Addressing potential disruption when pricing NEC compensation events

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KEY POINTS

- A majority of NEC users who responded to a survey last year believe disruption time and costs within compensation event quotations are always contentious and rarely agreed.
- Parties should discuss potential disruption issues before preparing a compensation event quotation, including the potentially long-term impacts on all trades on site.
- If the higher party (in the chain) consistently ignores or removes disruption pricing from compensation event assessments, contractors and subcontractors should document and record their objections.

Between May and September 2019, my consultancy conducted an online survey amongst NEC users about their use of the compensation event procedure. Following my article in the last NEC Users Group Newsletter (Issue 105), where I discussed our findings on risk pricing, this article looks at the pricing of potential disruption.

Of the 123 users who completed an online questionnaire, 24% were clients, 50% contractors, 15% subcontractors and 12% consultants and advisers. A high majority of respondents (82%) said disruption costs within compensation event quotations are always viewed as contentious and rarely agreed.

Over three quarters (77%) said the higher party – meaning the project manager in an NEC3 Engineering and Construction Contract (ECC) or contractor in an NEC3 Engineering and Construction Subcontract (ECS) – should state an assumption about disruption costs when instructing changes to the works information. This would mean the higher party retaining the risk of disruption costs should they occur in the future.

Over half (58%) of those questioned said contractors and subcontractors nearly always over-inflate disruption costs in their quotations. Finally, 53% of respondents said when disruption costs are priced, the value is nearly always reduced by the higher party by more than 50%.

Claiming for disruption

Disruption is defined by the *Society of Construction Law Delay and Disruption Protocol* (Society of Construction Law, 2017) as, 'a disturbance, hindrance, or interruption to a contractor's normal working methods, resulting in lower efficiency. Disruption claims relate to loss of productivity in the execution of particular work activities. Because of the disruption, these work activities are not able to be carried out as efficiently as reasonably planned'.

Demonstrating disruption is ordinarily the key to a contractor recovering its costs. However, determining the time and cost consequences of disruption is notoriously difficult. It also is important to distinguish between disruption and delay as one does not necessarily follow the other.

Traditional forms of contract generally deal with disruption claims retrospectively. This means actual events play out on site and the contractor's (or subcontractor's) claims are based on what actually happened, supported by appropriate evidence. The old adage 'records, records, records' is very much at the forefront of that evidence and there are numerous legal cases dealing with retrospective claims for disruption.

Pricing disruption in NEC

However, ECC and ECS requires users to deal with disruption prospectively. This means contractors and subcontractors are asked to forecast what the time and cost consequences of disruption might be following acceptance by the higher party that a compensation event has arisen. It is not surprising therefore that the parties to NEC contracts often find it difficult to agree on the time and cost consequences of disruption before that disruption has happened.

The higher party, in general, does not want to pay for disruption before that disruption has happened despite the obvious advantages, such as closing out issues before they arise and not having to worry, at least financially, about the actual consequences of compensation events as they play out in real time.

One solution is to promote discussions about disruption – or, more accurately, the potential for disruption – in advance of pricing quotations and making assessments. It is possible to use the assumptions mechanism in the ECC and ECS contracts (e.g. ECC clause 61.6) to reduce what might otherwise be highly conflicting views.

For instance, the project manager might assume the contractor will not be disrupted whatsoever due to a compensation event although this, in effect, makes the assumption a risk-retention mechanism for the employer. Alternatively, the project manager might assume that only certain trades will be disrupted by a compensation event, limiting the contractor's scope to price the risk of disruption to other trades.

Advice for NEC users

Disruption can and often does occur in construction contracts. Where this relates to compensation event in an NEC contract, the effects should form a key part of the quotation and assessment process.

Those required to quote for and assess NEC compensation events should always consider the potential disruptive effects of the events. Rather than thinking of the time and cost consequences of disruption as secondary to the direct costs of the event, or even as a forecast risk, they perhaps should be regarded as part of the direct costs.

It is important for parties to discuss potential disruption issues before pricing a quotation. They should consider the potential impact to all trades on site and not just those directly related to the compensation event work. Furthermore, they should consider that the disruptive effects of the compensation event might not be realised for months or perhaps even years later on longer projects.

Finally, if a contractor or subcontractor is faced with a higher party or participant that consistently ignores or removes disruption pricing from compensation events quotations, they should document their objections and keep accurate records to support any future possible action.