



Technical

Early Warning Notices

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What Are Early Warning Notices?

1. The concept of Early Warning Notices (“EWN’s”) does not appear in more conventional forms of contract. Broome (2012, p.208) sees the early warning procedure as the missing step between how the risk management is normally implemented (identifying what can go wrong and developing strategies to minimise the impact) and monitoring the programme to identify something that has already gone wrong and has affected the Works and only then taking action. This is a departure from the usual approach used in traditional contracts such as JCT where Contractors serve Notices of events that have already occurred.
2. The EWN’s process is included in the Contract Provisions at Clauses 16.1 and 16.2:

“16.1 The Contractor and the Project Manager give an early warning by notifying the other as soon as possible as either becomes aware of any matter which could:

- *increase the total of the Prices;*
- *delay Completion;*
- *delay meeting a Key Date or;*

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- *impair the performance of the works in use.*”

Who Should Issue Early Warning Notices?

3. The Contractor may give an early warning by notifying the Project Manager (“PM”) of any other matter which could increase the total cost. The Project Manager enters early warning matters in the Risk Register. Early warning of a matter for which a Compensation Event has previously been notified is not required.

“16.2 Either the Project Manager or the Contractor may instruct the other to attend a risk reduction meeting. Each may instruct other people to attend if the other agrees.”

4. A summary of this procedure is as follows:
 - The Contractor and/or the PM is to give the other a warning of any matter.
 - A matter is anything which could increase the total of the Prices, or delay the Completion Date or Key Date, or impair the performance of the works in use.
 - The Contractor and PM are then required to attend an early warning meeting if one or other of the parties request it.
 - The purpose of the early warning meeting is to discuss how the problem can be avoided or reduced.
5. The purpose of early warnings is to give the Contractor and PM foresight of any matter that may cause a problem in the future. This principle of foresightedness is confirmed in the NEC3 Contract Guidance Notes, where it states:

“ECC is founded upon the proposition that foresighted, co-operative management of the interactions between parties can reduce the risk inherent in construction and engineering work.”

Issues With Early Warning Notices

6. Eggleston, (2006) identifies difficulties with Clause 16.1:

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“...is that it suffers from the problem, common too much of NEC3, of leaving unclear how rigidly its mandatory parts are to be operated.”
(Eggleston, B. 2006, p.117)

7. If taken literally, every minor event that meets the criteria of Clause 16.1 should attract an EWN and lead to an administrative burden.
8. Thomas, (2012, p. 51), Gould (2008) and Lloyd (2006) identify that if the Contractor fails to give an EWN which he was “*required*” to give, then the cost which has been incurred, only because he so failed, will be a Disallowed Cost under Options C-F.
9. Ennis, (2010) states that, central to this is the definition of Disallowed Cost in the reimbursement Options at Clause 11.2(25)¹ and the manner of assessment of CE’s stipulated in Clause 63, in particular 63.5. and 63.7.
10. Judge Humphrey Lloyd QC, (2006) states it is reasonable for an Employer to expect an adjustment if additional costs were incurred as a failure by the Contractor to issue an EWN. The response from the NEC Panel to Judge Humphrey Lloyd QC’s point was unequivocal and stated a Project Manager can request that any cost or time savings, which it could have made had the EWN been given, are taken into account when assessing the effects of a CE.
11. From the above response of the NEC Panel, Ennis, (2010) questions the relevance of EWN’s and the risk reduction meetings. Ennis, (2010) says the implication appears to be that additional obligations may be defined at such meetings and recorded in revisions to the Risk Register. He goes on to say that it is not clear from the NEC drafting whether such decisions may amount to new contractual obligations, breach of which might give rise to claims for entitlement to additional compensation under the contract, whether by way of CE or other adjustment to price.
12. Judge Humphrey Lloyd QC, (2006) points out that the Risk Register is detached from Section 6 (CE section) and makes it clear that it is solely a valuable management tool. The EWN and Risk Register contractual provisions are seen by the NEC as being a management tool, but then failure to use them can have an effect on the defined cost of a particular Compensation Event. Unless you have detailed working knowledge of the NEC, the above issue is not easily identified.
13. My research shows only 11% of respondents used EWN’s 100% of the time. The results show that 67% used EWN’s either 50% or 75% of the time. They were also asked if they thought EWN’s were a useful contractual tool, with 79% rating it 4 out of 5, or 5 out of 5. The NEC see

EWN's as a good management tool for the parties to use, but it appears that it is a tool which is not used all of the time. Further investigation into this issue was carried out through interviews and a Main Contractor's quote below is a common view:

“Sometimes when you issue an early warning the feeling is its being contractual. I think they all understand the contract; they don't like the paperwork it generates and I think what they want is they only want an early warning for significant things.” (Main Contractor Interview)”

14. EWN's are not used as often, or as NEC3 drafters intended. They are not used because the party receiving the EWN's often believes that the issuer is being contractual and/or overloading it with paperwork. The EWN mechanism is a management tool to assist the parties and the lack of use and reasoning behind it appears to be due to a lack of understanding of the contract.

What Does The Contract Require?

15. If the contract is strictly followed, then EWN's should be issued by the Contractor or PM whenever any matter occurs which could affect the items set out in Clause 16.1. The volume of EWN's being a problem is often anecdotal, as what one PM may consider excessive another may not. It should be said that some degree of common sense and some tests of reasonableness and seriousness must be applied to avoid trivial matters obscuring the purpose of the EWN provision.
16. Rowlinson, (2011, p.43) raises the following points which must be considered:

“Project Managers should remember two things in such circumstances: Firstly, it is better to have matters which could result in potential problems brought to their attention, than not, and secondly, in the event that a contractor does not raise an early warning he could face sanctions (Clause 63.5).”

Summary

17. In summary, if a PM slavishly administers the contract and is willing to make deductions from his assessments under Clause 63.5 for failure to issue EWN's, then this can lead to Contractors submitting EWN's for all matters and causing an administrative burden. If the parties work collaboratively then the EWN contract mechanism is a good management tool to assist the parties. It comes down to a good working relationship between the parties and working to the NEC3 ethos of mutual trust and co-operation.
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Footnotes

1 Clause 11(26) in Option F.

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