

Answer

The simple answer is no, there is not, unless the stated method of measurement provides for such. Unlike other standard forms of contract, there is no general clause in ECC option B to pay monies in respect of materials on site that are not yet incorporated in the works. Payment in this option is basically based upon work carried out – see the definition of price for work done to date in clause 11.2(28).

Can option X20 be used to deduct monies?**Question**

We are preparing an ECC option C contract on behalf of a client. Can secondary option X20 be used to outline deductions to be made in the event of a failure to meet a key performance indicator, or should this only relate to incentive payments? If the answer is no, should a Z clause be drafted to achieve this?

Answer

As worded, option X20 cannot be used to make deductions from the contractor (see the clear wording of X20.4). So, your client would have to write a Z clause changing X20 in the main contract to achieve this. The Users' Group helpline is unable to comment on the meaning or wording of Z clauses, other than that they should be used sparingly and carefully written by somebody who knows and understands the contract they are trying to change.

In any event, it is possible that such a clause may be construed as a form of liquidated damages, in which case it must be based on a genuine pre-

estimate of the costs to the employer of such an event, otherwise it is unlikely to be enforceable. That is, however, a legal point on which the helpline is also unable to offer advice.

Use of project manager's assumptions**Question**

I am currently administering an ECC option A (priced contract with activity schedule). Within this contract an early warning was notified in relation to re-routing a pipeline to an area both outside of the working area and the extent of the site information. Other works nearby encountered rock and it was assumed the new route would also encounter rock. We tried to gain access for a site investigation, but the land owner did not grant access immediately.

As it was a critical-path item, the project manager decided to request a quotation and state an assumed amount of rock likely to be encountered. Before the quotation could be provided, access was granted and the contractor was able to undertake numerous trial holes on the proposed route of the pipe. A quotation was then provided based upon this investigation, but no quantity given or noted within the quotation. Despite numerous requests, the results of the site investigation were not provided to the project manager.

The work is now complete and the contractor has notified a new early warning, noting more rock was encountered than was assumed when preparing the quotation. The project manager has asked for proof of this. A record of what was actually encountered has been provided and agreed with the supervisor. A drawing has been provided which is supposedly a record of the levels

of rock encountered during the trial holes. This differs from the actual level encountered by 1.5–2 m. My query is whether this is a compensation event or not, given the contractor undertook the site investigation and also provided the assumption? Also, does this negate the assumption stated within the original request by the project manager?

Answer

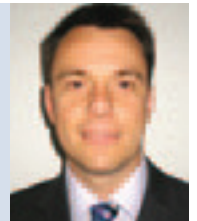
The project manager did the correct thing in dealing with the compensation event from the outset – that is just the sort of problem that clause 61.6 is designed to deal with. I think you may now be looking at it from the wrong angle. The question is, was the quotation the contractor gave for the original compensation event based on the project manager's assumption or not? The project manager should know this since he or she will have looked at the contractor's calculations in deciding whether or not to accept the original compensation event. If it was based upon the project manager's original assumption, then that assumption has to be changed if it is proved wrong from the rock actually found, and that change is another compensation event – see last sentence of clauses 61.6 and 60.1(17).

If, however, the quotation for the original compensation event was not based upon the project manager's assumptions but on what the contractor assumed it would find following its own investigations, then it is not a compensation event. Clause 60.1(17) only applies to assumptions made by the project manager, not those made by the contractor. ○

For further information please email the NEC helpline at info@neccontract.com

Bill of quantities or works information: which do you price at tender stage?

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A question sometimes asked of the NEC Users' Group helpline is: 'What happens under the contract if something is missing in the bill of quantities that was clearly indicated on one of the tender drawings?'

It is a relatively simple question. Let us say you are tendering to build a new sports stadium under the NEC3 Engineering and Construction Contract option B (priced contract with bill of quantities), and the drawings clearly show a roof. However, the bill of quantities make no reference to it. If you notice this at tender stage, would you or should you programme or price the roof? I accept that this is a pretty extreme example, and unlikely to happen so drastically, but smaller examples of this occur on most projects.

The initial answer of course is to pick up the telephone during the tender and get clarification – this at the very least will help your credibility and relationship with the potential employer. However, what happens for the smaller elements that you genuinely do not notice and hence do not question at tender stage?

There are a few contractual facts that we can deal with here, some of which have been subtly changed in NEC3 contracts compared to NEC2.

- The bill of quantities is not works

information, it is a contract document.

- By the very nature of option B, the risk in producing and verifying the bill of quantities lies with the employer (as opposed to option A, where the risk in missing something off the activity schedule lies with the contractor).
- The bill of quantities has not included an element to price specifically for the roof. Clause 20.1 requires the contractor to provide the works in accordance with the works information. Under clause 17.1 this is an ambiguity or inconsistency between contract documents and the project manager should give an instruction to resolve the matter.
- Clause 60.6 states that the project manager corrects mistakes in the bill of quantities which are due to ambiguities or inconsistencies – it also states that each such event is a compensation event.
- Clause 60.7 states that in assessing a compensation event that results from correction of an inconsistency between the bill of quantities and another contract document, the contractor is assumed to have taken the bill of quantities as correct.

Taking the above points into account, the contractor in our example does not need either

to price or allow time within the programme to build a roof. The roof itself (if required) will be assessed as a compensation event, and this will assess both the entitlement of time and cost. This leads to the following important conclusions.

- As soon as tenderers notice something ambiguous or inconsistent, they should let the employer know. Tenderers may think they are giving up a potential commercial advantage, but it will give them real credibility during the tender and demonstrate their commitment to working in a 'spirit of mutual trust and co-operation', as well as avoiding a contractual or political dispute on the project.
- Notwithstanding the above, tenderers should price and programme the bill of quantities, not the works information.
- Any omission from the bill of quantities will be assessed as a compensation event and contractors are entitled to costs of the change as well as the effects of time if the planned completion date is delayed. ○

For further information please contact the author at gmhplanning@talktalk.net