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As we head towards another winter, for many construction professionals the memories of last year's Christmas snow and freezing weather have now faded. For others however those memories linger on in unresolved arguments about weather claims. Guest contributor, Michael Conway explains.

Contractors' rights in respect of delays caused by bad weather are clearly dependent on the terms of the applicable contract. This paper looks at the provisions of NEC 3.

Commercial professionals in construction are well versed in the arguments surrounding the subjective provisions relating to exceptional and/or exceptionally adverse weather conditions. NEC 3 takes a different approach. No distinction is made between events that give rise to a remedy for extension of time and events that give rise to a remedy for additional costs. Unusually, the NEC has a mechanism whereby each Party is allocated some weather risk.

The starting point in the NEC for the allocation of the weather risk is a statistical comparison which is explained in the guidance notes to the NEC as follows:

Rather than rely on the subjective generalisations about 'exceptionally inclement weather' sometimes included in standard forms of contract, the ECC includes a more objective and measureable approach. The purpose is to make available for each contract weather data, referred to in the Contract Data, normally compiled by an independent authority, establishing the levels of selected relevant weather conditions for the Site for each calendar month which have had a

period of return of more than ten years.

The NEC Mechanism for Dealing with Weather

The NEC mechanism for dealing with weather starts at Clause 60.1 (13) which provides for weather to be considered as a compensation event whereby a contractor may be entitled to additional time and money if :

“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”.

So the principle of Clause 60.1 (13) is that weather measurements are kept on site (or at a nearby location) on a month by month basis while the contract is in progress and compared with previous weather data for the site (or a nearby location) which have had a period of return of more than ten years. The place where the weather is to be recorded is detailed in the Contract Data Part 1 of the NEC Contract. The Met Office keeps and issues this data on a calendar month basis for weather stations throughout the UK. If the weather recorded at the site exceeds these levels then it is a compensation event. The NEC requires that the contractor allow for 'normal' weather, which does not fall within the 1 in 10 year test. The compensation event is notified at the time of the event, but clearly one cannot quantify the effect until the end of that calendar month or when the full extent is known. The process then restarts for December 2010 and so on.

A Good or a Bad Mechanism for the Contractor?

The attempt to move away from arguments over the interpretation of the terms “exceptionally adverse” was seen as a great benefit for the Contractor. Avoiding references to Emden's Construction Law or Abrahamson in attempts to show that 'exceptionally adverse' weather did prevail which was both exceptional in itself and was averse to the carrying on of the works was welcomed by contractors who all too often sought to ignore the word

"exceptionally" and simply focus on "adverse".

The mechanism in NEC 2 used to be much better for the Contractor than it is now under NEC 3. This is investigated below.

Paragraph 6 of the NEC 3 Contract Data provision is made for weather measurements to be recorded for each calendar month. In relation to snow this comprises:

- The number of days with snow lying at a set time of day (the Parties are free to stipulate such time as they please but the Met Office normally records snow lying at 09:00 GMT).
- Other measurements as the Parties may stipulate.

There is no stipulation as to how much snow is required so it does not need to be deep or crisp or even. It is therefore essential that the weather station, or the place stipulated in the contract for the weather data, is not significantly remote from the site to avoid an unrepresentative comparison.

Let us assume for the moment that a December snow measurement is recorded on site which exceeds the 1-in-10 year value. On this basis the precondition for compensation is satisfied. Remember however that this precondition does not involve any consideration of the adverse nature or the impact of the snow upon the work. For the payment of monetary compensation the assessment is by reference to the "effect of the compensation event" (Clause 63.1) whereas for delay it is the extra time "due to the compensation event" (Clause 63.3). This is where things can go off the rails for our 'out of pocket' contractors. Let's look at some examples.

Most construction sites in the UK closed on 17 December 2010 (Black Eye Friday) until the New Year. Let's say between 18 December 2010 and 31 December 2010 it snowed heavily, such that the cumulative number of days with snow lying is exceeded. None of this snow will have actually adversely affected the work done in December at all. Consider in addition, that it snowed sufficiently during the period between 1 and 17 December 2010 that progress was affected but the snow in this shorter period did not exceed the 1-in-10 year value.

