

June 2022

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No. 18 - Clause 63.5 and assessing a compensation event against the last Accepted Programme

Introduction

Training and development support is a key part of CECA's core offer for its membership and working in conjunction with GMH Planning it has delivered a programme of training events around the NEC Form of Contract across several CECA UK regions.

In addition to this training, a series of monthly NEC Contract Bulletins are being produced for both Contractors and Subcontractors to improve practical awareness on key topics within the NEC. The coverage, whilst not exhaustive, is intended as a general overview on some of the contractual principles to increase a wider understanding in support of more sustainable outcomes.

For the purposes of these bulletins a contractual relationship between a "Client" and "Contractor" is assumed. The same rules/principles also apply if the contractual relationship is between a "Contractor" and a "Subcontractor" and so the term "Contractor" will be used to describe both parties.

These bulletins are based on the latest NEC4 family of contracts, but the same principles and rules would apply where parties are engaged under an NEC3 form of contract.

Coming next month:

Bulletin Nr 19 – Dispute resolution process

Please respond to Leone Donnelly should you require any further information on the CECA NEC4 Bulletins via e-mail: leonedonnelly@cecasouth.co.uk.

For further advice or guidance on the NEC details please visit www.gmhplanning.co.uk or contact GMH Planning Ltd by e-mail glenn@gmhplanning.co.uk.

NEC4 Contract Bulletin Nr 18 - Clause 63.5 and assessing a compensation event against the last Accepted Programme

The NEC3 version of the contract did not make it very clear on how a compensation event should be assessed in relation to a programme. It stated that any compensation event should be assessed against the last accepted programme, but what if the last accepted programme was several months old? Should progress and other already existing compensation events be taken into account first or not, as the outcome would very likely be different depending on the answer? The NEC3 clauses were not as clear or transparent as you would have hoped or expected to clearly explain what happens in that situation.



June 2017 NEC4 amendment to clause 63.5: Initially NEC4, when it was launched in June 2017, did not actually address this specific issue, and arguably made things worse with the actual words that were added to clause 63.5. It stated that “when assessing delay only, those operations which the Contractor has not completed, and which are affected by the compensation event are changed”. Given that the drafting of NEC4 was intended to provide greater clarity, this was not very helpful, creating a certain degree of subjectivity around this clause.

What was more welcome was the NEC4 amended wording adopted in 63.5 with the introduction of a new name for this “switch point” as to when a new compensation event has been established. It is now called the “dividing date” and is at the point the works are instructed, or for other types of event, when the compensation event was notified.

Oct 2017 ECC Practice Note 1: The authors of the contract did go some way to put this right by issuing a “practice note” (available to download) just four months later to clarify their intent of how a compensation event should be assessed against the last accepted programme. This guidance note made it clear that if the last accepted programme was three months old and a new compensation event has just been notified, to assess that compensation event the programme should be first brought up to date to show where the Contractor was in terms of progress at the time the compensation event was notified/instructed. It should also take into account the effects of other compensation events that have already occurred since that last accepted programme. This will establish where the Contractor was at that point in terms of planned Completion, and the new compensation event can then be assessed to determine any further impact.



Whilst a very useful guide, the words of the practice note did not form part of the actual contract, and people can be very quick to dismiss guidance notes in a real-life situation when it does not support their argument. To be effective, the point the practice note was trying to clarify really needed to be included in the contract wording itself to verify the interpretation.

Jan 2019 NEC4 amendment to clause 63.5: The 2019 updated version of NEC4 now reflects the principles from the practice note into the contract wording. The words added in 2017 have been replaced with “the compensation event assessment takes into account events which have happened between the date of the Accepted Programme and the dividing date”. The word “events” in that sentence would relate to any progress, be they compensation events and/or any major changes in logic that have occurred since the last Accepted Programme and prior to the “dividing date”. These should be assessed and captured prior to assessing the additional effects of the new compensation event to see if there is any further impact on planned Completion. This same rule would also apply to the impact on any Key Dates or Sectional Completion Dates that may exist on the project.



Whilst a very welcome clarification and fair to both Parties in how to assess the impacts of a new compensation event, it will not be without issues. Both Parties would need to agree as to what they believed the up-to-date picture was before the compensation event occurred to enable them to assess the additional effects of this new compensation event. It is in the interest of both Parties to have an Accepted Programme every period so that they both recognise where they stand in terms of any liability. It will also ensure that compensation events can be assessed more readily and with less subjectivity.

Summary – The last accepted programme should be first brought up to date with progress and other compensation events that have occurred prior to any new compensation event being assessed. This should lead to both a consistent and fair approach to assessing the true impact of any compensation events upon the Contractor's programme.

For further advice or guidance on the NEC details please visit www.gmhplanning.co.uk or contact GMH Planning Ltd by e-mail glenn@gmhplanning.co.uk