

Question

A 6 month refurbishment contract using the NEC3 Engineering and Construction Contract (ECC) has recently been awarded. The *defect correction period* is 4 weeks. On the second day on Site the *Supervisor* arrives to find a communication from the *Contractor*. The title is 'non-conformance report (NCR)' and goes on to detail what looks to be a Defect. The *Supervisor* picks up the phone to discuss this with the *Contractor* and is told that an NCR is a part of their ISO quality system. They don't like notifying Defects as they have a 'zero defects' policy in their organisation.

a. **What should the *Supervisor* do?** [5 marks]

b. **When does this Defect have to be corrected?** [6 marks]

After Completion, the *Supervisor* does a routine visit around the completed project and notices a number of other Defects, some of which need dealing with fairly soon. The *Contractor* writes back saying that he has left Site and will not be able to return for some months as he is busy elsewhere.

c. **What will you now do as *Supervisor*?** [4 marks]

Today is the *defects date* and the *Project Manager* calls the *Supervisor* first thing asking if he's prepared the Defects Certificate. The *Supervisor* had completely forgotten about this and is away on holiday for a few weeks from this evening.

d. **What should the *Supervisor* do?** [5 marks]

Suggested answer

a.

- Most organisations operate an ISO quality system which of course needs to followed to maintain accreditation.
- However, there is also a contract to be followed and in the ECC under clause 42.2 the *Supervisor* notifies the *Contractor* of each Defect as soon as he finds it and the *Contractor* notifies the *Supervisor* of each Defect as soon as he finds it. This must be in a form that can be read, copied and recorded (see clause 13.1).
- Clause 10.1 requires, amongst others, the *Supervisor* and the *Contractor* to act as stated in the contract.
- So, talk to the *Contractor* and find an efficient way to comply with both requirements, one to maintain ISO accreditation and the other to not put either Party in breach by not notifying a Defect.

b.

- The answer lies in clause 43.2 and 43.4.
- The *Contractor* has a degree of latitude here, depending on the significance of the Defect itself.
- Clause 43.2 states that the *Contractor* corrects a notified Defect before the end of the *defect correction period*. This period is found in the Contract Data and there may be more than one of these that deal with different types of Defects. In this case there is just one such period and that is of 4 weeks duration.
- As the Defect is notified before Completion then the *defect correction period* begins at Completion.
- This would be the case for those Defects which do not prevent the *Employer* from using the *works* and Others from doing their work. If such Defects do prevent the *Employer* as stated, then they will have to be corrected before Completion otherwise Completion will not occur.

c.

- The *Supervisor* still notifies such Defects under clause 42.2.
- The *Contractor* is still liable for correcting these Defects under clause 43.1.
- As Completion has passed the *Contractor* corrects each Defect before the end of the *defect correction period*. This period is 4 weeks.
- It is not for the *Supervisor* to do anything other than notify the Defect in this instance, it falls to the *Project Manager* to arrange for the *Employer* to allow the *Contractor* access to and use of a part of the *works* which the *Employer* has taken over if they are needed for correcting a Defect. This is stated in clause 43.4.
- The accepting Defects process in clause 44 or the uncorrected Defects process in clause 45 might later be applicable, but again this is something for the *Project Manager* to operate. This may draw upon the *Supervisor's* advice but strictly there are no express requirements.

d.

- Under clause 43.3 the *Supervisor* issues the Defects Certificate at the later of the *defects date* and the end of the last *defect correction period*.
- As there is no information here to suggest there's a last *defect correction period* then it seems that the Defects Certificate must be issued today.
- If it is not then this is a breach of contract and may delay the final payment, presumably to the *Contractor*, and interest might arise accordingly.
- So there are a few options here. The *Supervisor* can produce the Defects Certificate and issue it to the *Project Manager* and the *Contractor* today. See clause 13.6. The *Supervisor* could delegate this duty under clause 14.2, and that person would then issue it today.
- The only issue here is to know what Defects, if any, still remain to be corrected so that the Defects Certificate can be completed accordingly (see clause 11.2(6)).