



Whether the weather is fine, or whether the weather is a compensation event under NEC3

Weather under NEC3

The 'weather' provisions under NEC3 are quite different to those many are used to.

Take the JCT suite of contracts for example; those who are familiar with that contract form will recognise terminology such as 'exceptionally inclement weather'.

Under JCT, it is only weather which is 'exceptionally inclement' for the time of the year and the location of the project which would entitle the contractor to an extension of time (but no additional money) for the effect of that exceptionally inclement weather on the progress of the works.

That seems a fair approach. Inclement weather is neither the fault of the Employer nor the Contractor so neither the Employer should benefit (from liquidated damages) nor the Contractor should benefit (from loss and expense). Each party bears some risk.

This separation of time from money is possible under JCT as extension of time is dealt with separately to loss and expense; however, under NEC they are combined as 'compensation events'.

The upshot of this is the Contractor will be entitled to both time and money for the effect of exceptionally adverse weather conditions.

On the face of it, that seems rather unfair to the Employer (particularly when compared to the JCT provisions); however, the NEC addresses that by providing a more 'objective' approach to the assessment.

To quote the NEC3 Guidance Notes, which puts it quite succinctly:

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 measurable 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 idea is that both parties are well aware, before they enter into the contract, the risk each bears in respect of weather.

The relevant contract clause provides (at 60.1(13)):

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

Did you know:

The most rainfall in a 24 hour period was recorded on 18 July 1955 in Dorset, a drenching 279mm. That would have been a compensation event had NEC3 been written at that time.

Conversely, the most sunshine recorded in a month was 383.9 hours in July 1911 in Sussex.

From the quoted clause and the extract from the Guidance Notes, several

items of terminology require definition so as to understand the mechanism:

Weather measurement

A measurement of the actual weather conditions at the place stated in the Contract Data part 1. The place can be the site, or a nearby weather station. If it is the site, proper weather measuring instruments should be used.

The weather measurements to be recorded are set out in the Contract Data as:

- the cumulative rainfall (mm) the number of days with rainfall more than 5mm
- the number of days with minimum air temperature less than 0 degrees Celsius
- the number of days with snow lying at hours GMT.

The Contract Data also permits other measurements to be added.

Weather data

Baseline data against which the weather measurements are compared to ascertain whether a compensation event is warranted.

The Contract Data states where that data was recorded and who supplied it.

Handily, and expensively, the Met Office will provide, for a fee, NEC3 appropriate data for every weather station in the UK.

If no recorded data is available, there is provision in the Contract Data for 'assumed values' to be provided.

Once in ten years

There is divided opinion as to what this means (it is definitely not the average of the last 10 years); the Met Office (who are the experts on weather) define it as follows:

A 1-in-10 year value has a 10%

chance of being equalled or exceeded each year. It would be expected to be equalled or exceeded once every 10 years on average.

Exceedances of the value will not necessarily occur at regular intervals.

It is possible that they could occur in consecutive years or alternatively with an interval considerably longer than 10 years. 1-in-10 year values are calculated using monthly station data covering the period 1970 to 2010 inclusive.

Because exceedances do not necessarily occur at regular intervals, the 1-in-10 year values are most reliably calculated by using as long a period of data as possible. For example, only 10 years of data would not be adequate.

The period 1970 to 2010 inclusive is the longest available period of data for all stations used for this service. A standard extreme value analysis was used, fitting a statistical distribution to these 41 years of data.

The 1-in-10 year value would normally be close to the 4th highest ranked value.

A compensation event occurs if, in a particular month, a weather measurement is recorded which exceeds the one in ten year value of the corresponding weather data.

That compensation event must be notified by following the contractual procedure (refer to our article on compensation events here).

Assessing the compensation event is, however, a different matter.

Firstly, it is not the effect of the entire weather that is taken into account, only the 'extra' weather i.e. the amount by which the one in ten year value is exceeded.

Secondly, it is only the effect that 'extra' weather has on the Completion Date and/or the Prices which is assessed.

Accordingly, it is possible for a compensation event to be triggered but its value to be nil as the weather had no effect on the Completion Date and/or the Prices.

Some examples are provided below to assist in understanding the above mechanism; in each of the following we shall assume that the weather data one in ten year values for a relevant month are:

cumulative rainfall – 50mm
number of days with rainfall more than 5mm – 3 days
number of days with minimum air temperature less than 0 degrees Celsius – 5 days

Example 1

Measured rainfall of 50mm in one day causing a minor flood which washed away newly laid foundations. No further rainfall in the month.

Not a compensation event as the rainfall did not exceed the cumulative rainfall data.

Example 2

Measured rainfall of 51mm in one day causing a minor flood which washed away newly laid foundations. No further rainfall in the month.

This is a compensation event as the rainfall exceeded the cumulative rainfall data; it will be assessed as the effect the extra 1mm of rain had on the completion date and/or the prices.

Example 3

Measured temperature dips below 0 degrees Celsius on 6 consecutive days preventing concrete being poured.

This is a compensation event as the temperature measurement was below the minimum for a greater number of days than the weather data.

It will be assessed as the effect the extra day had on the completion date and/or the prices.

Example 4

It rains every Monday in a month as follows: 6mm, 7mm, 6mm, 10mm.

This is a compensation event as the number of days the rain measured was greater than 5mm was exceeded. It will be assessed as the effect the extra day had on the completion date and/or the prices.

Example 5

It rains every Sunday in a month as follows: 6mm, 7mm, 6mm, 10mm.

This is a compensation event as the number of days the rain measured was greater than 5mm was exceeded. However, as the site does not work on a Sunday, there is no effect on the Completion Date or the Prices.

For more information, please contact us.

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