

NEC 3 Project Manager's Decision Making Role



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Introduction

The Project Manager (PM) in the NEC 3 Contract documents is frequently caught in a real bind. Among the large number of functions both great and small are those, which call upon him to decide matters of opinion and do so founded on independence of mind. But he easily finds himself having to decide issues which his client, the Employer may dislike. He easily finds himself having to decide issues, which he, the PM, may dislike. He easily finds himself having to decide issues, which the contractor may dislike. The PM is supposedly there to “hold the ring” between Employer and Contractor. That’s the bind; there is serious conflict of interest. If it were not for the context in which this contract document is set, the PM’s decisions would be worthless and void. He is in law wholly biased.

NEC 3 Contracts anticipate bias and sensitivities

The NEC3 Contract anticipates all this. The Employer and Contractor under the Contract know full well that whomever the Employer appoints to be the PM, he will be in a sensitive position. Conflict of interest is inherent in the PM’s task. The opening promise in the PM’s Professional Services Contract [clause 10.1] expressly says that the Employer and Consultant (the PM) shall act as stated in the Contract and in a spirit of mutual trust and co-operation. Then, the NEC3 Building Contract between Employer and Contractor says that the Employer and Contractor and PM and Supervisor shall act as stated under the Contract and in a spirit of mutual trust and co-operation. It must be fair to suggest that the intention here is for example, that the Employer is to be trusted not to influence, lean on the PM to be partisan. The Contractor will trust the PM to be non-partisan, to be independent in thought, to objectively consider acts and omissions (even his own) notwithstanding conflict of interest. In other words the Contractor and Employer surrender to a person who can be said to have a real possibility of being actually or unwillingly influenced by all the circumstances when carrying out his role, which has a contradiction of independence.

Even IF the clause 10.1 “spirit” was unexpressed it is nevertheless fair to say that the two parties to the building contract have elected to have a PM who falls short of satisfying the test for bias. Indeed none of this is any different to decisions made by the architect or engineer or contract administrator under other forms of contract. The common thread is that the Employer and Contractor have agreed when they accept these standard forms that these folk together with whatever self interest is reasonably to be expected will make decisions, sometimes controversial decisions, as between these two parties.

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Project Managers' decisions can be reviewed by an adjudicator

There is another saving characteristic. The decisions of the PM are immediately reviewable by the Adjudicator. And, that person is completely bound by the rules for bias. The Adjudicator is wholly independent, impartial and must have no hint of possibility (mere possibility) of favouring or disfavouring a party. Put another way, there is to be absolutely no connection with either party. As to the contract rules either party is at liberty to immediately call for an Adjudicator to "open-up, review and revise" the PM's decisions... and do so within 28-days. It can be reasonably stated that the position in law of the PM under the NEC 3 Contract requires him to express opinion/certify in an honest and independent manner but is forgiven any test in law for bias. It does not apply. His decisions are effective until the Adjudicator reviews all that is said and more besides.

So, what behaviour might be expected from the PM when making decisions under the Contract? Notice immediately that "making decisions" is only part of the PM's role. He will also be the Agent for the Employer say, for example, conveying a change order from the Employer. The "making decisions" role is the activity, which is being discussed here, and something, which is potentially a dispute. It becomes a dispute as soon as the Employer or Contractor or both disagree. In reaching the decision the PM is entitled to rely upon his own knowledge of the Works, interpret the contract as he so thinks; arrive at facts, all of which need not necessarily be discussed with either party to the Contract. The Adjudicator will not behave that way. He will, in contrast, arrive at a decision by giving both parties every chance of explaining its case and hearing any pre decision view of the Adjudicator. "Natural Justice" breathes down the Adjudicator's neck! He must be scrupulously fair. He takes a judicial line. But the PM is forgiven all of such judicial notions. If the PM thinks work is defective he simply announces so. The same about value of Works, the same about disturbance compensation, the same about time compensation. The Adjudicator however reviews decisions of the PM by carrying out a judicial process. He has his views but puts them out for comment. Do you see the difference?

