



Turner & Townsend

April 2020

# COVID-19

Managing the contractual impact to construction projects

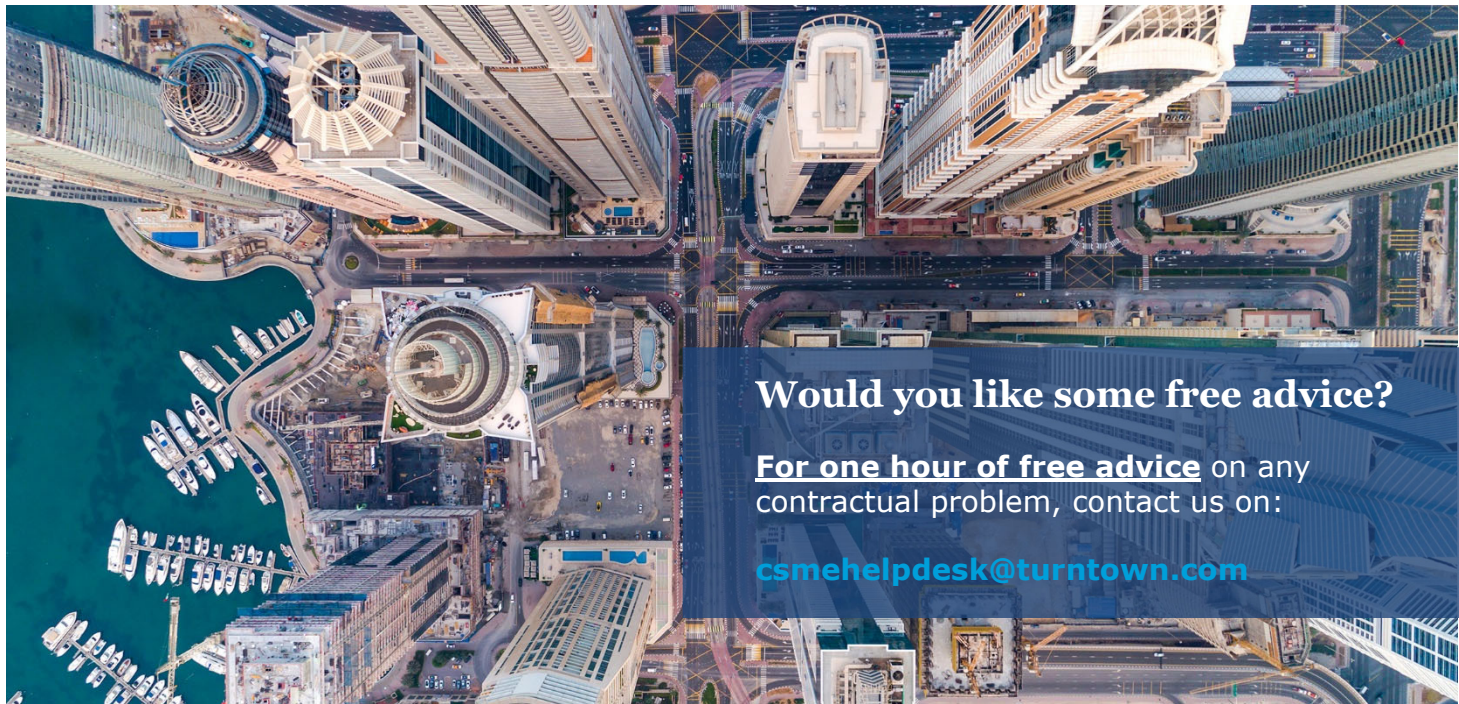
Middle East client guidance note

## Contents

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<b>Introduction</b>	<b>1</b>
<b>COVID-19</b>	<b>2</b>
<b>Our contract helpdesk</b>	<b>3</b>
<b>Key impact areas</b>	<b>4</b>
<b>FIDIC contracts</b>	<b>5</b>
<b>FIDIC Contracts: <a href="#">what can an Employer/Client do?</a></b>	<b>6</b>
<b>Public sector contracts</b>	<b>7</b>
<b>Public Sector Contracts: <a href="#">what can an Employer/Client do?</a></b>	<b>8</b>
<b>NEC Contracts</b>	<b>9</b>
<b>NEC Contracts: <a href="#">what can an Employer/Client do?</a></b>	<b>11</b>





**Would you like some free advice?**

**For one hour of free advice** on any contractual problem, contact us on:

**[csmehelpdesk@turntown.com](mailto:csmehelpdesk@turntown.com)**

## **Introduction**

**COVID-19 will have a significant impact on many construction projects currently being undertaken across the Middle East.**

There are three key impact areas of focus for Construction clients to manage the risks created by COVID-19:

- 1. Contracts**
- 2. Supply Chains**
- 3. Operations**

Being proactive and carrying out detailed reviews of projects to identify strategies that can manage these risks, will help to reduce the impact on your projects.

