOLOGY

NEC 3 Term	Not used in NEC 3
Contract Date	Extension of Time
Compensation Event	Variation/Change
Possession	Delay & disruption
Completion	Loss & Expense
Defects	Claims
Defects date	Prelims
Defect correction period	Interim valuation
Schedule of Cost Components	Practical Completion

NOTES

NEC3 CHARACTERISTICS

- Front loading of information
- Clear risk allocation
- No blanket exclusive remedies provision
- No huge Schedule of Amendments
- Proliferation of paperwork
- High management input required



NOTES

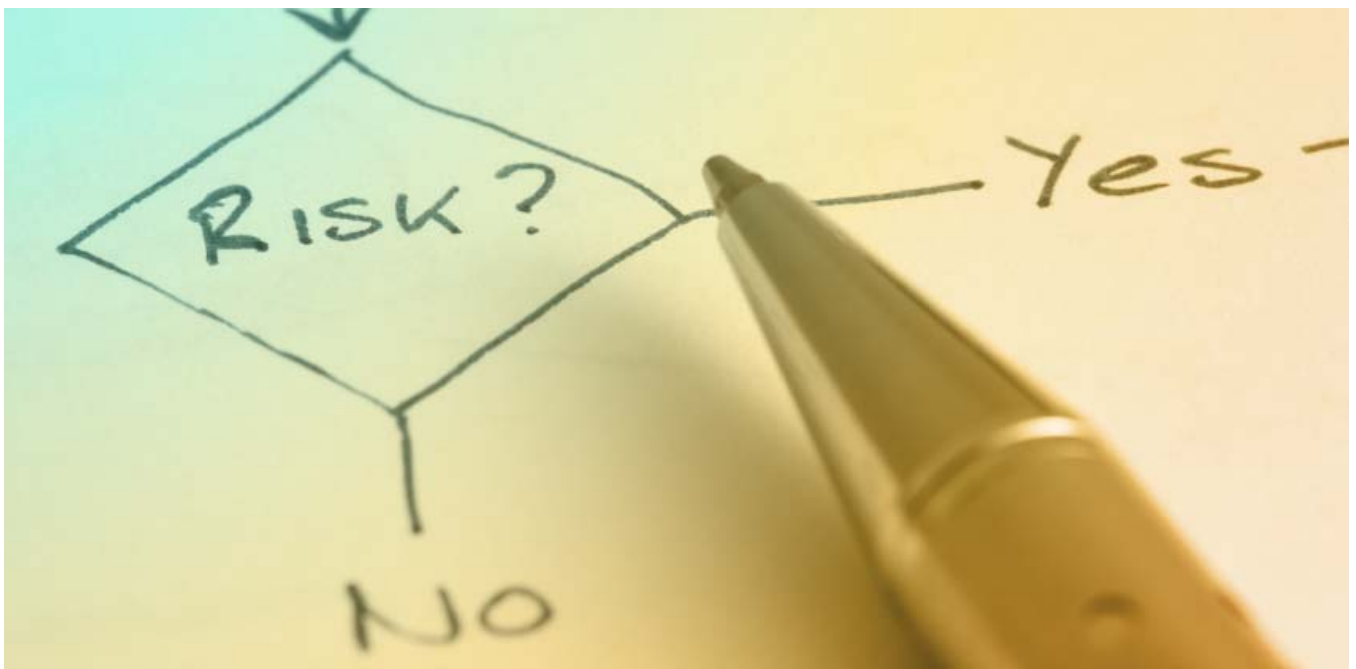
NEC3 – EARLY WARNING

EARLY WARNING NOTICES

- Clause 16.1 – both Contractor and Project Manager to give an early warning notice as soon as either becomes aware of any material which could:
 - increase the contract price
 - delay completion or meeting a key date; or
 - impair the performance of the works in use
- Early warning matters – Clause 16.1 also provides that Contractor ‘may’ give early warning to Project Manager of any other matter which could increase his total costs.
- Failure to give early warning notice – sanction on Contractor is that the assessment of any Compensation Event cannot be greater than the assessment which would have followed the notice.

RISK REDUCTION MEETINGS

- Project Manager or Contractor instructs the other to attend
- Those who attend are required to co-operate in considering how the effects of risks can be avoided or reduced, seeking solutions that will bring advantage to all affected and deciding actions to be taken.



NOTES

NEC3 – RISK REGISTER

- Register of risks already identified in the Contract documents and risk that the Project Manager or Contractor have notified as an early warning letter.
- Register is to include descriptions of the risk and descriptions of the actions to be taken to avoid or reduce them.
- Risks which are not expressly carried by the Employer are carried by the Contractor (Clause 81.1).
- Be CAREFUL! Additional Employer's risks are stated in the Contract Data (Clause 80).



