Notes for Seminar

Compensation events procedure and assessments under the NEC3 Engineering and Construction Contract (Third Edition)

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Basis/terminology

These Seminar Notes are based on the NEC3 Engineering and Construction Contract (Third Edition) published June 2005 and with amendments dated June 2006 and September 2011 (referred to in these Seminar Notes as ‘ECC’ or ‘ECC3’).

These Seminar Notes do not generally use the ECC system of italics for terms identified in the Contract Data.

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1 - Introduction

What is a compensation event?

A compensation event is an event that is defined as such in the contract (generally by way of a provision of the conditions of contract such as those in clause 60.1 or in the ECC3 option clauses or in a statement in the Contract Data part one) and which, if it does not arise from a fault of the Contractor, its effects, in terms of changes to the Prices and any delay to the Completion Date(s) and Key Dates (if any), are to be assessed and implemented in accordance with the procedure and basis for assessment in clauses 61 to 65.

Consistent approach

ECC3 adopts a broadly consistent approach to dealing with compensation events in terms of procedure, monetary basis for assessment and scope of adjustments, i.e.:

- procedurally; this will normally involve (amongst other things)
  - notification of the compensation event,
  - submission of alterations to the Accepted Programme (with the quotation(s)),
  - preparation and submission of quotation(s) (fully inclusive as to time and monies in accordance with clause 63),
  - implementation of the compensation event (i.e. implementation of the assessment of the changes to the Prices, Completion Date(s) and Key Dates if any – see clause 65).

- monetary basis for assessments - Defined Cost (as defined in the applicable main option clause) + Fee (as defined in clause 11.2(8)).
  (only exception, by agreement on Main Options A, B and D regarding use of rates and sums instead of Defined Cost).

- scope of adjustments - in principle, all compensation events may result in changes to the Prices and delay to the Completion Date(s) and Key Date(s) if any (depending on the circumstances etc).

The compensation event may also involve, amongst other things, early warning and a risk reduction meeting under clause 16.
Number / complexity of compensation events

ECC3 is best suited where

- there is only a small number of compensation events (i.e. an extensive number and/or interaction of compensation events will make it impracticable if not impossible to administer the compensation event system) and
- generally compensation events do not involve complex interaction of effects (e.g. as to delay, disruption or cost).

Communications (clause 13)

Generally

Clause 13 requires communications (as defined in 13.1 - including certificates, instructions etc) to be in a form which can be "read, copied and recorded” (Clause 13.1).

Communications have effect when received (at the notified address or, if none notified, at the address stated in the Contract Data) (see clause 13.2).

Given the wording of clause 13.1, ECC3 does not provide for verbal communications or for the Contractor to confirm verbal communications given by the Project Manager or Supervisor.

Accordingly, verbal communications should not be acted or relied on under the contract, unless otherwise provided in the contract.

Notifications (clause 13.7)

It is a requirement that any notification required by the contract is to be communicated separately. This is important since it should result in important contract notifications not being overlooked or being lost amongst other issues. For example, submission of an application for payment that identifies compensation events does not have effect as notification of such compensation events.

It is also very important due to the provisions of clauses 61.3 and 63.4 regarding the time-bar on notifying compensation events.

Project Manager

The Project Manager is appointed by the Employer.

The Project Manager is to manage the contract for the Employer.
ECC3 does not place any restrictions on who may be the Project Manager or require the appointment of an individual.

ECC3 places considerable authority in the hands of the Project Manager. It assumes that he has the Employers' authority to carry out the actions and make decisions in his role of Project Manager under the contract between the Employer and the Contractor.

If his contract with the Employer constrains him in any way, as for example in the case of a limit on the amount which the Project Manager may accept as a compensation event assessment, then it is the responsibility of the Employer and Project Manager to ensure that all the approvals are given in time to enable the Project Manager to comply with the time periods under the conditions of contract.

The Project Manager may delegate any of his actions under the contract (see clause 14.2). However, prior notice (in accordance with clause 13) to the Contractor is required in order to effect such delegation under ECC3.
2 - Compensation events

Summary

The compensation events are identified in various places in ECC3, as follows:

- the nineteen compensation event sub-clauses set out in the standard list in clause 60.1
- certain further compensation events in the following clauses (if included in the contract):
  - clauses 60.4, 60.5 and 60.6 of main options B and D (re: inaccuracies in quantity and mistakes in the Bill of Quantities)
  - the following secondary option clauses:
    - Option X2 - changes in the law (as defined in the option clause) after the Contract Date
    - Option X12 – instructions changing the Partnering Information (see clause X12.3(6)) and changes regarding revised timetable (see clause X12.3(7))
    - Option X14 - delay in making advanced payment (see clause X14.2)
    - Option X15 – correcting a Defect for which the Contractor is not liable under the contract (see clause X15.1)
    - Option Y(UK)2 – re: suspension of performance under the Housing Grants, Construction and Regeneration Act 1996 (see clause Y2.4)
- additional compensation events defined in the Contract Data, part one, in the section marked ‘optional statements’ (note: this part of the Contract Data in ECC3 has however been deleted by the NEC3 Amendment June 2006. The Contract Data part one does however still have a place for identifying additional Employer’s risks, which by virtue of last bullet in clause 80.1 and clause 60.1(14) are also compensation events).
3 - Compensation event procedure

3.1 - Summary

Basic elements of the compensation event procedure (clauses 61 to 65)

The basic elements of the procedure are as follows:

- **Compensation event arises.**

- **Notification** – i.e. notification by the Project Manager (entitled or obliged to do so) or Contractor of the compensation event.

- **Instruction to submit quotations** – i.e. the Project Manager instructs the Contractor to submit quotations (unless one of the exceptions stated in clause 61.1 or clause 61.4 applies).

- **Contractor assesses** the compensation event, including preparing alterations to the Accepted Programme as referred to in clause 62.2.

- **Submission of quotations**, including the alterations to the Accepted Programme referred to in clause 62.2.

- **Reply to quotations** (i.e. acceptance, instruction to submit a revised quotation or notification that the Project Manager will be making his own assessment).

- **Implementation** (as a result of the acceptance of a quotation, deemed acceptance of a quotation or notification of the Project Manager’s assessment under clause 64) – the implementation is of the changes to Prices, Completion Date(s) and Key Date(s) if any.

Other elements of the compensation event procedure (clauses 61 to 65)

Other elements of the procedure, which according to the circumstances may or may not apply, include the following:

- **Notification that the Prices, Completion Date and the Key Dates are not to be changed** – i.e. notification by the Project Manager of his decision under clause 61.4 in respect of an event notified by the Contractor under clause 61.3.
• **Notification that the Project Manager has not replied to the Contractor’s notification of the event within the time allowed** – i.e. notification by the Contractor under clause 61.4 that the Project Manager has not notified his decision under clause 61.4 within the time allowed (note the consequences stated in clause 61.4 if the Project Manager does not reply to the notification within two weeks).

• **Notification that the Contractor failed to give early warning** – i.e. notification by the Project Manager of his decision under clause 61.5 (note the requirement for this to be at the same time as he instructs quotations).

• **Project Manager’s assumptions as basis for assessment** – i.e. the Project Manager decides that the effects of a compensation event are too uncertain to forecast reasonably and states in his instruction to submit quotations the assumptions to be used as the basis for assessment (see clauses 61.6 and 60.1(17)).

• **Instruction to submit alternative quotations** – see clause 62.1.

• **Submission of a revised quotation** – if so instructed by the Project Manager (see clauses 62.3 and 62.4).

• **Notification of extension of time for submitting or replying to a quotation** – i.e. the Project Manager notifies the extension agreed under clause 62.5 (note that any such agreement needs to be made within the original period).

• **Notification that the Project Manager has not replied to quotation within the time allowed** – i.e. notification by the Contractor under clause 62.6 (note the consequences stated in clause 62.6 if the Project Manager does not reply to the notification within two weeks).

• **Notification that the Project Manager will be making his own assessment** – i.e. notification accordingly by the Project Manager pursuant to clause 64.1.

• **Notification of the Project Manager’s assessment** - i.e. following notification under clause 64.1 that the Project Manager will be making his own assessment, notification of such assessment by him under clause 64.3 together with details of it.

• **Notification that the Project Manager has not assessed a compensation event within the time allowed** – i.e. notification by the Contractor under clause 64.4 (note the consequences stated in clause 64.4 if the Project Manager does not reply to the notification within two weeks).
### 3.2 - Compensation event procedure