The contractor is entitled to have regard to the weather in the whole of the calendar month and has entitlement to a compensation event for both an extension of time and cost even though it is snow during a close-down period which triggered the entitlement. Good news for the Contractor – so far!

Taking this further, let us assume that the number of days in December when snow is lying in the preceding 1-in-10 year value is 8 days. Then assume that during the period 1 to 17 December 2010 there are 8 days of snow lying (so no extension of time is due as the 1-in-10 year value is not exceeded); then assume that during the Christmas shut down period there is only one day of snow lying. This latter event means that during the month of December 2010 the number of days with snow lying has exceeded the 1-in-10 value. Under the NEC, the compensation event relates to the full calendar month of December.

Under earlier versions of the NEC, the provisions did not confine the entitlement to compensation to only those working days within the calendar month for which the weather measurement exceeded the 10-year value; it actually looked at the whole month. So earlier versions of the NEC did more than just shift the weather risk, it actually reversed it once the relevant precondition was satisfied. The Employer compensated the Contractor for all the days in December when snow was lying and had an 'effect' on cost and time, not just those in excess of the 1-in-10 year value.

This is not the position under NEC 3 thanks to the final sentence of Clause 60.1 (13):

Only the difference between the weather measurement and the weather which the weather data show to occur on average less frequently than once in ten years is taken into account in assessing a compensation event.

In our example above the consequence of the one day of snow lying during the Christmas shut down period is to simply allow the Contractor to satisfy the compensation event 'precondition'. Whilst this may be welcomed by the Contractor, by the final sentence of Clause 60.1 (13) above, the compensation event only occurs from the day in the month when the snow measurement exceeds the weather data for December on a less than 1-in-10 year test. Thereafter the contractor still has to establish the consequences of the compensation event. Liability for the financial and/or time consequences of one day of snow during the Christmas

close down period are unlikely to be of great concern to the Employer. That concern may have been considerably increased if the Contractor was also entitled to consider the consequences of the 8 days of snow on site operations between 1 and 17 December 2010 but NEC 3 does not provide for that.

The converse of course is that without the one day of snow in the Christmas shut down period the Contractor doesn't get past the starting post at all because 'normal' snow which the weather data shows is likely to occur within the 1-in-10 year value is at the Contractor's risk anyway in relation to both cost and time.

In addition the contractor may not get past the starting post, despite there being severe delays and cost implications, where snow varies to sleet and then to rain, none of which exceed the ten year average. If there is no snow at all on the site itself but the works are severely affected by non-delivery of materials and/or transportation of labour due to snow in the surrounding area, the contractor will again find no relief within the NEC provisions.

The preceding examples show that the NEC 3 approach to the weather risk may not always work to the contractor's advantage. Another situation where the NEC approach may disadvantage the contractor is where a period of continuous snow straddles two separate but succeeding calendar months (like November/ December 2010). Under the NEC approach the period of snow has to be broken down and reviewed on a calendar month basis. The result could be that a period of infrequent weather (or exceptionally adverse weather if you prefer) is turned into two periods of average weather neither of which qualifies as a compensation event.

The principle within the ECC is that neither party gains or loses by the impact of the compensation event, the contractor being compensated for the effect, if any, on its programme and cost. Whilst it may appear that the NEC provides for some of the weather risk to be allocated to the Employer, the precondition means that the Employer is only taking the risk for the effects of weather over and above the worst of the 1-in-10 year value. The Contractor still carries the risk for weather below the worst of the 1-in-10 year value. That risk may be significant and is often overlooked at tender stage.

The NEC3 approach to weather risk has certainly removed the uncertainty from the question of defining 'exceptionally adverse' but the process of gathering and assessing ten years of data is not free of charge or straight forward. Having crossed the bridge of entitlement, the contractor is faced with a second and often more difficult task of demonstrating the effects. This often involves a demonstration of only part of the weather upon the progress of the works.

The value of these weather events however can be significant. Whilst a frosty reception often awaits a snow claim, contractors must plough on. With a little grit and determination, successful claims are achievable.

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