

September 2022

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No. 22 - Project audits and contractual 'health checks'

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 23 - Defined Cost/Schedule of Cost Components

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 22 - Project audits and contractual “health checks”

It is essential for any project team to be regularly reviewing and checking how they are performing in line with contractual processes. This could be done by an individual party on a project for their own contractual elements or (even more constructively) for the project as a whole, so that all Parties can consider/check how they are performing. This bulletin will consider the key elements that can be reviewed to check that the contract processes are being adhered to, and to identify where improvements can be made going forward to give yourself a regular project “contractual health check”.



Programme – the regular issue of a revised programme and subsequent acceptance is key to a project administered under an NEC contract. Both Parties should understand its importance and want to make sure that it is regularly revised showing everything the contract requires, and that the Project Manager accepts or rejects the revision in a timely manner.

Matters to review:

- Date since the programme was last accepted. Greater than one period (normally monthly or four weekly) of non-acceptance is a real problem and the project team need to do everything in their power to get back to a regular accepted programme. The longer the project goes without a regular Accepted Programme will make the assessment of compensation events much more subjective and problematic to agree.
- Review of level of detail included in the programme. It should comply with all the requirements of clause 31.2, 32.1 and any other specific requirements that may be stated in the Scope otherwise it could be rejected.
- Is there a programme review meeting being held each period? Not compulsory under the contract but strongly recommended to help increase the understanding as to what the programme is showing and whether it can be accepted or needs amending.
- Quality of response to a programme that is rejected? Project Manager should make it clear why any submission is not accepted. Contractor needs to address the comments and re-submit a programme as soon as possible rather than waiting for the next submission period to try and remedy.

Early Warnings – such a simple yet important process within the contract. Any matters that could impact the project are discussed and actions agreed to avoid or mitigate the impact of any such event.

Matters to review:

- Number of open early warnings and length they have been open. This is just a “sanity check” and there is no right or wrong in terms of how many should have been notified or how long they have been open for, but just important to ensure that these are being considered/actioned in a timely manner.
- Date since last early warning meeting? NEC4 now prescribes an “early warning interval” to encourage the regular occurrence of these meetings. These should be at a suitable frequency to ensure that they are being reviewed and mitigation actions considered.
- Clarity of actions on the early warning register, and date since it was last updated? The register should be recording the latest actions agreed and reissued (or updated on a cloud-based system) within one week of any early warning meeting.
- Who is attending early warning meetings? Relevant people to move the issues forward should be attending (and not just commercial people).
- Are early warnings being issued two-ways? Both Parties should be notifying early warnings, although it will tend to naturally be the Contractor who notify more as they are likely to be uncovering more of the potential issues.

Compensation events –these are matters that are not the Contractor’s liability under the contract and will determine the cost and time entitlement over and above what they originally tendered for. The timely agreement of these during the life of the project, rather than arguing such matters towards the end, is vital to be able to consider a pragmatic and fair entitlement.



Matters to review:

- Are regular compensation event meetings being held between both Parties? Not compulsory under the contract but strongly advised. This will encourage the review of each compensation event and be able to move it forward in its contractual lifecycle of notification/quotation/assessment/implementation.
- Are quotations being submitted on time? The Contractor has three weeks to provide the quotation which can be extended by agreement (and should only be requested where absolutely necessary), and if not submitted on time the Project Manager makes their own assessment (clause 64.1).
- Are Project Manager assumptions (clause 61.6) being used to limit the amount of risk that the Contractor needs to price? There is NO mechanism for the Contractor to include their own assumptions within a quote that if accepted can then be revisited at a later date. Without such assumptions the Contractor may have to price more risk within the quotation.
- Are notifications/quotations being responded to in a timely manner? This is important to keep the review process moving forward. If the process is stalling at any point, it is important for both Parties to address this. Both should want to get to a conclusion for each compensation event so they know where they are in terms of liability.
- Is the quotation fully detailed, clearly identifying risk, and in line with the relevant schedule of cost components? The quote needs to be as detailed and transparent as possible otherwise it is unlikely to be accepted quickly. It makes sense to present the quotation in line with the eight headings of the schedule of cost components to ensure everything that is entitled to be considered is included.
- Are programmes being submitted with quotations? Clause 62.2 requires that a programme is submitted where an event impacts the remaining works. This is not a programme that will ever become accepted, but should help the quotation to be understood and hence responded to more quickly by the Project Manager.

Payments – regular payments in line with the Contractors application are obviously important for any Contractor to allow effective and timely management of the project.



Matters to review:

- Are applications for payment being submitted on time? Under NEC4 it is now the case that an application submitted late could lead to a zero assessment that period.
- Is Project Manager being clear with responses to each application? Project Manager should be clear on what they have assessed particularly when lower than the Contractor had applied for.
- Are assessment and ultimate payments being carried out in a timely manner? Obviously cashflow is very important to any Contractor on any project. Any late payments should be chased via Client senior management to avoid this adversely impacting the delivery of the project.

General – numerous other elements of the contract also need to be complied with. Some important factors that should be considered would be:

- Are subcontractors being issued for acceptance? It is a requirement to have subcontractors ACCEPTED (along with contractual terms if not using a back-to-back NEC contract) BEFORE they are appointed.
- Are Project Managers instructions clear and concise as to what is being asked for and being issued by people with authorised power? Any instructions, particularly those changing the Scope, should be in writing and separate from other forms of communication. Any delegation by the Project Manager should be in writing so the Contractor understands who they can take instructions from.

- Is a cloud-based system being utilised to manage the flow of NEC communications between the Parties e.g. Cemar? If not, the Parties will have to use manual pro-forma and registers which is fraught with problems in terms of auditability and transparency (see previous CECA bulletin 12 for more details on the use and benefits of these systems).
- Has everyone in the project team had NEC contract training? Ongoing education is always important to ensure that people within the project understand the contractual requirements and how to best administer them.
- Have Z clauses been identified and communicated to everyone in the project team? Any bespoke amendments may alter the risk profile and the administration of certain contractual processes. It is important that these are highlighted to the project team members as they may have to administer aspects of the contract differently to what they would be used to from more standard contract wording.

Summary: Regular periodic reviews of your projects will help ensure that the contractual processes are being followed. Support and challenge your colleagues to enable correct contractual management. Put action plans in place where improvements are necessary. This will improve working relationships between the Parties, ensure liabilities are understood during the life of the project and help achieve the true contractual entitlement for all Parties.

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