

WORD COUNT:

ADMINISTRATION WITHIN CONTRACTS

CONTRACT PRACTICE & PROCEDURES (M5X01878)

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Abbreviations

- I.** University of Wales Trinity Saint David: **UWTSD**
- II.** Limited: **LTD**
- III.** New Engineering Company: **NEC3**
- IV.** Joint Contracts Tribunal: **JCT**
- V.** Project Manager: **PM**
- VI.** Compensation Event: **CE**
- VII.** Early Warning Notice: **EWN**
- VIII.** Project Managers Instructions: **PMI**
- IX.** Alternative Dispute Resolution: **ADR**

1.0 Introduction

There is a significant variation within the contract that impacts on the delivery timeframe of the project and cost.

1.0.1 Scenario

There have been substantial failures found with the cut 'n' tern foundations at the UWTSD SA1 Phase 1 University Project where Kier Construction LTD are the main contractor. This variation means that the foundations are not able to be built upon as this will cause failure of the structure. A Geotech© gridding must be applied as well as imported stone to reinforce the foundations **(see figure 1)** The contract between the client and the main contractor is in NEC3 form. Project Manager Mike Bessell must now ensure the correct administrative steps are taken to ensure smooth project delivery that satisfies the contractor and client.



Figure 5: The implantation of Geotech© gridding suitable to reinforce weak sub-grade soils (www.archiexpo.com, 2019).

1.1 NEC Contract Administration

The role of contract administrator in NEC3 contracts usually falls upon the project manager (PM) whereas in JCT a dedicated contract administrator is often employed. The main advantage of NEC3 contracts in this scenario is that Z clauses (**see Appendix 1.A**) are used to amend contracts by a means of adding conditions or adjusting wording. This characteristic is not available in JCT.

In addition, option C (**see Appendix 1.B**) within a NEC3 contract is a pain and gain mechanism that gives both parties shared incentives to perform well, as well as adding protection where “A target cost contract introduces a mechanism enabling the contractor, and/or the consultant team, to share the benefits of cost savings, but also to bear some of the cost when there are cost overruns.” (www.designingbuildings.co.uk, 2019)

