

Q&A Session for NEC Programme Webinar

18 February 2016

The questions below are those not answered during the live webinar on 18th February and refer to the slides used. They have been answered by the webinar presenters based on a practitioner's point of view and cannot be taken to be legal advice. These assume the unamended NEC3 Engineering and Construction Contract (ECC) is being referred to, unless otherwise stated. The details of those asking the questions have been removed and some questions have been slightly modified for grammar, contractual correctness and the like.

Q. With regard to a *Project Manager* not accepting a programme because it does not show the information which the contract requires, is this a compensation event under clause 60.1(9) – or does the fact that non-acceptance is for reasons stated in the contract preclude this from being a compensation event? Shouldn't the *Employer* be compensated for the added resources needed to establish the *Project Manager's* own programme?

A. It is not a compensation event. Clause 60.1(9) relates to the withholding of acceptance for a reason not stated in the contract. The reason given here appears to fall under the second bullet of clause 31.3. There is no provision under the contract for the *Employer* to recover the costs of the *Project Manager* making his or her own assessment of the programme.

Q. What are the key useful project management software packages that can be used with NEC3 contracts?

A. NEC does not endorse or recommend specific software packages. There are a multitude of proprietary solutions on the market that cover all aspects of procurement, risk, cost, schedule and contract administration. Teams should carefully consider compliance against the contract procedures. In particular their adherence to clause 13 including the requirement to communicate notifications separately. Additionally teams may consider their accessibility, ease of use, reporting capability, security, governance provision and for larger programmes their ability to integrate with other business software.

Q. Do you have any experience of signing an early contractor involvement (ECI) contract and then moving to a fully-fledged NEC3 contract? I was wondering how the programme transitions between the two (assuming it's just a negotiation settled prior to signing main contract?)

A. Yes, some experience, but not using the recent ECC ECI clauses. The Stage One programme should be clear from the outset and the Stage Two programme will develop to a satisfactory level during Stage One. You are effectively negotiating the evolution of the programme as the Stage Two works are shaped during Stage One.

Q. How can you accept a tender but reject the programme within Contract Data part two?

A. Ensure that Contract Data does not reference/identify a programme. This will mean a first programme is still due and until one is submitted showing the information which the contract requires, the sanction under clause 50.3 will be active.

Q. Have you seen a prevention event clause (via a z clause) being used on any contracts? We have seen it used by a well-known public based company. If so, have you seen this clause impact on the compensation event and programme administration?

A. Prevention (assuming the ECC use of prevention) is a standard core clause in ECC (clause 19), so not sure why a z-clause would be necessary. If an instruction is given under clause 19 by the *Project Manager* this triggers a compensation event under clause 60.1(19). The effects on the programme would be assessed and demonstrated in the same way as for other compensation events.

Q. Can you please confirm that if a compensation event moves the Completion Date, but then the compensation event is revoked, are you then able to move the date back?

A. No. Once a compensation event is implemented the Prices and Completion Date change.

There is no provision to 'revoke' a compensation event. If by revoke we mean that additional work instructed through clause 14.3 is subsequently found to be unnecessary, then a further instruction is needed to omit the same works.

This would trigger a further compensation event that may reduce the Prices but the Completion Date would not move earlier. Clause 63.3 limits the direction the Completion Date can move due to compensation events to 'later'.

Q. If the *Employer* reduces the scope of work, does this automatically mean that the Completion Date is moved earlier or can the *Employer* not (unilaterally) change the Completion Date?

A. No. Compensation events can only move the Completion Date later in time. Clause 63.3 limits the movement of the Completion Date to a later date.

There is no provision for either Party or their representatives to unilaterally change the Completion Date. The *Project Manager* may instruct the *Contractor* to provide a quotation for acceleration, but the *Contractor* may decline for any reason.

Q. I have mixed guidance as to the sequence for entering compensation events into a programme. I have been told you need to progress the programme first, reschedule etc, and THEN input the compensation event to assess effect. Someone else has told me you should enter the compensation event first. What do you think?

A. This is a matter of timing. The more up to date the programme, the less hypothetical the exercise. Ideally the Accepted Programme is a true reflection of the situation immediately before the compensation event is assessed. This reinforces the 'first pass the post' principle with regard to the use of float to mitigate the *Contractor's* delays or compensation events.