Every project has its own unique challenges – professional advice will identify the best solution for your specific situation.



## COVID-19

**On the 11th March 2020, the World Health Organisation (WHO) declared the COVID-19 outbreak to be a pandemic. As global supply chains are affected, the virus is having a serious effect on the economy.**

It is clear that COVID-19 is likely to cause serious disruption and even suspension of works to projects due to labour and material shortages.



### Contract changes

COVID-19 is a significant event and as such, is likely to be classed as an event/change under the contract. This does not mean that the Contractor is automatically entitled to full or partial compensation. The event will still need to be assessed and its impact understood against the progress of the works. If the project is already in delay for other reasons, COVID-19 may not lead to compensation



### Supply chain disruptions

Supply chain disruptions, such as the temporary closure of manufacturing facilities and the constraints being placed on the importation and transportation of goods, will lead to delays, shortages and a potential peak in product prices.



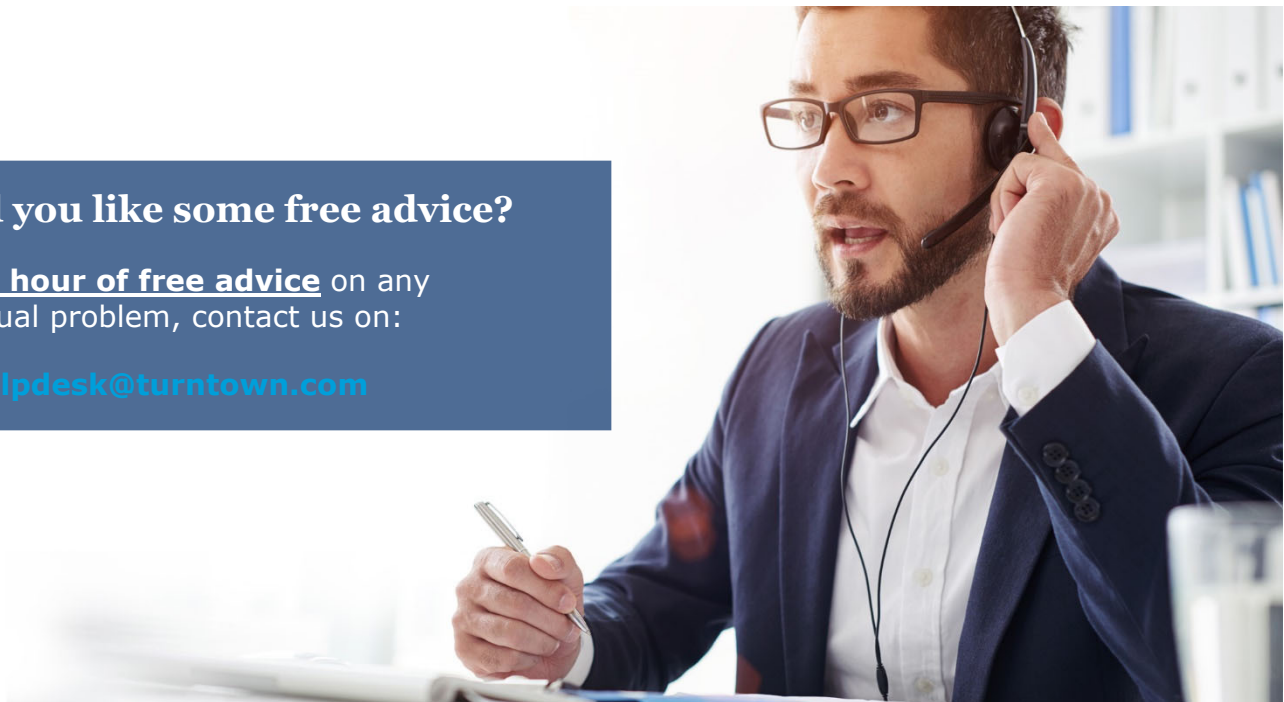
### Operation shut downs

Without a crisis plan, site closures and the demobilisation of workers could have a serious impact on project timescales and costs.

