

May 2022

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No. 17 - Should non-implemented compensation events be shown on a programme issued for acceptance?

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 18 - Clause 63.5 and assessing a compensation event against the last Accepted Programme

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 17 - Should non-implemented compensation events be shown on a programme issued for acceptance?

A very common question is “should a Contractor show on a revised programme the effects of a compensation event that has not been implemented”. The very simple answer to that question is “yes”.

There have been instances where a Project Manager acting for the Client has rejected a Contractor’s programme because it shows compensation events that have not been implemented (i.e. agreed). This is simply wrong, and in fact, **NOT** to show such an event on the programme would actually be a reason to reject the programme as it would not be representing the Contractor’s plans realistically.

What are un-implemented or non-implemented compensation events? These are not contractual phrases but are commonly used to refer to events that are agreed as being compensation events but have yet to have their cost/time impacts agreed as to the changes to the Prices/Completion Date (or Sectional/Key Dates).

The key point is that whilst the effects of such un-implemented compensation events should be shown on the programme, they can only demonstrate a movement to planned Completion (if it affects the critical path) and not the Completion Date. The time/ cost elements need to be agreed and the quotation accepted before the Completion Date can be moved by the agreed amount.

Contractual definition of “Implemented” versus dictionary definition: It is worth emphasising that “implementation” means when the compensation event has been agreed (or the Project Manager has made their own assessment). Implementation has nothing to do with when the works are actually done. If the works associated with the compensation event have been carried out but the quotation has still not been agreed, it is still not “implemented” in terms of the contract.

Why did NEC4 amend clause 31.2? NEC4 deleted the bullet point from NEC3 clause 32.1 which was the requirement to show on a revised programme the effects of “implemented compensation events”. The reason for this was that some people took that to mean that they could/should not show non-implemented compensation events on the programme. It is quite understandable how someone could come to that misconception if they considered that single bullet point in isolation from any other clauses. All that meant in NEC3 was that if you had a compensation event implemented within the period, then the Completion Date could be moved by the agreed amount on the next programme issued for acceptance. The effects of the compensation event itself should have already been in the programme but only demonstrating any movement to planned Completion at that point.

If planned Completion is beyond the Completion Date it would indicate that the project was running late but without clarity as to whether this was the Contractor’s liability in which case the Contractor may be liable for delay damages under X7, or as a consequence of a compensation event under assessment that has moved planned Completion and is yet to move Completion Date.

Are there any exceptions when a compensation event should not be shown? The Project Manager may give the Contractor an instruction under clause 65.1 to submit a quotation for a proposed instruction. The Contractor will need to feed this into the latest Accepted Programme to be able to demonstrate what impact this will have on the remaining works and be able to reflect that accordingly within their quotation. This should not however remain in any future programmes issued for acceptance UNTIL the Project Manager has upon receiving the quotation instructed them to proceed, which will now be a compensation event at that point.



An example to prove this point: A Contractor has been denied access by the Client to site for a whole week which affects all of their works on site. The Contractor notifies this as a compensation event under 60.1(2) and the Project Manager very quickly accepts that it is one and requests a quotation. The Contractor has recently submitted a quotation and the Project Manager is currently reviewing it. In the meantime, the Contractor is now due to submit a new programme issued for acceptance. They have no choice but to show the effects of this compensation event on the programme as it HAS affected their works by one whole week. They also show it has moved planned Completion by one week, but cannot yet move Completion Date as the compensation event quotation has not yet been agreed. The programme can be accepted by the Project Manager which still has no bearing on whether or not they agree on the liability of the compensation event. Only when the Project Manager has accepted the compensation event quotation (or made their own assessment) and it is "implemented" can the Contractor now move the Completion Date by the agreed amount on the next programme that they issue for acceptance.



Summary – The programme issued for acceptance should show a **true representation** of the Contractor's plans at any one point in time. This would include any instructed works or events that have been agreed are compensation events but have yet to have had quotations agreed in full. Prior to being implemented they can and should be shown on the programme, but at that point only be moving planned Completion. Once implemented, any agreed effects on Completion Date or any Sectional/Key Date can then also be reflected to show the full picture of liability.



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.