Compensation events and movement of completion date

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It is very clear within the suite of NEC3 contracts that, in terms of programme, there are two distinctly different completion milestones to track and report against: planned completion and completion date.

The contract is also clear that the completion date moves by an agreed amount once a compensation event is implemented (i.e. quote agreed along with associated time effects). However, this can cause a practical problem for both parties on a project where

- planned completion is constantly changing
- compensation events take several weeks or even months to be agreed
- there are numerous compensation events occurring, of which some are inevitably critical.

The consequence of the above is that planned completion can be flying around the programme with the completion date not adjusted for several weeks or months.

Typical example

Table 1 demonstrates the point, where planned completion is moved by a number of notified compensation events on a typical project.

In the example, the following events occur in the following sequence.

1. Programme revision 01 accepted at week 0.
2. In week 2, compensation event 03 is notified by the contractor due to no access to site, which the contractor demonstrates has an effect of 2 weeks on planned completion.
3. In week 3, compensation event 07 notified by contractor due to free-issue material not made available to contractor as per accepted programme, which has a further 1 week effect on planned completion.
4. Programme revision 02 issued at week 4, which shows a cumulative 3 week delay to planned completion.
5. In week 6, compensation event 12 notified by contractor due to design information supplied late to contractor, which has a further 3 week delay to planned completion.
6. In week 8, compensation event 21 notified by contractor due to emergency maintenance works being carried out, thus effecting critical-path works and planned completion by a further 2 weeks.
7. Programme revision 03 issued at week 8, which shows a cumulative 8 week delay in planned completion.
8. In week 9, compensation event 24 notified by contractor due to third-party interface, which has a further 1 week delay to planned completion.

It is not inconceivable that the quotation for the first compensation event takes 9–10 weeks to become implemented. At this stage, week 9, the planned completion date exceeds the completion date by 9 weeks.

It is only when the compensation events are implemented that the completion date 'catches up' with planned completion. The problem is how long this takes and the associated liability and perception in the meantime. If any team member picks up the above programme in say week 8, all they will see is a disparity between completion date and planned completion, of which it will not be evident from the programme alone whose liability that is. This is not too much help to either party as, from both the employer's and contractor's perspectives, they are unsure of the contractor's liability of planned completion beyond completion date.

Potential solution

A potential easy solution to the issue could be as follows. The contractor moves the completion date when it believes that planned completion has been moved due to a compensation event, providing – and only when – the following has been satisfied

- reason and effect of delay is transparent in the current programme and the programme narrative
- project manager accepts that the event is a compensation event
- project manager accepts that the time indicated in the programme is representative of the time for which the employer is liable.

If any of the three conditions is not satisfied, then the project manager does not accept the programme.

In the example, the contractor could have showed programme revision 02 with a completion date moved by 3 weeks, the same as planned completion (i.e. zero delay). If the project manager accepts a programme, he or she is only accepting that the time principle indicated in the programme due to individual compensation events is correct – that is, access was denied for 2 weeks and material was not provided for 1 week, and neither of these are the contractor's liability. Time is correct and ascertained now, while the cost of that event will be ascertained over the coming days and weeks as part of the quotation and assessment process.

If some people consider it difficult to agree the time affects of an event at the time of the 4-weekly programme issue (4 weeks being a typical contractual interval for programme submission), I can assure them it will be a whole lot more difficult further down the line with further progress (some good, some bad), re-sequence and other compensation events affecting the programme.

Any retrospective assessments of programmes is always subjective – the only time one can get the true picture is by assessing it when it actually occurs, and agreeing it very quickly thereafter. This is exactly where NEC3 contracts are trying to steer all parties towards. There is no rocket science here – just good-practice project management.

In terms of the quotation, it is important to note that a 1-week delay on the programme is not equal to a predetermined cost, such as 1 week delay = £10,000 'preliminaries'. Each compensation event would be assessed on its own merits and true effect, and will be what it will be, not a predetermined amount for a certain period of delay.

Benefits to parties

The benefits of agreeing the movement of completion date at the time of programme issue are primarily two-fold.

Firstly, there will be massive help to the commercial teams from both sides. When a quote issued is reviewed, the programme will already have demonstrated the time effect as agreed with the project manager and will not be subjective. This takes a little pressure off the commercial teams as arguably it does not matter so much if it takes a little longer to agree the final cost element. In the example above, compensation event 03 has a 2-week time affect, compensation event 07 has a 1-week time affect, and all other compensation events issued up to that date have no time affect. All that the commercial teams then have to agree is the direct cost of the compensation event along with the extra-over cost of the delay to planned completion.

Secondly, there will be clear visibility and transparency to both parties as to the status of the completion date on each programme issued for acceptance and associated liability.

Table 1. Example showing how a contractor could wrongly appear to be running up to 9 weeks late due to the typical 9–10 weeks taken to agree the time and cost effects of compensation events – agreeing the time effect immediately would ensure the agreed completion date more closely matches the planned completion date

Programme revision	01				02				03	
Week	0	1	2	3	4	5	6	7	8	9
Compensation event no.			03	07			12		21	24
Delay caused by event: weeks			2	1			3		2	1
Difference between completion and planned completion: weeks	0	0	2	3	3	3	6	6	8	9

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Use of NEC in legal jurisdictions other than English law

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Organisations, public and private, across the world are wanting to use NEC contracts for all the good reasons that explain why, for example

- they are specifically endorsed for use by the UK and South African governments
- they have been used successfully in more than 20 countries in the private and public sectors (Figures 1 and 2)
- global organisations, such as Glaxo, are using NEC
- after more that 15 years of use for billions of dollars worth of projects, there is no case law relating to the words of NEC contracts.

