

NEC 3 Project Manager's Powers and Duties

Under the core clauses of the construction contract

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Introduction

This guide explains the roles and responsibilities of Project Managers under the NEC 3 construction contract¹. The relationship between the Employer, Contractor(s) and Project Manager are explained. Here the role of the Project Manager in managing time, testing and defects, payments, compensation events, title, risks and insurance and finally termination of a contract is considered. However, it is the employer and contractor who are in contract. The project manager “administers” the contract.

Part 1 - Overview of roles and responsibilities

Generally the Project Manager (PM) will behave in a spirit of mutual trust and co-operation. The PM will be required in Law to act impartially in matters of assessment and certification; And, not be unfair to the contractor or dishonest.

Tip: Communicate in writing!

The PM has the power to delegate and to instruct a change to the Works information and/or key date. The PM can also accept/reject the Contractor's proposal for adding to the work area.

The PM is to give an early warning to the Contractor (and enter in the Risk Register) which could

- Increase the total of prices
- Delay completion
- Delay meeting a key date
- Impair performance of the works in use.

Instruct the attendance of the Contractor at risk reduction meetings and require co-operation in:

- Making and considering proposals for how the effect of the registered risks can be avoided or reduced,
- Seeking solutions that will bring advantage to all those who will be affected,
- Deciding on the actions which will be taken and who, in accordance with this contract will take them and
- Deciding which risks have now been avoided or have passed and can be removed from the Risk Register.

Record in the Risk Register changes made at meetings, and instruct these changes. Notify ambiguity or inconsistencies as soon as aware, and instruct to resolve.

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¹ As distinct from a professional services contract

Receive Contractor's Notices as to illegal or impossible action required in Works Information and if agreed, issue instruction. Issue Instructions (and say how to deal with them) IF an event occurs which:

- Stops the Contractor completing the Works, or
 - Stops the Contractor 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 such a small chance of occurring that it would have been unreasonable for him to have allowed for it.

Part 2 - Contractors Main Responsibilities

As far as the Main Contractor is concerned, the Project Manager considers:

- Particulars of Contractor's design (if any) for acceptance and say reason for non-acceptance.
- Contractor's design of equipment and instruct acceptance or say why none.
- Contractor's named key persons and accept or say why not.
- Removal of Contractor's employee and give reasons for removal.
- the Employer's Costs if the Contractor fails to provide services to the Employer in the Works Information.
- Names of proposed subcontractors and accept/reject.
- the Contractor's proposed sub-contract conditions.

If the Project Manager decides that the work does not meet the Conditions stated for a Key Date by the date stated and, as a result, the Employer incurs additional cost either in carrying out the work, or by paying an additional amount to others in carrying out the work, assess the amount.

On the same project, the additional cost which the Employer has paid, or will incur, is paid by the Contractor. The Project Manager assesses the additional cost within four weeks of the date when the Condition for the Key Date is met. The Employer's right to recover the additional cost is his only right in these circumstances.

Part 3 - Time

The Project Manager should certify completion within one week of completion (whether by Key Date or by Completion). Receive, accept, reject the Contractor's first programme within period stated in the Contract Data and each subsequent programme and consider the following:

- the starting date, access dates, Key Dates and Completion Date,
- planned Completion,
- the order and timing of the operations which the Contractor plans to do in order to provide the Works,
- the order and timing of the work of the Employer and Others as last agreed with them by the Contractor or, if not so agreed, as stated in the Works Information,
- the dates when the Contractor plans to meet each Condition stated for the Key Dates and to complete other work needed to allow the Employer and Others to do their work,
- provisions for float, time risk allowances, health and safety requirements and the procedures set out in this contract,

- the dates when in order to provide the Works in accordance with his programme, the Contractor will need:
 - access to a part of the Site if later than its access date.
 - Acceptances,
 - Plant and Materials and other things to be provided by the Employer and
 - Information from Others,
- for each operation, a statement of how the Contractor plans to do the work identifying the principal Equipment and other resources which he plans to use and
- other information which the Works Information requires the Contractor to show on a programme submitted for acceptance.

Say within two weeks of the Contractor submitting a programme to him for acceptance, the Project Manager either accepts the programme or notifies the Contractor of his reasons for not accepting it. A reason for not accepting a programme is that:

- the Contractor's plans which it shows are not practicable,
- it does not show the information which this contract requires,
- it does not represent the Contractor's plans realistically or
- it does not comply with the Works information.