**Notifying compensation events – clause 61**

#### Notification of compensation events

**Powers and duties of the Project Manager to notify events as compensation events**

<table>
<thead>
<tr>
<th>Compensation event</th>
<th>Brief description</th>
<th>Project Manager’s power or duty to notify</th>
</tr>
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<tbody>
<tr>
<td>60.1(1)</td>
<td>Instruction changing the Works Information</td>
<td>PM is obliged to notify under clause 61.1.</td>
</tr>
<tr>
<td>60.1(2)</td>
<td>Employer not allowing access</td>
<td>See Note 1 below.</td>
</tr>
<tr>
<td>60.1(3)</td>
<td>Employer not providing something</td>
<td>See Note 1 below.</td>
</tr>
<tr>
<td>60.1(4)</td>
<td>Instruction to stop or not start work or change Key Date</td>
<td>PM is obliged to notify under clause 61.1.</td>
</tr>
<tr>
<td>60.1(5)</td>
<td>Employer or Others work</td>
<td>See Note 1 below.</td>
</tr>
<tr>
<td>60.1(6)</td>
<td>Project Manager or Supervisor not replying within applicable period</td>
<td>See Note 1 below.</td>
</tr>
<tr>
<td>60.1(7)</td>
<td>Instruction for dealing with object of value, etc</td>
<td>PM is obliged to notify under clause 61.1.</td>
</tr>
<tr>
<td>60.1(8)</td>
<td>Project Manager or Supervisor changes a decision</td>
<td>PM is obliged to notify under clause 61.1.</td>
</tr>
<tr>
<td>60.1(9)</td>
<td>Project Manager withholds an acceptance</td>
<td>See Note 1 below.</td>
</tr>
<tr>
<td>60.1(10)</td>
<td>Instruction to search for a Defect</td>
<td>PM is obliged to notify under clause 61.1.</td>
</tr>
<tr>
<td>60.1(11)</td>
<td>Test or inspection by Supervisor causes unnecessary delay</td>
<td>See Note 1 below.</td>
</tr>
<tr>
<td>Compensation event</td>
<td>Clause reference</td>
<td>Brief description</td>
</tr>
<tr>
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</tr>
<tr>
<td>Physical conditions</td>
<td>60.1(12)</td>
<td>See Note 1 below.</td>
</tr>
<tr>
<td>Weather</td>
<td>60.1(13)</td>
<td>See Note 1 below.</td>
</tr>
<tr>
<td>Employer’s risk stated in the contract</td>
<td>60.1(14)</td>
<td>See Note 1 below. Various Employer’s risks are identified in clause 80.1. The last bullet in clause 80.1 incorporates into the conditions of contract the additional Employer’s risks, if any, stated in the Contract Data (ECC3 provides a place in part one of the Contract Data for identifying additional Employer’s risks).</td>
</tr>
<tr>
<td>Project Manager certifies take over before both Completion and the Completion Date</td>
<td>60.1(15)</td>
<td>The ECC3 Guidance Notes state that clause 61.1 would normally apply to this compensation event (in which case the PM would be obliged to notify the matter as a compensation event). However, this does not seem correct as the clause refers to a certificate and not to an instruction or changed decision, which is the basis for the operation of clause 61.1. It is therefore advisable that the Contractor notifies under clause 61.3, within 8 weeks of becoming aware of the event (i.e. from receipt of the certificate but preferably earlier if the certificate is delayed).</td>
</tr>
<tr>
<td>Employer not providing materials, etc for tests and inspections</td>
<td>60.1(16)</td>
<td>See Note 1 below.</td>
</tr>
<tr>
<td>Notification of a correction to an assumption stated by the Project Manager</td>
<td>60.1(17)</td>
<td>The ECC3 Guidance Notes state that clause 61.1 would normally apply to this compensation event (in which case the PM would be obliged to notify the matter as a compensation event). However, this is not clear from ECC3, because whilst the Project Manager is obliged by clause 61.6 to notify the correction it is unclear whether this also operates as notification of the correction as a compensation event. Also, clause 61.1 operates on the basis of compensation events arising from instructions and changed decisions (i.e. it is silent on the matter of compensation events arising from notifications, which is the case under clause 60.1(17)). It is therefore advisable that the Contractor notifies under clause 61.3, within 8 weeks of becoming aware of the correction (or earlier if he is aware that the assumption is wrong).</td>
</tr>
<tr>
<td>Compensation event</td>
<td>Clause reference</td>
<td>Brief description</td>
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<tr>
<td></td>
<td>60.1(18)</td>
<td>Breach of contract by the Employer</td>
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<td></td>
<td>60.1(19)</td>
<td>Matter of prevention</td>
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<td></td>
<td>60.4 (main options B and D)</td>
<td>Differences between actual and billed quantities causing Defined Cost per unit of quantity to change</td>
</tr>
<tr>
<td></td>
<td>60.5 (main options B and D)</td>
<td>Differences between actual and billed quantities which delays Completion or meeting a Key Date</td>
</tr>
<tr>
<td></td>
<td>60.6 (main options B and D)</td>
<td>Correction of mistakes in the Bill of Quantities</td>
</tr>
<tr>
<td>Compensation event</td>
<td>Clause reference</td>
<td>Brief description</td>
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<tr>
<td>X2.1 (secondary option X2)</td>
<td>A change in the law of the country in which the Site is located occurring after the Contract Date.</td>
<td>Clause X2.1 states that the Project Manager may notify such event as a compensation event (i.e. it does not seem to oblige him to notify it as such). It is therefore advisable that the Contractor notifies under clause 61.3, within 8 weeks of becoming aware of the change in the law (preferably however within 8 weeks of the change in the law).</td>
</tr>
<tr>
<td>X12.3(6) (secondary option X12)</td>
<td>Instruction by the Core Group to change the Partnering Information.</td>
<td>Such an instruction does not necessarily fall within the scope of clause 61.1, because the instruction is from the Core Group (i.e. not from the Project Manager). Whilst the Project Manager may be a member of the Core Group, it is advisable that the Contractor notifies under clause 61.3, within 8 weeks of becoming aware of the event (which would normally mean within 8 weeks from receipt of such instruction).</td>
</tr>
<tr>
<td>X12.3(7) (secondary option X12)</td>
<td>The Contractor changes his programme if it is necessary to do so in order to comply with a revised timetable (showing the proposed timing of the contributions of the Partners) issued by the Core Group.</td>
<td>See Note 1 below.</td>
</tr>
<tr>
<td>X14.2 (secondary option X14)</td>
<td>Delay in making the advance payment under clause X14.</td>
<td>See Note 1 below.</td>
</tr>
<tr>
<td>X15.2 (secondary option X15)</td>
<td>The Contractor corrects a Defect for which he is not liable under the contract.</td>
<td>See Note 1 below.</td>
</tr>
<tr>
<td>Y2.4 (secondary option Y(UK)2)</td>
<td>The Contractor exercises his right under the Housing Grants, Construction and Regeneration Act 1996 to suspend performance.</td>
<td>See Note 1 below.</td>
</tr>
</tbody>
</table>
Note 1 (re: above table): In respect of the corresponding compensation events, ECC3 does not specifically empower or oblige the Project Manager to notify such events as compensation events. The Contractor should therefore notify under clause 61.3, within 8 week of becoming aware of the event, in order to avoid the risk of losing his contractual entitlement to adjustment of the Prices, Completion Date(s) and Key Dates (see clauses 61.3 and 63.4).

compensation events which arise from the Project Manager or Supervisor giving an instruction or changing an earlier decision (clause 61.1)

The procedure is (briefly):

- Contractor to comply with the instruction or changed decision, i.e. put it effect under the contract notwithstanding the following procedure (see clauses 27.3 and 61.1)
- Project Manager to notify the Contractor that such instruction or changed decision is a compensation event (see clause 61.1)
- Project Manager to also instruct the Contractor to submit quotations (unless the event arises from a fault of the Contractor or quotations already submitted) (see clause 61.1)

When all the requirements of Clause 61.1 are considered in tandem with the requirement at Clause 13.7 that every notification is communicated separately it can be seen that strictly the Project Manager needs to issue up to three communications, for example:

1. an instruction to change the Works Information;
2. a notification that a compensation event has occurred; and
3. an instruction to submit quotations.

The instruction to submit quotations would not be required if either;

- the event arises from a fault of the Contractor; or
- a quotation or quotations have already been submitted (which may have been the case as a result of instruction under clause 61.2 to submit quotations for a proposed instruction or a proposed changed decision).

Practically, and acting in a spirit of mutual trust and cooperation, it is suggested that the parties should agree that this administrative burden can be reduced, to the mutual benefit of all concerned, by agreeing that an instruction to change the Works Information, for example, can include a statement that the instruction constitutes a compensation event and an instruction to submit a quotation or confirmation that a quotation has already been submitted.

The requirement in the last sentence of Clause 61.1 that the Contractor puts an instruction or changed decision into effect seems to repeat Clause 27.3.
Timing of the Project Manager’s notification of a compensation event and instruction to submit quotations (clause 61.1)

The Project Manager is obliged by clause 61.1 to notify a compensation event referred to in clause 61.1 “at the time of giving the instruction or changing the earlier decision” that constitutes the compensation event, i.e. at the same time.

The Project Manager’s instruction to submit quotations may however for good reason be issued slightly later, which presumably is why the second sentence of clause 61.1 merely states that the Project Manager “also instructs the Contractor to submit quotations” and does not go on to state that such instruction is to be given at the time of giving the instruction or changing the earlier decision that constitutes the compensation event. There are potentially five reasons that may justify a time lag before instructing quotations (albeit that the time lag should normally be fairly short given that clause 61.4 only allows 1 week in response to a Contractor’s notification – unless extended by agreement). This is because the Project Manager has to consider the following questions:

- **did the compensation event arise from a fault of the Contractor** (in which case quotations are not required)?
- **have quotations already been submitted** (this may have been the case under clause 61.2 in respect of a proposed instruction or proposed changed decision, however in practice the eventual instruction or changed decision will often be of a different content or given at a different time to that envisaged with the initial quotation(s) and consequently new quotations will be required)?
- **did the Contractor fail to give an early warning** within the meaning of clause 61.5?
- **are the effects of the compensation event too uncertain to be forecast reasonably**, in which case assumptions should be stated by the Project Manager under clause 61.6? and
- **are alternative quotations for different ways of dealing with the compensation event required** under clause 62.1?

Proposed instructions or proposed changed decisions (clause 61.2)

The Project Manager may instruct the Contractor to submit quotations for a proposed instruction or changed decision. In that situation the Contractor should not put the instruction etc. into effect until the quotation is accepted (see clause 61.2).

The wording of this clause relates to the giving of quotations for a proposed instruction or proposed changed decision rather than for the compensation event that would arise should the proposal become firm. This is odd in so much that the rest of ECC3 requires quotations for compensation events. Although there is a clear disparity in language and terminology it is not thought that this carries any significance.
The logic behind this provision is clear and such a requirement exists in other standard forms of construction contract.

**Compensation events where the Project Manager has not notified the event (clause 61.3)**

The procedure is (briefly):

- Contractor to proceed under the contract notwithstanding the compensation event procedure,
- Contractor to notify the Project Manager in accordance with clause 61.3 (note the time limit of 8 weeks),
- Within one week of such notice (or longer period as agreed – see clause 61.4), Project Manager to instruct the Contractor to submit quotations (other than in the excepted cases stated in clause 61.4).

**Contractor’s notifications of compensation events and time bar for failure to notify within 8 weeks (clauses 61.3 and 63.4)**

**Clause 61.3**

This clause makes the notification of compensation events by the Contractor a condition precedent to his right to changes to the Prices, Completion Dates and Key Dates (if any) under the compensation event procedure, other than where the Project Manager should have notified the event to the Contractor but did not. Reference to the ECC3 Guidance Notes gives an indication of which compensation events the Contractor and Project Manager respectively would normally be expected to notify. See also the comments in the table above.

The period for notification is **8 weeks** from the Contractor becoming aware of the event.

As the compensation events that are not caught by the time bar are those that the Project Manager should have notified to the Contractor but did not (see clause 61.3), an instruction changing the Works Information would seem to be an important exception to the time bar, as the Project Manager should notify it under clause 61.1 (see table above).