NOTES

COMPENSATION EVENTS

- Clause 60
- Cover all Contractor claims for time and money.
- Numerous – 19 listed in Core Clauses and 5 in Secondary Options.
- Some notable omissions e.g. Specified peril (as defined in JCT) is not a Compensation Event.
- The Project Manager is required to notify the Contractor of compensation events arising from instructions or the changing of earlier decisions.
- The Contractor is required to notify the Project Manager within eight weeks or other events not notified by the Project Manager. **SERIOUS CONSEQUENCES IF YOU FAIL TO COMPLY TIMEOUSLY**

DEEMED ACCEPTANCE PROVISIONS

- If Contractor notifies the Project Manager of what he thinks is a compensation event and the Project Manager fails to reply within one week, or such other time as the parties agree, then Contractor reminds Project Manager of the need to reply.
- If Project Manager still doesn't reply within two further weeks then compensation event notification is deemed to be accepted.

QUOTATIONS:

- The Contractor is required to submit quotations for compensation events showing both time and money implications. He may be required to submit alternative quotations. A revision of the accepted programme must be submitted with each quotation if there are time or disruption implications.
- Again deemed acceptance if Project manager does not reply to a quotation within a stipulated time, a quotation is treated as having been accepted.



NOTES

COMPENSATION EVENTS CONTINUED

- The Project Manager is permitted to make his own assessment if the Contractor does not submit his quotation on time or if the Contractor's programme is not in order or if the Project Manager decides that the Contractor's assessment is incorrect.
- Again deemed acceptance where Project Manager does not accept a quotation but fails to make his own assessment within the stipulated time.
- The Project Manager notifies the Contractor when a quotation is accepted or his own assessment is made.
- The contract price and the times for completion and key dates are changed accordingly.



POINTS TO NOTE....

- Time Limits – Contractor loses all right to claim a compensation event after the 8 week period.
- Deeming Provisions & Project Manager Input – for the compensation event scheme to work effectively the Project Manager must be active in recognising compensation events and in seeking quotations from the Contractor.
- Unlike JCT – can claim time and money for adverse weather compensation event.
- Assessment of a compensation event is not revised if a forecast upon which it is based is shown by later information to have been wrong.
- Float – delay to the completion date is assessed as the length of time that planned completion is later than planned completion shown on the Accepted Programme.
- Overload – if multiple compensation events the procedure for assessment can break down.
- Works information related events – most claims in past have been to do with changes to Works Information.
- Physical Conditions – compensation event if;
 - within the site;
 - not weather; and
 - conditions that an experienced contractor would have judged at the contract date to have such a small chance of occurring that it would have been unreasonable to have allowed for them.

Adverse Weather – a compensation event if by comparison with ten year records or assumed values stated in the contract data, weather is regarded as adverse.

- Note it is only the difference that qualifies as a Compensation Event. Physical conditions – between what a reasonable contractor should have accounted for and what is discovered. Weather – ten year average or contract data figures and actual weather.

NOTES

TESTING AND DEFECTS

- Clause 40
- Heavy reliance on what is specified in Works Information. Must specify as much detail as possible – what tests, when, who undertakes, what standards etc.
- A defect is a part of the works which is not in accordance with the Works Information or a part of the works designed by the Contractor which is not in accordance with the applicable law or the Contractor’s design which the Project Manager has accepted.
- Clause 42.2 requires both the Supervisor and the Contractor to notify each other as soon as either finds any defects.
- Uncorrected Defects – on strict reading, clause 45.1 means Contractor is liable to pay an assessed cost of rectification whether or not that proves to be the actual cost. Also, whether or not incurred.



NOTES

PREVENTION

Often deleted.

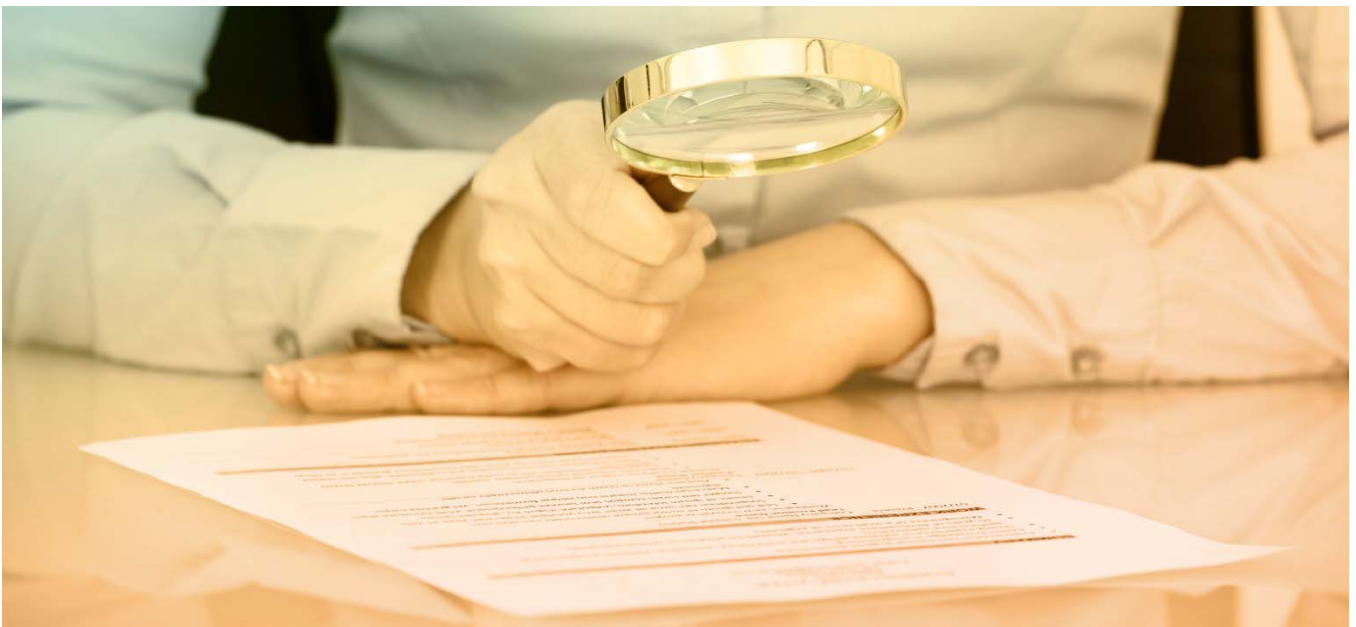
Clause 19.1 – if an event:

