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“Real world” issues of managing NEC contracts

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About the Speaker

Glenn Hide – Director, GMH Planning Ltd

- GMH Planning provide training and consultancy to clients and contractors working under the NEC forms of contract
- provide experienced resources (planners, project managers, quantity surveyors) to projects using NEC forms of contract
- owner of NEC People LinkedIn group with over 7000 active members
- community manager for Reachback, a question and answer portal with over 3000 answered questions around NEC
- lead developer of FastDraft – the newest NEC administration tool to come to market



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About the Topic

Real World Issues

1. no accepted programmes
2. which programme to use when assessing compensation events
3. lack of acceptance of compensation events
4. subcontractors not following same contractual rules
5. lack of use of online administration tools to manage NEC flow of communications
6. multiple compensation events on a large fast-paced project
7. contractual baselines and earned value



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Summary of NEC contract principles

- set of proactive good practice project management processes formalized into a single contract
- requirement for a detailed programme to be regularly revised and accepted to become the new contract programme
- integral early warning process to try to avoid issues becoming problems or at least minimizing their potential impact
- assessing change in the form of compensation events at the time they occur rather than storing them up until the end for a protracted argument
- clarity and simplicity, avoiding subjective phrases and legal speak



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1. Lack of Programme Acceptance

- Projects going several periods without an Accepted Programme
- Article 2017 cited six main reasons they do not get accepted
 - Project Manager worried what liability taking on by accepting
 - Project Manager doesn't like the end date!
 - wanting to reject and finding spurious reason to do so
 - Contractor not submitting programme showing all requirements
 - Contractor manipulating programme to try to maximize entitlement for existing or imminent compensation events
 - Project Manager expecting all delays to be instantly mitigated to maintain a fixed "immoveable" date

1. Lack of Programme Acceptance

- Parties have to work together and ensure that a regular accepted programme is a reality not a fantasy
- Contractor to run a check list to make sure programme is fully compliant with 31.2, 32.1 and any other requirements of Scope
- comprehensive narrative explaining what programme is showing
- meeting soon after submission to explain and talk through elements of the programme, allow the Client to ask any questions and get closer to an understanding of its likely acceptance
- Parties should work together to get programme responded well within the two-week period contract allows
- if rejected, Contractor to address and resubmit within the period and call further meeting to try to get acceptance within the period (every period)

2. Which Programme to assess change against

- NEC3 stated that a compensation event should be assessed against the last Accepted Programme
- what if that programme was several periods old?
- should you take into account other events you already knew about since that programme was accepted?
- 2013 article highlighting clauses that must mean you do

Assessing compensation events: which programme do you use?



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A common question asked by NEC users is, what programme do you use to assess a compensation event and what progress or change (if any) should you first take into account?

Clause 62.2 of the NEC3 Engineering and Construction Contract (ECC) states that, 'If the programme for remaining work is altered by the compensation event, the Contractor includes the alterations to the Accepted Programme in his quotation'. Clause 63.3 also states that, 'A delay to the Completion Date is assessed as the length of time that, due to the compensation event, planned Completion is later than planned Completion as shown on the Accepted Programme'.

What then happens if that accepted programme is several months old and contains logic that is now clearly known to be wrong? Would you

Read the contract as a whole

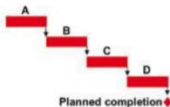
Whenever I am giving advice about the administration of the contract a simple response is normally, 'just do what the contract says' or 'follow the contract'. For the most part the contract is pretty clear on what should be done and the associated consequence for not doing it. However, there are certain areas in the contract where simply following the precise words of a single sentence or clause in the contract will not give us a concise answer because the contract needs to be read as a whole.

The problem generally comes about when the parties have not been following the contract in the first place. For whatever reason, the programme submission and acceptance process has got out of kilter, either by the contractor not providing compliant programmes, or by the project manager not following the acceptance process in the contract. Following the contract clearly puts both parties in a better place. However, if the parties

you know for a fact has already changed since it was accepted.

Some examples

Let us look at a simple example. A contractor shows on the original programme that it plans to do activity A then B then C then D. Each activity is 4 weeks long, making a total programme time of 16 weeks. C is critical to the start of D.



