

# 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 really consider that it would be contractually or practically correct blindly to ignore matters that you know have changed by taking the words of that clause so literally?

Unfortunately in my experience some people appear to take that view. They suggest that you assess the compensation event against the last accepted programme without taking into account anything that may have happened since that programme was accepted. In their interpretation, that is what the contract says.

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transfer of the ownership of IP from its supply chain. This could be along principles already present in secondary option clause X9 of the NEC3 Professional Services Contract.

Such a licence could also include the need for designers to waive their moral rights in their IP. A distinction may have to be made between IP created specifically for the project ('foreground IP') and that already owned by the designer prior to the project ('background IP'). Invariably, there will be tensions with the supply chain, keen perhaps to preserve IP ownership in its creations, which will need to be resolved.

## Potential and practicalities

BIM represents huge opportunities in construction. To ensure the industry maintains momentum, it needs to develop technologies and practices that tap its full potential.

Traditional IP ownership and licensing structures must be reviewed to accommodate the unique features of BIM, and the NEC3 Professional Services Contract could provide the ideal starting point to achieve this.

## References

Cabinet Office (2011) Government Construction Strategy, 2011. [http://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/101000/gcs\\_strategy\\_2011.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/101000/gcs_strategy_2011.pdf)

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## 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 producing 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 have got themselves into this situation, then we have to be able to use the contract to try to get back on contractual track.

## Non-implemented compensation events

I wrote an article in NEC Users' Group newsletter issue 50 which had a similar type of problem. The ECC says you show the effects of implemented compensation events but it does not expressly mention non-implemented compensation events. By non-implemented compensation events I mean those that are currently being quoted or assessed and in the meantime are being carried out on site (as per quotes requested under clause 61.1).

The conclusion I came to within that article was that you must show notified compensation events on the programme (which I believe meets the first bullet of clause 32.1) as it would be non-sensical not to, particularly when they are affecting the programmed works and possibly even the critical path and hence planned completion.

By not showing non-implemented compensation events on the programme it would mean that the programme was not realistic and therefore a reason not to accept the programme under 31.3. I thus believe it is contractually incorrect to those who say you should not show non-implemented compensation events on the programme, despite the second bullet of 31.2 only specifically mentioning implemented ones.

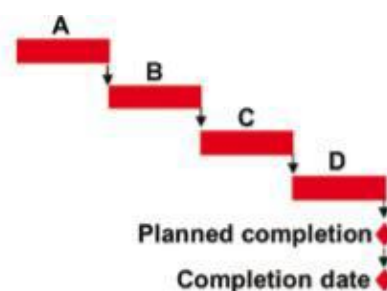
Whenever you assess a compensation event, my general approach is that you take into account any progress and change that you were aware of up to the point that the compensation event was notified by the project manager (or if notified by the contractor, the point at which the project manager agreed that it was a compensation event and requested a quotation). This seems to be compliant with the first bullet of clause 32.1, although I do accept it would be more useful if either the contract or the guidance notes more expressively and clearly made this point.

Following the same logic, when it says you use the accepted programme to assess a compensation event against, you should take that as the starting point but not then blindly ignore everything that

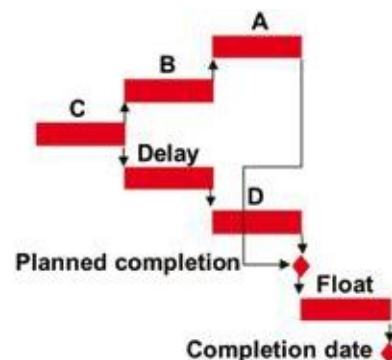
you know for a fact has already changed since it was accepted.

## 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.



The contractor subsequently decides to do C first, effectively creating 8 weeks float on D. But a compensation event then arises that delays the start of D by 4 weeks, reducing the float to 4 weeks.



The contractor has either not had its latest submitted programme accepted or possibly even deliberately has not updated its programme. Either way it now claims that, by using the original accepted programme, it is entitled to a 4 week delay to planned completion and hence completion date, and all of the preliminary costs that go with it.

In reality the delay to activity D did not at that point in time affect planned completion and therefore there would be no entitlement of time, but there may be cost which would be assessed on its own merit.

It is worth noting that clause 64.1 also states that the project manager can make its own assessment of a compensation event if the latest programme submitted has not been accepted. This must be because the project manager does not agree with the way that the contractor has assessed changes and progress since the last accepted programme, and can assess it directly. If it were the case that you only used the last accepted programme, then this bullet would not be needed as the rules would be clear.

# FAQs



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NEC USERS' GROUP SECRETARY

This is a selection of recent questions to the NEC Users' Group helpline and answers given. In all cases it is assumed there are no amendments that materially affect the standard NEC3 contract referred to.

## Activity schedule and programme changes

### Question

We have an NEC3 Engineering and Construction Contract (ECC) option A (priced contract with activity schedule) project on site where the programme has been changed. Our funding is time-critical and we are questioning how we can best release payments. Considering subclause 32.1, can the project manager and contractor mutually agree to revise the activity schedule to co-ordinate with the accepted revised programme, including splitting original contract activities within the activity schedule and tasks within the revised programme into two sub-activities, for example 'delivery of materials on site' and 'final complete installation'?

