

June 2021

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No.6: Importance of an Accepted Programme Every Month/Period

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 7: Instructions from Project Managers and associated delegation of powers

Please respond to Leone Donnelly should you require any further information on the CECA NEC4 Bulletins via e-mail: leonedonnelly@cecasouth.co.uk.

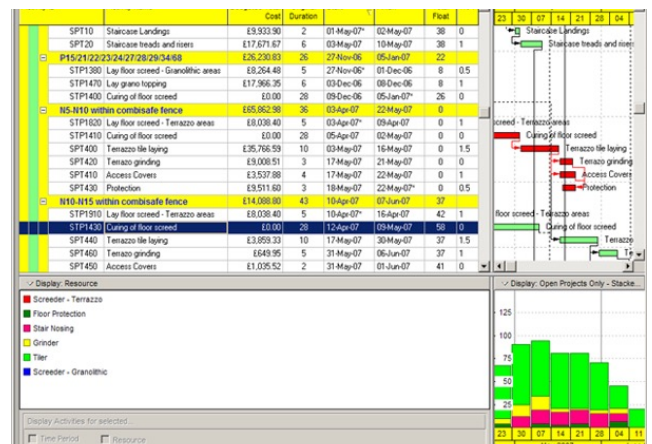
For further advice or guidance on the NEC details please visit www.gmhplanning.co.uk or contact GMH Planning Ltd by e-mail glenn@gmhplanning.co.uk.

NEC4 Contract Bulletin Nr 6 - Importance of Accepted Programme Every Period

NEC contracts have elevated the programme to its rightful level of contractual importance. The contracts have more precise rules on what the programme should demonstrate, requiring it to be regularly revised and issued for acceptance, and obligating the Project Manager to formally accept or not accept it. The latest accepted programme by the Project Manager supersedes any previous programme and becomes the one that future compensation events should be assessed against. The contract seeks to steer the Contractor to provide the level of programme detail that they should have considered anyway for their own expedient delivery of the project.

A comprehensive well thought out programme to a good level of detail, correctly logic linked, should be a key management tool used by the Contractor to manage their works. NEC contracts achieve this in many instances by formalising the requirements of the contractual processes to be followed that map what are just simply good practice project management processes.

Include a programme within your tender submission: The Contractor has the opportunity to reference a programme within contract data part 2 when they submit their tender. Whilst it is not an obligation to submit one at that stage, it will be a requirement to submit the programme within just a few weeks of contract award. A fully detailed programme at tender stage is the chance for the Contractor to demonstrate that they have understood the project requirements, they can produce a quality programme in a recognised planning software tool and demonstrate contractual knowledge/understanding of what is expected to be shown on an NEC contract programme. A good tender programme submitted at tender stage could go a long way to demonstrate that the Contractor understands the complexities of the project and will improve their chances of being awarded the contract. **Note** - if a programme is referenced in contract data 2 in the signed contract, this becomes by default the first Accepted Programme under the contract.



Ensure the first programme is accepted as soon as possible: Where a Contractor's programme is not included within the signed contract, the first programme must be issued following contract award. It is essential for both Parties to get this first programme accepted as soon as possible so that there is a clear baseline agreed as to how the works were planned to be executed. Until you have this original baseline agreed, it will not be possible to assess the effect of future change as there will be no agreement on how the works were originally planned?

Maintain the regular revision of the programme: A revised programme is required to be submitted at the intervals stated in contract data 1, which for most projects would be every four weeks/month. It is essential that the time and effort is put in to regularly revise the programme, demonstrating actual dates as to what has been achieved in the period since the last accepted programme, as well as revised forecast of current/future activities, durations, logic and what that means in terms of ability to achieve any completion milestones (i.e. any Key Date, Sectional Completion and the overall Completion Date).