It seems that the Contractor can notify under clause 61.3 at any time up to and including the defects date. However if such notification is given after the expiry of 8 weeks from when the Contractor became aware of the event then he is not entitled to a change in the Prices, Completion Date(s) and Key Date(s) (see clause 61.3 and 63.4) unless the Project Manager should have notified the event to the Contractor but did not.

The words “should have” (in clause 61.3) could be held to mean circumstances where the Project Manager is specifically obliged to notify the event as a compensation event (for
example under clause 61.1) and possibly also where he is not specifically obliged to do so but where he ought reasonably to have notified the event (if he is aware of it and taking into account clause 10.1 as to mutual trust and co-operation).

The Contractor’s obligation to notify arises within eight weeks since he became aware of the event. This seems to be a lesser test than if the clause included the words ‘it is less than eight weeks since he (or an experienced contractor) should have become aware of the event’.

**Effect on clause 63.1**

The 8 week period would seem to provide the Contractor with the opportunity to defer the dividing line between actual Defined Cost and forecast Defined Cost in respect of those compensation events that only the Contractor can notify, by notifying towards the end of the 8 week period (see clauses 61.3 and 63.1). However, this is not beyond doubt because clause 61.3 could be construed as obliging the Contractor to notify once he believes that an event is a compensation event.

**Rights of the Parties to changes to the Prices, the Completion Date(s) and Key Dates (clause 63.4)**

Clause 63.4 states that such rights are their only rights in respect of compensation events. This is particularly important given the time bar in clause 61.3 regarding the Contractor’s notification of compensation events.

Clause 63.4 could be construed as precluding an alternative claim by the Contractor for damages under the common law. The Guidance Notes indicate that this is what the authors intended, however there are counter-arguments and not all commentators agree with the Guidance Notes on this matter.

**Latest date for notifying compensation events (clause 61.7)**

Clause 61.7 sets the latest date for the notification of a compensation event, presumably by either the Project Manager or the Contractor, as being the defects date. The defects date is identified in the Contract Data part one, and is calculated from Completion of the whole of the works.

Contractors in particular should also note the provisions of clause 61.3, by which they are required to notify compensation events within eight weeks of becoming aware of the event. This period for notification reduces for any event that occurs in the eight weeks prior to the defects date. It is thought that this situation should not arise very often, as the (significant) events the Contractor should have to notify are not common after Completion.
3.3 - Compensation event procedure

The Project Manager’s response to the Contractor’s notification of a compensation event clause 61.4

**Project Manager’s decision and notification under (clause 61.4)**

The Project Manager is required, by clause 61.4, to respond to every notification of a compensation event issued by the Contractor (subject however to clause 61.7 which states that a compensation event is not notified after the defects date). The drafting of this clause is such that it starts assuming the negative as can be seen below.

The drafting suggests that the Project Manager, on receipt of a notification from the Contractor should first of all look at the notification from the negative point of view to see whether one of the four reasons stated in clause 61.4 for not instructing quotations applies. If he finds that one of these four reasons applies, then his response is that a quotation is not required. Any other finding results in the Project Manager instructing the Contractor to submit quotations.

It is interesting that clause 61.4 does not list as one of the reasons for not changing the Prices, etc the reason stated in clause 61.3 (i.e. late notification by the Contractor where applicable). This is probably academic because even if a quotation is instructed and accepted in such circumstances the Prices, etc are still not changed (because of the effect of clause 61.3).

The Project Manager’s decision or instruction is to be given within one week of receipt of the Contractor’s notification or such longer time as the two may agree.

**Failure to notify a decision (clause 61.4)**

Under clause 61.4, if the Project Manager fails to notify his decision regarding a compensation event notice within either one week of the Contractor’s notice or a longer period to which the Contractor has agreed, the Contractor may notify the Project Manager to such effect, after which the Project Manager has two weeks to respond, and failure to do so will cause deemed acceptance of the event as a compensation event and a deemed instruction to submit quotations.

However, adjudication could possibly change the ‘deemed’ acceptance of the compensation event.
Circumstances where quotations are not required (clauses 61.1 and 61.4)

Where no effect upon Defined Cost (clause 61.4)

A quotation is not required if a compensation event notified by the Contractor under clause 61.3 has ‘no effect on Defined Cost’. This seems self-explanatory. Most if not all compensation events will have some effect on Defined Cost, even if only a minor effect.

Note that this does not apply to clause 61.1.

Where no effect on Completion (clause 61.4)

A quotation is not required if a compensation event notified by the Contractor under clause 61.3 has ‘no effect on Completion’. Presumably this must mean ‘planned Completion’ given the timing of the decision under clause 61.4 (i.e. it would normally have to be made in advance of knowing the actual effects on Completion) and when put in context with clause 63.3.

Note that if sectional Completion applies under option X5 then ‘Completion’ is to be interpreted accordingly (see clause X5.1).

Where no effect on meeting a Key Date (Clause 61.4)

A quotation is not required if a compensation event notified by the Contractor under Clause 61.3 has ‘has no effect upon meeting a Key Date’. Like in the case of Completion, this must presumably mean ‘the planned date when the Condition stated for a Key Date will be met’ given the timing of the decision under clause 61.4 (i.e. it would normally have to be made in advance of knowing the actual effects on meeting the Key Date) and when put in context with clause 63.3.

‘event arises from the fault of the Contractor’ (clauses 61.1 and 61.4)

For example, a change to the Works Information in order to overcome a failure by the Contractor to design or execute work in accordance with the Works Information.

It is not clear whether this applies only to faults arising under the contract or otherwise out of the performance of the contract or whether it could extend to faults arising otherwise, e.g. a fault in early contractor involvement pre-contract.
3.4 - Compensation event procedure
Further matters for the Project Manager to consider before instructing quotations
clauses 61 and 62

Contractor’s failure to give early warning (clauses 61.5 and 63.5)

To comply with Clause 61.5, in the event that the Project Manager instructs the Contractor to submit a quotation for the event notified, he should also consider whether the Contractor failed to give an early warning (Clause 16) of the event which an experienced contractor could have given. If the Project Manager decides that the Contractor failed in this respect then he is required to give notice at the same time as instructing the quotation. This is the start of the procedure by which the Contractor is potentially penalised for not giving an early warning.

However clause 16.1 provides that early warning is not required of a matter for which a compensation event has previously been notified. This would seem to mean that the Contractor (and indeed the Project Manager) would no longer be obliged to give an early warning notice for the same event. Consequently, it must surely be the case that the Project Manager cannot then operate clause 61.5 in respect of the lack or lateness of an early warning that clause 16.1 relieved the Contractor of giving at the time due to prior notification as a compensation event.

In any event, the wording of clause 61.5 is such that it appears that the Project Manager only gets one chance (under the compensation event procedure) to raise this alleged failure by the Contractor. It would hardly seem appropriate that the Project Manager could raise the matter for the first time when instructing the submission of a revised quotation. Whilst ECC3 does not specifically prohibit the PM from raising the issue for the first time when he instructs any revised quotation, logically it ought to be interpreted that the PM is not entitled to do so.

Strangely, in giving notice of his decision, the Project Manager is not expressly required to state what he or the Employer would or could have done to mitigate the effects of the event had the early warning have been given.

Where the Project Manager has given notice under Clause 61.5, then in accordance with Clause 63.5 assessments of compensation events, in terms of both cost and time are made as if the Contractor had given early warning of the event.

In these circumstances, the Contractor, in preparing his quotation, must somehow work out what the Project Manager and/or Employer could have done to mitigate the effect of the
event on either cost or time or both. It appears that the Contractor is put into a difficult position of having to forecast the effects based on what the Project Manager and/or Employer could have done without actually being expressly entitled to have such details provided to him. This seems to be one of the instances where the communications between the Project Manager and the Contractor will be tested, as will the spirit of mutual trust and cooperation.

Assumptions (clauses 61.6 and 60.1(17))

If the effects of a compensation event are too uncertain to be forecast reasonable then the Project Manager should state assumptions upon which the quotation is to be based. Such assumptions, if any, are to be stated in the instruction to submit quotations (see clause 61.6).

If the assumptions so stated by the Project Manager are later found to be wrong then the Project Manager notifies a correction (see clause 61.6). Such correction is treated as a new compensation event (see clause 60.1(17)).

This is the only mechanism for assumptions being correctable as a new compensation event.

In order to remove some of the uncertainty that can exist within the preparation of quotations for effects that have not yet happened and which cannot be reasonably forecast, the Project Manager is empowered by clause 61.6 to state assumptions to be used in assessing the compensation event in the relevant quotation.

The power to state assumptions is clearly one for the Project Manager, however he ought reasonably to consult with the Contractor on the matter before instructing the Contractor to submit quotations. The Contractor does not have to agree or disagree with such assumptions - he is however obliged to make his assessments on the basis of such assumptions (see clause 61.6).

It is important to distinguish between ‘assumptions’ and forecasts’ when preparing quotations for compensation events. If the Contractor bases his quotation on forecasts of his own (which is generally the case given the requirements of clause 63), then he must be aware that, as stated in Clause 65.2, the assessment of a compensation event is not revised if later recorded information shows those forecasts to have been wrong. On the other hand if an assumption (stated under clause 61.6) is later found to have been wrong then the Project Manager notifies a correction and this correction becomes a compensation event in its own right under Clause 60.1(17).

So two questions arise

• how can the Contractor protect himself where the Project Manager does not state assumptions? and
how can the Project Manager exert a reasonable level of control on cost and/or delay on the Employer’s behalf?

It is inevitable that where a Contractor feels at risk from the uncertainty affecting any aspect of a compensation event then he will ‘load’ his quotation so as to reduce that risk. The Project Manager will probably see such allowances in the quotations he receives as being unacceptable and leaving him open to criticism by the Employer if he accepts the Contractor’s quotation. The Project Manager then ends up either instructing a revised quotation or making his own assessment, which if the allowances (in such an assessment by the Project Manager) later prove to be inadequate, the Contractor will seek to challenge through the dispute resolution procedures.

The Project Manager, on the other hand, may feel that he can protect the Employer by stating assumptions about the effect of all compensation events. By this apparent ‘precautionary’ method the Project Manager will create a situation whereby all assumptions, excepting those that prove to be right, will be corrected with the result that the Employer pays for what happened and the Contractor’s risk contingencies will be negated.

