

## **Making the most of your early warnings – sorting out your TQs and RFIs.... and what about the opportunities?**

All NEC3 contracts have a very clear, simple, but critical process for 'early warning'. Some call it the 'jewel in the NEC crown'. The contracts all require the supplier and the contract administrator (Contractor and Project Manager in the ECC<sup>1</sup>, Consultant and Employer under the PSC<sup>2</sup>, Contractor and Service Manager under the TSC<sup>3</sup>) to formally notify each other of an early warning of certain types of event. In the case of the ECC those events are events that could, if they happen

- increase the Prices (to do so the event would have to be 'compensation event' under the contract) or
- delay Completion<sup>4</sup> (which could be caused by events which may or may not be a compensation event)
- delay meeting a Key Date or
- impair the performance of the works in use.

The early warning allows those that might help avoid the event or mitigate any negative effects of the event to get together to work out how to do so. The early warning notification does not need any more information than the nature of the matter.

An early warning does not have to be given if the event has already happened – the clue is in the name! In particular, an early warning is expressly not required if the event has happened and been notified as a compensation event<sup>5</sup>.

The NEC3 contracts commercially incentivise the supplier to give early warnings. If the supplier does not give early warning he risks

- having a later compensation event assessed as if he had given the early warning<sup>6</sup> (in which case the contract administrator would have had a chance to act) and
- in the case of cost based contracts, having disallowed those costs incurred as a result of not giving the early warning<sup>7</sup>.

There is no direct remedy in the contract for the Project Manager not giving an early warning. But the person paying the bills, the Employer, may not appreciate the lost opportunities to manage such risks.

### **The Risk Register**

The contract administrator does not have to 'reply' to an early warning. He or she has to add each early warning to the 'Risk Register'. This Risk Register is started on the Contract Date (when the contract comes into existence) and includes any items for

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<sup>1</sup> NEC3 Engineering and Construction Contract (ECC)

<sup>2</sup> NEC3 Professional Services Contract (PSC)

<sup>3</sup> NEC3 Term Services Contract (TSC)

<sup>4</sup> Completion is relevant to the ECC and the PSC and to a 'Task' under the TSC.

<sup>5</sup> In the ECC, clause 16.1

<sup>6</sup> In the ECC, this is in clause 63.5

<sup>7</sup> In the ECC, this is in clause 11.2(25)

discussion submitted before award in the Contract Data by either Employer or supplier. After each early warning either supplier or contract administrator may call a 'risk reduction meeting' to discuss the issue<sup>8</sup>.

On a well-run contract the contract administrator will have set up routine risk reduction meetings, typically weekly. The Risk Register is just a list of things to be talked about in the risk reduction meeting and, for each risk, includes

- 'a description of the risk and
- a description of the actions to be taken to avoid or reduce the risk<sup>9</sup>'.

No more is required by the contract, but the contract administrator may usefully include in the risk register the following columns:

- Notification Ref (CD1, CD2 or EW)
- Date notified
- Notified by (PM or C)
- Description of matter
- Date action last updated (risk reduction meeting)
- Actions to be taken to avoid or reduce the risk
- Action by (organisation)
- Action by (individual)
- By when?
- Live (Y/N)
- Indicative impact (H/M/L)

The (NEC3 contract) Risk Register is not the same as any (non-NECe contract) project risk register, which may or may or may not exist. Critically, the Risk Register does not affect the risk allocation under the contract.

### **The risk reduction meeting**

The Risk Register (often best in a simple spreadsheet format) might also include columns to allow the contract administrator to select and re-order the risks. By doing so, the contract administrator can use the Risk Register directly as the agenda for each risk reduction meeting. He or she can then project the Risk Register on to the wall in the meeting room and update the actions there and then in the meeting. Good meeting facilitation makes sure all present understand the risk before they 'co-operate 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] the contract, will take them and
- deciding which risks have now been avoided or have passed and can be removed from the Risk Register<sup>10</sup>.

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<sup>8</sup> Eg clause 16.2 and 16.3 in ECC

<sup>9</sup> Eg clause 11.2(14) in the ECC

<sup>10</sup> Eg Clause 16.3 in the ECC

We are used to regular so-called 'progress meetings'. The NEC3 contracts make no mention of such meetings - although they may have been required by your ECC Works Information (or PSC Scope or TSC Service Information). In the author's experience about 10% of most progress meetings tend to be concerned with recording and dealing with 'progress'. The rest of the time is typically spent dealing with 'issues' and 'problems'. Someone then writes up the minutes, might get them signed then and puts them in a file. The ECC does not recognise those minutes as a communication under the contract. Any actions arising must be carried out in accordance with the appropriate clauses of the contract. Good practice is to run most of the 'progress meeting' as a risk reduction meeting and so use the updated Risk Register with its updated actions acting as the 'minutes' of the meeting.

### **So early warnings can only be a good thing?**

Early warnings are designed to get supplier and contract administrator together to sort out issues. Despite the logic and common sense behind them, early warnings are still not appreciated by some clients. Some, incorrectly, see an early warning from a supplier as just a precursor to a compensation event (a 'claim' in other contracts - a word not used in NEC3 contracts). This is simply not the case and the Employer's and contract administrator's staff must be trained to appreciate and use early warnings. Also in the industry it is normal to see more early warnings from the supplier than from the contract administrator. This is perhaps to be expected, but the contract administrator should set the example by being open and honest about possible problems and giving the early warning required. For example, if the contract administrator gives an early warning about a possible problem giving access on the date required by the contract, the parties can work together to minimise the consequences to the project.

