

'The Prices are the lump sums and the amounts obtained by multiply the rates by the quantities for the items in the Bill of Quantities'.

Thus to establish the total of the prices, and from this the contractor's share in accordance with clauses 53.5 to clause 53.8 inclusive, I do not believe that there is any doubt that re-measured quantities must be used to arrive at the said total of the prices.

However, the above clarity introduced within NEC3 is somewhat clouded by what I have set out above concerning the opera-

tion of clause 60.6 under NEC2. The principles of clause 60.6 remain in NEC3. Therefore in the scenario I have been considering, both options—of re-measuring the item and evaluating it at its bill rate, or treating the error as an ambiguity or inconsistency and assessing it as a compensation event on the basis of actual cost—seem to exist in the new drafting. This apparent conflict could be argued as an ambiguity in itself!

Conclusions

In conclusion, although some may argue that my contractual interpretation under NEC2

is based upon somewhat tenuous links, I am still of the opinion that the final total of the prices must be derived from the actual quantities of work executed, in order to give the share mechanism business efficacy.

However, any doubt here is intended to be clarified by the various amendments made within NEC3, which clearly indicate this to be a re-measurement form of contract – save for the ambiguity of leaving the operation of clause 60.6 unchanged within NEC3.

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Programme effects of early warnings

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As with any form of contract, there are regular reviews and revisions that ensure the contract moves with the times and meets industry requirements. The NEC3 Engineering and Construction Contract (ECC3) saw a number of enhancements, such as inclusion of key dates and alterations to the early-warning process.

A revision issued as an amendment in June 2006 – after the main issue of ECC3 in June 2005 – was alteration to clause 32.1. It is a subtle change, but one that I have seen misinterpreted by other parties to the potential detriment of the contract programme.

The amended clause is shown below, with the deleted element of it shown in struck-through italics.

32.1 The contractor shows on each revised programme

- the affects of implemented compensation events *and of notified early warning matters.*

Given that it used to be a contract requirement to demonstrate the affects of early-warning matters on the programme, is the suggestion now that these should not be shown? Also, considering that 'implemented' compensation events only become implemented after a lengthy process (once cost as well as time is agreed), should 'non-implemented' compensation events be shown?

There is a grave danger that any contract can be taken too literally and it often requires a little more thought in conjunction with other contract clauses as to what is actually required. I have frequently experienced cases where this clause has been taken literally to mean that only when a compensation event becomes implemented should it ever appear on the programme. Let's consider this with the use of an example.

An example

A contractor is excavating a trench for the installation of a large-diameter drainage pipe run. Half way along the route a concrete obstruction is found which prevents the pipe run being installed as designed. Works are stopped and an early warning raised. The next day a risk reduction meeting is held and the matter discussed. The contractor has investigated the concrete obstruction and it appears to be a quite heavily reinforced base of an old building that was not

shown on any works information.

The matter is discussed at length by the contractor and project manager, and only two solutions are apparent. The first is to re-route the pipe run to avoid the obstruction, and the second is to break out the obstruction to retain the original route. Re-routing the pipe will add two weeks to the programme, whereas the break-out option will add one week to the programme but will be significantly more labour intensive. The project manager instructs the contractor to submit quotations for both proposed instructions to change the works information in order for it to choose which of the two options is the most beneficial. The contractor has advised that it will take two weeks to draw up the quotations and issue them to the project manager for acceptance.

It is also time to issue the next programme for acceptance as it has been four weeks (time interval stated in contract data part 1) since the last issue. What should therefore be shown on the programme in terms of this proposed instruction that will most likely be a compensation event?

Essential to show reality

It is essential to show reality at all times and the prime objective of the contract programme is to reflect how the remaining works are intended to be carried out. The simple test I carry out on any revised programme is to run a filter on the next one or two weeks worth of activities. Are these the activities that are really intended to be carried out on these dates? If they are not, then this is *not* the correct programme and does not represent the contractor's plans realistically. Under clause 31.3 it is also a reason not to accept the programme by the project manager.

In the above example, if we were to ignore the early warning / notified compensation event, then the programme logic would suggest that we would continue installing the pipe – which we know is not possible.

Therefore I would be looking to demonstrate the minimum guaranteed affect that this notified compensation event will have on the programme. The following events have already happened or will happen

- one day lost since hitting the obstruction and having the risk reduction meeting
- two weeks required by the contractor to

produce a quotation

- two days required by the project manager to review quotations and accept one of them, resulting in this being an implemented compensation event
- two days mobilisation required for labour and materials by the contractor for either of the two options
- minimum one week additional work required prior to proceeding with pipe installation.

This information will be added to the programme and represents the known impact that this work will have. If the two-week option for re-route of the pipe is chosen at a later date, then the additional one week will be added to the programme at that time. All this will be captured in a comprehensive programme narrative issued along with the revised contract programme. These activities may or may not affect the critical path and hence planned completion, but either way the programme narrative will explain this.

Proposed amendment to 32.1

While I understand the reason for removing the element regarding demonstration of notified early-warning matters, I believe that it would be useful if clause 32.1 was amended as follows (amendment shown in yellow italics).

32.1 The contractor shows on each revised programme

- the affects of implemented compensation events *and the agreed affects by both parties of any matter as discussed at a risk-reduction meeting*

This would capture every event that is between the stages of an early warning and an implemented compensation event. While drafters of the contract may consider this point, the requirement to demonstrate as detailed above is *already* implied in a number of different clauses of the contract. However, it may not be as obvious to some, leaving them in doubt as to what should or should not be shown.

For further information please contact the author at glenn.hide@birsemetro.com. More such programme details are covered in the NEC3 ECC Programming Workshop, for details see www.neccontract.com