

NEC Contracts - Programmes under ECC and PSC, 20 July 2021	
Question Asked	Answer Given
<p>If the Contractor shows CEs which are not implemented on the programme, with associated time delays which is not agreed, is this a reason for not accepting the programme?</p>	<p>No. This is not a stated reason for not accepting the programme (31.3). ECC3 had an odd requirement in 32.1 to show 'implemented compensation events'. But if the programme does not include notified but not yet implemented compensation events it will not be 'realistic'. NEC4 clarifies this by (in 32.1) requiring the Contractor to show:</p> <ul style="list-style-type: none"> - 'the actual progress achieved on each operation and its effect upon the timing of the remaining work.' That 'remaining work' will include work related to compensation events. But note that accepting a revised programme does not accept the 'delay to Completion' caused by a compensation event. That is assessed separately as part of the compensation event, assessment. That is based on a 'mark up' of the Accepted Programme that was 'current at the dividing date'.
<p>After commencement the Contractor (C) agrees with the S/C to use the C's programme with outputs for the S/C to use to submit their CI31 programme. This is done but C rejects on the grounds that 'the S/C's plans aren't realistic'. Basically wanting better productivity on the SC programme as CE's have happened in the meantime. What happens if SC refuses and relies on the previous agreement = No agreed CI31 and no baseline to input implications of CE's. Is it better for SC just to agree to duress to get an agreed baseline?</p>	<p>Both 'sides' need an Accepted Programme to be able to manage NEC and especially the compensation event process. As soon as the main contractor 'not accepts' the programme (31.3) the Contractor is required to submit a revision (13.4). Going forward the next compensation event will always be based on the 'Accepted Programme current at the dividing date'. It is in both Parties' interest to agree and get accepted a sensible Accepted Programme.</p>

<p>What kind of detail will you include when updating the programme in accordance to Clause 32</p>	<p>32.1 is: 'The Contractor shows on each revised programme</p> <ul style="list-style-type: none"> • the actual progress achieved on each operation and its effect upon the timing of the remaining work, • 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.' <p>There are no more detailed rules on the 'level of detail', but both 'sides' will benefit from an agreed and sensible level of detail so that the programme is usable. For example I would not expect to see the correction every minor Defect on the programme.</p>
<p>Defined Terms vs Identified Terms (<i>Italics</i>)</p>	<p>This was someone helping others in the chat. But it is important in dealing with programme under NEC. To work with the programme you need to fully understand the difference between:</p> <ul style="list-style-type: none"> - Completion (a defined term and a 'state, not a date, as defined in the contract) - <i>completion date</i> (the date in the Contract Date, when, as at award of contract, the Contractor promised to achieve Completion) - Completion Date (a defined term, being the <i>completion date</i> as delayed (not brought forward) by compensation events (NEC3 63.3, NEC4 63.5) or possibly brought forward by acceleration or the acceptance of Defects. - planned Completion (the Contractor's latest estimate of when it will achieve Completion) and - the date of Completion (the PM certifies that Completion actually happened (30.2).
<p>You training is referring to an ECC contract, but assume same principles apply for an Accepted Programme under a TSC?</p>	<p>Good question. The training was indeed based on ECC. The treatment of programme is almost identical in both:</p> <ul style="list-style-type: none"> - the PSC and - the programme for individual Task Orders under the TSC.

<p>You mentioned that Dividing Date relates to "date CE was notified", NEC I thought requires Contractor to submit CEs within 8 weeks of event occurring for a CE to be valid?</p>	<p>It is true that for compensation events that are not required to be notified by the PM those caused by a communication from the PM (61.1), 63.1 give the Contractor a maximum of 8 weeks to notify a compensation event. The dividing date (lower case) is 'defined' in 63.1: 'For a compensation event that arises from the <i>Project Manager</i> or the <i>Supervisor</i> giving an instruction or notification, issuing a certificate or changing an earlier decision, the dividing date is the date of that communication. For other compensation events, the dividing date is the date of the notification of the compensation event.'</p>
<p>Can you please repeat what PWDD stands for?</p>	<p>Sorry for the CMA (completely meaningless abbreviatuon/acroym!). PWDD is the Price for Work Done to Date, which is the main part of the amount due each month. Its definition depends on the main (payment) option being used.</p>