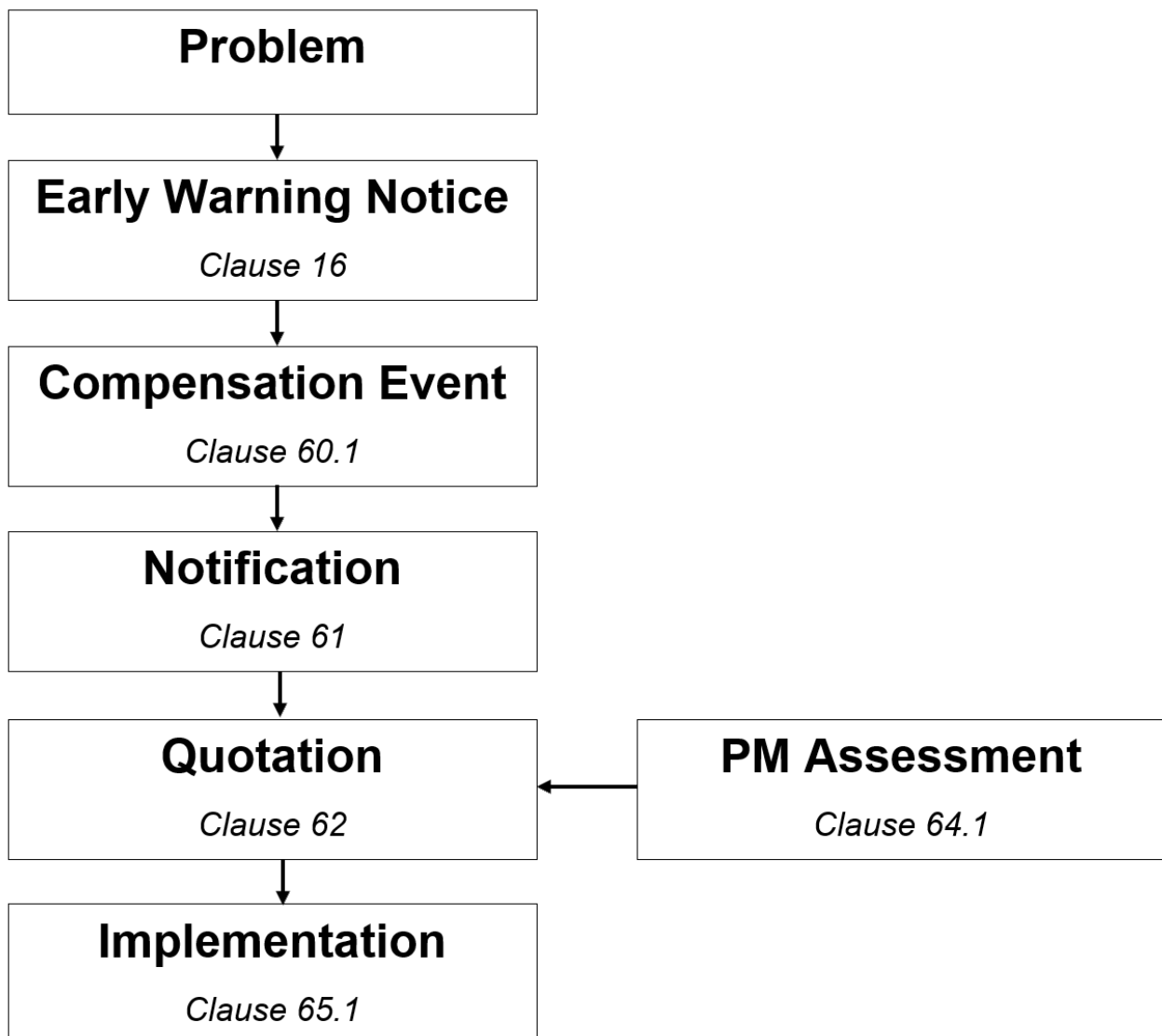


Figure 6: The standard procedure of delivering a compensation event.

1.1.1 Risk Register

The risk register is a management tool within the NEC3 contract used to manage risks. If any party feels that any risk, whether it be the employer's or the main contractors, they can be put in the entries in the contract data if any party feels that it is something that needs to be properly managed. The risk register will then identify the time and cost consequences to the parties and others if the risk event occurs (**see appendix 1.C**).

Stage	Risk management process	NEC contract clause number and description
1	Risk identification	Clause 16.1 – Risk early warning Clause 16.3, 16.4 – Risk register
2	Risk quantification and analysis	Clause 16.2, 16.3 – Risk reduction meeting Clause 16.3, 16.4 – Risk register
3	Risk mitigation	Clause 16.2, 16.3 – Risk reduction meeting
4	Risk monitoring and control	Clause 16.3, 16.4 – Risk register

Figure 7: NEC3 contract clauses for risk management (www.researchgate.net, 2018).

Risk rating		Likelihood			
		Almost certain	Likely	Possible	Unlikely
Consequence	Serious	Extreme	Extreme	Extreme	High
	Major	Extreme	Extreme	High	Medium
	Moderate	Extreme	High	Medium	Medium
	Minor	High	Medium	Medium	Low
	Low	Medium	Medium	Low	Low

Figure 8: Risk matrix used for assessments within the risk register (www.researchgate.net, 2018).

The risk of failures in the cut 'n' turn foundations clause will have certainly been implemented within the risk register by the PM, consultants or client and so the following process can be undertaken, starting with an early warning notice.

1.2 Compensation Events (CE)

"Compensation events are events which are usually not the fault of the contractor and change the cost of the work, or the time needed to complete it. As a result, the prices, key dates or the completion date may be reassessed, and in many cases the contractor will be entitled to more time or money." (**Kingston, 2015**)

CE's are usually implemented when the time, cost or quality of a project are under jeopardy (**see figure 5**). Under specific CE's listed at **clause 60.1** in NEC3, the best applicable CE faced by Mike Bessell would be "Actions by others" where the contractors or statutory bodies within the project have caused problems by not properly surveying sub soil conditions for the cut 'n' turn foundations. CE's are known as 'relevant matters' in the JCT contract form.