This article is intended to highlight some of the few issues that need to be addressed to make NEC contracts suitable for use in jurisdictions other than English law. It was prompted and informed by the excellent paper and lecture given by Humphrey Lloyd on this subject (see issue 45). That paper, which is published in a special issue of the NEC Users' Group newsletter, is recommended to any interested reader. The aim of this article is to give some of the points made in Humphrey Lloyd's paper a wider audience.

The following sets out some of the key points of specific relevance to a potential user under a jurisdiction other than English law. As stated by Humphrey Lloyd, the issues are all peripheral to the core provisions of NEC contracts and, with only minor modifications, they can be used under most jurisdictions.

This article does not constitute legal advice, but is intended to encourage consideration of the use of NEC contracts in new countries and to assist lawyers that may be asked to review the contracts for use in a particular jurisdiction. It should be noted also that any such lawyer is strongly advised to obtain proper training on the use of NEC contracts before attempting to draft additional conditions of contract (option Z). The author's experience is that some lawyers (both in UK and outside the UK) have a habit of proposing unnecessary, unwieldy and/or simply incorrect amendments to a contract they do not really understand.

NEC structure designed for global applicability

NEC contracts were designed to

- use plain English that can be read and understood (and translated if necessary)
- be free of direct reference to provisions of any particular law and so, as far as possible, be able to be used globally.

Core clause 12.2 of the NEC3 Engineering and Construction Contract (ECC) states, 'This contract is governed by the *law of the contract*'. This law is simply stated in the required place in the 'contract data', one of the documents that forms part of the contract.

It was recognised that certain modifications and additions may be required to use NEC contracts in specific legal jurisdictions. In the UK – which includes Scots law and Northern Ireland law as well as the laws of England and Wales – there are two 'secondary options', each a 'Y clause' under ECC. They are

- Y(UK)2 – the payment timing provisions of the Housing Grants, Construction and Regeneration Act 1996
- Y(UK)3 – the Contracts (Rights of Third Parties) Act 1999.

In New Zealand, a secondary option (provisionally called Y(NZ)2) is being developed with advice from local lawyers to deal with particular issues under New Zealand law.

A few issues need to be considered

The plain and direct language used by NEC contracts in general reduces reliance on interpretation of words used in the particular jurisdiction. Instead, the natural and necessary focus of any required interpretation will be on the intended meaning of the words themselves in all the key processes within an NEC contract.

Most jurisdictions recognise the principle of *pacta sunt servanda*, meaning 'agreements must be observed' and the words of ECC include (clause 12.4), 'This contract is the entire agreement between the Parties.' In essence the contract sets out the rules governing the actions required of the parties and rights of the parties. Anyone deciding a dispute under the contract will use the words in the contract and only deviate from them if required to do so by the law governing the contract.

However, in some jurisdictions it is not only permissible but normal to consider pre-contract negotiations and documents such as NEC guidance notes. In such cases clause 12.4 may not be effective. Humphrey Lloyd goes on to note that under certain international arbitration rules, arbitrators may – and in some cases are required to – take into account 'relevant trade usages'. It may be appropriate to clarify that the guidance notes may be used to guide interpretation.

ECC has a named project manager as its key contract administrator. The project manager is engaged by and acts on behalf of the employer. However, he or she is required to 'act as stated in the contract' (clause 10.1), including when assessing and certifying amounts for payment and assessing the effect of compensation events. The contract sets down well-defined rules for each of these actions.

In some jurisdictions, particularly outside common-law countries, the concept of an agent of the employer being able to assess amounts impartially and according to the rules of the contract may be difficult.

Dispute resolution

ECC provides for adjudication as the first stage in the resolution of disputes, followed by the

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In the example above, at the time of the first programme re-issue, it is a cast-iron certainty to both parties that the delay to planned completion is 3 weeks for the two delays, one being denied access to site of 2 weeks and the other being delay in providing critical free-issue materials of 1 week. There is little point to either party in denying now that the completion date will move by 3 weeks. It will be enhancing the visibility and transparency that the programme is trying to bring, hence better to move it now than wait for the commercial teams to agree and implement the detail of the quotation.

Conclusions

NEC3 contracts make it very clear how important the contract programme is in terms of both a management and a commercial tool. The programme has to reflect everything known about the works now, which will also give clarity as to the outcome of any future events as and when they happen.

The assessment of time and cost are fundamentally two components that can be practically separated out – although in the final assessment they will be brought together. Time invariably should be relatively easy to agree as it is not directly proportional to any cost assessment. The project manager has to take responsibility for pushing for a quick agreement on the time element to help the project as a whole. The follow-on cost element will be reviewed on its own merits and will 'be what it will be' in accordance with the detail and the timescales of the contract.

The solution proposed in this article should lead to a better understanding to all parties and help the programme acceptance process, with the programme becoming a clearer, more transparent management tool for the whole project team. That team can then get on with building the job – which surely has to be both parties' prime objective. The contract intends for the programme to become the primary management tool for everyone on the project – not a contractual hindrance.

Remember: by agreement, almost anything is possible!

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