However, a word of warning is needed here. Clause 63 states that a correction of an assumption is one of the situations where the Prices are reduced if the effect of the compensation event is to reduce total Defined Cost. What ECC3 does not allow is for any time previously added to the Completion Date or any Key Dates to be reduced if assumptions on which that time was assessed subsequently prove wrong.

In practical terms, the Project Manager and Contractor, working in a spirit of mutual trust and cooperation, can communicate about the effect of compensation events as soon as they are notified, by either of them, and either agree the forecasts to be used, albeit at the Contractor’s risk, or the assumptions that need to be stated and the level such assumptions should be pitched at. ECC3 does not specifically require this step, but it seems a sensible practical approach.

**Alternative quotations (clause 62.1)**

**Project Manager’s instructions to submit alternative quotations**

The Project Manager has the power under Clause 62.1 to instruct the Contractor to submit alternative quotations based upon different ways of dealing with the compensation event. The only limit on the type and number of alternative quotations is that they must be practicable.
To make clause 62.1 effective the Project Manager needs to specify in his instruction the different ways for which the Contractor must provide quotations for the compensation event.

Clause 62.1 is worded widely so that the type of alternatives envisaged is not only limited to different construction methods but also different resource levels and corresponding lengths of time that will produce varying costs/delays for the same construction solution. The provision of quotations for different time periods is a useful alternative to the Project Manager seeking quotations for acceleration pursuant to Clause 36.1.

The onus would seem to be on the Project Manager to show that it is practicable, as the wording does not seem to empower him to so instruct merely because he is of the opinion that it is practicable.

The Project Manager may possibly seek to use this to put pressure on the Contractor to take measures to mitigate or avoid the delaying affects of compensation events. However, this could only work in practice if the Contractor does not need to make a decision as to how to deal with the compensation event until after acceptance of the relevant quotation. In practice, the Contractor has to make a decision as to programming, including methods and resources, soon after the compensation event arises and not potentially a number of weeks later whilst quotations are being prepared and reviewed.

The Contractor must comply with an instruction to submit alternative quotations, but may also provide his own alternative quotations.

Strangely, ECC3 does not specifically oblige the Contractor to adopt the way of dealing with the compensation event that is used as the basis for an alternative quotation accepted by the Project Manager. It is however possible that this could be implied.

**Contractor’s alternatives**

Clause 62.1 also allows the Contractor to submit alternative quotations, in addition to any alternatives that the Project Manager has instructed, for other methods of dealing with the compensation event which he, the Contractor, considers practicable. As with alternative quotations instructed by the Project Manager the wording is wide and the comments under the previous sub-heading apply.

As ECC3 allows the Contractor to submit such quotations the Project Manager has no alternative other than to consider the submission and reply as required by clause 62.3.
3.5 - Compensation event procedure
Mitigation of the effects

Early warning (clause 16)

Introduction

Early warning is dealt with specifically at clause 16, which contemplates advance knowledge and then collaboration between Contractor and Project Manager in respect of risks.

Early warning matters (clause 16.1)

Subject to the last sentence of clause 16.1, early warning notification is required in respect of any matter which could:

- increase the total of the Prices (e.g. normally as a result of a compensation event),
- delay Completion (e.g. as a result of a compensation event or other matter),
- delay meeting a Key Date (e.g. as a result of a compensation event or other matter) or
- impair the performance of the works in use (e.g. a design fault).

Both the Project Manager and Contractor are required to give notice once they become aware, subject however to the following regarding prior notification as a compensation event (see clause 16.1)

Matters not required to be notified as early warning matters (core clause 16.1)

Clause 16.1 provides that early warning is not required of a matter for which a compensation event has previously been notified.

This is particularly significant as regards the information to be shown in revised programmes unless the NEC3 Amendment dated June 2006 applies (see clause 32.1, 2nd bullet). It is also significant as regards compensation event assessments and Disallowed Cost where the Contractor fails to give early warning (see clauses 61.5 and 63.5 and main options C to F).

‘increase the total of the Prices’ (clause 16.1)

This will cover compensation events, except where they do not lead to an increase in the total of the Prices (for example, an instruction omitting work).
In the case of main options C and D, an early warning notice is not required under clause 16.1 for an increase in Defined Cost except in cases where there is an increase in the Prices (but even then not if the matter has previously been notified as a compensation event – see clause 16.1, last sentence).

The Contractor is entitled to give an early warning under core clause 16.1 of any matter that could increase his total cost. Note this is wider in scope than Defined Cost.

In the case of main options E and F, the Prices include all the Defined Cost, consequently the scope of early warning notices under clause 16.1 deal with all increases in Defined Cost.

‘delay Completion’ (clause 16.1)

‘Completion’ is a defined term (see clause 11.2(2)).

It seems to mean impact on the critical path to Completion in respect of the whole of the works or, where option X5 applies, of a section of the works.

‘delay meeting a Key date’ (Clause 16.1)

It seems to mean impact on the critical path to meeting the Key Date.

‘impair the performance of the works in use’ (clause 16.1)

This could for example be a workmanship or design problem.

'The Contractor may … by notifying... any other matter which could increase his total cost’ (clause 16.1)

This makes it clear the Project Manager must consider ways of avoiding the Contractor’s risk events as well as the Employer’s, although there would be a mutual interest if any of Main Options C to F applies.

Amendment June 2006

The NEC3 Amendment sheet issued June 2006 deletes from clause 32.1 the words “and of notified early warning matters”. This is a very significant amendment and would seem to mean that the effects of notified early warning do not have to be shown unless the matter in question is a compensation event and even then only when it becomes an implemented compensation event within the meaning of clause 32.1. In practice however the Contractor will probably include and normally specifically show the effects of notified early warning matters where he considers it necessary as part of the preparation of a realistic programme.
Risk reduction meetings (clause 16)

Either the Contractor or Project Manager may instruct a risk reduction meeting (see clause 16.2).

At such meeting proposals for overcoming/dealing with the relevant matter and/or action to be taken should be dealt with and recorded by the Project Manager (see clauses 16.3 and 16.4).

The Contractor and the Project Manager will therefore have duties under this clause which could impact on the Contractor’s ability to make programme or cost decisions without any influence from the Project Manager or Employer.

Failure to notify (clauses 61.5 and 63.5)

Failure by the Contractor to give a required early warning may affect the assessment of the compensation event concerned and in effect prejudice his rights to time and/or money adjustment should the Project Manager operate the procedure on this (see clauses 61.5 and 63.5).

Contractor’s duty to mitigate risk, delay, etc

In our opinion, the Contractor does have some duty to mitigate or overcome risks, delays, etc by reason of various clauses in the conditions, including

- clause 10.1 - duty to act in a spirit of mutual trust and co-operation,
- clause 16.3 - duty to co-operate at risk reduction meetings,
- clauses 11.2(14) and 16 - duty to take actions agreed at risk reduction meetings,
- clauses 30.1 and 30.3 - duty to do the work so that Completion is on or before the Completion Date (similarly for Key Dates),
- clause 62.1 - duty where instructed or Contractor decides to submit alternative quotations for different ways of dealing with compensation events and
- clause 63.7 - assessments of compensation events based upon the assumption that the Contractor reacts competently and promptly, etc.

Acceleration

Introduction

ECC3 does not seem to empower the Project Manager to impose acceleration on the Contractor in order to mitigate the effects of compensation events, except perhaps by way of clause 62.1 where it is practicable to do so or by way of risk reduction meetings under
clause 16.1 or, in the case of Key Dates, by giving an instruction under clause 14.3 changing a Key Date.

Clause 36

The clause deals with agreed acceleration not imposed acceleration.

Instruction to submit quotation (clause 36.1)

This clause empowers the Project Manager to instruct the submission of a quotation for achieving Completion before the Completion Date (this can apply separately to a section(s) where sectional Completion is incorporated in the contract by option X5). He also states changes to the Key Dates to be included in the quotation.

Under clause 36.1, the Project Manager is not entitled to simply instruct acceleration or to avoid accepting a quotation (for a compensation event) stating a later Completion Date merely because he wants the Contractor to meet the current Completion Date.

Content of quotation for acceleration under clause 36

It includes four things:

- proposed changes to the Prices,
- proposed change to the Completion Date,
- a revised programme and
- the changed Key Dates

Response to instruction to submit quotation (clause 36.2)

The clause seems to give the Contractor discretion as to whether to submit the quotation or to simply give reasons for not doing so. There will often be many reasons in practice that the Contractor may sensibly use for declining to give a quotation.

Acceptance of a quotation for acceleration (main options A to D, clause 36.3)

The Project Manager, when accepting a clause 36 quotation for acceleration, must then change the Completion Date, Key Dates and Prices accordingly and accept the revised programme.

Contrast this with clause 65 regarding compensation events, where implementation is the changes to the Prices, the Completion Date(s) and Key Dates and it is silent on whether the alterations to the Accepted Programme included in the quotation are also accepted (as regards creating a new Accepted Programme).
Acceptance of a quotation for acceleration (main options E and F, clause 36.4)

This is as clause 36.3 except acceptance does not change the Prices.

Change to a Key Date (Clause 14.3)

The Project Manager is empowered to issue an instruction changing a Key Date, and such an instruction will be a compensation event pursuant to clause 60.1(4).

The Contractor is obliged by clause 27.3 to comply with such an instruction.

There appears to be nothing preventing the Project Manager from instructing earlier achievement of a Key Date, and which would involve the Contractor in implementing accelerative measures.

One question that arises is what would be the position if the Contractor believed it was not possible to comply with an instruction changing a Key Date. Clause 18.1 (illegal and impossible requirements) only provides relief if the Works Information requires him to do something that is ‘illegal or impossible’.

It would seem both sensible and reasonable, especially in view of the overriding requirement to work in a spirit of mutual trust and cooperation, that the Project Manager does not issue unreasonable instructions or that after discussion with the Contractor he withdraws, or makes reasonable modification to, the instruction.

In any event, if Contractor’s statutory obligations as to health and safety will override his contractual obligations to comply with such an instruction should it be inappropriate to do so on such grounds.
3.6 - Compensation event procedure
Contractor’s quotations and
Project Manager’s reply – clause 62

Quotations for compensation events (clause 62)

Introduction

From Clause 62.2 it is can be seen that a quotation is a proposal from the Contractor for changes to the Prices and delay to the Completion Date and Key Dates, if any.

