



By Robert A Sliwinski

The NEC 3 has something called a Risk Register. This week, guest contributor Robert A Sliwinski takes a look at what it is for , how to administrate it, why you should watch out for compensation events and asks if it is a valuable management tool overall.

Clause 80.1 sets out the allocation of risk between the Employer and the Contractor and although not expressly stated, the use of a Risk Register in the Contract is not intended to alter that allocation of risk. In this article I do not deal with the risks as allocated by clause 80.1 but rather the use of and obligations arising out of the Risk Register which is dealt with in clauses 11.2(14) and 16 – Early Warning.

What is the Risk Register for?

So if the allocation of risk is not meant to be altered by the Risk Register what is the Risk register for? It is intended as a tool where risk is managed by the parties in a collaborative and farsighted manner. The Risk Register is defined at core clause 11.2(14) as “*a register of the risks listed in the Contract Data and the risks which the Project Manager or the Contractor has notified as early warning matters*”.

Whilst this may seem a little vague, the NEC does set out a minimum content for the Risk Register which should show a description of the risk along with a description of the action(s) needed to avoid or reduce that risk. The idea is for each party to list the risks that they see within the contract and which they wish to be managed in order to avoid or minimise those risks.

This will require a certain level of prescience before the contract commences. Fortunately, those risks that were not or could not have been foreseen can be added to the register at a later date. It may seem obvious but the risks that should be listed in the register are those to do with price, time and quality. The NEC Guidance Notes at pages 33 & 34 are a little more helpful in that they provide further detail of the objectives and expected content of the Risk Register including the types of information and documentation that should be supplied.

The project has started on site and the various administrative functions are up and running with everybody feeling confident that the contract will run smoothly and profitably. Naturally a situation arises that had not been foreseen by either party and the Clause 16 Warning Procedure should kick in. In fact this is not automatic and will require either the Project Manager or the Contractor to notify the other side of any issue that impacts upon price, time or quality and if thought necessary a Risk Reduction Meeting can be called. The idea of this being that at that meeting the parties can co-operate in the making, discussion and consideration of proposals to overcome the perceived risk that has arisen. Notwithstanding, any adoption of any proposal made the Project Manager is obliged to update and revise the Risk Register to reflect the issues as discussed and any decisions taken.

Taking note of Compensation Events

Why is this important? The answer is Compensation Events. If a situation has arisen that could and should have been raised within a Risk Reduction Meeting which ultimately results in a claim by the Contractor as a Compensation Event, the claim may be reduced in both value and/or time due to the Contractor's failure to give warning of the situation that has or may arise and which gives rise to the claim. In other words, the Contractor may be deemed to have failed in his duty to mitigate the claim by not bringing the matter to the attention of the Project Manager at an early stage when actions could have been taken to remove or reduce its effect.

The Early Warning Notice and Risk Reduction Meetings also have another effect. Where an issue has been raised as being a risk to the project and no decision is taken as to the way forward or indeed the Project Manager does not consider the matter as needing any decision at that time this is recorded in the register. If consequently the matter does escalate into a Compensation Event the register can be used to show that warning was given but no decision to deal with that situation was made. This will help the Contractor to substantiate his claim and avoid possible reductions to its value and/or time to a failure to mitigate.

A valuable management tool?

I believe the answer is emphatically yes. It is not only a valuable management tool for the Project Manager but also for the Contractor. Whilst the need for good administration cannot be emphasised enough when using the NEC 3 contract, the ability to recognise possible future issues that may affect the cost and programme is also required. Pass the crystal ball...

Robert A Sliwinski
SWL Dispute Resolution
Aston House
Frederick Place
Loudwater
Bucks HP11 1LA
Tel: 01494 616007
Fax: 01494 616189

More details on SWL Dispute Resolution are available at [http:// www.swl-legal.co.uk /](http://www.swl-legal.co.uk/)