### **Early warnings, RFIs and TQs**

The construction industry habitually sees suppliers sending in:

- 'Requests for Information' (RFIs) and/or
- 'Technical Queries' (TQs).

It is important to recognise that NEC3 contracts also does not recognise those two CMAs (completely meaningless acronyms (!)). They have no formal status under the contract – even if they have been required the ECC Works Information (or PSC Scope or TSC Service Information).

A supplier will generally notify a RFI or a TQ for a good reason – because he needs the information to be able to complete the works. Often, but not exclusively, these are requests to the Employer's designer, passed through the Project Manager. If the RFI or TQ relates to a perceived ambiguity in the contract it should be notified to the Project Manager as such under the contract.<sup>11</sup>

So how might TQs and RFIs relate to early warnings? There seem to be three options:

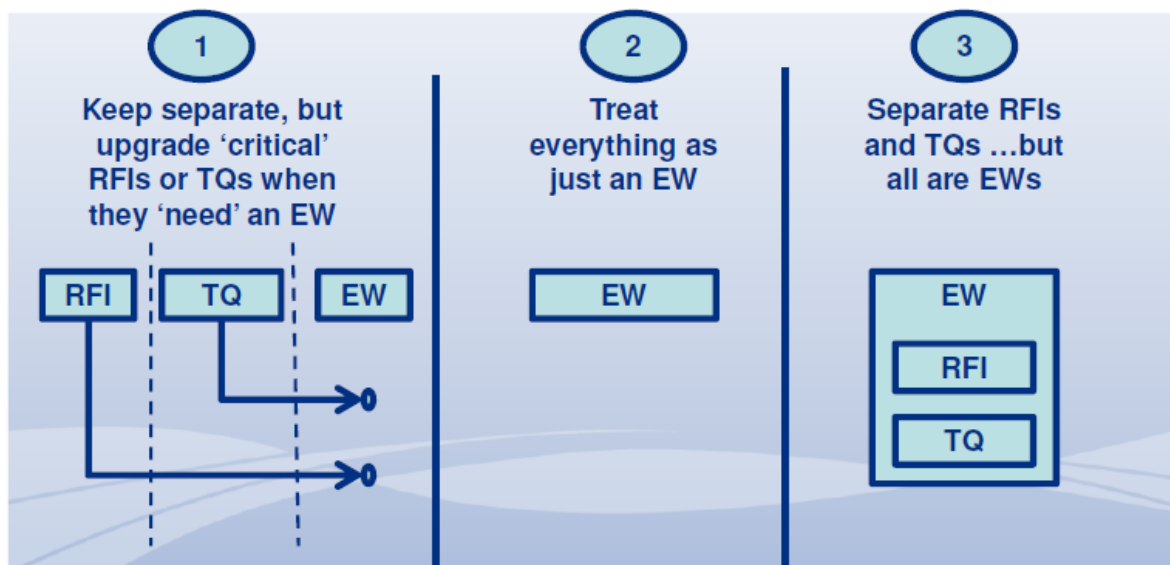
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<sup>11</sup> In the ECC this is under clause 17

1. TQs , RFIs and early warnings are managed separately. When the supplier considers the lack of a response to the TQ or RFI to have a real chance of causing a delay to Completion they notify an early warning.
2. TQs and RFIs are not used. Instead an early warning is notified.
3. RFIs and TQs are considered a 'special' type of early warning.

These options are illustrated below.

## early warnings, TQs and RFIs



The advantages and disadvantages of these options are set out below:

Option	Advantages	Disadvantages
1	Clear, simple and separate	Supplier is not giving the early warning 'as soon as' he becomes aware of the matter. This is required by the contract and could have commercial consequences as noted above.
2	Clear and simple	More important and urgent early warnings may be 'lost' in a plethora of RFIs and TQs really aimed at the Employer's designer.
3	There is no need to 'reissue' RFIs or TQs as early warnings. Whilst included within the early warnings, RFIs and TQs are still 'separate' and so can be managed separately and given the attention of the right people.	Lists of RFIs and TQs do have to be integrated with the list of other early warnings.

In general, option 3 may be the most appropriate.

## **What about the opportunities?**

According to the contract, the whole early warning process and the Risk Register are about minimising the effect of potential problems? The word 'warning' says it all. What about the good news? There are no express clauses in the contract to share and discuss possible opportunities.

It is suggested that any good idea from either supplier or contract administrator could usefully be shared as an early 'warning'. This would get it added to the Risk Register and so be up for discussion at the next risk reduction meeting. The contract requires each 'side' to notify early warnings. It would seem very logical for the contract administrator to encourage early 'warnings' of opportunities and good ideas and to use well managed risk reduction meetings to record and manage them to get the best of them for the project.

## **Conclusion**

The early warning process is simple in principle and critical to the success of NEC3 contracts and facilitating the 'spirit of mutual trust and co-operation' required by clause 10.1 of the contract. The contract administrator must give the process, and the associated Risk Register the attention it deserves and develop and use his or her 'soft skills' to get the best out of risk reduction meetings. RFIs and TQs, if used, need to be managed – alongside or within the early warning process. The contract administrator can and should also encourage the systematic use of early 'warnings' and the risk 'reduction' meetings to share and manage the good news and good ideas too.

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