The rules for establishing the amount of such changes/delay are set out in clause 63. Consequently, a quotation under clause 62 is not the same thing as a quotation freely given in the market place, whereby the Contractor can decide not only whether to give a quotation but also its content and its terms (e.g. qualifications).

By clauses 62 and 63 the Contractor has pre-agreed to submit quotations in accordance with those clauses (i.e. to compile quotations on the basis stated in clause 63 and without qualifications save only for any assumptions instructed by the Project Manager under clause 61.6).

Content (clause 62.2)

The quotation must cover the full assessed effects of the compensation event, in terms of the resultant changes to the Prices and any delay to the Completion Date(s) and, Key Date(s) if any. The only exception to covering the full assessed effects is where assumptions have been stated by the Project Manager under clause 61.6 in respect of the compensation event.

Qualifications

Given the wording of clause 62.2, particularly when read in conjunction with clauses 61.6 and 65.2, it seems clear that the Contractor is not entitled to state qualifications in his quotations for compensation events.

Programme effects and information

ECC3 requires the alterations to the Accepted Programme to be included in the quotation if the programme for remaining work is altered by the compensation event.
In practice many compensation events will give rise to alterations to the Accepted Programme. Such alterations are not limited to those to the order or timing of operations. For example, an alteration could merely be one to the planned resources.

It would seem that the alterations are to be submitted as substantiation of the time element of the assessment of the compensation event. The alterations are not however being submitted in order to give rise to a new Accepted Programme. It would be necessary to submit a full revised programme in accordance with clauses 31 and 32 in order to do so.

**Risk allowances (clause 63.6)**

The Contractor should include in his quotation appropriate allowances for his risks (see clause 63.6).

**Details**

Details of the Contractor’s assessment for the quotation must be provided to the Project Manager with the quotation.

ECC3 does not specify the level of detail, but it could be argued by the PM that it in terms of cost it should be in the level of detail of the various cost components (and sub-components, e.g. like in items 11, 12 and 13 of the SCC) constituting the definition of Defined Cost.

No doubt some such information is confidential, e.g. wages and salaries. ECC3 does not however make an exception for confidential information and in the case of main options C to F clause 52 obliges the Contractor to keep records and accounts and make them available for inspection.

It is clearly in the Contractor’s interests to provide an appropriate amount of detail so as to enable the Project Manager to be confident in reviewing and accepting quotations.

**Submission period**

The quotations should be submitted within three weeks of the Project Manager's instruction to do so (or longer period as agreed under clause 62.5).

A longer period may only be agreed within the existing period (see clause 62.5). Once the existing period has expired without a quotation having been submitted then the Project Manager must make and notify his own assessment (see clause 64).
content of revised programmes under clause 62.2 in quotations for compensation events

Generally

ECC3 requires the alterations to the Accepted Programme to be included in the quotation if the programme for remaining work is altered by the compensation event.

It is not clear why clause 62.2 refers to ‘programme for remaining work’, as this is not a defined term, whereas clauses 63.3 and 63.7 refer to the Accepted Programme, which is a defined term. Consequently, it is not clear what programme clause 62.2 is referring to. In our opinion, it is implicit that the words ‘programme for remaining work’ mean the planned elements of the Accepted Programme (i.e. the parts of the Accepted Programme that deal with the period after the date to which actual progress is shown in the Accepted Programme).

A logical view would therefore be that the alterations to be submitted under clause 62.2 are compiled on the basis of the latest Accepted Programme at the time when the compensation event arose. This would seem to necessitate inputting compensation events into an Accepted Programme in the order in which they arise and ignoring actual progress after that shown in the Accepted Programme. If this is correct, then the matter of concurrent culpable delay on the part of the Contractor due to poor actual progress occurring after that shown in the Accepted Programme would seem to be irrelevant as regards the assessment of compensation events (in terms of changing the Completion Date(s) and Key Dates). However the question of whether this is the correct interpretation and approach to be adopted will probably be an arguable point of law.

Logically, the relevant Accepted Programme must be the latest one at the time when the compensation event (not its effects) arose. However, it could be considered that the relevant Accepted Programme is the latest one at the time when the Project Manager issues (or should have issued) his instruction to submit quotations for the compensation event. This is because of the provisions of clause 63.1 as to the dividing line between actual and forecast Defined Cost. However, it is likely that such Accepted Programme will not have the same data date for actual progress achieved as the date of the dividing line referred to in clause 63.1. In our opinion, the relevant Accepted Programme is the latest one at the time when the compensation event (not its effects) arose.

Note that ECC3 does not require a whole revised programme to be submitted (only the ‘alterations to the Accepted Programme’).

‘programme … is altered

Given the extensive amount of information to be shown on programmes (see clause 31.2 and 32.1), it is highly likely that there will be an alteration on such programme. For
example, the alteration may simply be to move an acceptance date or prolong a non-critical activity by a short period or require a further item of Equipment or other resource.

**Status of alterations submitted under clause 62.2**

It is clear that the alterations submitted pursuant to clause 62.2 are submitted as part of a quotation for a compensation event (i.e. as supporting information), and not for acceptance pursuant to clause 32.2.

The Contractor would of course have the option of submitting a revised programme for acceptance pursuant to the second bullet of clause 32.2, provided it complied with the requirements of clause 31.2 and 32.1

**Conclusion**

It seems logical that the alterations to be submitted under clause 62.2 should be compiled on the basis of the latest Accepted Programme at the time when the compensation event arose, without (further) updating that Accepted Programme for actual progress etc in accordance with clause 32.1. In our opinion, the updating of the Accepted Programme for actual progress is part of the procedure in clause 32 and not part of the procedure in clause 62 or clause 63.

Also, clause 62.2 does not require the whole programme to be submitted (only the ‘alterations’).

**Project Manager’s reply to quotation**

The Project Manager replies within two weeks (or longer period as agreed under clause 62.5) of the submission, either requesting a revised quotation (with reasons), accepting the quotation or stating that he will make his own assessment (or, in the case of a quotation for a proposed instruction or proposed changed decision notifying that it will not be given or made).

All quotations submitted by the Contractor to the Project Manager as a consequence of an instruction to do so from the Project Manager must be considered by the Project Manager and replied to in accordance with the requirements of Clause 62.3 and the general principles of Clause 13.

ECC3 appears to contain an anomaly in so much that the Contractor can be instructed to provide more than one quotation for a particular compensation event based on different ways of dealing with that event. The Project Manager is given four options for his reply to a quotation (see Clause 62.3), none of which cater for the rejection of an alternative quotation on the grounds that another quotation for that compensation event has been
accepted. Presumably it must be implied that the other (alternative) quotations are treated as not accepted.

Quotations submitted in response to an instruction from the Project Manager have no formal status under ECC3 until accepted by the Project Manager. In the event that such a quotation is not accepted it is suggested that it will provide the basis for the Contractor’s submission to a third party decision maker should the Contractor be unsatisfied with a subsequent assessment for that compensation event by the Project Manager.

ECC3 is silent as to what the Project Manager does when he receives a revised quotation from the Contractor. Common sense suggests that revised quotations should be treated in the same way as the original quotation (i.e. by replying in accordance with clause 62), and that if necessary the process could be repeated over and over again.

**Extending submission or reply period (clause 62.5)**

The Project Manager can by agreement extend the time for submission.

The agreement, if any, must however be made before the period in question expires and is confirmed to the Contractor by the Project Manager. This clause does not refer to revised quotations but following the logic referred to above it would seem that the rules should apply equally.

**Status of quotations submitted without any instruction to do so**

Under Clause 62.1 the Contractor may submit quotations to the Project Manager other than those that the Project Manager has instructed for other methods of dealing with the compensation event. As such quotations are submitted in accordance with a provision of ECC3 there would appear to be no doubt that they must be responded to by the Project Manager as if he had instructed the quotation (see comments above).

Where the Project Manager has decided that a compensation event notified by the Contractor under clause 61.3 is not one for which quotations are required (because of one of the reasons set out in the four bullets in clause 61.4), and given a decision to that effect in accordance with Clause 61.4 or the Project Manager has failed to respond to such notification, the Contractor may in practice submit a quotation for that notified event. As such quotations have not been instructed it would appear that the Project Manager is not obliged to consider them under the provisions of clause 62.3. It is suggested that the only purpose such quotations would serve would be to act as a marker of the Contractor’s contention should the dispute over the status of the notified event be referred to any form of dispute resolution.
Revised quotations (clause 62.4)

The Project Manager, in accordance with Clause 62.4, can instruct the Contractor to submit a revised quotation but only after explaining his reasons for doing so. Unlike many other clauses in ECC3 that list the reasons the Project Manager can give when rejecting a submission from the Contractor, no such list of reasons is given in connection with the instruction for a revised quotation. Logically the Project Manager should only use the reasons stated in the second bullet in clause 64.1, i.e. that ‘the Project Manager decides that the Contractor has not assessed the compensation event correctly … …’. This does however still leave enormous scope for dispute.

It should be remembered that the withholding of an acceptance for a reason not stated in the contract gives rise to a compensation event under clause 60.1(9).

Another matter that is unclear in respect of revised quotations is whether an instruction for a revised quotation can include assumptions about the compensation event in accordance with Clause 61.6. There are no clear words in ECC3 that either allow or prevent the Project Manager from stating such assumptions in an instruction for revised quotations. The ECC3 Guidance Notes state that the Project Manager may when instructing a revised quotation alter or add to the assumptions made under clause 61.6. Indeed, it would seem both sensible and reasonable, especially in view of the overriding requirement to work in a spirit of mutual trust and cooperation, that the Project Manager should state assumptions in an instruction for a revised quotation where he considers it appropriate, preferably after discussion with the Contractor, to do so.

Deemed acceptance of a quotation for a compensation event (clauses 62.6 and 64.4)

These clauses apply where the Project Manager’s fails to reply to a quotation or make his own assessment of a compensation event.

These clauses allow (but do not require) the Contractor to notify the failure (and if more than one quotation was submitted, the notice must state which one should be accepted).

The Project Manager has two weeks to reply to such notice, failing which it is treated as acceptance of the Contractor’s quotation.

