

NEC4 – the Elephant in the Room

First thing to say is congratulations to the NEC4 authors/contributors for the new family of contracts. It is never easy updating such documents in a format that everyone in the industry is going to be happy with. It is very much an “evolution” rather than “revolution” in terms of development, following the principles of “if it ain’t broke don’t fix it”. NEC3 was a good set of contracts but following its launch and after 12 years of minimal enhancements it was time for an update to continue its development and having to move with the times.

There are some really nice initiatives – many of which the panel members have listened to us as individuals and as a global LinkedIn group community, so in a way we are all contributors to NEC4. There will always be differences of opinion as to what they should or shouldn’t do with the contract and you will never get everyone to agree on everything. It is never easy to write one set of rules that will work as a consensus for the whole of the industry.



However – from my perspective there is a pretty large “elephant in the room” that has not been dealt with in NEC4 and this takes away the gloss from what otherwise should be a very successful launch. If you have car that you like, but there is a problem with its gearbox, and you decide to upgrade it for a new model with some really nice new features and gadgets, but the gearbox problem is still there, that will be a big disappointment.

This “elephant” from a NEC4 perspective is in terms of “which programme do you use to assess a compensation event”. It is a known problem in the industry and I feel it is a crying shame (or I would go as far to say irresponsible) that NEC4 has not specifically addressed this issue. NEC is all about creating transparency and clarity – and here is an issue that everyone knows exists, different people have different opinions over, will occur on nearly every project, and yet we do not have clear direction from the contract wording as to how it should be dealt with.

Yesterday (22nd June) NEC4 was launched and it was the first time (officially) that we could see the new contract clauses in hard print. What used to be clause 63.3 is now clause 63.5. It adds one

welcome addition which is the concept of a “dividing date” which along with clause 63.1 defines the boundary between actual/forecast Defined Cost being when the instruction was given or for all other situations when the compensation event is notified. So far, so good.

The same clause then concludes with a final sentence that states “when assessing delay only those operations which the Contractor has not completed and which are affected by the compensation event are changed”. I will be honest here – on first inspection (and second and third) I am not even sure what that means. There may be a difference between the last Accepted programme and the “dividing date” – so what is this clause saying about activities that did occur between these two dates?? I can only assume this clause was intended to solve the problems I am highlighting in this article, but if so from my perspective it does not achieve that brief. I only had a quick review of the NEC4 guidance notes for this clause, but a) it didn’t convince me, and b) we should not need to seek clarity in the guidance as the clause should stand up on its own.

I wrote an article back in 2013 in the NEC User Group newsletter (see link at bottom of article) which on reflection is still as current now for NEC4 as it was then. At the time of writing (after canvassing lots of expert opinion), I wrote it to give direction for the industry as to how this should be dealt with in the absence of the contract giving us that clarity. This was to bridge the gap until the next revision of the contract addressed this issue clearly – but NEC4 has not (obviously). It almost seems as though it was in the “too difficult” box to do, so it was avoided rather than addressed.

The contract is quite clear that you use the last Accepted Programme to assess compensation events. So far so good. But what if that last Accepted Programme was say four months old? Do you (or are you allowed to) take into account anything else that has happened in that last four months, or are you only allowed to plug that single compensation event into the old programme ignoring anything else and expect to get a true/fair answer? The latter just doesn’t work on so many levels, for example:

- The programmed works have fundamentally changed e.g. gone from in-situ poured concrete walls to installing pre-cast units, or directional drilling rather than open cut excavation.
- There are 30 other compensation events that have been implemented since the last Accepted Programme. When compensation event 31 comes along and there has been no new accepted programme, do you feed CE31 into that old programme ignoring the effects of CE01-30?
- The Contractor has incurred significant delays since the last Accepted Programme, or indeed has achieved significant progress on certain areas creating additional float before a compensation event has been identified
- A programme has been issued for acceptance and it is 1 week before it may be accepted, yet today we have to put in a quotation for a compensation event. Do we use the ‘old’ programme or the ‘new’ programme (which may give different answers)?
- The Contractor has 3 weeks to produce a quotation, does it use the accepted programme at the start of that 3 week process or, if 1 day before it goes in, a new programme is accepted, does it change the quotation?
- You are assessing two compensation events at the same time – both of which on the critical path. If you assess the first one and that impacts planned Completion, do you then use that programme to assess the impacts of the second, or simply assess it against the original ignoring the effects of the first?

This is just a sample of the issues that are currently occurring on projects that people are seeking direction on and in meantime having to make their own judgements. This should not be the case, when the contract tries to give clear direction and clarity on the contractual rules that should be followed. My article in 2013 concluded that the ONLY way you can assess a new compensation event that will get the most correct/fair result every time to either Party is to take into account progress and other compensation events that have occurred up until that point (that the CE is instructed/notified) compared to the last Accepted Programme. You can't expect to take an old programme, plug in a single event (ignoring anything else you know has happened) and expect to get the right/fair result. In real simple terms the contractual sequence should be:

1. Once a compensation event is instructed/notified, you take the last Accepted Programme and update it with progress and the effects of other compensation events that you know have happened before the compensation event was identified
2. Reschedule that programme, and see what effect (if any) that progress and other CE's have already had on planned Completion/Key Dates or Sectional Completion Dates.
3. Save this as a new interim baseline within the planning software
4. Then feed in the compensation event to that programme identified in step 2 and then reschedule again and see if it has any further effect upon planned Completion/Key Dates or Sectional Completion Dates. If so, this would be the effect that should be considered in the evaluation of the compensation event quotation cost and movement in Completion Date/Key Date/Sectional Completion Date.

I am not saying this won't be without its practical problems or elements of subjectivity, but in my experience this will be much less compared to any other outcome or process. I am aware of a large well known Contractor who on a major project deliberately was submitting programmes that would get rejected, on the basis that they were now in delay themselves, thinking that if CE's are assessed against the old Accepted Programme (that did not show them in delay) they would get a better result. That obviously cannot be what the contract intends.

There are already clues in the contract that the Project Manager can take into account other things that have happened since the last Accepted Programme, but we shouldn't have to go hunting for these within the contract. Clause 64.1 states that the Project Manager can make their own assessment of a compensation event if the latest programme submitted has not been accepted. This must be because the Project Manager does not agree with the way that the Contractor has assessed changes and progress since the last accepted programme, and can assess it directly. If it were the case that you only used the last accepted programme, then this bullet would not be needed as the rules would be clear. Clause 64.2 then goes onto say "the PM assesses a compensation event using his own assessment of the programme for the remaining work". Also clause 62.2 states; "If the programme for the remaining work is altered by the compensation event...". If you were to assess the CE based on the current Accepted Programme, this will not show how the remaining work at that point in time has been altered by the compensation event.

I think that in the most part this whole issue can be resolved with the addition of the following simple words at the end of the existing relevant programme clause (currently clause 63.3 in NEC3), the red text being the new element of clarity needed:

"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. **The Accepted Programme is updated with actual progress achieved, and the effect of other**

compensation events notified between the date of the Accepted Programme and the date the compensation event was notified.”

I would like to think that shortly we can issue some kind of guidance or white paper in the meantime as to how this should work to give the industry the clearest direction possible. The more enlightened clients out there may actually consider these red words above or similar into their NEC4 contracts by making good use (for a change) of a Z clause!

Either that, or we just wait for NEC5...

For further information please email the author “glenn@gmhplanning.co.uk”.

Link to previous 2013 article:

<https://gmhplanning.co.uk/publications/which-programme-to-use-when-assessing-compensation-events>