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## Our contract helpdesk

**Our helpdesk is available to support you with any Middle East contract related queries you may have, be it to understand your current situation and where you stand, or to anticipate how you could be effected in the weeks and months to come.**

We can help in particular with issues relating to; contract risks and effective management, detailed assessments, commercial impacts, guidance on potential delivery delay, and comprehensive supply chain audits.

We can assist in protecting your commercial interests should your project shut down or you require detailed protocols to be implemented if your site or project team's office needs to close. We're here to help you to maintain a focus on safety, speed and site security.

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*Our Contract Services Helpdesk is operated by a team of highly experienced contract and procurement specialists. They will guide you through your options and support you to navigate through COVID-19 and its short, medium and long term impacts.*

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## Key impact areas

<div>1</div> <b>Contracts</b>	<div>2</div> <b>Supply chain</b>	<div>3</div> <b>Operations</b>
<p><b>Do you understand the risks of your contract, where risk lies and how to manage it?</b></p> <p><b>Contract review</b> What does your contract say about:</p> <ul style="list-style-type: none"> <li>Force majeure, epidemics or pandemics</li> <li>Suspension provisions</li> <li>Termination provisions</li> </ul> <p>Extension of Time provisions and entitlement to time and money.</p> <p><b>Insurance</b> Check whether your insurances cover any of your losses and seek specialist advice with regard to existing insurance provisions.</p> <p><b>Future contracts</b> Instruct lawyers to include 'express infection disease/epidemic' provisions in new contracts and, where possible, amend existing contracts. You should consider who will hold this risk as well as how it can be managed and by whom.</p> <p><b>Other agreements</b> Consider if there any other agreements, such as development agreements or agreements for lease, which need to be notified of delays and/or increased costs.</p> <p><b>Records</b> Request/mandate that main contractors collate detailed records of resources and additional costs incurred as a pre-requisite to claims for additional time and/or money on projects.</p>	<p><b>Do you know what issues your supply chain has – and the impact to your project?</b></p> <p><b>Audit supply chain</b> Conduct end-to-end supply chain audits to identify possible delivery delays, shortages and increased costs.</p> <p><b>Monitor supply chain</b> Monitor supply chains for early warning signs of distress, such as requests to change payment terms, deliveries not in accordance with the programme, lack of communication, or where suppliers are not delivering in accordance with agreed schedules or contract terms.</p>	<p><b>Do you have a 'Plan B' that will help your project team to approach problems consistently?</b></p> <p><b>Site shutdowns</b> Produce protocols to be implemented if a site or project team's office needs to close. Consider how this can be done safely and quickly, whilst maintaining the security of the site. Take note of any insurance requirements.</p> <p><b>Health and safety</b> Understand your health and safety obligations to both your employees and Contractors. Consider what facilities you need to provide to minimise the risks (e.g. increased washing facilities).</p>

## FIDIC contracts

**FIDIC Contracts** - contracts issued by the 'Fédération Internationale des Ingénieurs – Conseils' (International Federation of Consulting Engineers), have been around for the last 100 years and are used widely around the world.



Current FIDIC contracts have clauses that provide specifically for epidemics, which should make it easier for parties to agree to time and money.

There are other contractual mechanisms that should be considered depending on the specifics of the project.

### 1. Extension of Time

### 2. Force majeure

### 3. Suspension

### 4. Termination

1

#### Extension of Time

**FIDIC deals with Extension of Time, much better than other contracts. Both the 1999 and 2017 FIDIC Red Books include for 'epidemics' directly under the Extension of Time (EOT) section of the completion provisions.**

For instance under 8.5(d) of the 2017 Red Book, it states the following as reason for entitlement to an EOT:

**"Unforeseeable shortages in the availability of personnel or goods (or Employer-supplied materials, if any) caused by epidemic or governmental actions."**

With the World Health Organisation (WHO) declaring the outbreak a "pandemic" on the 11 March 2020, this clause may be the obvious clause to use when needing to extend a project's timeline.