These clauses do not apply to proposed instructions or proposed changed decisions.

Adjudication

Adjudication can however change the ‘deemed’ acceptance.
3.7 - Compensation event procedure
The Project Manager’s assessments – clause 64

Introduction

Clause 64 deals with the situation where the Project Manager makes assessments of compensation events.

There is potentially wide scope for the Project Manager to assess compensation events under clause 64.

Grounds for the Project Manager to assess compensation events - clause 64.1

There is potentially wide scope for the Project Manager to assess compensation events under clause 64.

not submitted required quotation and details (re: clause 64.1, 1st bullet)

Once the due period expires the Project Manager must go on to make his own assessment if he has not received the quotation and details. See clause 62.5 regarding extending the time period.

not assessed the compensation event correctly (re: clause 64.1, 2nd bullet)

This causes enormous dispute in practice and is not easy to interpret. In our opinion, this does not empower the Project Manager to decide that the Contractor has not assessed the compensation event correctly and impose his own assessment merely because he disagrees with the Contractor’s view of forecast effects, such as risk, resource levels and outputs, etc. It will often be more appropriate for the Project Manager to seek to agree with the Contractor the basis for a revised quotation instead of making his own assessment of such matters.

not submitted a programme or alterations to a programme which this contract requires (re: clause 64.1, 3rd bullet)

There is enormous potential for this if the Contractor is not dealing with programmes in accordance with clauses 31, 32 and 62.
not accepted the Contractor’s latest programme for one of the reasons stated in this contract (re: clause 64.1, 4th bullet)

The onus will be on the Project Manager to show that the reason is stated in the contract.

Commentary

Under the first, third and fourth bullet points the Project Manager is obliged to make an assessment if the Contractor has failed to do one of the specified things. Under the second bullet point it is a decision of the Project Manager that triggers the Project Manager’s obligation to act.

The wording of the clause is such that the Project Manager does not have any option once the trigger event has happened. The obligation on the Project Manager is so clear that it appears that should the Project Manager fail to carry out the assessment then a breach will occur.

The intent of the clause seems to be to ensure that the compensation event mechanism is carried out even where the Contractor fails to do what is required of him. The Project Manager could find himself carrying a heavy burden in this respect.

In accordance with Clause 64.3, the Project Manager is obliged to provide his assessment within the period allowed for the Contractor’s assessment. This period starts when the need for the Project Manager’s assessment becomes apparent.

Clause 64.2 allows the Project Manager to use his own assessment of the programme for the remaining work where there is either no Accepted Programme or the Contractor has not submitted a programme or alterations to a programme as required by the contract.

Project Manager assessing compensation events using his own assessment of the programme for the remaining work - clause 64.2

no Accepted Programme (re: clause 64.2, 1st bullet)

This shows one of the advantages of identifying a programme in the Contract Data part two. This is because at least that one will be the Accepted Programme, even if all other programme submissions are rejected.

Contractor not submitted a programme or alterations to a programme for acceptance as required by the contract (re: clause 64.2, 2nd bullet)

This would seem to apply in respect of any initial programme under clause 31.1 and revised programmes under clause 32. It is debatable whether it applies in the case of
alterations under clause 62.2 because they are not submitted for acceptance (rather they are submitted as supporting information for a quotation for a compensation event).

**Details of Project Manager’s assessments – clause 64.3**

The PM is obliged to provide these.

**Failure of the Project Manager to assess a compensation event within the time allowed (clause 64.4)**

Clause 64.4 allows (but does not require) the Contractor to notify the failure (and if more than one quotation was submitted, the notice must state which one should be accepted).

The Project Manager has two weeks to reply to such notice, failing which it is treated as acceptance of the Contractor’s quotation.
3.8 - Compensation event procedure
Implementing compensation events – clause 65

Meaning of ‘implementation’

The word ‘implemented’ is misleading, as it implies that compensation events are not acted upon until they are implemented. However implementation is dealing with the point in time when the Prices (or in the case of main options E and F, the forecast amount of the Prices), the Completion Date(s) and the Key Dates (if any) are changed (see clause 65).

The timing of the implementation of a compensation event is when:
- the Project Manager accepts a quotation;
- the Project Manager notifies his own assessment; or
- when a quotation is treated as accepted (clauses 62.6 and 64.4)

Clause 65.4 (main options A to D)

The sums in the accepted quotation or the Project Manager’s assessment are implemented under clause 65.4 by way of changing the Prices.

Clause 65.3 (main options E and F)

The sums in the accepted quotation or the Project Manager’s assessment are implemented under clause 65.3 by way of changing the forecast amount of the Prices.

Implementation of changes to the Completion Date and Key Dates (if any) (clauses 65.1, 65.3 and 65.4 – compensation events)

A Completion Date or Key Date is not changed as a result of a compensation event until the time of implementation as referred to above. Consequently, there may be a considerable time lag between a compensation event arising and the resultant change to a Completion Date or Key Date; possibly a number of months, during which there may be a number of programme revisions still showing the unchanged Completion Date or Key Date.
3.9 - Compensation event procedure
Revising assessments

Introduction

ECC3 provides only limited grounds for revising assessments

Revised quotations (clauses 62.3 and 62.4)

These may be instructed by the PM only after explaining his reasons and presumably only where the quotation is broadly acceptable.

Forecasts (clause 65.2)

Clause 65.2 emphasises that an assessment is not to be revised simply because a forecast on which it is based is shown by later recorded information to have been wrong.

This emphasises the finality of an accepted quotation or Project Manager’s assessment, except in the latter case if the Project Manager’s assessment is challenged in accordance with the dispute resolution provisions. It is not clear whether the Employer (or indeed the Contractor) can challenge the Project Manager’s acceptance of a quotation. Even so, neither the Project Manager nor the Contractor can use records as the sole basis for revising a forecast (see clause 65.2).

Correction of Project Manager’s assumptions (clauses 60.1(17) and 61.6)

If the Project Manager stated under clause 61.6 assumptions to be used as the basis for assessment of a compensation event and it is later found that one or more of such assumptions is wrong, then the correction of the assumption(s) in question is treated as a new compensation event. This does not however provide grounds for wholesale revision of the assessment of the original compensation event.

Disputes (Option W1 and W2)

Any dissatisfaction by the Contractor as to the Project Manager’s actions and inactions under the compensation event procedure could be dealt with under the dispute resolution provisions in ECC3.
It seems that the Employer cannot challenge a decision by the Project Manager where Option W1 applies, given the wording of those provisions, as it seems to assume that the Project Manager is acting on behalf of the Employer. It is not clear whether this is the case for construction contracts in the United Kingdom where Option W2 will normally apply. Given that clause W2.3(4) specifically empowers the Adjudicator to alter a quotation which has been treated as having been accepted, it is at least arguable that the Adjudicator is not empowered to alter a quotation which has actually been accepted by the Project Manager. If the Adjudicator could do so then it would potentially undermine one of the key aspects of the compensation event procedure, which is the early resolution of the Contractor’s entitlements in respect of compensation events, which has the benefit of giving the Parties greater certainty in terms of managing the contract.

Subject to the above points, under option W2, either party can refer any dispute referred to in clause W2.1 to adjudication.

Any dispute referred to in clause W2.1 must be dealt with by adjudication before it can be referred to the tribunal (clause W2.4).
4 - Compensation event procedure
Assessing compensation events – clause 63

Changes to the Completion Date(s) and Key Date(s) (clauses 62.2 and 63.3)

Assessment of the delay to the Completion Date

The Contractor has to assess the delay to the Completion Date(s) and the Key Dates (if any) and include this in quotations. The rules for assessing this are in clause 63.

Under ECC3, the delay to the Completion Date (i.e. the entitlement to extension of time) is measured as the delay to planned Completion (as shown on the Accepted Programme) due to the compensation event. Under traditional forms of contract delay is often measured in practice (and sometimes contractually so) by the effect on the Contractor’s ability to achieve completion by the completion date, which can have the effect of depriving the Contractor of the benefit of terminal float.

Under the provisions of ECC3 there is no doubt that the wording means that the Contractor owns any terminal float (i.e. the float between planned Completion as shown on the Accepted Programme and the Completion Date).

The use of planned Completion as the yardstick by which delay is assessed makes it appropriate in many cases, from the Contractor’s point of view, to plan to complete the works early and to show such early Completion on the Accepted Programme, as the Employer will not be able to take advantage of such float.

Any activity float that is available in the Accepted Programme will still be available to absorb the impact of delaying events, subject to the rules for assessing compensation events. In order to assess the impact of a particular compensation event the assessed effect of that event needs to be put into the Accepted Programme, either as a change to the timing or duration of an existing activity or as a new activity or activities with appropriate links into the existing bars. If this change results in planned Completion being delayed, then subject to the rules in clause 63 (and in particular clauses 63.6 and 63.7) the Completion Date is delayed by the same period.

There is no provision in ECC3 that provides for the reduction of the time for carrying out the works (i.e. advancing the Completion Date, except by agreed acceleration under clause 36 or agreed changes to allow a Defect to remain uncorrected under clause 44). This restriction is a cause for concern for Project Managers when considering whether to make assumptions with regard to the effect of a compensation event pursuant to Clause 61.6. As any correction of such assumptions is in itself a compensation event (Clause 60.1(17)), this
second compensation event cannot reduce the time for completion should the assumptions made prove to have given rise to a longer than necessary delay to planned Completion.

As stated at Clause 63.3 the assessment of delay is the effect of the compensation event on planned Completion as shown on the Accepted Programme. The feedback from users of the ECC shows that where the Accepted Programme has not been established and then maintained throughout with often numerous revisions, the management of time, especially in relation to compensation events is difficult and often breaks down.

This definition makes it clear that the Accepted Programme is a dynamic document that will change from time to time. In the event that the revisions are not maintained as prescribed at clause 32 then it is apparent that the Contractor will find it difficult to comply with his obligations and prepare quotations. Contractors must recognise that if they do not comply with the requirements of the contract in respect of programme they may find it difficult to obtain the revisions to the Completion Date that they would otherwise be entitled to. This will have the effect of making the time they have to complete the works uncertain and possibly shorter. Experience shows that resolving the inevitable dispute will be difficult, costly and time consuming.