- stops Contractor completing the works, or, stops him completing the works by the date shown on the accepted programme; and which
- neither party could prevent; and
- an experienced Contractor would have judged at the contract date to have had such a small chance of occurring that it would have been unreasonable to have allowed for it
- then Project Manager gives an instruction on how to deal with the event.

Prevention” is capable of wide interpretation.

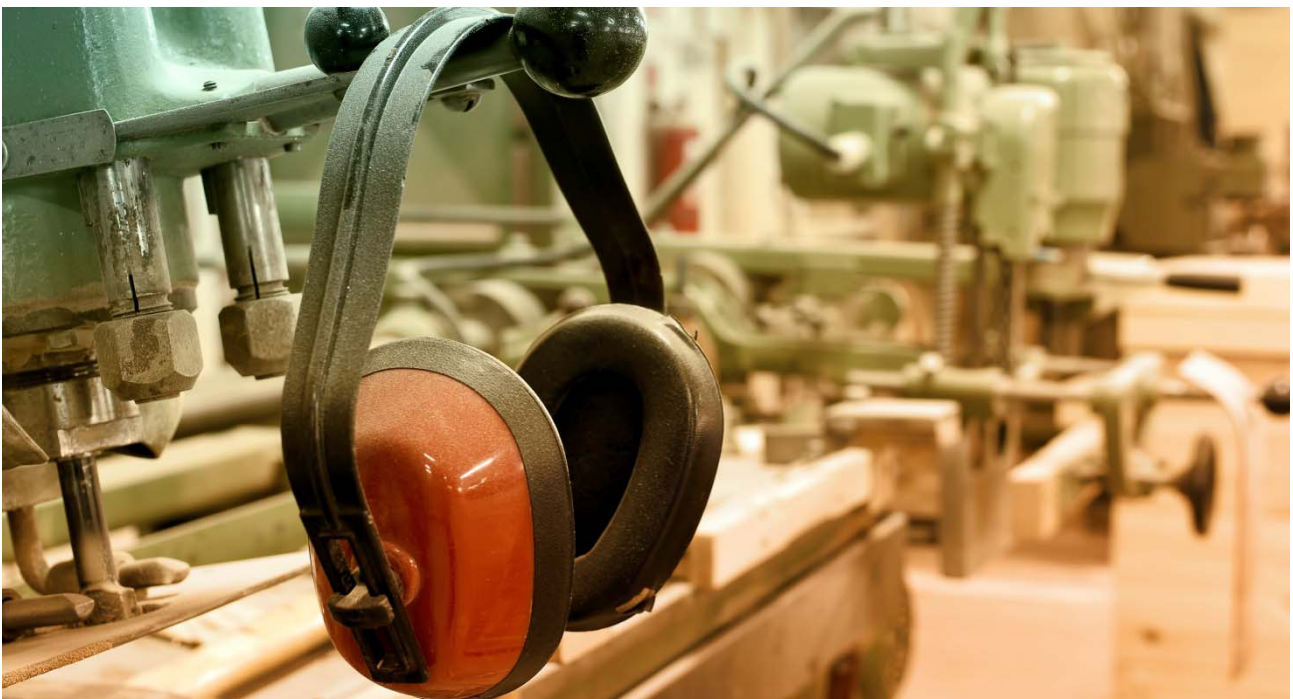
- Could it include insolvency of suppliers and subcontractors, supply of defective materials, defective design by Contractor’s consultants, strikes, accidents and other disturbances?

It may or may not be a Compensation Event.