Mike Bessell must ensure that **Clause 61.3** of the NEC3 contract is adhered to. This clause provides that 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 price, the completion date or a key date (**see figure 6**).



Figure 5: Time, cost, quality project management triangle (Madurai, 2018).

In NEC3 contracts, there is a procedure to follow when CE's occur. In order;

- Notification (EWN)
- Quotation,
- Assessment,
- Implementation (PMI)

Contractor CE Timeline

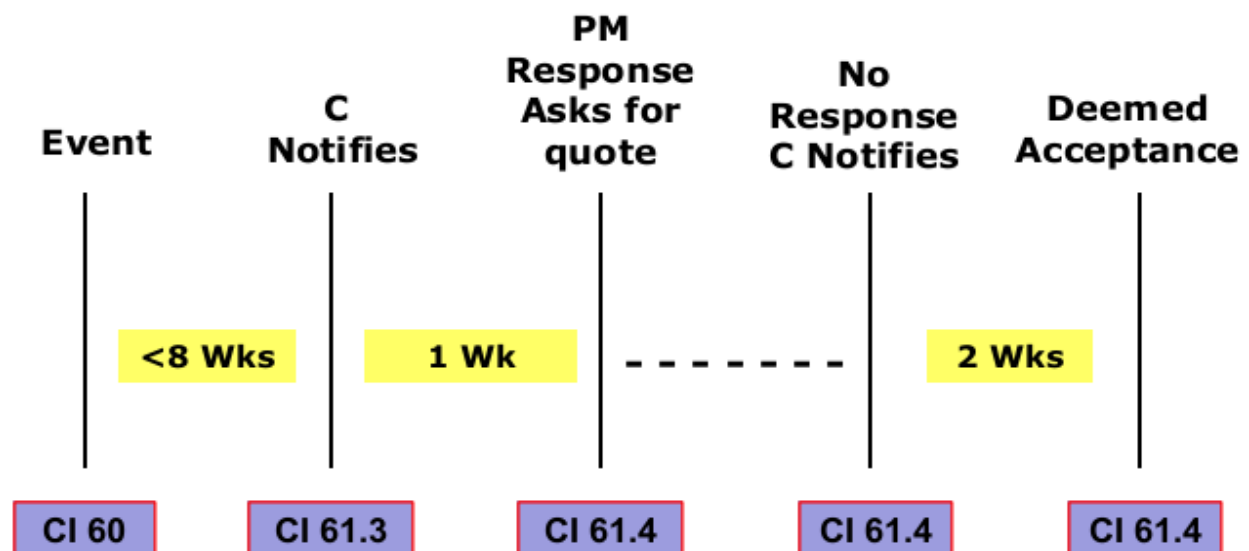


Figure 6: Time scales for a contractor when notification of compensation events occurs (Martin, 2016).

1.2.1 Early Warning Notice (EWN)

An early warning process is where both the project manager and contractor are required to notify each other of any matter which could affect time, cost or quality. The earliest indication of such a problem followed by a risk reduction meeting allows the contractor and project manager to focus on avoiding/reducing the problem as best they can, this being in the interest of both parties to the contract. Mike Bessell must issue this notice as soon as possible to the client. An example of an EWN Mike Bessel would have received from Kier Construction LTD can be found on **Appendix 1.D**.

1.2.2 Notification

This notification stage allows the PM to assess the contractors EWN and confirm whether further action should be taken. An example of an NEC3 notification document produced by Mike Bessel to return to Kier Construction LTD can be found on **Appendix 1.E**.