One thing to note: the claiming party is required to give notice of a claim within 28 days of becoming aware of the causing event or circumstance, otherwise risks losing entitlement.

2

#### Force majeure

**Parties could use the force majeure clauses when looking to amend time or money related agreements. The 1999 FIDIC Red Book, under clause 19.1, defines 'force majeure' as an exceptional event or circumstance beyond a party's control which:**

- such party could not reasonably have provided against before entering into contract,
- having arisen, such party could not reasonably have avoided or overcome, and
- is not substantially attributable to the other party

and it provides for:

- time and payment of costs (clause 19.4),
- suspension of work (clause 8.8), and
- termination (clause 19.6)

Under the FIDIC 1999 Red Book provision 19.2, it is stated that if a party is aware that it is not going to perform its obligations under the contract caused by force majeure, a notice should be issued within 14 days after the affected party becomes aware or should have become aware of the event. The term 'force majeure,' is not included in FIDIC 2017 editions however it does include the term 'exceptional event,' (under clause 18), with very similar implications to "force majeure".

The circumstances relating to COVID-19, when tested against each of the above criteria in clause 19.1, give a strong argument that a force majeure event has occurred.

3

### Suspension

**Under clause 8.8 of the 1999 Red Book and under clause 8.9 of the 2017 Red Book, the ‘Engineer,’ may at any time, instruct the Contractor to suspend progress of part or all of the works, stating the date and cause of the suspension.**

Where the Contractor suffers a delay and incurs cost due to the suspension, when resuming work the Contractor is entitled to an Extension of Time and/ or payment of cost plus profit.

The use of the suspension provisions should be a serious consideration for Clients if practical circumstances dictate that all works need to be stopped.

4

### Termination

**Under clause 8.11 of the 1999 Red Book or clause 8.12 of the 2017 Red Book, if a Suspension of Work continues for 84 days, the Contractor may give a Notice to the Engineer requesting permission to proceed.**

Under clause 8.13 (‘Resumption of Work,’) if the Engineer fails to give a notice within 28 days, the Contractor can:

- agree to a further suspension
- after giving a second notice to the Engineer, treat the suspension as an omission of the affected part of the works
- where suspension affects the whole works, may give a notice of termination under clause 16.2, ‘Termination by Contractor.’

Clients should be aware of these clauses and discuss termination with the contractor, if it is applicable to do so.

Parties should seek legal advice if they are considering termination.

## FIDIC Contracts: what can an Employer/Client do?

**It would still be prudent for Employers to ensure that the following are carried out:**

- A review of the contractual provisions with the Engineer/lawyers/other advisors, to understand the benefits and risks of different provisions.
- Checks to ensure that the programme is up-to-date and that there is an understanding of the critical path and concurrent/ parallel delays. This will also make agreement of any extension of time easier.
- The Contractor should be advised (where applicable) that the procedures in Clause 20.2, ‘Claims for Payment,’ and/or those relating to extension of time, should be followed with ‘detailed supporting particulars of the amount of additional payment claimed’ will be required.







## Public Sector Contracts

**Whilst FIDIC contracts are used in the Middle East, some states publish a bespoke contract for use by public sector bodies in the relevant jurisdiction.**

This is further complicated in the UAE, where many public sector bodies often use their own bespoke contracts. These contracts are generally based on FIDIC contracts but include various amendments. The use of generic FIDIC guidance in interpreting these contracts is therefore to be done so with caution.

To illustrate this, we have highlighted differences between the 1999 and 2017 FIDIC Red Books and the following sample public sector body contracts;

- Sultanate of Oman Standard Documents for Building and Civil Engineering Works Fourth Edition September 1999 (referred to as the Oman Standard Contract)
- Dubai Municipality Conditions of Contract for Works of Civil Engineering Construction May 1999 (referred to as the Dubai Municipality Contract).

1

### Extension of Time

**Unlike the 1999 and 2017 FIDIC Red Books, Clause 44 of both the Dubai Municipality Contract and the Oman Standard Contract, do not refer specifically to an ‘epidemic,’ as grounds for an extension of time (EOT).**

However, Clause 44 of these contracts provides entitlement to an EOT in the event of ‘other special circumstances,’ other than Contractor default.