TITLE

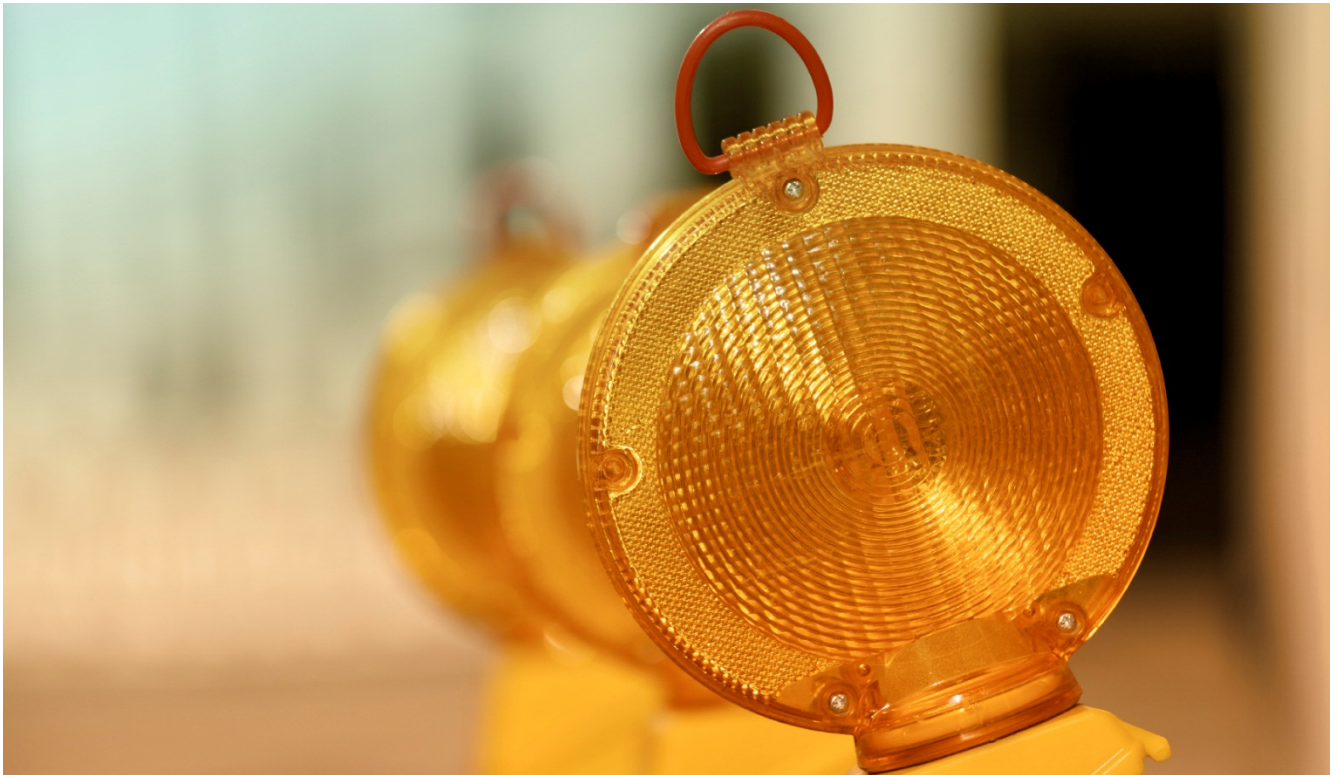
- Titles to Plant and Materials passes to the Employer when it has been brought into the Working Areas or where it has been marked by the Supervisor and marked for payment.
- What happens if Plant and Materials are removed from Working Areas for work done on them elsewhere e.g. by the manufacturer for modifications.



NOTES

REPAIR AND INDEMNITY

- Repair – Contractor to replace loss of and repair damage to works, Plant and Materials until the Defects Certificate has been issued (Clause 82).
- Indemnity – each to indemnify the other against claims, proceedings and compensation costs due to an event which is at his risk.
- Liability to indemnify reduced to the extent that the other party contributed to the claims, proceedings and compensation costs (Clause 83).



NOTES

INSURANCE

- Clause 84
- Contractor to provide insurance in Joint Names for:
 - Loss of or damage to the works, Plant and Materials.
 - Loss or damage to Equipment.
 - Loss or damage to property
- Certificates of insurance to be produced.
- If Contractor fails to ensure, Employer insures the risk and cost payable by the Contractor.



NOTES

TERMINATION

- Clause 90
- Both parties have right to terminate.
- The Party wishing to terminate initiates procedure by notifying the PM and giving his reasons. If PM satisfied that the Party giving he notice has provided reasons which are valid under the Contract, the PM issues a termination certificate.
- Only Employer has right to terminate entirely at his discretion.
- Contractor can terminate only for the reason state din the termination table.
- PM to carry out assessment of sums due following termination so that he can certify the final payment within 13 weeks.