Require the Contractor to show on each revised programme:

- actual progress achieved on each operation, and its effect upon the timing of the remaining work,
- the effects of implementing compensation events,
- how the Contractor plans to deal with any delays and to correct notified defects,
- any other changes which the contractor proposes to make to the Accepted Programme.

Accept/reject the Revised Programme and say IF rejected, why. The PM should instruct the Contractor to stop or not start any work and start or re-start that work.

Remember! Certify the date upon which the Employer takes over any part of the Works and do so within 1 week. If acceleration (of the works) is desired, require a quotation.

Part 4 - Testing and Defects

The Project Manager should assess the costs incurred by the Employer in repeating a test or inspection after a defect is found. Arrange access to parts already taken over for the Contractor to correct a defect. Consider a proposal from or to the Main Contractor not to correct a defect. Consider a quotation from the Contractor for a saving as to defects or saving as to earlier completion date and decide whether to instruct.

- Assess the cost to the Employer if Contractor fails to correct within the Defects Correction Period.
- Assess the cost to the Employer if he does not give access to correct a defect.

Part 5 - Payment for UK Construction Contracts

Basic Information

The Project Manager should be familiar with the Payment Provisions in the HGCRA 1996 and the forthcoming provisions of the LDED&C 2009. The prompt payment requirements of OGC are important if the project is a public body procurement. Remember to check the payment rules in Subcontracts and Sub-subcontracts for compliance.

Arrange KPI monitoring of payments to tiers 1, 2 and 3. Identify the "Assessment Date" and ensure tier 1, 2, and 3 has this common Assessment Date. Identify the "Due Date for

Payment" and ensure tiers 1, 2, and 3 have a common "Due Date for Payment". The differing "Final Date for Payment" in tiers 1, 2 and 3 contracts should be identified and entered in KPI records. Finally, identify the latest date prior to "Final Date for Payment" for the service of Withholding Notice/Pay Less Notices and enter in the KPI records.

Practical Application of Payment Provisions

The Project Manager should receive the tier 1 Contractors "Application for Payment" prior to the "Assessed Date". Once obtained, the Project Manager should carry out, in good time, an *independent and impartial assessment* of the Account Due/Valuation by the Assessment Date and whether or not the Application for Payment is received. Issue in good time the Notice/details of how the "Amount Due" has been assessed and issue the Certificate of the Amount Due. Consider grounds for Withholding Sums from the "Amount (otherwise) Due" e.g. the *want* of programme. Next, issue in good time the "Withholding Notice/Payment Notice" and the grounds articulated and the KPI. Monitor and report to the Employer what sums are due to the Contractor or whether there is a repayment from Contractor to Employer. Finally, monitor actual transfer of the money and KPI the data.

Part 6 – Compensation Events

Basic Principles

The Project Manager should recognise that there is a significant burden and duty to notify the Contractor that a Compensation Event has occurred [see 61.1 & 61.3]². Do not wait to be informed. Initiate the Notice and do so at the time of giving the instruction or changing an earlier decision. The Project Manager should be familiar with what "Compensation Events" actually apply in the contract.

Note that if the Project Manager fails to notify a Compensation Event, it will *not* fall to the Contractor to so notify of the Event. The test is whether the average Project Manager ought to have identified and notified of the event to the Contractor (but did not) (objective test) [61.3].

Quotations machinery

Consider if an event happens instructing the Contractor to submit quotations for a potential instruction or change decision. After discussion with the Contractor, instruct for alternative quotations and familiarise yourself with the time limits and machinery for those quotations. Consider how acceptance is give or acceptance implied (!) and rejection is given. The Project Manager should consider making his own (PM) Assessment. Consider whether the effects of a compensation event are too uncertain to be forecast reasonably and whether *assumptions* can be indicated for the Contractor to base his quotation on. (*Note*: if an assumption later turns out to be wrong the Project Manager issues a correction).

Notice of a Compensation Event

The Project Manager should notify the Contractor of a Compensation Event (whether now or likely to happen in the future) with and at the same time, as his Instruction or change of earlier decision, and *may* instruct a quotation. The Project Manager need not notify the contractor if he believes *No* Compensation Event has occurred or will likely occur.

