

Early warning obligations in Consultancy Appointments

The ACE Professional Services Agreement 2017 (“ACE PSA”) is the latest standard form contract to include an “early warning” regime, as highlighted in our summary of key points in our recent note on ACE PSA (available [here](#)). Whilst early warning regimes aim to “flush out” issues at an early stage before they escalate, they are not without their risks and need to be managed carefully.

Early Warning Regimes

An early warning regime typically requires each party to notify the other at an early stage of any issues/potential issues which may cause additional cost or delay to be incurred, or otherwise have an adverse impact on the project. This is so that the impact of those events can be avoided or mitigated insofar as possible. If they are addressed at a later stage substantially more cost and delay is likely to be incurred than would have been the case if early warning had been given.

If an appointment does not include an express obligation to give an early warning notice or similar provisions, a Consultant's obligations to warn the Client is likely to be limited to notifying any issues which a reasonable Consultant would have been expected to notify when exercising its duty of care. Whilst there is a common law duty to warn, this is more limited than the duty under a typical early warning regime. The case of *Goldswain and Another v Beltec* [2015] suggests that a common law duty to warn will only arise if there is “an obvious and significant danger either to life and limb or to property” when a careful professional “ought to have known of such danger”. It would follow that there is no general obligation to give early warning of events which could cause delay, disruption and/or additional costs if there is

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no such danger. An express early warning regime will therefore impose additional obligations on a Consultant.

Early Warnings Under NEC3 PSC

The first standard consultancy appointment to include an early warning regime was the NEC2 Professional Services Contract published in 1995. Clause 15.1 of the current edition (“NEC3 PSC”) requires the *Employer* and the *Consultant* to give an early warning as soon as they become aware of a wide range of events and circumstances, i.e. any matter which could:

- + increase the total of the *Prices*;
- + delay Completion or meeting a Key Date;
- + change the Accepted Programme;
- + impair the usefulness of the *services*; or
- + affect the work of others.

Following an early warning notice the *Employer* must enter the event in the Risk Register and either party may instruct the other to attend a risk reduction meeting to discuss, amongst other things, how to avoid or reduce the effect of the risk (clause 15.2).

The main risk associated with the early warning regime under the NEC3 PSC is that if the *Consultant* did not give an early warning which “*an experienced consultant could have given*”, any subsequent compensation event is assessed as if the early warning had been given (clause 63.5). A *Consultant*'s failure to give early warning of any of the events or circumstances referred to above could therefore reduce its entitlement to additional payment and to an extension of the Completion Date or a Key Date. This will be the case where steps could have been taken to avoid or mitigate the impact of the event or circumstances concerned if an early warning notice had been given.

Generally, given the wide circumstances in which early warning notices are required, the early warning regime under the PSC is a significant administrative burden which should be reflected in the contract price and managed carefully.

ACE PSA Early Warning Regime

The early warning regime in the ACE PSA requires each party to notify the other as soon as they become aware of “*any matter likely to affect the provision of the Services, including delay and additional costs*” (clause 4.2). Within 7 days of this notice the parties are to have discussions and if appropriate a meeting to consider “*actions or measures in response to the matters...notified*”. Whilst the circumstances in which an early warning notice is required in the ACE PSA are arguably wider than under the NEC3 PSC, this process is fairly similar to the NEC3 PSC approach to early warnings.

The considerations summarised above in relation to the early warning regime under NEC3 PSC therefore also apply to the equivalent regime under ACE PSA. In addition, Consultants should be aware of the following further point arising from this regime.

Any matters agreed are to be recorded in writing and once such a record is signed that agreement will be:

- + binding on the parties (clause 4.2(i)); and
- + if the agreement includes matters of payment or adjustment to the programme, in full satisfaction of any claim (clause 4.2(ii)).

This creates a potential pitfall for the Consultant since an agreement in relation to the Consultant’s fee or extension of time may also cover matters pertaining to the Consultant’s liability. As that agreement will be binding, unless care is taken, it could mean that the Consultant’s “*hands are tied*” in respect of liability. If any such agreement is reached without insurers being notified, this could prejudice the Consultant’s position in relation to coverage under its professional indemnity insurance policy.

The Consultant can avoid this risk since clause 4.2 requires it to sign a written agreement in relation to the above matters. In principle the parties can in fact agree any terms (including to leave some issues open for future review) to deal with the “*early warning*” matter. In light of clause 4.2 it will be important to make clear that notwithstanding clause 4.2, the agreement is not intended to be binding if the parties do not intend it to be so. If appropriate, the agreement should also make it clear that the Consultant makes no admission of liability in agreeing actions or measures, and reserves its position on liability.

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Practical Considerations

It is therefore important that care is taken by Consultants when operating an early warning regime, whether under the NEC3 PSC, the ACE PSA or otherwise. Any early warning regime will be a significant administrative burden and failure to comply with it can have serious adverse consequences for the Consultant.

In addition, under the ACE PSA the terms of any agreement reached pursuant to clause 4.2 need to be carefully considered since there is a risk that a Consultant could enter into an agreement which inadvertently prejudices its position. Accordingly, before reaching any written agreement regarding the actions or measures to be taken following an early warning notice, the Consultant should obtain advice from its insurers and, if necessary, its legal advisors.

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