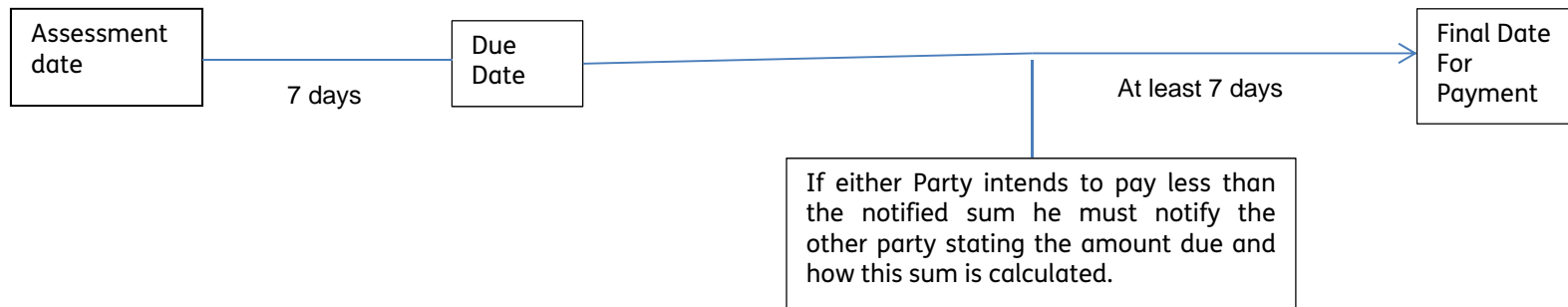


NOTES

TIMELINES

NEC 3 – Timelines

Payment –Y(UK)2 (CLAUSE 50 – NOT ACT COMPLIANT)



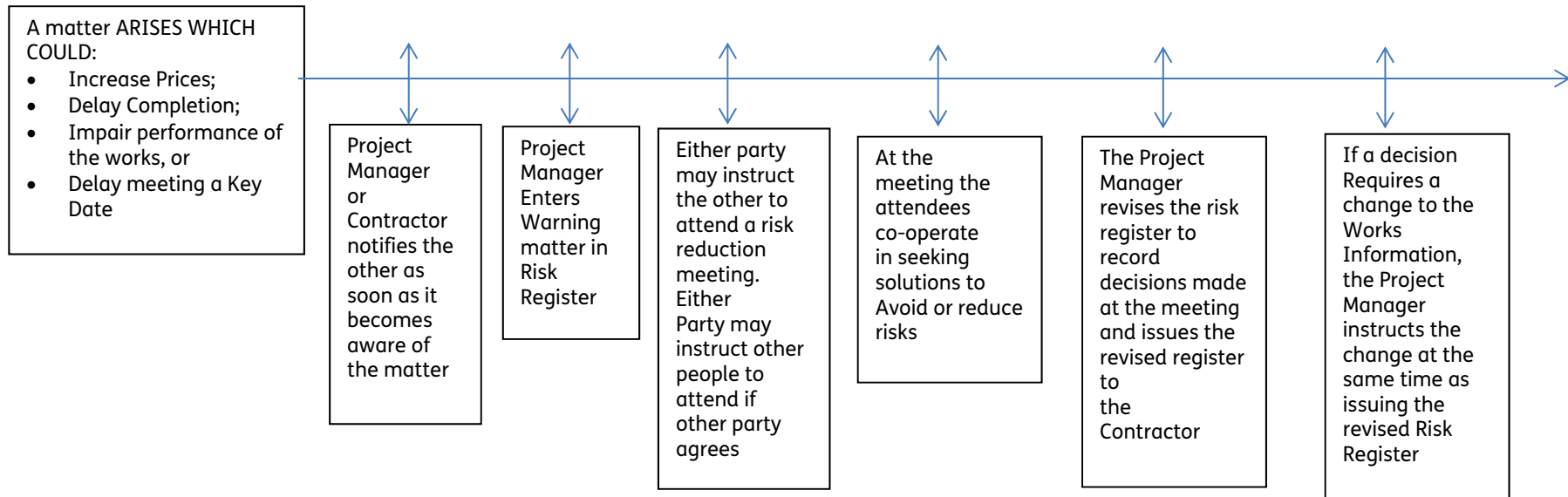
The Project Manager approves payment in line with the agreed monthly invoicing and payment cycle.

If an approved payment is late, interest is paid on the late payment.

Note – Notices must be given within the periods stated. The timeline reflects the outer limits of the timescale.