The Employer, Contractor and Project Manager must all be aware that the Accepted Programme acts as a baseline against which performance is measured and that a failure on the part of the Employer or Project Manager to do something or provide something by a date shown or within a period shown on the Accepted Programme will in itself give rise to a compensation event. Remember that three of the first five compensation events listed at Clause 60.1 refer to the Accepted Programme as the basis for the event.

**no effect on Completion - clause 61.4**

A quotation is not required if a compensation event notified by the Contractor under clause 61.3 has ‘no effect upon … … Completion’. Presumably this must mean ‘planned Completion’ given the timing of the decision under clause 61.4 and when put in context with clause 63.3.

**Assessment of the delay to a Key Date**

The Contractor has to assess the delay to Key Dates (if any) and include this information in quotations. As in the case of Completion Dates, the rules for assessing this are in clause 63 and similarly the delay to a Key Date (i.e. the entitlement to extension of time) is measured as the delay to the planned date for meeting the Key Date as shown on the Accepted Programme.

Also, as in the case of Completion Dates, there is no provision in the compensation event procedure in ECC3 for the reduction of the time for meeting a Key Date. However, the
Project Manager may instruct a change to a Key Date (see clause 14.3). Such an instruction is a compensation event (see clause 60.1(4)).

**no effect on meeting a Key Date - clause 61.4**

A quotation is not required if a compensation event notified by the Contractor under clause 61.3 has ‘no effect upon … … meeting a Key Date’. Presumably this must mean the planned date for meeting the Key Date given the timing of the decision under clause 61.4 and when put in context with clause 63.3.

**which ‘Accepted Programme’? – clause 63.3**

As a matter of logic it must be referring to the latest Accepted Programme at the time when the compensation event arose. If it were otherwise, it would cause enormous complexity in assessing compensation events. This is particularly so if a later Accepted Programme is used, because of the likelihood that such Accepted Programme will have taken into account some or all the effects of the compensation event and as a result planned Completion (and the planned dates to meet Key Dates) will have been impacted accordingly. The use of such a later Accepted Programme would therefore distort the assessment under clause 63.3. The matter of which Accepted Programme to use as the basis for assessment is however far from clear from the the provisions in ECC3.

**To summarise:**

- a compensation event cannot result in a reduction in the time for completion, either to a date before an original Completion Date (or Key Date) or indeed to a date earlier than a later Completion Date (or Key Date) fixed previously.

- where the Accepted Programme shows float between planned Completion and the Completion Date (or between the planned date to meet the Condition for a Key Date and the Key Date), then this cannot be used to reduce or extinguish an extension of time for a compensation event.

- where the Accepted Programme shows float before planned Completion (or the planned date to meet the Condition for a Key Date), then it can be used to absorb the effects of a compensation event without giving rise to a right to extension of time.
Changes to the Prices (clause 63.1)

The basis for the assessment of changes to the Prices is set out at clause 63.1.

The broad intent seems to be that the compensation event is assessed by comparing what it would have cost the Contractor to do the original work with what it should cost to do the revised work (‘cost’ however being in terms of ‘Defined Cost’). The value of the original work included in the tender price plays no part in the assessment of the compensation event.

Part of the difficulty, however, is that Defined Cost (as defined in ECC3) can be a long way from the true actual cost incurred by the Contractor.

The first of the three bullet points in Clause 63.1 covers the Defined Cost of work already done due to the compensation event (typically in practice before the quotation is submitted) and would often be based on records kept.

It is not difficult to envisage situations where the changed work required by instructions is commenced and even completed before the quotation must be submitted. Similarly, many events that are the Employer’s risk may require emergency or immediate action to, for example, safeguard the works or the public. Accordingly, a retrospective valuation will often be made for any such work notwithstanding the rule in clause 63.1 as to the division between actual and forecast Defined Cost.

The second bullet point clearly refers to the forecast of Defined Cost yet to be incurred but necessary to complete the work required by the compensation event in question. Again this forecast is calculated using Defined Cost rather than true actual cost. No rules are stated for establishing the forecasts. Consequently, this is an area ripe for differences of opinion between the Contractor and the Project Manager. Logically, the Accepted Programme should be used as the baseline for such forecasts, unless the Accepted Programme has not been revised in accordance with clause 32. However, clause 63.1 does not state that the Accepted Programme is to be used for assessing the changes to the Prices. Consequently, the extent to which the Accepted Programme should be used for such purposes is arguable, particularly if the Accepted Programme is significantly out-of-date relative to when the compensation event arose, quotations were instructed and/or the assessment made.

The final bullet point relates to the Fee that results from the assessment under the first two bullet points. The respective fee percentages are applied to the respective elements of Defined Cost (see definition of the Fee in clause 11.2(8)), it would seem regardless of whether the Defined Cost is a positive or a negative.
To summarise:

- The rules for assessment are such that it is essential to have a detailed and realistic Accepted Programme, particularly in order to deal with prolongation, delay and disruption.
- Basically, the assessment is on the basis of the difference in Defined Cost, i.e. between (1) the Defined Cost incorporating the effects of the compensation event and (2) the Defined Cost without incorporating such effects.
- It is therefore not permissible to take total Defined Cost and deduct bill rates or activity schedule prices, however the treatment of work omitted by instructions is not clearly within the scope of clause 63 in terms of changes to the Prices.

‘work’

Clause 63.1 refers to ‘work’ and not the ‘works’. It would therefore seem that ‘work’ is wider in scope than ‘works’. For example, ‘work’ could include design work or work by management, subject to the definition of Defined Cost.

Effect on forecasts of Defined Cost

ECC3 does not provide specific rules for establishing the forecasts of Defined Cost. The Accepted Programme should be the logical basis for the monetary forecasts (or some of them, depending on the relevant main option and treatment of payments to Subcontractors). This would however need the Accepted Programme to be regularly updated and changed in accordance with clause 32.

division between ‘actual’ and ‘forecast’ Defined Cost (core clause 63.1)

The dividing line

ECC3 clarifies the division between work already done and work not yet done as regards the assessment of compensation events and their impact on actual Defined Cost and forecast Defined Cost.

The dividing line is the date when the Project Manager instructed or should have instructed the Contractor to submit quotations. This gives more emphasis to assessments being based on forecasts, which is a principal aim of ECC£. This is particularly so for instructions, including instructions changing the Works Information, as clause 61.1 seems to require the instruction to submit quotations to be given at or about the same time as the instruction that gives rise to the compensation event (see previous comments).

Consequently, the provisions of clause 63.1 seeks to prevent the common practice of deferring the assessment until after the effects of the compensation event have all occurred and making the assessment wholly on actual Defined Cost.
Relevance to revised quotations

The ECC3 Guidance Notes state that as clause 63.1 does not refer to the first instruction to submit a quotation then it means that if a revised quotation is instructed then the dividing line (they refer to the ‘switch date’) becomes the date of that instruction to submit the revised quotation. This seems wrong as a revised quotation ought merely be to correct an error or omission in the original quotation (and perhaps deal with new or changed assumptions stated by the Project Manager under clause 61.6 – although it is not clear that he can do so in an instruction to submit a revised quotation) rather than change the basis on which it was calculated.

It would also go against the NEC philosophy of motivating the Contractor to minimise cost and delays due to compensation events and possibly encourage some project managers to regularly instruct revised quotations in order to provide for assessments by way of retrospective analysis of facts.

In our opinion, ECC3 should not therefore be interpreted as allowing an instruction to submit a revised quotation to change the dividing line (‘switch date’) under clause 63.1.

Alternative basis for assessment – rates and prices

Use of rates and sums (main options A, B, and D, clause 63.13 and 63.14)

In the case of main options A, B and D (not C), rates and lump sums may be used as the basis for assessment of compensation events, instead of Defined Cost and the resulting Fee, if the Project Manager and the Contractor so agree (see clauses 63.13 and 63.14).

Applying rates and sums will normally be easier, in administration terms, than assessing Defined Cost. This alternative, by agreement, is therefore particularly useful for small items or where additional works are ordered in time for them to be arranged efficiently with the rest of the works.

The clauses do not however state where these rates and sums are to be found. In the case of main option B and D, it presumably means the rates and sums in the Bill of Quantities.

In the case of main option A there is no document containing rates (other than the rates in the Contract Data, which are elements of Defined Cost)! It is also not clear why the principle does not also apply to main option C.
Reduction in the Prices (clause 63.2)

The general rule is that a compensation event can only lead to an increase in the Prices. The exceptions to that rule, i.e. the compensation events that can lead to an increase or decrease in the Prices, are the compensation events listed below and any other compensation events for which the contract states the Prices are reduced if the effect of the compensation event is to reduce the total defined cost (see clause 63.2).

Compensation events that may lead to reduction in the Prices

<table>
<thead>
<tr>
<th>Compensation event</th>
<th>Clause reference</th>
<th>Brief description</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Instruction changing the Works Information</td>
<td>60.1(1)</td>
<td>See clause 63.10 (main options A and B) and clause 63.11 (main options C and D – not however the exception in clause 63.11 for a change to the Works Information provided by the Employer which the Contractor proposed and the Project Manager has accepted).</td>
<td></td>
</tr>
<tr>
<td>Notification of a correction to an assumption stated by the Project Manager</td>
<td>60.1(17)</td>
<td>See clause 63.10 (main options A and B) and clause 63.11 (main options C and D).</td>
<td></td>
</tr>
<tr>
<td>Differences between actual and billed quantities causing Defined Cost per unit of quantity to change</td>
<td>60.4 (main options B and D)</td>
<td>See clause 60.4 (main options B and D).</td>
<td></td>
</tr>
<tr>
<td>Correction of mistakes in the Bill of Quantities</td>
<td>60.6 (main options B and D)</td>
<td>See clause 60.6 (main options B and D).</td>
<td></td>
</tr>
<tr>
<td>A change in the law of the country in which the Site is located occurring after the Contract Date.</td>
<td>X2.1 (secondary option X2)</td>
<td>See clause X2.1.</td>
<td></td>
</tr>
</tbody>
</table>
Rights of the Parties to changes to the Prices, the Completion Date(s) and Key Dates (clause 63.4)

Clause 63.4 states that such rights are their only rights in respect of compensation events. This is particularly important given the time bar in clause 61.3 regarding the Contractor’s notification of compensation events.

As stated previously, clause 63.4 could be construed as precluding an alternative claim by the Contractor for damages under the common law. The ECC3 Guidance Notes indicate that this is what the authors intended.