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2. Which Programme to assess change against

- NEC4 launched 22nd June 2017
- not addressed issue but actually made it worse!
- 23rd June 2017 article – “NEC4 elephant in the room”



2. Which Programme to assess change against

- Oct 2017 NEC4 practice note 1



PRACTICE NOTE

ECC PRACTICE NOTE 1
OCTOBER 2017

Assessing delays due to compensation events

This practice note has been prepared for the NEC4 Engineering and Construction Contract, June 2017. The approach set out in this note should be followed on other NEC4 contracts.

The key requirements for assessing delays to Completion Dates and Key Dates due to a compensation event ("CE") under ECC clause 63.5 are to

- determine the effect that the CE has upon planned completions and
- use the Accepted Programme current at the dividing date to do so.

The objective is to assess the effect due only to the CE and not due to other events.

To help determine this, users should firstly recognise the impact of:

- alterations to the Accepted Programme resulting from other CEs occurring prior to the

2. Which Programme to assess change against

Jan 2019 NEC4 revised contract

63.5 now adds:

The assessment takes into account:

- any delay caused by the compensation event already in the Accepted Programme, and
- events which have happened between the date of the Accepted Programme and the dividing date



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2. Which Programme to assess change against

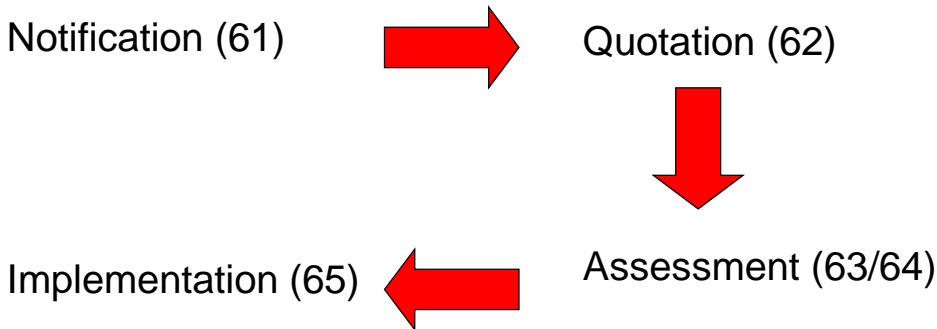
In summary, at the point you are aware of a new compensation event:

- last Accepted Programme is updated with progress up until that point along with the effects of any other compensation events that had already occurred prior to that date
- reschedule the programme and see if there was already any effect on planned Completion and/or any key dates/sectional completions and save an interim baseline
- now feed in the new compensation event and reschedule for a second time and see if any further effect on planned Completion etc. and this is the entitlement to be priced within a quotation



3. Lack of acceptance of compensation events

Defined process to follow for compensation events with each stage having prescribed timescales



3. Lack of acceptance of compensation events

- has to be a common understanding and intent to agree change as you go which should be in both Parties interest to know respective liability
- regular compensation event meetings to push each one forward and a shared compensation event register so everyone clear on status
 - those notified and not yet agreed as events
 - those currently quoting – update where at
 - those quotes in – where PM is at in review process – early thoughts
 - quotes not agreed – action to move forward
 - confirm ones that are implemented and hence “closed”
- work on quotes together
- ensure programme issued with each quote demonstrating effect



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4. Subcontractors not following contract

- greater focus on Client/Contractor to follow contractual rules but less so on Subcontractor
- Engineering Construction Subcontract (ECS) has exactly same processes/ rules to follow as the ECC contract
- early warning process and compensation event processes all same but just with different timescales
- programme requirements are EXACTLY the same
- seems to be an acceptance that we can't expect Subcontractors to be able to do it – why?
- show some “tough love” and help them to help themselves
- educate them - demonstrate expectations at tender stage, enforce the rules during the life of the contract transparently and constructively
- use of an online administration tool to keep them on right road

5. use of an online administration tool

anyone still use a fax machine?

we have evolved and use of a cloud-based system becoming the norm

- system should give full instant audit trail of who raised what/when
- timescales automatically triggered
- set authority levels as to who raises/accepts communications
- standard pro-forma built into platform ensuring right process followed, correct language used and all information provided
- transparency and full audit trail for everyone
- reports on status of all elements of the project
- encouraging right behaviours
- efficiencies all round – time/cost