If a bottom up approach to programme updates is operated (the whiteboard in the site hut updated twice daily and incorporated into the programme) then teams have more chance of establishing the order of events.

It seems unsatisfactory to be assessing a compensation event using an aged Accepted Programme. The Accepted Programme should never be older than the interval stated in Contract Data, if it is then clause 64.2 would apply and the *Project Manager* would make his own assessment of the compensation event using his own assessment of the programme.

Q. How do you manage with an event that you know is going to happen, such as you know the forecast predicted date for a delivery is going to cause an impact. Do you ignore it on the programme (apart from putting in an early until the event 'impacts on Site')?

A. Firstly early warning should be given by notifying the matter to the *Project Manager*. Each programme submitted for acceptance should be realistic and practicable. Clause 32.1 is relevant also. It sounds as though '*it's going to happen*'. Therefore this reality needs to be shown on the programme.

This may in turn show impacts to planned Completion or the dates when the *Contractor* plans to meet each Condition stated for Key Dates. (Please ensure the distinction between a 'Key Date' and 'the dates when the *Contractor* plans to meet each Condition stated for Key Dates' is understood).

It is sensible to show how these delays will impact these dates and how you plan to deal with the delays. IF the matter is the subject of a compensation event, you cannot show or pre-empt the movement of the Completion Date or Key Dates until the event has been implemented.

In summary, progress and reality should be shown realistically at all times (planned Completion). The effects of compensation events on 'contractual deadlines' should only be shown once implemented (Completion Date, Key Dates).

Q. In the capacity as a Subcontractor, does issuing progress reports against the Accepted Programme weekly or fortnightly meet the requirement to issue fortnightly programmes should the need arise?

A. Each programme submitted for acceptance should show the information required by the

contract. How this is achieved is up to the *Contractor* and *Project Manager*. It is perhaps simpler in use to have an updated programme rather than a commentary against an old programme.

Q. How would you advise to best spread the time risk allowance over a programme with Key Dates? Also what would you consider a fair percentage of time to allocate as time risk allowance?

A. Time risk allowance is not an exact science and unlikely to conform to the application of a single percentage. Arbitrary provision should be avoided. Time risk allowance should be appropriate to the activity.

One way to achieve its inclusion is to show the task duration on the programme as inclusive of time risk allowance. Then identify what part of the duration is risk allowance as a value in a column of the programme adjacent to the duration. This works well as it does not specifically identify where in the task the provision for risk has been allowed.

It is flawed to show all time risk allowance as a single bar at the end of the programme just before planned Completion. This may provide for a realistic planned Completion, but it tells the reader that the adjacent tasks spanning back in time are in the wrong place by up to the duration of the bar! Not very realistic.

In terms of Key Dates, it may be prudent to provide more than just risk allowances (only for *Contractor's* risk). It may be that the *Project Manager* is keen to see additional float within the programme to provide contingency for interfacing with Others. Perhaps a less complex approach is to build this contingency into the setting of Key Dates pre-contract based on the *Employer's* perception of risk and likely delays.

Q. In terms of design and documentation acceptances - should you plan for at least one round of comments to present a realistic/fair logic or should you always plan not to fail (get it right first time!)?

A. Perhaps work back on a 'what if' basis. What if the designs are not accepted? Can we mitigate this? Should we be collaboratively checking progress on the run up to submission? Can we use the early warning procedure to identify problem elements of the design proactively? Can we submit the design in parts and mitigate the impact on progress by getting acceptance on some parts in advance of others (clause 21.3).

The planning of design acceptances is not like launching a rocket and crossing your fingers. We can constantly review and adjust, monitor and check. The early warning system and programme allow us to apply foresight collaboratively to mitigate problems and shrink risk at any time.

Submission need not be the first time the other Party sees something.

Q. If a programme is accepted but is contrary to the Works Information, which takes precedence and can an acceptance be undone in any such event?

