



## Gone with the wind...

“Don’t lose out on your contractual entitlement to claim for delays due to periods of inclement weather”

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The first of the ‘recent’ storms to hit the UK came in October 2013 and now with British springtime fast approaching the end must surely be in sight. However, for a number of contractors who had planned works over the ‘exceptional’ winter period, the outlook may not be so sunny.

MBM Consulting has prepared the following on how to brighten your hopes should you find yourselves in delay this spring due to the recent meteorological events.

### Contract Type

The most commonly used forms of contract in the UK are JCT and NEC. Contractors and subcontractors affected by adverse weather conditions working under the standard NEC forms can make a claim for both time and money.

Those working under the JCT standard forms of contract should be aware that they can **only make a claim for any loss of time**. This gives protection from liquidated and ascertained damages, but gives no contractual entitlement to recover any loss and/or expense as weather is not a Relevant Matter under clause 4.24.

JCT = Time Only

NEC = Time & Money



### Relevant Event or Compensation Event

The first hurdle to overcome is establishing that the weather conditions incurred give rise to any contractual entitlement (i.e. are they a Relevant Event under JCT or a compensation event under NEC).

The NEC adopts a more objective test to weather than JCT whereby weather conditions which satisfy the requirements of clause 60.1(13) can be notified as compensation events. The NEC guidance notes summarise the test as;



*“Weather which the weather data show is likely to occur within a ten year period is the Contractor’s risk in relation to both cost and time.”*

To establish a compensation event in line with clause 60.1(13) *Contractors* or *Subcontractors* have to provide *weather measurements*, the scope of which is identified in the Contract Data Part One, demonstrating that the weather conditions incurred fall outside of the prescribed ten year period. Once this threshold has been achieved the notification process can be instigated under clause 61.

The approach under the JCT standard forms is more subjective and is based on establishing that the weather conditions are “exceptionally adverse” and fall as a ‘Relevant Event’ under clause 2.29.9.

Emden’s Construction Law (part VI commentaries concerning the JCT Standard Form of Building Contract 1998) indicates that;

*“Exceptionally adverse weather conditions require quite unusual severity: it will frequently be necessary to establish this with the aid of weather charts covering a considerable period.”*

Reference must therefore be made to historical weather data demonstrating that something of statistically unusual severity has occurred.

Where the NEC form is prescriptive in the time period required to evidence that inclement weather constitutes a compensation event (i.e. 1 in 10 year values), the JCT forms do not specify any particular period of time. Based on the above quote from Emden’s it is recommended that a considerable period must also be analysed to ascertain how exceptional and adverse any weather has actually been.

## **Notification**

Under NEC3 the *Contractor* must notify the *Project Manager* of the potential compensation event within 8 weeks (7 weeks for a *Subcontractor*) of becoming aware of the event. Clause 61.3 states;

*The Contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if*

- *The Contractor believes that the event is a compensation event and*
- *The Project Manager has not notified the event to the Contractor.*

***If the Contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the Project Manager should have notified the event to the Contractor but did not. (Emphasis added)***

Under JCT the Contractor must follow the provisions of Clause 2.27 which states:



2.27.1: *If and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give notice to the Architect/Contract Administrator of the material circumstances, including the cause or causes of the delay, and shall identify in the notice any event which in his opinion is a Relevant Event.*

JCT provides no specific time limits for the submission of the notice and there is no clear stated loss of entitlement in the event of a failure to notify.

Practically, although you may not be certain at the time that any weather conditions are exceptionally adverse, you would know that they have affected progress and therefore it would be prudent to issue a notice of delay so not to effect any decision regarding your entitlement.

### Preparation of compensation event quotations / Relevant Event justification

NEC3 places stringent timescales in respect of notification of compensation events and the submission of quotations. Once notified the *Project Manager* must respond with his decision within a week (or longer by agreement). If he fails to respond the *Contractor* can notify him of this failure. A further failure by the *Project Manager* to respond within two weeks of this notification is treated as acceptance of the notification.

Quotations should be submitted within three weeks of being instructed by the *Project Manager*. These should comply with clause 62 and include, where applicable:

- Revised programme; demonstrating any changes to the Accepted Programme affecting the Completion Date and/or Key Dates
- Financial consequences; in the form of proposed changes to the Prices

Unlike NEC, the JCT requires a Contractor to submit the effects of the Relevant Event within his notification. Clause 2.27 requires the Contractor to submit with such notification the material circumstances, the Relevant Event and where practicable or **as soon as possible thereafter**, the expected effects including an estimate of any delay in the completion of the Works or any Section beyond the relevant Completion Date.

Do not avoid giving details of any delay at the time or as soon as possible thereafter. From the writer's experience this can often get ignored with Contractor's preferring to include a note to the effect of *"the delay cannot as yet be established"* included with its notification. All this highlights is that you have ineffective planning procedures in place and cannot work out the delay.

### Obtaining Weather Records

As a reliable source of meteorological records, the Met office provide a 'post project issues' service on their website;

<http://www.metoffice.gov.uk/construction/postprojectissues>

For a small fee starting at £140 + VAT for a detailed '**Monthly Summary**' the Met Office can provide a report which identifies



information necessary to document the weather conditions for a specified location and time period. This includes the NEC approved Long Term Average and 1 in 10 year values to measure the extremity of a month's weather.

As noted on the Met Office website, for other contracts, their '**General monthly summary**' provides trusted, documented weather conditions for the months requested.'

### **Concluding thoughts**

Although weather conditions have been challenging over the last few months, that does not necessarily mean that any contractual entitlement is due. Weather claims cannot be viewed as an "easy way out". The various hurdles demonstrating entitlement to either a compensation event or a Relevant Event must be established, and as demonstrated above, this requires some detailed analysis. Although the JCT requirements are less specific than NEC it may be good advice if working under a JCT contract to adopt, as a minimum, the same standard of analysis for your weather Relevant Event as you would to establish a compensation event under NEC3.

Should you require any assistance with the preparation of your weather-related claims then please get in touch.

An alternative title for this article was 'Rain Stops Play' but with Wimbledon not too many months away a more timely update will be drafted in due course....

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