NEC PROGRAMME MYTHS - Structure

• Introduction

• Myths around the Accepted Programme (Ewen Maclean)

• Myths around the Accepted Programme and compensation events (Glenn Hide)
NEC PROGRAMME MYTHS - Introduction

• The programme is the beating heart of the NEC3 contract

• Central to its administration

• The programme can be identified in the Contract Data

• Provisions for the submission and revision of the programme under clauses 31 and 32
NEC PROGRAMME MYTHS - Question 1

What should the contractor show in a revised programme?

- The *Contractor* must only show implemented compensation events
- The *Contractor* must not show potential compensation events
- The *Contractor* must not show Early Warnings
NEC PROGRAMME MYTHS - Question 1

Clause 32.1:

- the actual progress achieved on each operation and its effect upon the timing of the remaining work,
- the effects of implemented compensation events,
- how the Contractor plans to deal with any delays and to correct notified Defects and
- any other changes which the Contractor proposes to make to the Accepted Programme.
GETTING IT RIGHT:

What should the Contractor show in a revised programme?

• The Contractor should show implemented compensation events; AND

• The Contractor should show all matters affecting the progress of the works; and

• The Contractor can show early warnings in a manner that allows the parties to make key decisions. (If the matter is affecting the works then it will be a compensation event or a culpable delay)
What happens if the *Project Manager* does not respond to a programme for acceptance?

- The programme is deemed accepted if the *Project Manager* does not respond
What happens when the programme for acceptance is not accepted or rejected?

- The rejected programme is of no use
What happens when the *Project Manager* does not respond to a quotation where alterations to the Accepted Programme have been made in the quotation?

- Alterations to the Accepted Programme result in a new Accepted Programme
NEC PROGRAMME MYTHS - Question 2

GETTING IT RIGHT

What happens if the *Project Manager* does not respond to a programme for acceptance or programmes submitted with quotations?

- The programme is simply not accepted
- The only deemed acceptances within the NEC3 are in relation to compensation events
- Dealt with as a compensation event under clause 60.1(6) due to the *Project Manager* not responding to a communication from the Contractor
NEC PROGRAMME MYTHS - Question 2

GETTING IT RIGHT

• The unaccepted programme is not all bad and may contain significant useful information that can still be used by the Project Manager in assessing compensation events.

• Compensation events with alterations to the Accepted Programme may be accepted by default but this does not mean they become the Accepted Programme under clause 31.3.
NEC PROGRAMME MYTHS - Question 3

What liability does the *Project Manager* take on with the acceptance of the programme?

- The *Project Manager* / the *Employer* takes on responsibility for the programme

- Compensation events contained within the programme are accepted

- If it shows a revised Completion Date that Completion Date is accepted
NEC PROGRAMME MYTHS - Question 3

GETTING IT RIGHT:

What liability does the Project Manager take on with the acceptance of the programme?

- Acceptance of the programme is not an admission of liability on behalf of the Employer for everything contained in the programme, noting in particular clause 14.1

- Compensation events arising still fall to be considered under the provisions of clause 6 not from the acceptance of the programme

- The Completion Date can only be revised as a consequence of a compensation event
NEC PROGRAMME MYTHS - Question 4

Who owns the float when assessing compensation events?

• The Contractor !!

• The Employer !!!!!
NEC PROGRAMME MYTHS - Question 4

Who owns the float when assessing compensation events?

- Contractors have tried to hide float and think it is in their interest not to show it
- Contractors have extended activities to “mask” float
- Employers have tried to use Contractors time risk elements in assessing compensation events
NEC PROGRAMME MYTHS - Question 4

GETTING IT RIGHT:

Who owns the float on a programme, particularly when assessing compensation events?

- It depends what float you are talking about:
  - Total float shared by both Parties – either can use it
  - Time risk allowance is Contractor owned – this is risk that they have allowed for against their activities, for which is risk elements that is their risk under the contract
  - Difference between planned Completion and Completion Date – “terminal float” – is again Contractor owned and can not be used up in the assessment of compensation events
NEC PROGRAMME MYTHS - Question 5

How do you assess a compensation event against an accepted programme?

- You assess the compensation event against the last accepted programme, taking into account no progress or any other change!
Assessing compensation events: which programme do you use?

GLENN HIDE GMH PLANNING

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 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.

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 control, 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 61.3).

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 52.1) 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.

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.

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NEC PROGRAMME MYTHS - Question 5

How do you assess a compensation event against an accepted programme?

- What then happens if that accepted programme is several months old and contains logic that is now clearly known to be wrong?
- A programme has been issued for acceptance and it is 1 week before it may be accepted – to assess a CE do we use the ‘old’ programme or the ‘new’ programme?
- 1 day before a CE quote goes in a new programme is accepted – should that change the quotation?
- Two CE’s assessed against the last accepted programme might have a cumulative delay if one assessed against each other but not if they are looked at individually?
- What if fundamental logic/way of doing things has changed?
NEC PROGRAMME MYTHS - Question 5

GETTING IT RIGHT:
How do you assess a compensation event against an accepted programme?

• All of the previous issues 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.

• Otherwise could even be in the Contractors interest to get programme rejected if he thinks he would get a better result against the original one?

• NEC3 does not probably state this expressly enough within the clauses or the guidance notes but it is what it clearly implies
NEC PROGRAMME MYTHS - Question 6

Who is the accepted programme most important to?

- Employer – the Contractor only ever uses it as a reporting tool !!!

- Contractor – it is no benefit to the Employer and they would be ill advised to accept a revised one !!!
How frequently is a revised programme that has been issued for acceptance formally accepted on your project(s)?

- Every 4 weeks/month: 35% (44)
- Every 2-3 months: 30% (37)
- Rarely accepted: 32% (40)
- Never accepted: 2% (3)
In your experience, who do you genuinely feel would benefit from a well managed/regularly updated programme?

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<thead>
<tr>
<th>Party</th>
<th>Percentage</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contractor</td>
<td>0% (0)</td>
<td></td>
</tr>
<tr>
<td>Employer</td>
<td>2% (2)</td>
<td></td>
</tr>
<tr>
<td>Both Parties</td>
<td>98% (124)</td>
<td></td>
</tr>
</tbody>
</table>
NEC PROGRAMME MYTHS - Question 6

GETTING IT RIGHT:
Who is the accepted programme most important to?

• The programme is only requesting what a good Contractor should be doing for themselves anyway

• A regular accepted programme will serve primarily two fold:
  1. A live management tool for the Contractor to manage the works with, and
  2. A mechanism to assess and agree change against for the life of the project

• Without an accepted programme neither party can be sure of liability in terms of the final outturn costs and overall Completion Date.