A. There is no need for a precedence. Clause 20.1 is clear that the *Contractor* Provides the Works in accordance with the Works Information. The programme is not Works Information, rather it is the *Contractor's* plan as to how he is going to Provide the Works. Remember also that under clause 14.1 a *Project Manager's* acceptance of a submission by the *Contractor* (programme) does not change the *Contractor's* obligation to Provide the Works or liability for his design.

Q. Clause 14.1 is relevant but is it true that if programme includes *Employer* obligations, the acceptance of that programme can put additional obligations on the *Employer* (via compensation events) .

A. Correct. Clause 60.1(3) and (5) underpin this principle. One way to smooth the way to acceptance is to submit a schedule as part of the programme submission, identifying those elements in the submission that will change the *Employer's* or *Others'* deliverables. This helps the *Project Manager* prioritise his or her review when time is short.

Q. If you are waiting for a programme to be accepted, should you be reporting against the programme awaiting acceptance as it's your update plan, or should you just monitor against the Accepted Programme?

A. It depends what the reports are for. It is a general preference to always use the latest information. However we are constrained, for example, by clause 63.3 in that the Accepted Programme is the one we must use. Therefore all the more reason to keep it updated regularly. Often the interval for programme revision in Contract Data part one is inappropriately long.

Q. Do we have to accept or reject the programme in a partnering or collaborative contract environment?

A. Yes. All NEC3 contracts are collaborative. Partnering is achieved through adoption of certain main and secondary options. Regardless, acceptance is a key part of various procedures. It brings clarity, certainty and aligns expectations.

Q. If *period for reply* for design submission is 4 weeks and Accepted Programme shows *Project Manager* accepting within 2 weeks, what if *Project Manager* only accepts after 3 weeks? The *Employer* not doing things as per the Accepted Programme is a compensation event – but the *Project Manager* not doing as the Accepted Programme is not clearly a compensation event. What do you think?

A. The *period for reply* (clause 13.3) would apply to the acceptance of a design given clause 21.2 is silent with regards timings. It is not the *Employer* whom provides such acceptance and so clause 60.1(3) or (5) does not apply. Clause 60.1(6) or (9) would as appropriate.

It is perhaps useful to record the intention of an earlier acceptance on the programme, but this will not change the *Project Manager's* contractual time to reply. The date when acceptances are required must be shown on the programme, but submission dates should be calculated with the *period for reply* in mind and shown accordingly.

Q. I have a question on terminal float. If a job to build a house is going to take 1 year and have 5 months on top for terminal float, but then the job changes and you now have to build 2 houses in the 1 year is it right (or can we) add another 5 months to the terminal float? This would mean that 1 year to build 2 houses but now with 1 year shown as 10 months. Or do we add time to each activity (time risk), or can we do both?

A. The additional work to build the 2nd house is included in the Works Information through a clause 14.3 instruction. This will in turn require the notification of a compensation event under clause 61.1 (60.1(1)).

The quotation for the compensation event will include a programme showing how the event alters the remaining work (clause 62.2). In this programme, planned Completion will have no doubt moved later in time due to the incorporation of the additional work.

Under clause 63.3, 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.

So any 'terminal float' (the float between planned Completion and the Completion Date) is preserved in accordance with clause 63.3. You cannot add additional 'terminal float'. Terminal float is not proportional to the volume of work. However in your assessment of the effects on planned Completion, you are able to add time risk allowance under clause 63.6. Such allowances sit within the programme (i.e. before planned Completion).

Q. Is the 'submission' of a programme a communication under clause 13.1?

A. Yes.

Q. Do you remove time risk allowance when you have completed an activity?

A. Clause 32.1 requires revised programmes to show the actual progress achieved on each operation. If a task is finished early then the next task can start, unless there is a constraint, in which case you must show the resulting float.

Unused risk allowance will 'fall out' in the programme revisions. Sometimes it will result in an earlier planned Completion which in turn enables the *Contractor* to 'bank' it as 'terminal float'.

Q. Instead of showing time risk allowance in a column, could it be added as a note (say for option1)?

A. Yes, as long as it is communicated clearly.

Q. Would you recommend cost loading the programme to aid forecasting?

A. Yes. So long as the *conditions of contract* are followed, there is no reason the various 'tools' cannot be dual in purpose. It is perhaps useful to incorporate the Activity Schedule into a version of the programme so the Prices for Option A and C contracts can be time-scaled. In cost contracts, the requirement to provide forecasts of Defined Cost to Completion could be shown profiled over the programme activities. Perfect for anyone who is tasked with earned value analysis (EVA).