TIMELINES

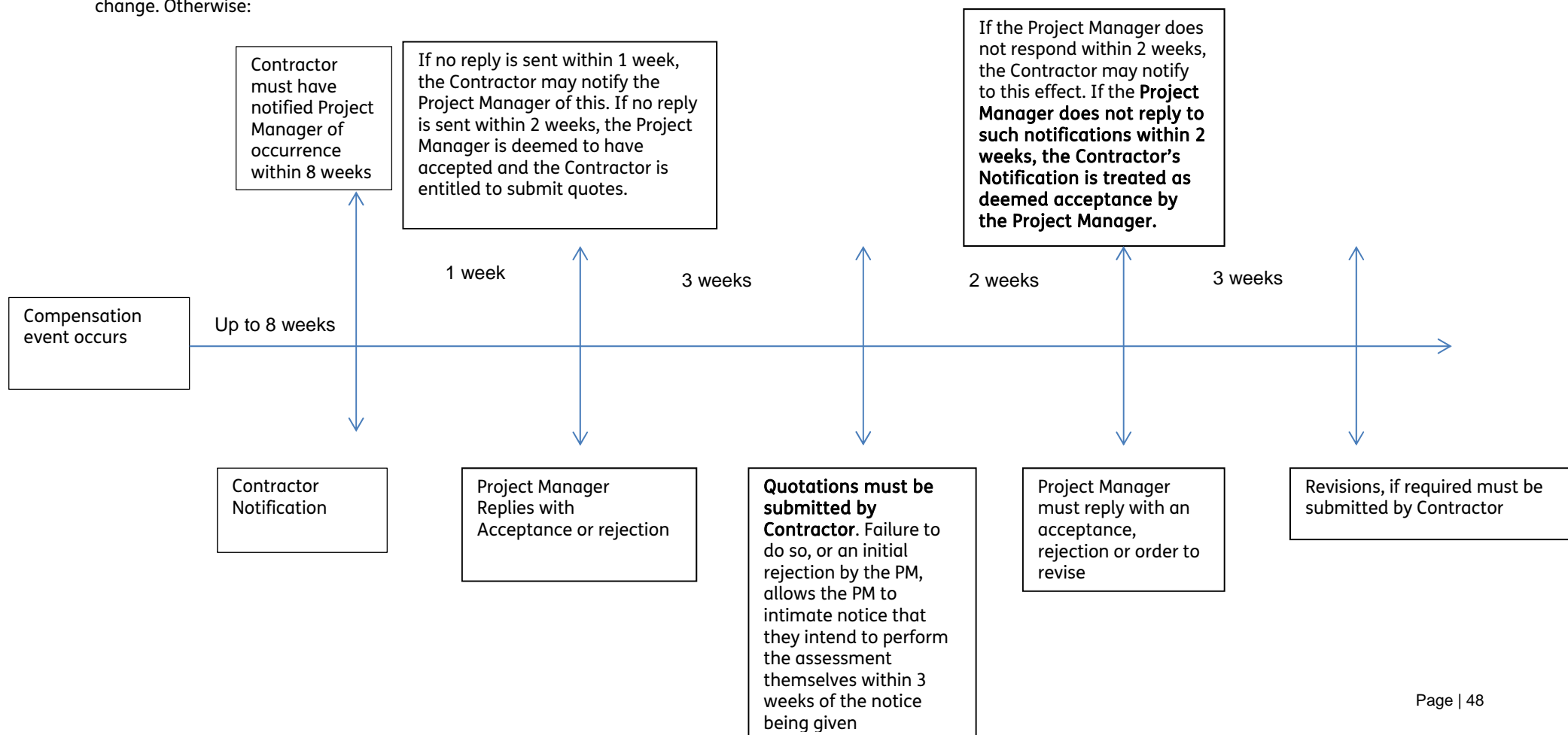
EARLY WARNING – CLAUSE 16



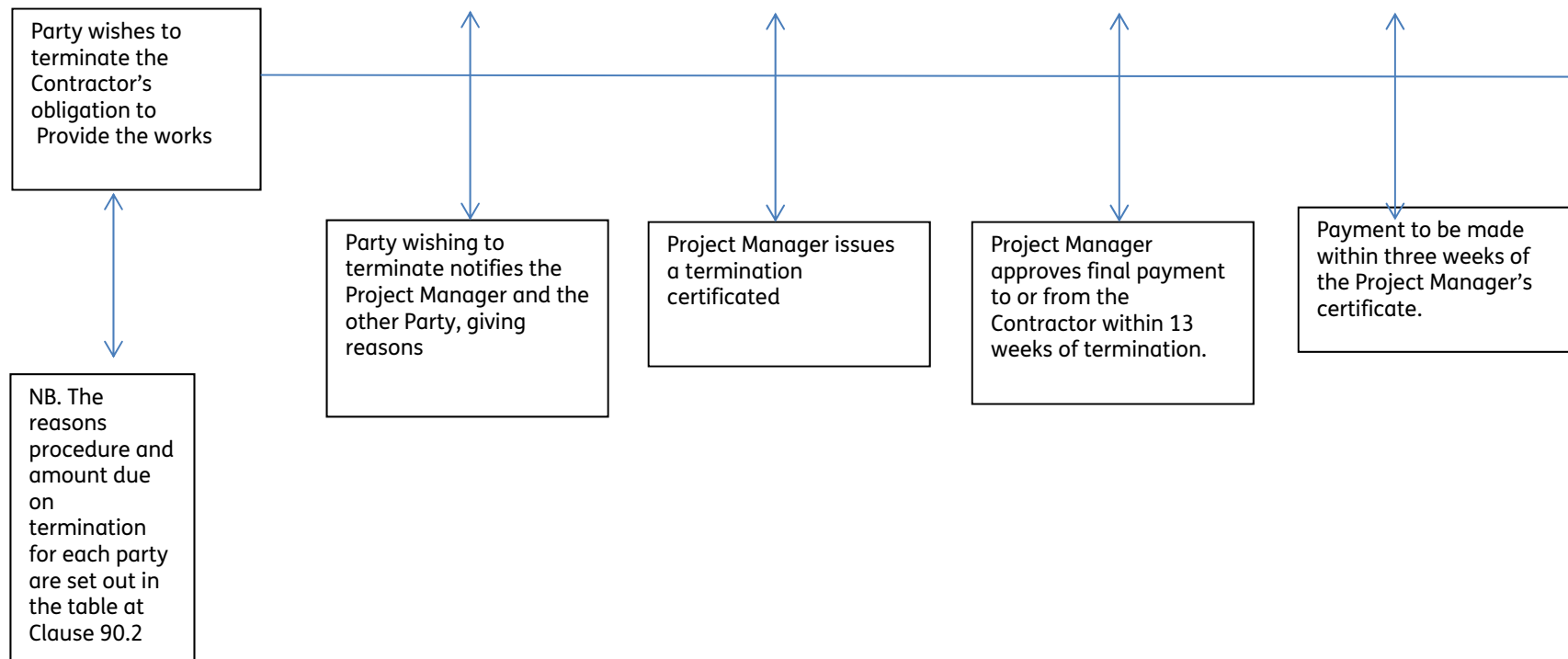
TIMELINES

COMPENSATION EVENTS – CLAUSES 60-65

If the event arises from a change of instruction by the Project Manager (61.1) then the compensation event must be submitted by the Project Manager at the time of the change. Otherwise:



TIMELINES



WORKSHOP EXAMPLES

EXERCISE 1 – NEC3

In relation to payment the contract provides that:-

- the assessment date is the first of the month and the Contractor may submit applications for payment on the assessment
- the due date is the seventh of every month;
- by twelfth of the month the Project Manager is to issue a payment notice in the form of a certificate setting out the amount due and basis for calculating the same;
- a Pay Less Notice can be issued up to seven days prior to the final date for payment;
- the final date for payment is fourteen days from the due date, so the twenty first of every month.

The Contractor submits its first application for payment on the assessment date (1 March 2014) for £120,000. On 10 March the Project Manager issues a certificate for £120,000. On 17 March 2014 the Project Manager issues a Pay Less Notice advising that a deduction of £30,000 has been made from the sum due as there is no Approved Programme. The Contractor is paid £90,000 on 21 March 2014.

Question 1

Is the deduction made by the PM valid?

Was the pay less notice issued on time?

EXERCISE 2

A number of incidents occur giving rise to possible price increases and programme changes:

- (a) Three weeks into the project the Contractor discovers possible historic artefacts.
- (b) A change in the water table requires the Contractor to alter their design and proposed methodology for carrying out the works.
- (c) Key members of the Contractor’s team contract swine flu and are signed off from work for a month.
- (d) There is a delay in Scottish Water coming to site to inspect the drainage installation causing a delay in follow on works.
- (e) There is a very wet summer culmination in the river bank next to the site bursting and flooding of the site. This caused disruption/delay to the works.
- (f) There is a riot prevent the Contractor progressing his works for two days.

Question 2 Do these events constitute Compensation Events?	Question 3 If so, under which provision?
(a)	
(b)	
(c)	
(d)	
(e)	
(f)	

EXERCISE 3

Event 1

A Contractor is appointed to design and construct a hospital development in Edinburgh. On 1 March 2014 the Contractor advises that it may not be possible to build the hospital to the specification required by the Employer. The specific footprint of the hospital is out with the footprint of the land owned by the Employer.