In *Costain v. Bechtel & Others* [May 2005] Mr Justice Jackson discussed the role of the PM in a Contract document not dissimilar to NEC 3. He said (paras 38 - 40): -

38. The starting point for any consideration of issue (2) must be the decision of the House of Lords in *Sutcliffe v Thackrah* [1974] AC at 727. In that case the House of Lords held that an architect, issuing interim certificates under the then standard form of building contract, was not immune from liability in negligence to his employer. In the course of their speeches, their Lordships necessarily discussed the role and duties of an architect in that situation. At page 737 Lord Reid said this:

"It has often been said, I think rightly, that the architect has two different types of function to perform. In many matters he is bound to act on his client's instructions, whether he agrees with them or not; but in many other matters requiring professional skill he must form and act on his own opinion.

Many matters may arise in the course of the execution of a building contract where a decision has to be made which will affect the amount of money which the contractor gets. Under the R.I.B.A contract many such decisions have to be made by the architect and the parties agree to accept his decisions. For example, he decides whether the contractor should be reimbursed for loss under clause 11

(variations), clause 24 (disturbance) or clause 34 (antiquities), whether he should be allowed extra time (clause 23); or when work ought reasonably to have been completed (clause 22). And, perhaps most important, he has to decide whether work is defective. These decisions will be reflected in the amounts contained in certificates issued by the architect.

The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor."

At pages 740 to 741, Lord Morris said this:

"An examination of the R.I.B.A. contract shows how manifold are the duties of the architect. Being employed by and paid by the owner he unquestionably has in diverse ways to look after the interests of the owner. In doing so he must be fair and he must be honest. He is not employed by the owner to be unfair to the contractor."

At page 759 Lord Salmon took as the starting point for his reasoning the proposition that in issuing certificates an architect must act fairly and impartially between employer and contractor.

39. The statements made by the House of Lords in *Sutcliffe* have for the last 30 years been accepted by the construction industry and the legal profession as correctly stating the duties of architects, engineers and other certifiers under the conventional forms of construction contract. The term "conventional contracts" has been used by counsel and myself in the present hearing to denote standard forms of contract, such as those promulgated by the Joint Contracts Tribunal, under which a certifier assesses extensions of time, recoverable loss and expense, the valuation of variations and so forth.
40. What I have said so far is not a matter of controversy. The issue between the parties does not concern the duty of certifiers in general, but the specific duties of the Project Manager under the present contract. Defence counsel submit that the present contract should be distinguished from conventional contracts for four reasons:
- (i) The terms of the present contract which regulate the contractor's entitlement are very detailed and very specific. They do not confer upon the project manager a broad discretion, similar to that given to certifiers by conventional construction contracts. Therefore there is no need, and indeed no room, for an implied term of impartiality in the present contract.
 - (ii) The decisions made by the project manager are not determinative. If the contractor is dissatisfied with those decisions, he has recourse to the dispute resolution procedures set out in section 9 of the contract. The existence of these procedures has the effect of excluding any implied term that the project manager would act impartially.
 - (iii) The project manager under contract C105 is not analogous to an architect or other certifier under conventional contracts. The Project Manager is specifically employed to act in the interests of the employer. In *Royal Brompton Hospital NHS*

Trust v Hammond (No. 8) [2002] EWHC 2037 (TCC); 88 Con LR 1 Judge Humphrey Lloyd QC at paragraph 23 described the project manager as "co-ordinator and guardian of the client's interest".

(iv) The provisions of clauses Z.10 and Z.11 prevent any implied term arising that the project manager will act impartially.

The author here says: As to the reference to the Project Manager in Royal Brompton v. Hammond being "co-ordinator and guardian of the client's interest" be careful. The Judge in that case was not talking about the Project Manager being a Certifier. The Contract was JCT and the role of making decisions and holding the ring was and remained that of the Architect. The introduction of a Project Manager was to be the client's representative and eyes and ears reporting to the client. This was no decision maker.

The Project Manager's powers and duties in NEC entitle him to increase the total of prices, delay completion, impair performance of Works, weigh and instruct risk features and seek solutions, arrange and assess payments, compensation events, approve quotations, consider quality, operate termination. A moment's thought indicates that as soon as a decision or observation or opinion is expressed then rejected a dispute arises. The NEC 3 document expressly provides (and by statute in the UK) that an Adjudicator be called to make an immediate review. It may be fair to say that the Project Manager's bind is entirely permissible provided the arms length Adjudicator is on hand.

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