1.2.3 Quotation

A quotation will be submitted under **clause 62** and deals with all the effects of a compensation event on both time and money. The quote must be assessed using the procedures in the contract and, when providing his quote to the Project Manager, the Contractor must include details of his assessment and, if the compensation event affects the Completion Date or the Key Dates, a revised programme for acceptance. **Henry Boot Construction Ltd. v Alstom Combined Cycles [1999]** set a precedent that the contractor's rates do not become judicious or arbitrary by the implementation of variations (**see Appendix 1.H**).

On receipt of a quotation, the Project Manager must respond within 2 weeks (or an agreed and notified extended period). His reply must be one of the following four permitted responses:

- An acceptance of the quotation;
- A confirmation that a proposed compensation event will not be instructed;
- A notification that the quotation has not been prepared properly (with reasons) and an instruction to resubmit;
- Ditto, with a notification that the Project Manager will instead assess the compensation event.

An example of an NEC3 quotation document Mike Bessel would have received from Kier Construction LTD can be found on **appendix 1.F**.

1.2.4 Assessment

Clause 64.1: If PM Mike Bessell decides that the consultant has not assessed the compensation event correctly in a quotation and he does not instruct the consultant to submit a revised quotation. **Northern Ireland Housing Executive v Healthy Buildings Limited [2017]** sets the precedent for the assessment of CE's (**see Appendix 1.J**).

A compensation event is assessed as the effect of the event on:

- The actual defined cost for work already done plus the fee,
- The forecast defined cost for work not yet done plus the fee,
- Planned completion as shown on the latest accepted programme.

1.2.5 Project Managers Instruction (PMI) & Implementation

Under clause 14.3, 20.1 and 27.3 the Mike Bessell will issue a PMI to Kier Construction LTD, like that found on **appendix 1.G**. This will change the contractors works information and/or completion date. It will then be the contractor's duty to formally provide the works in accordance to the PMI. In this instance, the PMI will include works information on how to strengthen the cut 'n turn foundations by implementing additional Geotech© gridding and imported stone.

Clause 65.1:

When a compensation event is 'implemented' it means it is finalised and cannot be changed by the parties, only by an adjudicator. "A compensation event is will then be implemented when;

- The PM notifies his acceptance of the consultant's quotation,
- The PM notifies the consultant of his own assessment, or
- A consultant's quotation is treated as having been accepted by the PM.

The case **ERDC Group LTD v Brunel University [2006]** gives importance to the formal execution of the contract documents being before proceeding with construction work. Although in this case the claimant's contractor claimed entitlement based on quantum meruit, this may or may not entitle the party to entitlement of imbursement (**see Appendix K**).

1.3 Alternative Dispute Resolution (ADR)

ADR has two dispute procedures under NEC3 contracts with options W1 and W2. *"The Tribunal settles the dispute referred to it. The Tribunal has the powers to reconsider any decision of the adjudicator and to review and revise any action or inaction of the employer related to the dispute. A party is not limited in Tribunal proceedings to the information or evidence put to the adjudicator."* (**Will Hughes, 2015**)

The case **Atkins Ltd v Secretary of State for Transport [2013]** saw claimant Atkins challenge the decision of an arbitrator who found in favour of the Secretary of State for Transport in determining whether Atkins was entitled to claim additional payment for remedying an excessive number of potholes beyond the number it had included as part of its lump sum contract. The dispute centred on Atkins' claim for additional payment under clause 60.1 (**see Appendix 1.L**)

1.3.1 Construction Act 2011

This act affects all "construction contracts" in England, Wales and Scotland. The aims of the act are:

- To increase clarity and certainty as to payment in construction contracts,
- To introduce a 'fairer' payment regime, and improve rights for contractors to suspend their work in non-payment circumstances,
- To make adjudication more accessible for the resolution of disputes.

This act is relevant to this variation **because...**

1.4 Conclusion & Discussion

Overall the variation within the UWTSD SA1 Project was dealt with efficiently under the NEC3 contract leaving both the client and contractor sharing risks and costs, therefore leaving both parties satisfied. Whereas, if this were and contract JCT project...

(Evans, 2017) (Davies, 2017)

References

Davies, R. 2017. 22 new jobs created at SA1 and £18.5 million injected into local economy.