Q. Would it be better if time risk allowance was called productivity risk allowance.....then a separate element of "time" may not be so often displayed?

A. Maybe, although connotations of 'productivity' are perhaps narrower than 'time risk'?

Q. Does option 3 allows for blind optimism, which the *Employer* often likes, particularly at tender stage, so is a potential bid winner (despite being unrealistic)?

A. It may well show a realistic planned Completion. Trouble is the nature of this approach means the activities are themselves not in a realistic place in time, getting worse the later in the programme you look.

Q. As a *Contractor*, we were asked by our *Employer* to show programme option 3 in the programme for acceptance. What do you think?

A. This is problematic as this approach means the activities are themselves not in a realistic place in time, getting worse the later in the programme you look.

Q. Option 2 would be good if the *Employer* is looking to take a particular risk off of the *Contractor*, particularly for additional works that attract a particular risk profile and is being assessed under clause 62 conditions. What do you think?

A. Agreed. This may in fact be the case under clause 61.6 where the *Project Manager* assumes that certain events won't occur. For example snow on the ground might be a *weather measurement*. Up to the 1 in 10 year value could be included as a time risk allowance in relation to a compensation event. An assumption given by the *Project Manager* than it will not snow, would mean this element of time risk allowance would not be included on the programme. This would be the case also for option 1 in the slides.

Q. If you split the time risk allowance between activities do you "lose it" if not used on that activity or can it carry over for other activities?

A. Clause 32.1 requires revised programmes to show the actual progress achieved on each operation. If a task is finished early then the next task can start, unless there is a constraint, in which case you must show the resulting float.

Unused risk allowance will 'fall out' in the programme revisions. Sometimes it will result in an earlier planned Completion which in turn enables the *Contractor* to 'bank' it as 'terminal float'. It cannot be used to mitigate the effects of compensation events.

Q. The 'lean management' line and 'collaborative planning' does encourage no time risk allowance - this is an issue as 'collaborative planning' is a positive intervention. Any comment on this?

A. The programme needs to be contemporary and realistic. This makes it useful in practical terms for tender evaluation, planning, forecasting, payment assessments, compensation event analysis, risk mitigation planning etc. It is difficult to see how the programme could be used for these tasks if it was unrealistically optimistic.

Q. Terminal float often referred to as *Contractor's* terminal time risk. Is this correct in your opinion?

A. Sometimes coining new terms is dangerous unless all parties have the same interpretation. The ownership of the float between planned Completion and the Completion Date is deduced from clause 63.3. This float cannot be used to mitigate the effects of compensation events. Therefore it is widely understood to be the *Contractor's* float and potentially acts as a cushion against his risk of delay damages.

Q. What should *Project Manager* do if the terminal float seems excessive?

A. If the *Employer* stated the Completion Date in Contract Data part one, then perhaps the *Contractor* has an innovative way of delivering the work. The *Employer* will have their asset sooner. If the *Contractor* has identified the Completion Date in Contract Data part two, and it is in the opinion of the *Employer* too distant, then he may choose not to enter into contract.

Alternatively if the question relates to a post contract scenario, then the Completion Date will already exist. The *Project Manager* is required to decide if the programme is acceptable. If the terminal float is in his opinion 'excessive' it can only be because the *Contractor* is planning to achieve Completion early? If his plans are not realistic or practical he should withhold acceptance under clause 31.3 providing reasons. There is no test or concept for 'excessive terminal float' and it is a reason in the contract to withhold acceptance.

Q. The implication is that the *Employer* owns the free float and the *Contractor* owns terminal float. Always a source of arguments, but is my understanding and how I have always worked. Do you agree?

A. Time risk allowances are owned by the *Contractor* and cannot be used to mitigate the effects of compensation events. Float within the programme (prior to planned Completion) can be used by either Party to mitigate delays, lack of progress or compensation events, on a first past the post basis. The float between planned Completion and the Completion Date (sometimes referred to as 'terminal float') is the *Contractor's* (clause 63.3).

