



It is vital on all NEC projects for employers, project managers, supervisors and contractors to make every effort to keep a regularly accepted programme in place.

While it can sometimes be difficult to get a programme accepted, not having an up-to-date realistic programme in place even for a short period means neither side will be clear on liability in terms of final outturn costs and also liability in terms of the completion date.

Project managers still have to assess compensation events if they have not accepted the contractor's latest programme.

And the longer non-acceptance goes on, the harder it will be for the project manager to assess compensation events accurately when the programme is so far out of date and other compensation events have yet to be quantified.

In my experience there are six main reasons that can result in delays in accepting programmes. I set out in this article how they can be overcome, either practically or contractually.

Project manager worried about what liability they are taking on by accepting a programme

The NEC3 Engineering and Construction Contract (ECC) clause 14.1 makes it clear what acceptance of a programme means – and importantly what it does not mean. If there is a compensation event shown in a programme that has been accepted, the acceptance does not mean that a compensation event has been agreed in terms of its principle or of its duration.

If in a programme submission the completion date has been moved without there being an implemented compensation event, it does not mean that by accepting the programme this is now the completion date. It can and should be corrected (i.e. moved back) on the next programme submitted for acceptance.

Project manager does not like the contractor's end date being beyond completion date

A key feature of NEC contracts is that there is a requirement for a separate planned completion and completion date. The fact that planned completion is beyond completion date is not one of the four reasons that the project manager can not accept the programme for.

If a project manager accepts a programme with planned completion being beyond completion date, this is not an acceptance of liability. The contractor cannot move completion date unless there is an implemented compensation event that justifies or agrees that movement.

Planned completion being beyond completion date suggests that the contractor will be liable for delay damages unless it can recover its own programme, or there are compensation events yet to be agreed that may or may not account for any gap between these two milestones.

Project manager not accepting programmes for a fairly spurious reason

Project managers should be looking at a submitted programme with an attitude of, 'I will accept this programme unless there is a reason not to', rather than, 'I want to reject this programme so let me find a reason why I can'.

Some project managers come from a background of other contracts where the attitude is never to accept or approve anything as there was a fear of liability that it brought.

It is as important for the employer to have an accepted programme as it is for the contractor, otherwise agreeing change on the project will grind to a contractual halt.

Contractor's programme not compliant with ECC clause 31.2 or works information, so waits until next month (or period) to get the next one accepted

When I was a contractor's planner, if ever I had a programme that was not accepted (it did happen once or twice), upon receipt of the reasons for non-acceptance I would turn those comments around and resubmit the programme within a day or two. I would also arrange a meeting to discuss the amendments made in the revised submission – which normally led to that programme being accepted within a few more days.

The key here is not to wait until the next programme issue to address the previous reasons for non-acceptance – as even if corrected there could be other reasons to not accept the next one.

Very quickly this could lead to a cycle of several months without an accepted programme.

Contractor artificially manipulates critical path to set itself up for future compensation events

It has been known for contractors to move activities around or increase durations to make previously non-critical items either critical or near critical. This could then make future compensation events which may or may not already be on the horizon more likely to affect future end dates and increase preliminary costs within the assessments.

Such behaviour would be a reason to not accept the contractor's programme as it would not be 'representing their plans realistically' or not 'practicable', but hard definitively to tie down to an absolute black-and-white answer. This is quite a risky strategy on the contractor's part to use up float it otherwise may need.

Even if there is a compensation event that includes time – it can only include associated costs that will or are likely to be incurred, so other than fee there is very little chance to make significant profits from compensation events. This is an issue where the parties do really need to get around a table and decide and agree on what is realistic or genuine in terms of the sequence of activities planned and agree measures to limit risk to either side.

Project manager expecting works to be rescheduled and overlapped to maintain previous completion date

This is one of the more common reasons for delays to accepting the programme. There have been compensation events but the employer expects the completion date identified in the contract to be maintained. Where possible and easy to achieve without any additional risk or cost to the contractor, then this is at the very least an implied obligation within the contract. This should not however be expected by any means, no matter what.

If there is an agreed sequence of works from last month on the critical path, and access is not given for a week which is a compensation event, the suggestion is that the planned completion and hence completion date (once the compensation event is implemented) should move by one week. There is probably a way that the completion date could still be achieved, but not without extra risk or cost on the contractor, which would need to start overlapping multiple activities.

There is not an obligation on the contractor to meet a fixed completion date no matter what it takes – there are simply 'penalties' or incentives to reward and discourage. There are delay damages applicable if the contractor finishes late for reasons of its own making or risk.

There is then a formal process within ECC clause 36 for acceleration if there is ever the need to ask the contractor to achieve an earlier completion date. The value of this acceleration is by offer and acceptance and

cannot be imposed upon the contractor. Unlike dealing with a compensation event, a project manager has no power contractually to make his or her own assessment of a quotation for acceleration and impose it upon the contractor. However, users should watch out for Z clause amendments that sometimes allows the project manager to do just that.

Conclusion

In conclusion, there are no benefits to either party in not having an accepted programme. ECC could probably be a bit clearer in its wording but, taking the words of the existing clauses together as they stand, you use the last accepted programme but take into account any progress and other things that have happened up until the point the compensation event had been notified and a quotation instructed. That is the only set of consistent rules that would give a fair and correct contractual answer in any eventuality.

The most important aspect to recognise is that if either party digs its heels in and will either not accept a programme (employer) or refuse to change a programme to allow it to be accepted (contractor), then the project is heading for a protracted dispute at the end. This is the very scenario that NEC contracts are written to try to avoid. No one normally does very well in that situation other than those that derive an income from disputes.

My advice is to get everyone in a room, lock the door and on a big screen walk through the programme jointly to identify any reasons why it has not been accepted. Correct the reasons there and then, so no one leaves until you get to a point where it is or can be accepted.

Should a project ever have a programme not accepted for two or more consecutive periods, I think it is the responsibility of senior management from both sides to get around a table and get to a position where it does not enter a third month or period without being accepted. It sounds easy on paper – and it can be providing there is an intent from both sides to achieve the same goal.

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