Evans, S. C. (2017) *NEC3 Compensation Events – a Practical Guide*. Available at:

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<http://www.archiexpo.com/prod/terram/product-60830-1954110.html> (Accessed: 25th February 2019).

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(Accessed: 25th February 2019).

www.researchgate.net (2018) *Risk Register*. Available at: [https://www.researchgate.net/figure/NEC-](https://www.researchgate.net/figure/NEC-contract-clauses-for-risk-management_tbl2_329713416)

[contract-clauses-for-risk-management_tbl2_329713416](https://www.researchgate.net/figure/NEC-contract-clauses-for-risk-management_tbl2_329713416) (Accessed: 23rd February 2019).

<https://www.neccontract.com/getmedia/3d1b7c3f-097d-4504-8b1f-5a944dbc19dc/A-comparison-of-NEC-and-JCT.pdf.aspx>

<file:///C:/Users/weato/Downloads/nec-contracts-july-2017.pdf> ADR

<https://www.out-law.com/en/topics/projects--construction/construction-contracts/the-construction-act-and-its-amendment--payment-issues/> CON ACT 2011

Case law on NEC <https://fenwickelliott.com/research-insight/newsletters/insight/47>

Appendices

Appendix 1.A - Z Clauses (2018)

URL: https://www.designingbuildings.co.uk/wiki/Z_clauses

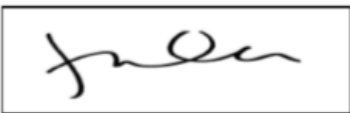
Appendix 1.B – Option C, NEC3 Pain and Gain Strategy (2016)

URL: https://www.designingbuildings.co.uk/wiki/NEC_Option_C:_Target_contract_with_activity_schedule

Appendix 1.C - Risk Register

URL:

Appendix 1.D - EARLY WARNING NOTIFICATION

Project Title: SA1 Development	Project Manager: Mike Bessell															
Project Number: P.021	Contractor: Kier Construction LTD															
Ref Number: 001																
Issued by: <i>Project Manager to the Contractor</i> <input style="float: right;" type="checkbox"/> <i>Contractor to the Project Manager</i> <input checked="" style="float: right;" type="checkbox"/> Tick appropriate box																
Description of Early warning: There have been significant load bearing failures found with the cut 'n turn foundations. This variation means that the foundations are not able to be built upon as this will cause failure of the eventual structure.																
Is the matter referred to above likely to: <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 60%;"></th> <th style="width: 20%; text-align: center;">Yes</th> <th style="width: 20%; text-align: center;">No</th> </tr> </thead> <tbody> <tr> <td>Increase the total of the Prices:</td> <td style="text-align: center;">☒</td> <td style="text-align: center;">☐</td> </tr> <tr> <td>Delay Completion</td> <td style="text-align: center;">☒</td> <td style="text-align: center;">☐</td> </tr> <tr> <td>Impair the performance of the <i>works</i> in use</td> <td style="text-align: center;">☒</td> <td style="text-align: center;">☐</td> </tr> <tr> <td>Is an Early Warning Meeting Required</td> <td style="text-align: center;">☒</td> <td style="text-align: center;">☐</td> </tr> </tbody> </table> Tick appropriate box			Yes	No	Increase the total of the Prices:	☒	☐	Delay Completion	☒	☐	Impair the performance of the <i>works</i> in use	☒	☐	Is an Early Warning Meeting Required	☒	☐
	Yes	No														
Increase the total of the Prices:	☒	☐														
Delay Completion	☒	☐														
Impair the performance of the <i>works</i> in use	☒	☐														
Is an Early Warning Meeting Required	☒	☐														
Signed:  (Contractor) Date: 02/10/2017																

Issued To:

Contractor ☐ Project Manager ☒ Supervisor ☐ File ☐ Other ☐

Author	Kier Construction LTD
Reviewer	Mike Bessell
Version	1
Date:	02/20/2017

Appendix 1.E - NOTIFICATION OF COMPENSATION EVENT

Project Title: SA1 Development	Project Manager: Mike Bessell
Project Number: P.021	Contractor: Kier Construction LTD
Ref Number: 002	Early Warning Ref Number: 001

To the Contractor

☐ The following event is likely to occur on

Date:	02/10/2017
-------	------------

☒ The following event occurred on

Time:	1:00 PM
-------	---------

Compensation Event: 001
Clause Ref. 60.1

Details of the Event:

There have been significant load bearing failures found with the cut 'n tern foundations. This variation means that the foundations are not able to be built upon as this will cause failure of the eventual structure.

The Compensation Event is likely to have / has an effect on:

	Yes	No
The Prices	☒	☐
The Completion Date	☒	☐

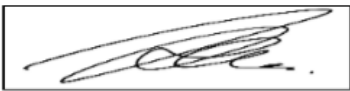
	Yes	No
Quotation Required	☒	☐

If No the *Project Manager* has decided that the Event:

☐ Arises from a fault of the *Contractor*
☐ Has not happened and is not expected to happen
☐ Has no effect upon Actual Cost or Completion
☐ Is not one of the compensation events stated in the contract

	Yes	No
Was Early Warning Given?	☒	☐

Signed:



Project Manager

Date

30/10/2017

Issued To:

Contractor ☒ Project Manager ☐ Supervisor ☐ File ☐ Other ☐

Author	Mike Bessell
Reviewer	Kier Construction LTD
Version	1
Date:	30/10/2017

Appendix 1.F - QUOTATION FOR A COMPENSATION EVENT

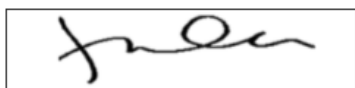
Project Title: SA1 Development	Project Manager: Mike Bessell
Project Number: P.021	Contractor: Kier Construction LTD
Ref Number: 003	Early Warning Reference: 001

To the *Project Manager*

Quotation Summary (Detailed Information Attached)

<u>Description</u>	<u>Changes to Prices</u>	<u>Changes to Completion Date</u>
A Geotech© gridding must be applied as well as imported stone to reinforce the foundations.	£5,000	+ 1 Week
Plant	£1,000	
Labour	£2,000	

Signed:



Contractor

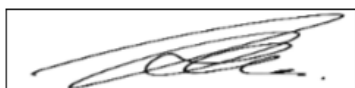
Date

06/11/2017

The Project Manager's Reply is:

- ☐ Acceptance of the quotation
- ☐ An instruction to submit a revised quotation
- ☒ A notification that I will be making my own assessment
- ☐ The attached assumption is to be made

Signed:



Project Manager

Date

07/11/2017

Issued To:

Contractor

☐

Project Manager

☒

Supervisor

☐

File

☐

Other

☐

Author	Kier Construction LTD
Reviewer	Mike Bessell
Version	1
Date:	07/11/2017

Appendix 1.G - PROJECT MANAGERS INSTRUCTION

Project Title: SA1 Development	Project Manager: Mike Bessell
Project Number: P.021	Contractor: Kier Construction LTD
Ref Number: 004	

Please tick as appropriate:

Instruction	☒	Notification	☐	Communication	☐
-------------	-------------------------------------	--------------	--------------------------	---------------	--------------------------

To the *Contractor*

You are hereby instructed to:

Commence the part(s) of the Works	☒	Deal with an object of value or interest	☐
Change the Works Information	☒	Implement a changed decision	☐
Change a key date	☒		☐
Stop work	☐		☐
Not start work	☐		☐

As detailed below:

A Geotech© gridding must be applied as well as imported stone to reinforce the foundations. Additional plant and Labour must also be sourced.