Q. What happens when planned Completion is not on the critical path, but it moves as a result of compensation event?

A. Not sure how this would occur - planned Completion would always be on the critical path? Regardless, clause 63.3 uses the delay to planned Completion resulting from the compensation event, as the means to assess delay to the Completion Date. See clause 63.3 for full details.

Q. If a project is in delay due to late sign off of design, and early warnings have been submitted, and no compensation event has been notified, how should your progress be reported contractually?

A. Clause 32.1 requires the *Contractor* to show on revised programmes the actual progress achieved, its effect on the timing of remaining work and how he plans to deal with delay.

Q. If float is utilised, can a *Contractor* notify a compensation event?

A. Float shown on the programme prior to planned Completion can be used to absorb the effects of compensation events, mitigating any impact to planned Completion. Float can also be used in the same way to absorb lack of progress or delay suffered by the *Contractor*. Float between planned Completion and the Completion Date cannot be used to mitigate the effects of compensation events – see clause 63.3.

If the *Project Manager* wants to reduce the float between planned Completion and the Completion Date, he or she can instruct the *Contractor* to submit a quotation for acceleration (clause 36). The *Contractor* can decline to do so for any reason.

Q. Option 2 shows a reduction in terminal float that should not be altered by a *Project Manager's* instruction. Do you agree?

A. This is the slide that deals with showing the effects of compensation events on the programme. Stage 2 of this shows the programme inclusive of the works in the *Project Manager's* instruction (PMI) and its realistic impact on planned Completion. There is a compensation event in progress at this time, but it is not yet implemented so we cannot show a movement to the Completion Date.

As part of the compensation event's assessment, clause 63.3 applies. This establishes the event has delayed planned Completion. Once implemented, the Completion Date moves out to restore the terminal float. This is shown in stage 3. Apologies for the misspelling of 'planned' in these figures!

Q. Our programme acceptances take 1 day. However we do pre-empt the submission with a thorough programme review meeting to sort out any issues. That said, the *Contact*or insists on including 'target Completion' which they use to drive their supply chain! Any comments on this?

A. Sounds really positive. Well done on the programme acceptance timeframe. Must result from you talking about it and preparing it together - 'target Completion' is not something the standard ECC has a concept of, or requires you to identify, but neither does it preclude you from showing it if you like. Sounds motivational to show a target Completion. Well done.

Q. Doesn't option 2 give the wrong impression to the *Employer*? Wouldn't it be better to show an impacted Completion Date?

A. We assume the question refers to the slide that deals with showing the effects of compensation events on the programme. These are not options, but stages. Stage 2 of this shows the programme inclusive of the PMI works and its realistic impact on planned Completion. There is a compensation event in progress at this time, but it is not yet implemented so we cannot show a movement to the Completion Date.

As part of the compensation event's assessment, clause 63.3 applies. This establishes the event has delayed planned Completion. Once implemented, the Completion Date moves out to restore the terminal float. This is shown in stage 3.

Q: The way I have always worked is to show all compensation events including the effect on planned Completion, but only to move out Completion Date (and hence adjust terminal float) once the compensation event is agreed and implemented. What do you think?

A. This seems a good strategy as it ensures the programme is always as realistic as it can be. An argument can be made in the interpretation of the word 'effects' under clause 32.1, that this approach does not follow the requirement of the 2nd bullet. However I have yet to hear a satisfactory explanation for how the programme remains realistic, practicable and inclusive of actual progress, if compensation events not yet implemented are ignored completely.

The trick perhaps is to avoid marking up the activities with references to compensation events. Instead consider labelling with less emotive details like 'delay' or 'PMI-55 for extra drain'. This leaves room to establish the exact details during the assessment of the compensation event without appearing to pre-empt the outcome in programme revisions.

Q. Do you need to link the Completion Date? As it is *Employer* controlled can it be independent?

A. Not sure what is meant by 'link'. The Completion Date is independent of actual progress. It is a contractual deadline that can only move in accordance with the conditions of contract. It is incorrect to say it is '*Employer* controlled'. It is established by either the *Employer* or *Contractor* depending on the choice made pre contract. Once in contract, neither Party has a unilateral ability to change it outside of its authority under the conditions of contract.