The Contractor requests a meeting on site with the Employer to discuss the necessary design changes and to conduct a site survey. The Employer delays holding the meeting, explaining that the relevant personnel who they would like to attend such a meeting are on holiday.

Following their return from holiday the parties work together to agree a solution. The Employer instructs the Contractor to redesign the works to the revised specification.

The drawings for the hospital are submitted by the Contractor on 7 May 2014, several weeks after the deadline specified in the Accepted Programme. Some four weeks later the Contractor writes to notify the PM of a compensation event resulting from the delay to meet on site.

Event 2

The contractor has also been appointed to design and construct a footbridge linking the old hospital facilities on one side of Old Edinburgh Road to new hospital facilities on the other side of Old Edinburgh Road. On 6 January 2014, in response to a query from the Contractor, the Employer clarifies its requirements for the footbridge. The Contractor begins to design the footbridge on the basis of what it has been told by the Employer. The PM notifies the Contractor on 12 February 2014 that the bridge should be redesigned to accommodate increased passenger numbers which have been forecast in a recently issued report by NHS Lothian.

In addition to the price for redesign, which has been agreed with the Employer, the Contractor is concerned that his late change will have knock-on effects which may result in late completion of their obligations under the Contract. However, he does not communicate these worries until 31 March 2014.

Question. 4

Do either of the above events constitute Compensation Events?

If so, under which provision?

Event 1		Event 2	
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Question. 5

Are any early warning notices required and, if so, when should they be served?

Event 1		Event 2	
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Question. 6

Has the Contractor in each event issued valid notice of the Compensation Event to the Employer?

If not, what are the consequences for the Contractor's claims?

Event 1		Event 2	
---------	--	---------	--

EXERCISE 4

A Contractor is commissioned to design and construct an underground railway station. The Contractor brings in a sub-contractor in geotechnical engineering to carry out ground investigation work required under the contract. The sub-contractor is approved by the Employer.