What to do if a programme is rejected by the Project Manager: First, try to understand the reasons for rejection. There are four valid reasons listed in clause 31.3 for which the Project Manager can reject a programme. Clause 13.4 of the contract requires the Project Manager, if they are not accepting any submission from the Contractor, to state the reasons why they are not accepting in sufficient detail to allow the Contractor to correct the submission. The underlined words are new words introduced within NEC4 as a point of clarity, emphasising that the Project Manager cannot just reject for a high-level reason leaving the Contractor unsure as to what they need to do to put it right.



Arrange a meeting to talk through the comments to make sure they are understood or indeed explain why from the Contractor's perspective some of the comments may be considered incorrect. The Contractor should revise the programme in line with those agreed comments as soon as possible (as in within days not weeks) and resubmit for acceptance. Ideally, schedule another meeting to be able to show and talk through all the changes and if necessary, make any final changes there and then to hopefully allow the programme to be quickly accepted. Too often, Contractors have a programme rejected and then they look to correct the comments in the next submission the following month. In the meantime, they do not have that programme accepted, only to find the next month's programme is also then rejected but for other reasons, resulting in a prolonged period of non-accepted programmes. Neither party should want this to happen as not having an up-to-date realistic programme in place, even for a short period, means neither side will be clear on liability in terms of final outturn costs and liability with regard to achieving the Completion Date. This will also have a direct impact on resolving Compensation Events arising during this period (see note below*).

Sanctions against the Contractor for not having a programme accepted: If the first programme has not been issued or has been rejected by the Project Manager, 25% of the Price for Work Done to Date will be withheld from the Contractor until such point that a programme is issued showing the information the contract requires (as per clause 50.5). Once the first programme is accepted, there are no further provisions to withhold money from the Contractor for subsequent programmes (although check Z clauses to see if this has been changed on your contract). However, a potentially bigger sanction on revised programmes not being accepted for a reason stated in the contract is that it allows the Project Manager to make their own assessment of future compensation events until such time that a programme is accepted (see clause 64.1). Whilst a Project Manager should make such assessments fairly and in accordance with the rules of the contract, it is likely to be less than the Contractor would have assessed it as. Hence another reason why a Contractor should make every effort to get a revised programme accepted every month as a minimum.

It is in both Parties' interest to have a regular accepted programme: Without a regular revised accepted programme, neither party will be able to understand their liability for assessing change. If that continues it means the project could be heading for a protracted dispute towards the end of the project, which is the scenario NEC contracts are written to try to avoid in the first place. In the event there is no response at all from the Project Manager regarding the submitted programme, after two weeks of silence the Contractor can notify to the Project Manager of their lack of response. The newly introduced NEC4 wording of clause 31.3 then states that after a further week of silence the programme will be treated as acceptance, i.e. deemed accepted.

Summary tips on how to get each submitted programme accepted: A simple yet important check list to make sure that the risk of a programme subsequently being rejected by a Project Manager is reduced:

Make sure the programme fully complies with the list of requirements within clause 31.2 (for the first and revised programmes) and 32.1 (specifically for revised programmes).

- Ensure any specific programme requirements listed within the Scope issued at tender stage are also complied with. These might be requirements for the programme to be produced in a certain software package, or to be cost and/or resource loaded.
- Submit a programme narrative with each submission – explaining clearly what has changed since the last programme in terms of progress achieved, ability to meet future contractual milestones, any changes in programme durations or logic and why those changes have been made.
- Schedule a meeting with the Project Manager to be able to talk through face to face the details of the programme and allow any questions to be asked to speed up their understanding and response.

Therefore, do whatever it takes to make sure that the programme requirements are understood, and a revised programme is issued and accepted every period. Any periods of non-acceptance need to be addressed and resolved by the project team, or failing that resolved by senior management, to ensure this does not prolong for a significant period without acceptance which would be to the detriment of both Parties.

Summary - The NEC has a prescribed programme acceptance process that is intended to minimise disputes between the parties and resolve uncertainty. It is intended to be used in a proactive manner to allocate respective liabilities in a collaborative and objective manner to support delivery of the project. It is therefore imperative that all parties to the contract afford the process significant and continued consideration throughout the life of the contract.