The Project Manager should receive a Contractor's Notice of a Compensation Event and consider whether the Notice is justified [61.4]. If so, he now issues a Notice and may instruct for Quotations. If not, the Project Manager should notify the Contractor.

² Referring to clauses in the contract document NEC 3

Consider whether a "Contractor's Notice" of a Compensation Event (in the absence of a PM "Notice") is in time. If not, consider whether the Project Manager, via an objective test, has failed to issue his own Notice [61.3]. That is to say, the average Project Manager would have notified the event to the contractor but did not. The Project Manager should be familiar with how a want of reply by the Project Manager is implied to be a Compensation Event.

Early warning of Compensation Event

The Project Manager should consider whether the Contractor could have, but did not give, an "early warning" of a Compensation Event (use objective test: Could an experienced contractor, knowing the circumstances, have given an early warning?). If so, notify the contractor of that decision when and if the Project Manager instructs the contractor to submit quotations (since the Compensation assessment may be impacted [see 63.5]).

Assessing prices for Compensation Event

It should be recognised that it is the Project Manager who assesses a Compensation Event price ordinarily (unless a previous quotation was accepted expressly or impliedly). The contractor will invariably indicate his opinion of a price for the Project Manager's assessment.

Here are some general principles of assessment under NEC 3:

- it is the *effect* (increase/decrease) of the Compensation Event on cost or anticipated cost of the *original* works,
- and risk allowance (*i.e.* significant chance of it occurring)
- and the effect of prolonged time on site ('Cost'),
- and the effect of disrupted working ('Cost'),
- and the time to be extended,
- and the "direct fee percentage to be added (see Contractor's Data)
- and/or "Subcontractor fee percentage added.
- BUT assuming that physical conditions were taken into account (objective test of the average contractor).

List of Compensation Events in core clauses

1. Project Manager instruction for change except for defects, contractor's own design change.
2. Denied access.
3. Employer fails to provide what he promised.
4. Instruction to stop or change to Key Date.
5. Employer or others fail to do work as per Accepted Programme or fail to comply with conditions in the Works Information or carry out work out with Works Information.
6. Project Manager or Supervisor does not reply to a communication in time.
7. Project Manager instruction artefacts
8. Change of previous Decision
9. Project Manager withholds an acceptance wrongly
10. Supervisor instructs contractor to search for defect wrongly.
11. Supervisor test or inspection causes unnecessary delay.
12. Contractor encounters unreasonably foreseeable physical conditions.
13. One in 10-year weather condition.
14. An express Employer's risk occurs.
15. PM certifies take over of works before completion.
16. Failure of Employer to provide materials, facilities, samples for tests and inspections as stated in Works Information.

17. Project Manager notifies the correction of an earlier assumption about a Compensation Event
18. Employer's breach not a Compensation Event.
19. An event which was unforeseeable and prevents progress.

Part 7 – Title

The Project Manager is entitled to give permission to remove plant from the works. The Project Manager is also entitled to give permission for plant to be left on the works when it is no longer needed.

Part 8 – Risks & Insurance

Loss of and repairs of damage to the Works, plant and materials is for the Contractor to bear unless otherwise instructed by the Project Manager. It is important to receive the Contractor's Insurance certificates before the starting date and at each renewal date and indicate acceptance of them or not. Issue to the Contractor policies and certificates for insurance provided by the Employer for acceptance of the Contractor.

Part 9 – Termination

The Project Manager should receive from the Employer and Contractor detailed Notice of Termination. Decide whether the Notice complies with the Contract³ and if it does, issue a Termination Certificate to both parties promptly. Certify within 13 weeks of Termination a Final Payment Assessment.

Consider the condition precedent to Employer Termination is the Project Manager's Notification that the Contractor has defaulted *and* failed to put the default right within 4 weeks of the Notification. Reasons can include a substantial breach, want of Bond or Guarantee required under the Contract, want of pre-approval of a Subcontractor (for Substantial Work), whether the Employer and others were substantially hindered or whether health and safety regulations were substantially broken.

Consider whether any Project Manager instruction to stop or not to start any *substantial* work or all work or (a re-start) has/has not been instructed within 13-weeks entitles Termination by the Employer or Contractor.

NOTE: The option clauses are not considered in this paper, or the differences in Primary obligations between Options A-F.

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³ Consider reasons in the Termination Table and other reasons.