The declaration of the COVID-19 outbreak as a ‘pandemic’ by the World Health Organisation (WHO) on 11 March 2020, would likely satisfy the ‘special circumstances’ referred to in Clause 44. This could therefore present grounds for an EOT to the extent that the Contractor is able to demonstrate that these ‘special circumstances,’ affected a project’s progression of the works.

As is the case with the FIDIC contracts, the Contractor is required to submit a notice of claim within 28 days of the event arising and risks losing entitlement if they fail to do so.

2

## Suspension

**As is the case with the 1999 and 2017 FIDIC Red Books, clause 40.1 of both the Dubai Municipality Contract and Oman Standard Contract, states that the Engineer may at any time, instruct the Contractor to suspend progress of part or all of the works.**

Where the Contractor suffers a delay and incurs cost due to the suspension, it is entitled to an extension of time and/ or additional payment.

However, unlike the 1999 and 2017 FIDIC Red Books, which refer to payment of 'cost plus profit,' clause 40.2 of the Dubai Municipality Contract refers more vaguely to an 'amount...in respect of the cost incurred by the contractor.' Similarly, clause 40.1 of the Oman Standard Contract refers to an 'extra payment' which may be due to the contractor.

The use of the suspension provisions should be a serious consideration for Clients if practical circumstances and/ or government directives dictate that works need to be stopped due to the outbreak of COVID-19.

3

## Termination

**The Dubai Municipality Contract at clause 40.3 and Oman Standard Contract at clause 40.2 include similar prolonged suspension provisions as the 1999 and 2017 FIDIC Red Books.**

The Dubai Municipality Contract and Oman Standard Contract state that if a suspension of work continues for 84 days or 90 days respectively, the Contractor may give a notice to the Engineer requesting permission to proceed.

If the Engineer then fails to give a notice to resume the suspended work within 28 days, the Contractor is entitled to either:

- after giving a second notice to the Engineer, treat the suspension as an omission of the affected part of the works
- where suspension affects the whole works, the Contractor may treat this as the termination of the contract by the Employer.

It is worth noting that, whereas the 1999 and 2017 FIDIC Red Books provide for a further suspension to be agreed between the parties as a third alternative, this is not explicitly provided for by the Dubai Municipality Contract or the Oman Standard Contract.

Clients should be aware of these clauses, obtain legal advice and discuss termination with the Contractor if such circumstances arise.

## Public Sector Contracts: what can an Employer/Client do?

**The public sector body contracts provide somewhat different provisions to the 1999 and 2017 FIDIC Red Books.**

It would therefore be prudent for Employers to ensure that the following are carried out:

- A review of the contractual provisions with the Engineer/lawyers/other advisors, to understand the benefits and risks of different provisions. This should include consideration of how these contracts are to be interpreted within the framework of the laws of each jurisdiction.
- Checks to ensure that the programme is up-to-date and that there is an understanding of the critical path and concurrent/ parallel delays - this will assist in the agreement and award of any extension of time.
- The Contractor should (where applicable) be advised that the contractual procedures relating to claims for additional payment and/or EOT procedures, should be followed. They should also be advised that detailed supporting particulars of the amount of additional payment claimed will be required.





## NEC Contracts

**The NEC is a family of contracts used by our Clients for procuring a diverse range of works, services and supply, spanning major framework projects through to minor works and purchasing of supplies and goods. It is used and promoted by the UK Government on a range of projects. The choice of NEC contract will depend on the project complexity and level of risk the Client wishes to pass on.**



The NEC contracts do not specifically identify epidemics under the contract clauses, therefore consideration of the various contractual mechanism is required and the one which should be used will be heavily dependent on the specifics of the project.

When dealing with COVID-19 under NEC contracts, there are four key areas which may be applicable to the ongoing delivery of your project(s);

- Option X2 Changes in the Law
- Clause 19 Prevention and the associated compensation events
- Compensation events 60.1(2) and (4)
- Termination

1

## Option x2: changes in the law

**If the secondary option clause X2 ‘Changes in the Law,’ has been included as an option in a contract, which often is the case, then new legislation such as ‘The Health Protection (Coronavirus) Regulations 2020,’ (recently brought in by the UK Government), which affects the works, would potentially be grounds for compensation.**

The wording under NEC3 and NEC4 is different. Parties should check the exact wording, to ensure compliance to the contractual requirements mandated, in order to provide notification of an event (such as COVID-19).

