

NEC4 ECC – PRACTICE NOTE 1.1

Assessing delays due to compensation events

This practice note has been prepared for the NEC4 Engineering and Construction Contract, as amended in January 2019. It is an updated version of the practice note originally issued following the publication of NEC4 in 2017. This update takes into account the changed drafting of clause 63.5, which clarifies how the contract is managed. The approach set out in this note should be followed on other NEC4 contracts.

The key requirements for assessing delays to Completion Dates and Key Dates due to a compensation event under ECC clause 63.5 are to

- determine the effect that the compensation event has upon planned completions and
- use the Accepted Programme current at the dividing date to do so.

The objective is to assess the effect due only to the compensation event and not due to other events.

The assessment takes into account

- any delay caused by the compensation event already in the Accepted Programme and
- events which have happened between the date of the Accepted Programme and the dividing date.

In some cases the effect of a compensation event may have already impacted on the Accepted Programme for example where an event was raised as early warning (clause 15.1) and then later identified as a prevention event (clause 19). In such cases any delay already reflected in the Accepted Programme needs to be taken into account when assessing the impact of the compensation event on planned Completion.

In terms of events that may be taken into account between the date of the Accepted Programme and the dividing date these could be other compensation events that have occurred prior to the dividing date and any delays resulting from events which are not compensation events.

In practical terms, the parties need to decide which activities on the Accepted Programme each compensation event affects, and what the delay impact is to each activity. The durations of activities which are not completed at the dividing date are changed where appropriate to recognise the effect of the compensation event. Activities which have been completed may have been affected by the compensation event, and if so the time impact must be recognised. However, the actual timing of completed work is not further adjusted.

In assessing the effect, risk allowances and mitigation measures should be included on the basis that the Contractor reacts competently and promptly to the event. The intention is that the logic in the Accepted Programme is used as the basis for determining the effect of the compensation event upon planned completions, subject only to changes required as a direct result of the compensation event assessment.

If helpful, users may produce a version of the programme specifically for the purpose of the compensation event assessment. This can be used to support and explain the assessment. However, it is important to understand this programme is not a programme submitted for acceptance, but is used only for assessing the compensation event.

If the Accepted Programme at the dividing date is a long way out of date, the approach to be taken depends upon the reasons for the out of date programme.

- If the parties have set long intervals between submissions of revised programmes in Contract Data, then the practical guidance above should be followed.
- If the Contractor has not submitted a revised programme for acceptance in accordance with clause 32.2, then the parties should seek to agree a programme to be used for the assessment, failing which the Project Manager should make an assessment in accordance with clause 64.
- If a recent programme submitted by the Contractor has not been accepted by the Project Manager, then the parties should seek to agree a programme to be used for the assessment. If the Parties agree that the reasons given for non-acceptance do not affect the assessment of the compensation event then the submitted programme should be used to identify the changes. If a programme to be used for the assessment cannot be agreed the Project Manager must make an assessment under clause 64, based on the previously Accepted Programme.

It may be that the assessment of delay using the Accepted Programme identifies an obvious error which does not show a genuine forecast effect of the compensation event on planned completions. In this situation the Project Manager and Contractor should resolve the problem in the logic of the Accepted Programme. To recap, the objective is to assess the effect due to the compensation event and not due to other factors.

If multiple compensation events arise the assessments should be carried out sequentially, separately and prospectively. However, when a number of events arise over a short period of time, it may be sensible, by agreement, to consider them together. The impact of other compensation events existing prior to the dividing date should be recognised before making the new compensation event assessment.