It becomes apparent to the Contractor that the sub-contractor has poorly managed the ground investigation work and will be late in completing the work. This will, in turn, delay the completion of the Contractor's duties under the contract. The Contractor considers this to be a Compensation Event, issues an early warning and promptly notifies the PM.

Question. 7

Can the Employer contest the Compensation Event claim?

Refer to the relevant contractual provisions which must be considered.

EXERCISE 5

Event 1

The Contractor is contacted by its piling subcontractor on 10 February 2014 who has identified Japanese knotweed on site and provided an indication of the cost of removing this. It is apparent that the change may give rise to an increase in the total of the prices.

Event 2

In April 2014, the M & E subcontractor is at an advanced stage with its works. The Contractor receives a call from the Employer's design engineer on 13 April 2014 to advise that some changes to the Works Information will be required in respect of certain tunnel wiring works. The Contractor is told that the PM has not yet been notified but that an instruction will be issued shortly. The Contractor is concerned that this late change will have significant knock on effects which may well delay completion. The Contractor's construction manager writes an email to the PM to give early warning. At the same time the Contractor's construction manager also gives notification of the Contractor believe that a compensation event has occurred. A copy of the email is attached.

Email 16 April 2014

From: Contractors Construction Manager

To: Project Manager

Subject: Early Warning and Compensation Event

In accordance with the Conditions of Contract Clause 16.1, I hereby give early warning notice of an event which might give rise to an increase in the total of the prices, a delay to Completion or the impairment of the performance of the works when in use.

In brief, the design engineer contacted me earlier today to advise that a variation is required in respect of the wiring specification. He stated that he will be contacting you shortly so that you might issue an appropriate instruction.

I should also notify you that it is our opinion that any such change in the Works Information constitutes a compensation event under clause 60.1(1). This change is certain to have a considerable effect on our ability to complete the works on time and the cost implications (in relation to time and materials) will be confirmed in due course once an instruction has been given.

On a separate matter, it has come to light that an additional cost has been incurred in relation to the piling resulting from discovery of Japanese knotweed. We shall provide a breakdown of this cost in due course.

I look forward to hearing from you.

XX

Question. 8

Do either of the above events constitute Compensation Events?

If so, under which provision?

Event 1		Event 2	
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Question 9

Are any early warning notices required and, if so, when should they be served?

Event 1		Event 2	
---------	--	---------	--

Question 10

Has the Contractor in each event issued valid notice of the Compensation Event to the Employer?

If not, what are the consequences for the Contractor's claims?

Event 1		Event 2	
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EXERCISE 6

A Contractor submits its application for payment (£100,000) on the assessment date, 8 July 2014. The PM issues a certificate in the sum of £75,000 on 12 July 2014. The PM has deducted retention from the application for payment as the Contractor has not provided the required parent company guarantee and collateral warranty. The Contractor issues an invoice on 13 July 2014.

The Employer writes to the Contractor on 15 July 2014 issuing a pay less notice advising within this note that they intend to deduct from sums due payment in the sum of £10,000 in connection with defective design which the Contractor had failed to remedy. The Contractor is paid £65,000 on 21 July 2014.

On 22 July 2014 the Contractor suspends performance, arguing that the design had been remedied and signed off by the Employer earlier that week.

Question 11

Was the PM entitled to deduct retention from the application for payment?

If so, under which provision?

Question 12

Did the Employer serve their pay less notices on time?

Question 13

Is the Contractor's suspension of performance a compensation event?

EXERCISE 7

During the tender period the Contractor seeks to qualify his price with a statement that excavation to a depth of more than five metres for turbine foundations in relation to a wind farm project is excluded from this price. The Employer tells the Contractor that they are not happy about this qualification. When the contract is signed under the “Risk Register” heading in the Contract Data Part 2, the Contractor includes the following statement “excavation beyond five metres for turbine based foundations – Employer’s Risk”. The Employer signs a contract.

Of the 24 turbine bases constructed, 15 require the Contractor to excavate to a depth greater than five metres. The Contractor carries out the work and at the time of excavation of the foundations, the last of which is complete on 24 August 2014, the Contractor submits no early earning or compensation event notices.

At the time the Project manager is, however, aware, from the Contractor’s progress reports, that some of the foundations require excavation beyond 5 metres. The reports say nothing about the excavation depths delaying the works and the Project Manager thinks nothing more of it. On 31 October 2014 the Contractor writes to the Project manager stating:

“Dear Sirs

Hilly Wind Farm, Hill Farm

We hereby give you notice of a Compensation Event under clause 60(14) – “an event which is an Employer’s Risk stated in this contract”.

The Employer’s Risk which has occurred is that we are required to excavate to a depth greater than 5 metres to construct the foundations for 15 of 24 turbine bases. This caused delay to our works and additional costs. We consider we are entitled to extend the Completion Date and to a change in the Prices.

Please confirm your agreement by return.

Yours faithfully

Chancer Contractors Limited”

Question 14:

How should the Project Manager respond to this letter?

QUESTIONS AND ANSWERS



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