Effect of the Contractor’s failure to give early warning (clause 63.5)

Whilst the wording is not wholly clear, it would seem that the intention is that it provides a sanction whereby the changes to the Prices, Completion Date(s) and Key Dates (if any) as a result of a compensation event can be reduced, if for example the Employer or PM has been prejudiced from taking mitigating or avoiding action by the failure of the Contractor to give early warning.

Strangely, clause 61.5 does not require the PM to state what he considers would have been the position had the Contractor given early warning. How can the Contractor make an assessment in accordance with clause 63.5 if the PM has not informed the Contractor with his notification under clause 61.5 as to the basis for assessment?

Further, as mentioned previously, clause 16.1 provides that early warning is not required of a matter for which a compensation event has previously been notified. This would seem to mean that the Contractor (and indeed the Project Manager) would no longer be obliged to give an early warning notice for the same event. Consequently, it must surely be the case that the Project Manager cannot then operate clauses 61.5 and 63.5 in respect of the lack or lateness of an early warning that clause 16.1 relieved the Contractor of giving at the time due to prior notification as a compensation event.

Risk allowances (clause 63.6)

This seems to recognise allowances for such things as materials wastage and downtime due to adverse weather (other than weather constituting the compensation event in clause 60.1(13)) and equipment breakdowns.

It is debatable whether it allows all matters that are at the Contractor’s risk and have a significant chance of occurring, for example delay and/or disruption caused by the Contractor or by one Subcontractor to another Subcontractor.
The ECC3 Guidance Notes state that the value of the allowance is greater when the work is uncertain and there is a high chance of a Contractor’s risk happening.

**time risk allowances**

**Definition of ‘time risk allowances’**

It is not a defined term.

It seems that it is commonly understood to mean the time that the Contractor includes in an activity duration (or attaches to an activity or series of activities) as an allowance for the time impact on the activity(s) duration arising from a risk other than a compensation event. See ECC Guidance Notes.

Consequently, it should not be allowances for compensation events.

**Examples**

A typical example would be an allowance for downtime for weather conditions (to the extent that they are not a compensation event under clause 60.1(13)) or plant breakdowns.

**Ownership of time risk allowances**

Basically the Contractor should own them in order to absorb the time impact of (his) risk. See ECC Guidance Notes.

However, the allowances may change as a result of changes in the programme. For example, an allowance for downtime for weather may warrant an increase or decrease if the activity moves from one season to another.

Also, allowances may be added or deleted where changes in the programme warrant it.

A compensation event assessment should take into account any relevant changes, additions and deletions of time risk allowances. For example, substantial additional work early in the programme could cause an increase in time risk allowances for weather conditions for later activities where they are weather susceptible and delayed into prevailing adverse conditions.

The test for whether such allowances should be included as part of the assessment of a compensation event is that they should have a significant chance of occurring and be at the Contractor’s risk (see clause 63.6).
Recognised factors such as downtime due to inclement weather should not be controversial. However, it is likely that allowances for delay, disruption and matters such as winter working will be more controversial and cause Project Managers to either instruct revised quotations or make their own assessments.

**Assumptions as the basis for assessments (clause 63.7)**

‘reacts competently and promptly’ and ‘time due to the event are reasonably incurred’

This clause provides the Employer with some protection against inefficiency by the Contractor, in terms of assessing compensation events.

In respect of matters of cost this requirement is not difficult to apply and acts to protect the Employer against unreasonable inefficiency of the Contractor. This clause, as discussed below, is however more difficult to operate in terms of time.

‘that the Accepted Programme can be changed’

ECC3 does not state the criteria for determining whether the Accepted Programme ‘can be changed’. For example, the Contractor may want to change it but the Employer may be unwilling to allow the change, particularly in the rail industry as a result of possessions, etc.

The ECC Guidance Notes interpret this requirement as being that the Contractor is obliged to change his arrangements if he can and presumably whenever and however required to accommodate the effects of a particular compensation event.

However ECC3 does not state what happens if the Accepted Programme cannot be changed, for example in the case of a track possession on a railway that cannot be delayed or re-arranged. Two possibilities spring to mind, either the Project Manager instructs the submission of a quotation for acceleration (Clause 36), which in itself could be difficult as the Contractor can decline to give a quotation, for example if the acceleration required cannot be achieved, or the effect on time is assessed as if the Accepted Programme could be changed and the Prices are adjusted to reflect the notional delay. In the second instance the Contractor would receive payment for delay, which presumably he would have to spend in effectively accelerating, but not the time. Neither of these options can be said to be satisfactory, if the Accepted Programme cannot be changed because of external constraints the Contractor cannot fairly be disadvantaged as the result of a risk that he does not carry.
The ECC procedures seem to run into a dead end on this particular point. In the rare event that it is encountered, the parties will need to work together to overcome the problem in a sensible and practical manner.

**Assessing the effects of ambiguities or inconsistencies (clause 63.8)**

Clause 63.8 sets out how ambiguities or inconsistencies in the Works Information are to be assessed (where the instructed resolution of the same constitutes a compensation event – see clause 60.1(1)). The clause interprets the ambiguity or inconsistency against the party who provided the Works Information that is changed by the instruction resolving the ambiguity or inconsistency.

**Assessment of a correction to the description of the Condition for a Key Date arising out of an instruction changing the Works Information (clause 63.9)**

ECC3 does not specifically empower the Project Manager to give an instruction changing a ‘condition’ stated in the Contract Data in respect of a Key Date, notwithstanding the reference in clause 11.2(9) to changes. However, clause 63.9 recognises that an instruction changing the Works Information may make the description of a Condition for a Key Date incorrect. If this occurs then the Project Manager is obliged to correct the description and such correction is to be taken into account in assessing the compensation event for the change to the Works Information (see clause 63.9).

**Cost reductions – main options C and D (clause 63.11)**

The provision is intended to motivate the Contractor to investigate and propose changes to the Employer’s Works Information where they will reduce the Defined Cost.

The clause provides that the Prices are not reduced (i.e. the target is not reduced) if the PM accepts the Contractor’s proposal.
Form of proposed changes to the Prices (main options A to D)

Main options A and C (clause 63.12)

The changes in an assessment of a compensation event under main option A or C are to be in the form of changes to the Activity schedule.

Main options B and D (clause 63.13)

The changes in an assessment of a compensation event under main option B or D are to be in the form of changes to the Bill of Quantities and in accordance with the specific rules in clause 63.13, which are set according to whether or not the work has been done and whether or not there is an item in the Bill of Quantities, in which case the rate, quantity or lump sum is to be changed (albeit that the change in the Prices are assessed by using Defined Cost and Fee unless by agreement rates and prices are used).

Secondary option X1 (price adjustment for inflation) (main options A to D)

Clause X1.3

It provides for Defined Cost for compensation events to be converted to base date Defined Cost using the formula stated in the clause, where the Defined Cost is not calculated from rates stated in the Contract Data for employees and Equipment.

Main options A to E - The Schedules of Costs Components

Two Schedules?

ECC3 contains two Schedules of Cost Components, namely the Schedule of Cost Components (‘SCC’) and the Shorter Schedule of Cost Components (‘SSCC’).

The SCC is incorporated into the definition of Defined Cost in the case of main options C, D and E, but not in the case of main option A, B or F.

Neither such Schedule is part of the ECC conditions when Option F is used (management contract).

The Schedules are intended to set out what is allowable as Defined Cost (where the Schedule applies).
Which ‘Schedule’? (clause 63.11)

The SSCC is used to assess a compensation event under Options A and B, except where rates and sums are used pursuant to clauses 63.13 (option B) or 63.14 (option A).

The SSCC may be used (instead of the SCC) to assess a compensation event under Options C, D or E

- by agreement (between the PM and the Contractor under clause 63) or
- where the PM decides to use the Shorter Schedule in making his own assessment (for example, where a quotation has not been accepted and he goes on to make his own assessment – see Clause 64).

Criteria for adopting the SSCC in relation to compensation events (main options C, D and E – its use is mandatory under main options A and B)

ECC3 does not specify the reasons that the PM may use when deciding whether or not to use the SSCC in assessing compensation events pursuant to clauses 63 and 64.

The ECC3 Guidance Notes state in its commentary on main options C, D and E that the SSCC should be useful where there is a large number of small compensation events.

The ECC3 Guidance Notes may be persuasive in dispute resolution procedures if the PM and the Contractor disagree on the application of the SSCC.

Cost of preparing quotations for compensation events

The cost of preparing quotations for compensation events is dealt with by ECC3 as follows:

- **for main options A and B**, such cost is excluded from Defined Cost and is therefore deemed to be included in the Fee (see clauses 11.2(22) and 52.1) the Contractor must therefore take this into account when establishing the subcontracted fee percentage to be stated in the Contract Data

- **for main options C, D and E**, the Contractor’s people involved in preparing the quotations will be allowable as regards Defined Cost provided they fall within the criteria for ‘people’ under cost component 1 of the Schedules of Cost Components.

- **for main option F**, the Contractor’s people involved in preparing the quotations will not be allowable as regards Defined Cost unless there are prices stated in the Contract Data part two for or covering such work, in which case such prices (and not expenditure) will apply as part of the Defined Cost (see clause 11.2(24)).
Under-recovery of cost

There is no guarantee that the Contractor will recover the full cost or even the full Defined Cost, because of the following factors (amongst others):

- **the definition of Defined Cost itself**, i.e. costs not within the definition are deemed to be included in the Fee (see clause 52.1),
- **the risk of failing to substantiate or, in the case of compensation event assessments, assess all costs.**
- **the risk of Disallowed Cost** (under main options C to F),
- **failure to have given an early warning** may be taken into account (see clauses 61.5 and 63.5 and the definitions of Disallowed Cost),
- **fees payable to Subcontractors may be excluded** (see clause 11.2(22) of main options A and B and the preamble in the Shorter Schedule of Cost Components) and
- **in the case of compensation event assessments:**
  - **the risk of underestimation by the Contractor when forecasting** future Defined Cost for the purpose of assessments (see clauses 63 and 65.2),
  - **the Defined Cost must be reasonably incurred and the Contractor must have reacted competently and properly** to the compensation event (see clause 63.7) and
  - **the risk of losing or prejudicing rights through non-compliance** with the notice and information requirements.