<p>What are your thoughts on using assumptions in CE's for time impacts please?</p>	<p>PM assumptions (61.6, 60.1(17)) are an excellent tool for the PM and Contractor to agree sensible assumptions to be made in the pricing of compensation events. They can only be stated by the PM but should be agreed first between PM and Contractor. They act to take risk out of a quotation and so reduce the cost (and possibly) time impact of the compensation event. If the assumption proves to be incorrect a correction to the assumption has to be notified by the PM and that causes another CE (60.1(17)). As such PM assumptions reduce the agreed impact of the compensation event but also reduce the level of certainty for the PM (and Client).</p> <p>It is normal for the assumptions to be around the inputs and driving factors of the event rather than on the consequences of the event. But, for example, if an event was just too hard to forecast and both sides wanted it to be carried out effectively reimbursably, one could state an assumption 'The event causes an increase in Defined Cost of X'. If it ended up costing more or less than X it would be corrected in the follow up 60.1(17) compensation event.</p> <p>In theory one could make similar PM assumptions about the time impact of the event, but it is not recommended as it will be difficult to unpick whether or not a certain event really did impact on achieving Completion by the Completion Date.</p>
<p>As a project progresses if the Contractor finishes an task/activity on the critical path early, what would happen to any time risk allowance associated with that task/activity. Would planned completion be shown prior to the completion date and if so who would own the terminal float?</p>	<p>The Contractor owns any 'time risk allowance'. If it is not needed, when the programme is updated the operation will be shown the updated programme to have been completed earlier than was shown on the last Accepted Programme. If the operation was on the critical path, this will bring forward the 'planned Completion'. The Completion Date is unchanged meaning the unused time risk allowance has given the Contractor more terminal float. And, thanks to 63.3 (NEC3) (63.5 (NEC4) it is clear that the Contractor owns the terminal float.</p>

<p>If the Contractor submits a programme with a planned Completion date later than the completion date due to activity delays, but the programme doesn't show a CE has driven the delay nor has the Contractor submitted a CE, if the Client accepts the revised programme are they accepting the Completion Date changes?</p>	<p>As above, be careful with your language. There is 'planned Completion' and a Completion Date. There is not a 'planned Completion date'! The Completion Date at any point of time is a fact. It is the <i>completion date</i> in the Contract Data, as modified by compensation events, acceleration and acceptance of Defects. That date is required to be shown on the programme. If it does not then the programme should be 'not accepted' as (31.3) a</p> <p>'reason for not accepting a programme is that</p> <ul style="list-style-type: none"> • it does not show the information which the contract requires' <p>If planned Completion is now later than the Completion Date, hen, fine, the Contractor is planning to be late. This is where the Client might hope it had included some delay damages (X7), or indeed bonus for early Completion (X6) to incentivise achieving Completion by the Completion Date.</p>
<p>Is the PM is specifically named in the contract?</p>	<p>Yes the (ECC) <i>Project Manager</i> is an 'identified term', in italics (11.1) and so is stated in the Contract Data. If a company name is stated, that company must appoint an individual to represent it on award of the contract. The <i>Client</i> should then use 14.4 to notify the <i>Contractor</i> of the change of the PM from company to individual.</p>
<p>If the PM is named in the contract and then leaves the Job is the contract able to be modified with new name etc... Is this process quick to do. Could the supplier use this to gain and ask for something to change the name?</p>	<p>The <i>Client</i> needs to use 14.4 to notify the <i>Contractor</i> of the replacement <i>Project Manager</i>. This must be in writing (13.1). The use of the word 'notify' means that this notification must be a clearly separate communication (13.7). It will be a simple one paragraph statement.</p>
<p>What are your thoughts on the 31.2 requirement for "provisions for...the procedures set out in the contract" ?</p>	<p>I am guessing that you are hinting at the potential 'enormousness' of this requirement. The most obvious procedures are the submission and acceptance of designs - but 'acceptances' has a separate bullet point in 32.1. Like everything else with the programme a degree of common sense is required to show any important 'procedures' but not have the programme unduly complicated. This will need a common sense and agreed approach between <i>Contractor</i> and <i>Project Manager</i>.</p>

Did NEC 4 miss a trick re: dividing date? Dividing date is stated as the date of communication / notification. What if the date of the actual delaying event was several weeks earlier than the date of the communication / notification? i.e. the Accepted Programme might include several weeks of actual progress after the delaying event. Therefore this progress needs to be omitted to separate actual from forecast and model the planned Completion movement.

The 'dividing date' is explained above. In training I use the example of the *Project Manager* noticing something that is clearly a physical condition (60.1(12)) compensation event. If they choose to notify it straight away that sets the dividing date and *Project Manager* and Contractor have to agree the forecast cost of the event. If the PM choses not to notify it (perhaps hoping the *Contractor* will not spot it!!) the *Contractor* could notify the event 7 weeks later. Their notification will then set the dividing date. That means the 7 weeks work will be assessed as its 'actual' cost. Of course the *Project Manager* and *Contractor* could informally agree for the *Contractor* to notify it later to allow the assessment of the work from the knowldge of the event to its notification to be effectively reimbursable and avoid the need to agree a forceast! (Of course, that is not the intention of the drafted of NEC, the aim of which is to get the effects of compensaton events agreed in advance.)