### Answer

The main ways to change the activity schedule are as a result of a compensation event (subclause 63.12) or if the contractor changes its planned method of working (subclause 54.2). Neither of these instances apply in this case.

The only way you can achieve what you require is if the employer and contractor agree to change the contract and it is confirmed in the way set out in subclause 12.3.

## Subcontractor's retention in target cost contracts

### Question

We are working on an ECC option C (target contract with activity schedule) contract and the project manager is not including the amounts of retention we have deducted from payments to subcontractors in his assessments of the price of work done to date. Subclause 11.2(29) defines the price for work done to date as defined cost which will have been paid by the contractor before

the next assessment date. In turn, defined cost in subclause 11.2(23) states that defined cost is the amount of payments due to subcontractors for work which is subcontracted without taking account of amounts deducted for retention.

We believe the project manager is doing this as the secondary option clause X16 for retention has not been included in our contract, but we are including it in our subcontracts. We therefore would be paid monies that we have not paid if he did not deduct amounts deducted for retention from our subcontract payments. What do you think?

### Answer

We consider that the project manager is incorrect. The amount that you are paid for the subcontractor is the amount before deduction of retention, as stated in subclause 11.2(23). It is irrelevant whether or not your main contract has retention included.

## Basis of cost in assessing compensation events

### Question

We are working on an ECC option C contract where the project manager has issued an instruction to change the works information. This constitutes replacing an item of furniture with one of a different specification. The project manager notified this as a compensation event and instructed us to submit a quotation. We have submitted our quotation on the basis of change of actual cost, but the project manager believes that it should be assessed on an add/omit basis. Could you please advise the correct method of assessment?

### Answer

Compensation events are assessed based upon the effect that they have upon defined cost – see subclause 63.1. In basic terms, you will therefore need to forecast what the defined cost of the works will now be with the compensation event and from that you deduct the forecast of what the defined cost would have been without the compensation event. What you have in the activity schedule is irrelevant in this calculation. Instead you add or subtract the amount you come up with to the amount in the activity schedule to arrive at a revised figure for this activity. If you have made a mistake in pricing the original item, then that gain or loss is preserved; compensation events have a neutral effect in that respect.

## Defined cost after completion

### Question

We have an ECC option C contract which is nearing completion. The contractor's planned

completion is some weeks in advance of the completion date. Completion is likely to happen on or around planned completion and the project manager will certify completion within one week of completion. When does defined cost cease to be incurred or payable? Is it when the project manager has decided the date of completion, or some other date? If for example the contractor still has commercial staff managing the contract within the working areas after completion, is this defined cost?

### Answer

Much depends on precisely what the staff are doing. If, and to the extent that, they are correcting defects then such cost will be disallowed – see the fourth main bullet of subclause 11.2(25). Otherwise, it will generally be paid. Those staff do though need to be providing the works (as defined by subclause 11.2(13)), otherwise they are disallowed – see seventh main bullet of subclause 11.2(25). Those people also need to be either working in the working areas or have the working areas as their normal place of work. The contractor will likely have to clear and make good the area of its temporary compound, close down any remaining subcontractor and supplier accounts as best it can, and so on.

## Responsibility after take over

### Question

What effect does certifying take over for part of the works have on the contractor's insurances and liability? We have an ECC option A (priced contract with activity schedule) where vandalism and anti-social behaviour have increased in recent months.

As a result of this, the contractor is keen to protect itself at the earliest opportunity.

### Answer

Take over of all or any part of the works occurs when the employer starts using that part (or all), unless that use is for a reason stated in the works information or to suit the contractor's method of working – see subclause 35.2.

One of the employer's risks listed in subclause 80.1 is loss of or wear or damage to any part of the works that has been taken over (fourth main bullet). Until take over, the contractor is responsible for this (subclause 81.1) and has to insure it (subclause 84.2). Take over is therefore important because once any part of the works is taken over, the contractor is not liable for damage unless the contractor causes it. ○

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A similar series of questions could result if you did not take into account any other changes that occurred since the last accepted programme. Consider the following examples.

- A programme has been issued for acceptance and it is 1 week before it may be accepted, yet today we have to put in a quotation for a compensation event. Do we use the 'old' programme or the 'new' programme?
- The contractor has 3 weeks to produce a quotation, does it use the accepted programme at the start of that 3 week process or, if 1 day before it goes in, a new one is accepted, does it change the quotation?
- You are assessing two compensation events at the same time – both of which are on

the critical path. If you assess the first one and that impacts planned completion, do you then use that programme to assess the impacts of the second, or simply assess it against the original ignoring the effects of the first?

- What if the accepted programme shows in situ concrete and you have since changed to precast units, which completely changes the programme?

## Follow the same principle

All of the issues and questions listed above are dealt with if you always follow the same principle: whenever you become aware of a compensation event, you take the accepted programme at that point, and take into account any progress and

change that occurred up until that point.

I think this subject is an example where future revisions of the contract can be tightened up so that the parties have an even clearer understanding of how compensation events should be assessed.

In the meantime as an industry we have to make the best of the words that we have. We should come to a recognised consensus that what I have proposed in this article is the only logical and, more importantly, contractual way for both parties to assess compensation events in order to get the fairest result each time. ○

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