Q. A non-implemented compensation event is an event that may be causing a delay and should be shown in a revised programme as a delaying event until it becomes implemented as a separate milestone! Any comments on this?

A. An argument can be made in the interpretation of the word 'effects' under clause 32.1, that this approach does not follow the requirement of the 2nd bullet. However I have yet to hear a satisfactory explanation for how the programme remains realistic, practicable and inclusive of actual progress, if compensation events not yet implemented are ignored completely.

The trick perhaps is to avoid marking up the activities with references to compensation events. Instead consider labelling with less emotive details like 'delay' or 'PMI-55 for extra drain'. This leaves room to establish the exact details during the assessment of the compensation event without appearing to pre-empt the outcome in programme revisions.

Q. Should non-implemented compensation events not be shown where they are issued to provide quotation only, i.e. if instructed to provide quote and proceed, include these, not provide quotes only?

A. If the question relates to a *Project Manager's* instruction to provide a quotation for a proposed instruction (clause 61.2) then it is unlikely that showing them on the programme is appropriate. The programme should reflect actual progress to date and the plan for the remaining activities. If the additional work is not yet Works Information (only proposed at this this time) then it should not be shown on the programme.

The quotation under 61.2 will include details of how the programme's remaining activities would be altered in the event the proposed instruction is given.

If the quotation for a proposed instruction is accepted, then the clause 14.3 instruction should also be communicated. At this point a compensation event arises and is immediately implemented. The programme should be updated.

Q. When submitting a programme with a *Project Manager's* instruction, should the duration for the impact be made clear of who it is apportioned to i.e. *Subcontractor/Contractor/Employer* as it may not be caused by a sole party?

A. This is an example of why it is perhaps best not to label the activities as compensation

events, certainly until after the event has been implemented. In the meantime it may be necessary to show an instruction on the programme. The instruction may be necessary due to a fault of the Contractor. Therefore it is unhelpful to over detail / label these events on the programme until after the compensation event assessment has concluded. Planned Completion may well be effected. How much the Completion Date will move by will depend on how much planned Completion is later than planned Completion on the Accepted Programme due to the compensation event.

Q. The Completion Date is set by the contract and should not move, correct? It is the planned Completion that would move as a result of implemented compensation events?

A. Not correct. See clause 63.3. 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.

Q. We have always separated out *Employer's* activities / responsibilities and shown these at the top of the programme, linked of course, but shown alone. This seems to work. Any thoughts on this?

A. It is perhaps more intuitive to keep in them local to the sequence within which they fall. However, appending an additional schedule to the programme submission that comprises these activities / responsibilities (in addition to them being shown on the programme) can smooth the way to acceptance as the *Project Manager* can more easily identify what an acceptance will commit his team and the *Employer* to.

Q. In a case where the *Contractor* makes a programming error (for instance a linking error) in the programme that then becomes the Accepted Programme, how can the error at a later time be corrected by the *Contractor*?

A. The *Contractor* can and should update his programme whenever they choose. This seems like a good reason to do so.

Q. How do you treat negative float when planned Completion is delayed and the Completion Date is constrained?

A. If X7 has been included into the contract then delay damages would be calculated and included in the assessment of the amount due. This is corrected in later assessments if implemented compensation events later move the Completion Date.

Q. What if a *Contractor* submits a programme which is accepted by the *Project Manager* showing no delays and then claims compensation events incorporating time delays. Should the claims for time elements be rejected because the *Contractor* never showed any delays on the Accepted Programme?

A. We are not sure whose delays these relate to – if they are the subject of compensation events then such delays should be shown on the compensation event quotation as

'alterations to the Accepted Programme' as required by clause 62.2. If the delays are caused by the *Contractor* and missed on the Accepted Programme then they will still now be subject to clause 62.2 in that the quotation should show alterations to the Accepted Programme if the remaining work is altered by the compensation event, so the previously missed off delays can be thread in here. The *Project Manager* should also instruct the *Contractor* to submit a revised programme under clause 32.2 to pick back up the omission.

Q. Would you please advise on whether a programme included in the tender process automatically becomes the first Accepted Programme?

