

Insights

CLIENT OMISSIONS FROM NEC CONTRACT

SCOPES AND HOW THEY ARE VALUED

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SUMMARY

- NEC clients can change or omit parts of the contract scope but each instruction to omit work is a compensation event.
- Contractors have both an obligation and a right to complete works, so any amendment designed to allow a client to omit work so that it can be undertaken by a third party needs to be worded very clearly.
- An instruction to change the scope may be valid even where it is a breach of contract.

Parties enter into NEC contracts on the basis of an agreed scope (or works information in NEC3), but clients have the power to change that scope or omit parts of it. The September 2020 decision by the Scottish Court of Session in *Van Oord UK v. Dragados UK* [2020] CSOH 87 considered the limits on a client's ability to omit works under NEC but also how such omissions should be valued.

The claim concerned works under an amended NEC3 Engineering and Construction Subcontract (ECS) Option B (priced subcontract with bill of quantities). The main issue was whether the contractor was entitled to omit a subcontractor's work so that it could be carried out by two other subcontractors, and how such omissions should be valued. It was not in dispute that each instruction to omit work was a compensation event.

Validity of omissions

The subcontract contained the standard provision in clause 14.3, which allows the contractor to give an instruction which changes the subcontract works information. There were also amendments which allowed the contractor to omit work where the same work was omitted under the main contract, and an express exclusion of any claims for loss of revenue, loss of opportunity, loss of any contract, loss of profit or for any indirect loss or damage.

In considering whether works could be omitted and be given to a third party, judge Colin Tyre considered how clause 14.3 should be interpreted and relied on the decision in *Abbey Developments v. PP Brickwork* [2003] EWHC 1987. In that case it was held that a contractor had not only the obligation to undertake the works but also the right to complete such works. Therefore, a clause which allowed a client to vary the works and deprive the contractor of the right to realise a profit had to be construed very carefully. The same principle applies to a contractor omitting works under a subcontract.

The judge went on to hold that clause 14.3, as amended, was not sufficiently clear to allow the omission of works so they could be given to another party, even when read in the context of clause 11.2(19), which makes it clear that an instruction can change the works information. He was influenced by the fact that the parties added an amendment that identified specific circumstances when this could be done, namely an equivalent main contract omission. The judge therefore found that while the instruction to omit the works was valid and changed the works information, it also constituted a breach of contract.

Valuation of omissions

When it came to the remedy for that breach of contract, the judge observed that the NEC3 ECS terms specify the only remedy that is available, which is a compensation event. He rejected the argument by the subcontractor that the compensation event procedure operated differently where the compensation event was a breach of contract.

The judge therefore held that as the compensation events were the instructions, the valuation had to be undertaken on the basis of the effect on the defined cost in accordance with clause 63.1, and the cost of components in the shorter schedule of cost components. It was common ground that the instructions resulted in a reduction in the defined cost and the judge observed that the instructions also fell within clause 63.10 and therefore the prices could be reduced.

All that followed was what the judge described as the mechanical exercise under clause 63.13 of making the resulting changes to the bill of quantities, which in practice meant reducing the rate for the work remaining to be done. He also commented that the use of the defined cost in NEC was intended to provide an objective method of giving effect to change, in a way that does not leave the contractor either better or worse off.

Clause 10.1

The judge also considered an argument based on clause 10.1, the obligation to 'act in a spirit of mutual trust and co-operation', but held that this did not affect his findings. To start with, he held that the motive for omitting the works was irrelevant, before noting that for a breach of clause 10.1 to have practical consequences it would have to be a compensation event and would presumably fall under clause 60.1(18) as a breach of contract. This would simply mean the compensation event procedure operated in the usual way.

Conclusions

The case serves to highlight the care that needs to be taken when considering the omission of work, especially when the standard provisions are amended. In this case the amendment supported the judge's finding that works could only be validly omitted in the specific circumstances included in the subcontract.

The case is also a reminder that a breach of contract is a compensation event and will be assessed like any other compensation event, especially as the rights of the parties to a change to the prices, the completion date and key dates are their only rights in respect of compensation events.

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