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- Analytics
- Contract Dashboard
- Contract Reports
- Aggregated Reports
- Early Warnings
- Compensation Events
- Programme
- Instructions
- Notifications
- Issue for Acceptance
- Payments
- Inspections & Defects
- Delegated Actions
- Records
- RFI/TQ
- Non-Conformance
- Contract Information

Whiteladies Road Redevelopment NEC4 ECC Option A

<p>OPEN EARLY WARNINGS</p> <p>TOTAL</p> <p>4</p> <p>VIEW REGISTER</p>	<p>OPEN EARLY WARNINGS</p> <p>CONTRACTOR NOTIFIED</p> <p>2</p> <p>VIEW REGISTER</p>	<p>OPEN EARLY WARNINGS</p> <p>PM NOTIFIED</p> <p>2</p> <p>VIEW REGISTER</p>	<p>OUTSTANDING ACTIONS</p> <p>CONTRACTOR</p> <p>3</p> <p>VIEW ACTIONS</p>	<p>OUTSTANDING ACTIONS</p> <p>PM</p> <p>9</p> <p>VIEW ACTIONS</p>	<p>OUTSTANDING ACTIONS</p> <p>SUPERVISOR</p> <p>0</p> <p>VIEW ACTIONS</p>
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Last programme submitted on **01/10/2019** | Last programme accepted on **01/10/2019**

<p>£5,683,721.22</p> <p>Tendered total of the Prices</p>	<p>£5,758,344.67</p> <p>Current total of the Prices</p>	<p>£74,623.45</p> <p>Increase in total of the Prices</p>	<p>+1.31 %</p> <p>% Increase in total of the Prices</p>
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<p>£0.00</p> <p>Total Contractor Applications</p>	<p>£0.00</p> <p>Total Certified for Payment</p>
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<p>CONTRACT STARTING DATE</p> <p>01/10/2019</p>	<p>ORIGINAL CONTRACT COMPLETION DATE</p> <p>31/07/2020</p>	<p>CURRENT CONTRACT COMPLETION DATE</p> <p>05/08/2020</p>	<p>CONTRACTORS PLANNED DATE FOR COMPLETION</p> <p>14/0</p>
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6. Multiple compensation events

- never easy to manage multiple compensation events on a large fast paced project - they have to be assessed as they occur
- again, has to be a common understanding/intent that it is in both Parties interest to keep on top of these
- by agreement lots of small CE's could be assessed as one for cost/time
- each period assess cumulative effect of that month's compensation events, and ensure that individual programmes/quotations once added together capture the full movement in Completion
- make sure that wherever there is a delay that there are "CE" labelled activities along the critical path that demonstrate the delay being claimed
- however difficult they are to assess now – it will only get worse with time and become more subjective



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7. Contractual baselines and earned value

- under NEC contracts once a programme is accepted, that becomes the new Accepted Programme and is in effect the new "baseline" for managing progress and change against
- we don't report against the original programme, just the last Accepted Programme so each acceptance brings a revised baseline
- this potentially horrifies project controls people when it comes to assessing "earned value" as in effect with every acceptance of a programme if you use that baseline your CPI/SPI will be reset to "1" each period



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7. Contractual baselines and earned value

- NEC contracts don't mandate use of earned value, but many contracts introduce that within the Scope as a mandatory requirement
- no trick here – just need to have a separate “performance measurement baseline” to assess earned value and agree rules as to when that baseline can be updated/reset
- earned value baseline used to report change from original plan in terms of cost performance and schedule performance
- last Accepted Programme baseline allows reporting of change since the last Accepted Programme – which is the last point at which everyone agreed that was a good representation of progress and planned future work

Summary

- these real-world issues are never straight forward and there is no “magic wand” to solve all problems
- there needs to be a good level of education as to what the contractual rules are and why/how they should be followed
- the behaviors need to be in place to encourage these issues to be addresses and kept on top of
- the only alternative is to put issues or change in the “too difficult box” and leave everything until the end – how well does that normally work out...



Summary

Thanks you for listening – any questions?

Come and visit us on our GMH Planning/
BuiltIntelligence stand where you will find Alex,
Chris or myself to discuss any contractual issues or
give you a demonstration of FastDraft



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