A. The definition of Accepted Programme is in clause 11.2(1) which states the Accepted Programme is the programme identified in the Contract Data. So yes, it does become the first Accepted Programme.

Q. Does the second programme have to identify attempts of mitigation in order to make it more acceptable to the *Project Manager*?

A. The second and subsequent programmes need to show the information the contract requires, namely clause 31.2 and 32.1 requirements.

Q. How can the industry join the dots between contractual programme management requirements and project controls best practices relating to earned value analysis, integrated performance baselines etc. - these functions often conflict on big projects?

A. We wonder quite how well informed the whole industry is on these sorts of techniques. Sometimes, at the very basic level, there can be a complete breakdown of the simplest delivery of the contractual programme management requirements. We think this is more of a time issue, though the industry seems incredibly slow to uptake these things, and when there is a consistent knowledge across the industry of these, maybe then we can piece all together successfully.

Q. Do you have any 'top tips' for getting through the 'mindbogglingness' of programmes for larger projects (60+ A3 sides) other than grinding through them or only looking at the critical path?

A. One school of thought is to provide a 'bow-wave' of enhanced detail for the one or two months ahead. That's not to say the rest of the programme shouldn't show the information the contract requires, but may cut down on the overall volume. Additionally areas of the programme where compensation events or early warnings are influencing events would perhaps benefit from a similar level of enhanced granularity. The benefit of having full detail for activities planned many years in the future is open to debate. Perhaps insisting on high resolution for distant future activities results in a level of false accuracy?

Finally, remember the *Project Manager's* acceptance of a programme is subject to clause 14.1. Therefore their primary focus is undoubtedly on areas of the programme that state

what the *Employer* or Others are to provide and by when. Showing these in an additional, easy to digest schedule that accompanies each submitted programme may ease the task. Further to the above, perhaps different people/teams may be tasked with reviewing different parts/levels of the programme? We would be interested to hear from others who have cracked this particular challenge.

Q. If planned Key Dates do not meet contractual Key Dates can the *Project Manager* withhold acceptance to the submitted programme on the grounds that this does not comply with the contract?

A. There are 4 reasons for not accepting a programme, these being stated in clause 31.3. It does show the information the contract requires i.e. it shows the Key Dates (bullet 1 of clause 31.2) and the date when the *Contractor* plans to meet each Condition stated for the Key Dates (bullet 5 of clause 31.2). The fact the *Contractor* believes it will be late is probably both practicable and realistic. So, all you have is the fact that the *Contractor* believes it will be late achieving the Key Dates. There is provision to deal with the breach in the contract (clause 25.3) and perhaps an early warning could be notified such that the problem might be solved at a risk reduction meeting. But in itself this is not grounds to not accept the programme.

Strictly speaking the *Project Manager* can withhold acceptance for any reason (see clause 13.8). However, we cannot think of a reason that would be sensible/helpful outside those listed, let alone one that would not result in a compensation event under clause 60.1(9).

Q. Do you think that it is good to show the programme updates overlapping the initial Accepted Programme? Is this a practice at present in the construction industry?

A. Baselineing the initial Accepted Programme may be of interest but it could quite quickly be significantly out of date due to delays, re-sequencing, changes through compensation events and so on. What information might you draw from an out of date baseline that would help you manage the programme in the future? So, it may be of interest but generally will not help manage the latest programme and not something we note as being current good practice.

Q. Would you not expect the first programme to have the same planned Completion and Completion Date?

A. Probably, yes, but the *Employer* may have included a very generous Completion Date so the *Contractor* is free to plan to achieve Completion earlier.

Q. What is the consequence of a programme not being accepted by the *Project Manager*?

A. Planning/programming the remaining works becomes difficult, determining the effects of early warnings becomes difficult also and the *Project Manager* ends up assessing compensation events. Try and avoid these outcomes by working together to keep the Accepted Programme completely up to date.

Q. I had thought that delay damages could be attached to failure to achieve Key Dates. Is that not correct?

A. That is not correct, look at clause 25.3 which states what additional cost is recoverable where a Key Date is not met.