Under NEC3, a change in the law after the contract date, allocates the risk to the Employer. The second sentence of the clause reads;

**“The Project Manager may notify the Contractor of a compensation event...”**

As this clause uses the word “may” in relation to a notification, it could be reasonably concluded that, if the Project Manager fails to provide notice, the Contractor will not be time barred under Clause 61.3.

Project Managers on NEC3 projects should ensure they give proper consideration to the recent COVID-19 legislation.

2

## Clause 19: prevention

**The un-amended version of both the NEC3 and NEC4 ECC contracts, include Clause 19, ‘Prevention and its associated compensation event 60.1(19).’**

In effect these clauses state that, if an event occurs, whereby neither party could have prevented the event and whereby there was a small chance of the event occurring, and where the event subsequently prevents the Contractor from completing the full works by the planned completion date that it would have been unreasonable to have expected the Contractor to have allowed for it.

The wording of the clauses are slightly different between NEC3 and NEC4 but clause 19 in NEC4 states:

**“If an event occurs which**

- stops the Contractor completing the whole of the works or
- stops the Contractor completing the whole of the works by the date for planned completion shown on the accepted programme,

**and which**

- neither party could prevent
- an experienced Contractor would have judged at the contract date to have such a small chance of occurring that it would have been unreasonable to have allowed for it

**the Project Manager gives an instruction to the Contractor stating how he is to deal with the event.”**

This clause sets out a number of conditions which need to be overcome, however we believe it is likely that COVID-19 would be an event pertinent to these provisions as it will impact the carrying out of the works.

The wording ‘completing the whole of the works,’ used in NEC4 could be interpreted as only being applicable in circumstances where there is no realistic way, that completion of the works can be achieved on time if in fact at all. If such an event does occur, it is required that the Project Manager issues instructions to the Contractor on how the event is to be dealt with.

This would be a compensation event in accordance with clause 60.1(19) and therefore, at the Employer’s (or Client’s) liability. Depending on the severity of the impact on a construction site, the compensation event could be challenging to assess in terms of both cost and time.



3

### Compensation events 60.1 (2) and (4)

Another alternative would be, where the Employer/Client does not allow access to the site (Clause 60.1(2)) or the Project Manager gives an instruction to stop the works (Clause 60.1(4)), to use these situations as compensation events. These compensation events can be classed as normal and are probably the easiest to manage contractually and commercially.

Under Clause 60.1(2) the Contractor must show that the Employer or others have failed to do something by the date shown on the 'accepted programme,' in order to preserve entitlement. It is in the interests of both the Contractor and the Project Manager to have current, realistic and achievable 'accepted programmes.'

4

### Termination

Clause 91.7 of NEC3 and NEC4 gives the Employer/Client (not the Contractor) a right to terminate the contract where an event occurs:

- which stops the Contractor completing the works,
- where completion of the whole of the works will be delayed by longer than 13 weeks,
- which neither party could prevent, and
- which an experienced Contractor would have judged at the contract date to have such a small chance of occurring.

This is similar to the prevention clause 19 and is effectively a force majeure clause. It should be noted that it only gives the Employer/Client the opportunity to terminate for this reason and not the Contractor. Termination should only be considered with the appropriate legal advice.

## NEC Contracts: what can an Employer/Client do?

**Contractors under the NEC contract, (particularly cost based options C, D, E and F), should already be keeping comprehensive records of defined cost as required by the contract, together with additional records as required by the scope of works.**

It would be prudent for Clients/ Employers to ensure that the following are carried out:

- 1 A review of the contractual provisions with the Project Manager/lawyers/other advisors to understand the benefits and risks of different provisions.
- 2 Check to ensure there is an accepted programme and that the programme is up-to-date and complete with method statements and schedules of resources as required by the contract. In addition, there should be an understanding of the critical path and concurrent/parallel delays, which will make agreement of any change to the completion date easier.
- 3 A detailed understanding of the Contractor's cost records so that the defined cost of the compensation event can be readily and objectively assessed. Only defined costs in accordance with the relevant 'schedule of cost components,' is claimable. The theory behind the clauses set out in NEC contracts, should result in the Contractor being neither better nor worse off, as a result of the compensation event.



## Get in touch:

For more information email [csmehelpdesk@turntown.com](mailto:csmehelpdesk@turntown.com) or reach out to one of our key Contract Services experts.

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