To the *Contractor*

You are hereby notified of:

Acceptance	☒		☐
------------	-------------------------------------	--	--------------------------

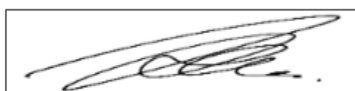
As detailed below:

To the *Contractor*

Communication:

Note: This is not a notification of a compensation event

Signed:



Project Manager

Date

14/11/2017

Issued To:

Contractor

☒

Project Manager

☐

Supervisor

☐

File

☐

Other

☐

Author	Mike Bessell
Reviewer	Kier Construction LTD
Version	2
Date:	14/11/2017

Appendix 1.H – Henry Boot Construction LTD v Alstom Combined Cycles [1999]

URL: https://www.designingbuildings.co.uk/wiki/Henry_Boot_Construction_Ltd_v_Alstom_Combined_Cycles

Case:

Henry Boot Construction LTD v Alstom Combined Cycles, Henry Boot Construction LTD was employed by Alstom to undertake civil engineering works at a power station. Boot's price was found to have been calculated incorrectly. Boot argued that the contract rates must be adhered to whereas Alstom argued that a fair valuation should be made.

Judgment:

The Court of Appeal endorsed that pricing errors do not allow the parties to adjust the rates. The rates may however be adjusted where they are used to value variations:

- Where the works are not executed under similar conditions.
- Where the rate is rendered inapplicable by a substantial change in the quantities.

Appendix 1.J - Northern Ireland Housing Executive v Healthy Buildings Limited [2017]

URL: <https://www.watsonburton.com/lib/liDownload/1241/NEC3%20%20Compensation%20events.pdf?CFID=28990211&CFTOKEN=31686700>

Case:

The defendant was, an asbestos surveyor of the Plaintiff's housing stock in 2 areas in Northern Ireland. There have been proceedings between the party's consequent on earlier adjudications which determined whether there had been a Compensation Event instructed by the Plaintiff at a meeting in January 2013 and whether the Defendant's notification in May 2013 was out of time. The adjudicator and the Courts decided that there was a Compensation Event and the notification was in time

Judgment:

Within the Court proceedings, the Employer requested the Consultant's records of actual cost. The Consultant argued the Employer was not entitled to them because the Employer should have requested a quote in January 2013 when the work had not been carried out and therefore the quote would have been based on a forecast.

Appendix 1.K - ERDC Group LTD v Brunel University [2006]

URL: <http://www.keatingchambers.com/case-report/erdc-group-ltd-v-mbrunel-university>

Case:

Formal execution of the contract documents being deferred until after planning permission was obtained, work proceeded under a series of letters of appointment and then continued after their expiry. The claimant's contractor claimed entitlement on the basis of quantum meruit for work done. The defendant denied that this should be assessed on a cost-plus basis and argued that defective work should be considered. The court rejected the defendant's right to set-off sums owing but accepted that the quantum meruit should reflect any sub-standard work and an allowance for delay. The basis for the quantum meruit would be primarily reference to the rates and prices in the earlier work.

Judgment:

Ultimately, the Judge concluded that, on the facts of this case it would be not right to switch from an assessment based on ERDC's rates to one based entirely on ERDC's costs. ERDC did not make its position clear straightaway only doing so when all the main elements of work were substantially complete. ERDC applied for payment (and was paid until December 2002) on the basis of the principles set out in the first letter of intent, i.e. in accordance with the JCT Valuation Rules.

Appendix 1.L - Atkins Ltd v Secretary of State for Transport [2013]

URL: https://www.designingbuildings.co.uk/wiki/Atkins_v_Secretary_of_State_for_Transport

Case:

In this case, Atkins sought to challenge the decision of an arbitrator who found in favour of the Secretary of State for Transport ("the Authority") in determining whether Atkins was entitled to claim additional payment for remedying an excessive number of potholes beyond the number it had included as part of its lump sum contract.

The dispute centred on Atkins' claim for additional payment under clause 60.1(11) of the Contract under which it sought relief for remedying the additional potholes which it claimed constituted defects under that clause.

Judgement:

The judge found on an ordinary interpretation of clause 60.1 (11) that the excessive number of potholes argument advanced by Atkins did not fall within the terms of the clause nor was it compatible with the extensive notice and other requirements of the Contract.