



**Steven Evans explores the Defects provisions in the NEC3 Engineering and Construction Contract and provides a practical guide to their effect and use.**

### **Defects in construction**

Most of us will recognise a defect in construction work; steelwork may rust or a window may leak. However, a contractor's liability arises only if the defect results from his breach of the contract; it could be the rusting steelwork is caused by an error in the engineer's design, in which case, whilst the works could be said to be 'defective', they are not 'defects' under the contract.

But if the contractor is liable, common law dictates that the Employer corrects the defective work himself, and sues the contractor for his loss.

This is rather labourious; usually the Employer will allow the Contractor to correct the defect, being not only simpler solution but also fulfilling the Employer's obligation, at common law, to mitigate his loss.

### **Construction Contracts**

Most standard forms of construction contract enshrine that simpler solution by displacing the common law rules with a contractual procedure whereby, for a period after completion of the works (often called the defects liability period), the Employer is bound to allow the Contractor access to the defect and the Contractor is bound to correct it.

If the Employer fails to allow access and instead engages others to correct the defects, he may be unable to recover from the Contractor the full cost he incurred; rather, it would be limited to what it would have cost the Contractor if access had been allowed.

Conversely, if the Contractor fails to correct defects to which he has been given access within the timescale set out in the contract or if no timescale exists, within a reasonable time, the Employer would be free to engage others and sue the Contractor for the full cost of doing so.

Straightforward? But is it the same under NEC3? Yes... and no.

### Defects under NEC3

To begin at the beginning with the definition of a Defect (note the capital 'D') at clause 11.2(5); Defects are the only defects the NEC3 considers to be the *Contractor's* liability:

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.

The first bullet point is self explanatory, as is the first part of the second. The remaining part raises an interesting point; at first glance it appears to exclude defects in *works* the *Contractor* has designed on acceptance of that design by the *Project Manager*.

Further reading of the Contract reveals that is not the case, as any such work would likely be caught by the first bullet point as, if the *Contractor's* design fails to comply with the Works Information, the *Project Manager* should not have accepted it in the first place (clause 21.2).

However, if the *Project Manager* does accept a proposed *Contractor's* design that does not comply with the Works Information, that acceptance would likely be an instruction to change the Works Information pursuant to clause 60.1(1). Accordingly, any part of that work not in accordance with that accepted design would again be caught by the first bullet point.

### The Procedure

Now we know what a Defect is, we can look at the procedure for correction.

Whilst the *Project Manager* has extensive powers under the NEC3, the custodian of quality is the *Supervisor* who exercises control over investigation, notification and certification. Control reverts to the *Project Manager* for acceptance of uncorrected Defects.

Both the *Supervisor* and the *Contractor* have a contractual obligation to notify the other of any Defects they may discover (clause 42.2); this obligation continues until the *defects date* (stated in the Contract Data and which marks the end of contractual defects liability). In addition, until the *defects date*, the *Supervisor* may instruct the *Contractor* to search for a *Defect* (clause 42.1).

On discovery of a Defect, the *Contractor's* obligations are set out in clause 43:

- To correct a Defect, whether notified of it or not;
- To correct notified Defects within the *defects correction period*.

The *defects correction period* is stated in the Contract Data and commences:

- At Completion for Defects notified before Completion;
- On notification, for Defects notified after Completion but before the *defects date*; or
- When the *Employer* provides access to the Contractor such access being arranged by the *Project Manager*.

The *Contractor's* obligation to correct a Defect within a *defect correction period* applies only to notified Defects. However, in practice all Defects which the *Contractor* is aware of must become notified Defects pursuant to clause 42.2 above. If the *Contractor* fails to notify he will be in breach of contract and, as a matter of law, will be prevented from taking advantage of his breach.

### Accepting Defects

Clause 44 permits either the *Contractor* or the *Project Manager* to propose to the other that notified Defects are accepted and remain uncorrected. If the recipient of that proposal is prepared to consider that suggestion, the *Contractor* submits a quotation for a reduction in the Prices and/or the Completion Date. If the *Project Manager* accepts that quotation, he instructs a change in the Prices, Completion Date and Works Information accordingly.

There is also no facility for the *Project Manager* to make his own assessment. In the event the *Project Manager* wishes to accept the Defect but disputes the *Contractor's* quotation, presumably that dispute can be put to Adjudication. However, the NEC3 Guidance Notes suggest otherwise, possibly as the procedure is voluntary.

### Uncorrected Defects

These fall into two categories; the first, where the *Contractor* has failed to correct a Defect within the *defects correction period* after the *Employer* has provided access (clause 45.1). The second where the *Contractor* has failed to correct a Defect as the *Employer* has not given him access before the *defects date* (clause 45.2).

In both cases, the *Project Manager* assesses an amount to be paid by the *Contractor* at the assessment date and the Works Information is treated as being changed to accept the Defect.

In the first case, the amount assessed by the *Project Manager* and paid by the *Contractor* is the cost for the *Employer* to correct the Defect (whether later corrected or not). In the second case, the amount assessed by the *Project Manager* and paid by the *Contractor* is the cost for the *Contractor* to correct the Defect (whether later corrected or not).

Some observations:

- There are defined dates as to when a Defect becomes 'uncorrected', either on the expiry of the *defects correction period* or at the *defects date*. The *Project Manager's* obligation to assess the amount the *Contractor* pays appears to be immediate on the happening of those dates and if he fails to do so, or if the *Contractor* disputes the assessment, it can be put to Adjudication;

- There is no requirement for the *Project Manager* to notify the *Contractor* of the amount he assesses; it is simply adjusted in the next payment certificate;
- No action is required to amend the Works Information to accept the Defect, it is treated as amended on the happening of the trigger dates above;
- The *Project Manager* assessment is likely to be in ignorance of the true cost of rectification;
- The *Project Manager's* gets 'one bite of the cherry', if he gets it wrong and under-assesses the cost to the *Employer*, the *Employer's* action is against the *Project Manager* not the *Contractor* (unless prevented by their contractual relationship).

### The Defects Certificate

Contractual liability for Defects ends at the issue of the Defects Certificate. Under many standard forms such certificate is issued when all defects are corrected. However, under the NEC3, the Certificate is issued:

At the later of the *defects date* and the end of the last *defects correction period* (clause 43.3)

And is:

Either a list of Defects that the *Supervisor* has notified before the *defects date* which the *Contractor* has not corrected or, if there are no such Defects, a statement that there are none (clause 11.1(6)).

It's issue also triggers the final payment to the *Contractor*.

Finally, the *Employer's* rights in respect of latent defects are protected in clause 43.3:

The *Employer's* rights in respect of a Defect which the *Supervisor* has not found or notified are not affected by the issue of the Defects Certificate.

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