Q. How much control has a *Project Manager* over the way a *Contractor* uses the float in a contract?

A. The *Contractor* has to show float on each programme submitted for acceptance. As described elsewhere here, some of that float (float prior to planned Completion) may be utilised by whichever Party first gets to it. So the *Contractor* does not have sole use of float and the *Project Manager* in turn does not control this. If it's there, it can be taken by whoever gets to it first.

Q. What is the essential difference between clause 61.1 and 61.2? Is clause 61.1 saying that the *Contractor* must give a quote and work simultaneously and clause 61.2 say the *Contractor* must first submit a quote and after it is accepted only then he can start the work?

A. Clause 61.1 requires the *Contractor* to put the instruction into effect (see also clauses 14.3, 20.1 and 27.3) and in parallel work this through the compensation event process. Clause 61.2 is clear that proposed instructions are not put into effect unless and until there is agreement.

Q. Let's say the first programme submitted for acceptance is not accepted and the *Contractor* takes the full two weeks to re-submit. Should the re-submitted programme show the actual progress of the works to the resubmission date or the "planned" progress envisaged on day one?

A. Any submitted programme (apart from the first) is a revised programme and as such must comply with clause 32.1. Otherwise in the extreme it could be months before the programme is up to scratch, by which point it would no longer reflect reality. If the concern relates to compensation event assessments, remember the final part of clause 63.1 and clause 63.6 work together to protect entitlement to risk allowances that could otherwise be wiped out by delays in achieving acceptance of the programme.

The *Project Manager*, having withheld acceptance for a reason in the contract (perhaps clause 13.4?) will now have to make their own assessment of the programme and assess compensation events (clause 64).

Q. A project has 6 weeks terminal float before a relevant event. Then two delays occur, one caused by the *Contractor* of 3 weeks and another of 9 weeks concurrent delay by the *Employer*. What happens to the 6 weeks terminal float?

A. When did the delays occur, at exactly the same split second in time or they just

happened to coincide at some point? Assuming the *Contractor* delay came first and all of these delays impact on the critical path, 3 weeks of the terminal float disappears. When the *Employer* delay is put into the programme (assuming this is a compensation event) then planned Completion will move back another 6 weeks (see clause 63.3) and the terminal float will remain at 3 weeks as it was first reduced by the *Contractor* delay.

Assuming the *Employer* delay came first, this is a compensation event and all of these delays impact on the critical path, then the 6 weeks of terminal float is preserved and planned Completion moves back 9 weeks (see clause 63.3). When the *Contractor's* subsequent delay is put into the programme it has no further impact because it occurs off the critical path.

Q. There is no breach by not completing by Completion Date under clause 20.1 but what about under clause 30.1?

A. There is a breach if the *Contractor* does not achieve Completion before the Completion Date – that is the purpose of X7 delay damages which provide the remedy for this.

Q. I think the programme requirements of ECC are excellent and possibly one of the best things that NEC has brought to mutual programme management. As a contractor though, it requires discipline not to write this as a claims document. It benefits all parties if this is kept as factual as possible. Do you agree?

A. Completely agree with all of this.

Q. When a *Contractor* is in delay due his own lack of progress and is due to be hit with delay damages, can the *Project Manager* take advantage of the overrun and instruct additional works that run parallel with the *Contractor* delay but will not push planned Completion further?

A. We are not sure about the statement 'take advantage of the overrun' but in principle yes, this can happen. If compensation events do not push planned Completion back further then no change to the Completion Date arises and the *Contractor* faces the possibility of delay damages.

Q. If the *Employer* has a requirement to provide planning permission, notices, etc. and these have a standard durations say 90 days but in reality they will take say 50 days, how is this best shown to maintain the *Employer's* 90 duration and avoid a potential compensation event?

A. If these sorts of periods are stated within the Works Information to be 90 days then the 90 days should be shown on each programme submitted. If such periods can be shortened that is hopefully good news for the progress of the project. If the *Contractor* put 50 days into the programme then this will not be in accordance with the Works Information and a reason for not accepting the programme. The most likely duration should surely be put into the Works Information in the first place and not the worst case scenario?



The *Project Manager* could change the Works Information to align to the 50 days. Doing so would enable for a more realistic programme. The *Contractor* may be mindful that this could bring about a reduction in the Prices and depending on the main Option, may wish to propose the change formally (clause 63.11).