

PRACTICE

Showing non-accepted compensation events on submitted programmes



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KEY POINTS

- When a contractor's notified compensation event is not accepted by the project manager, the contractors should follow the contract when submitting a programme for acceptance.
- This means showing on each revised programme all notified but not accepted compensation events plus those notified and accepted but not implemented and those implemented, assuming they all have a time impact.
- A colour coding system is recommended for differentiating and monitoring the status of compensation events.
- A not-accepted compensation event should remain on the revised programme for transparency, to help with lessons learned and to facilitate later reconsideration.

Consider the following situation under an NEC4 Engineering and Construction Contract (ECC): the contractor's notified compensation event is not accepted by the project manager for one of the reasons under clause 61.4.

'The *Project Manager* replies to the *Contractor*'s notification of a compensation event within

- one week after the *Contractor*'s notification
- a longer period to which the *Contractor* has agreed

If the event

- arises from a fault of the *Contractor*,
- has not happened and is not expected to happen,
- has not been notified within the timescales set out in the *conditions of contract*,
- has no effect upon Defined Cost, Completion or meeting a Key Date or
- is not one of the compensation events stated in this contract

the *Project Manager* notifies the *Contractor* that the Prices, the Completion Date, and the *Key Dates* are not to be changed...'

A question contractors often ask is: how should they deal with this scenario on the programme submitted for acceptance? The answer is: do what the contract says. Clause 32.1 states:

'The *Contractor* shows on each revised programme

- the actual progress achieved on each operation and its effect upon the timing of the remaining work,
- how the *Contractor* plans to deal with any delays and to correct notified Defects and

- any other changes which the *Contractor* proposes to make to the Accepted Programme.'

For clarity, the above covers notified but not accepted compensation events, notified and accepted but not implemented compensation events, and implemented compensation events, assuming they have a time impact. In effect, it covers all events and all activities.

NEC4 addressed concerns among NEC3 users about including non-implemented compensation events on revised programmes by removing the second bullet point from NEC3 ECC clause 32.1, which was requirement to show, 'the effects of implemented compensation events'.

A colour-coded system is one suggested method for including all events and activities on the programme submitted for acceptance, enabling it to be compliant with clauses 31.2 and 32.1, while maintaining clarity on the status of events notified as compensation events. The colour-coded system might look like Figure 1(a) on page 9: red is notified but not accepted, amber is notified and accepted but not implemented, and green is notified, accepted and implemented.

The colour coding of the activities is carried out within the table section of the programme along with the notification milestones. This will allow for any formatted colour coding being applied to resources or activities to be displayed within the bar chart.

Identifying delay within a revised programme

When they occur, delays are captured within the accepted programme (which hopefully is also being used as the live day-to-day programme). These would be inserted below the impacted operations as shown in Figure 1(a). The programme operation being impacted by the delay ('excavate for foundations' in this example) would then be split at the start of the delay and the delay activity would be inserted as a separate entity or operation below the impacted operation and linked to the split operation above.

Inserting the delay in such a manner is normally referred to as a fragmented network or 'fragnet'. This identifies the predecessors and demonstrate the impacts to successor operations. It allows the delay duration to be amended throughout the life cycle of the delay without the need to amend predecessor or successor operations within the programme.

Once the fragnet has been inserted, the colour coding can be applied to categorise the delay. Inserting the delays at this stage of the process will remove the need to make subsequent changes when preparing the programme for delay analysis, or where a lessons-learned session is required.

Some NEC users are of the opinion that events considered by the contractor to be compensation events should not be given a compensation event reference on the programme until they have been formally accepted as compensation events.

We believe that an event is either a compensation event or it is not, by virtue of whether it is one of the events stated at clause 60.1 or in limited other circumstances. The project manager's acceptance of a programme does not make the event a compensation event or vice versa. If the notification is included on the programme, shown as a milestone, then it will itself obviously have a reference number.

However, we can see the logic in a transparent approach, in that when a revised programme for acceptance is submitted, littering it with 'CE' numbers may make the project manager believe they are accepting them as compensation events, or accepting the contents and durations where the programme is accepted. The contractor's transparency should avoid this misbelief. Without such measures this may result in otherwise compliant programmes not being accepted for reasons which are not one of those stated at clause 31.3.

It is worth noting for absolute clarity that a programme submitted for acceptance is not a compensation event quotation programme (clause 62.2).

Dealing with a non-accepted compensation event

If a project manager has replied that the notified event is not a compensation event, all activity durations (whether past, present or future) will still need to be captured and shown within the revised programmes. This ensures that the programme is reflecting a 'warts and all' approach to all aspects of the project (Figure 1(b)). This would also cover the contractor's contractual requirement under 32.1 to show how it plans to deal with any delays and to correct notified defects. It will enable too informed decisions to be made regarding mitigation measures that may need to be implemented to ensure the planned completion date is met and any potential exposure to delay damages is mitigated.

The 'warts and all' programme will also assist with any lessons-learned sessions. This includes recognition of measures that assisted in understanding the events that led up to the compensation event non-acceptance, and identification of any self-inflicted delays or issues needed to be addressed. This may also require processes or procedures to be revised and implemented to prevent a recurrence of the same event or failure that contributed to the delay or issue.

Should a contractor ultimately choose to dispute a non-accepted compensation event, this can be resolved through optional dispute resolution provisions in Z clauses (such as mediation) as well as those expressly provided in the NEC4 ECC clause W2.1 for referring the matter to senior representatives, plus there is always the right to adjudication. If, following these processes, a project manager has to agree a formerly non-accepted event is now a compensation event and a quotation is instructed, producing the quotation and showing

the impact on the accepted programme is a relatively straightforward task. This is because the contractor will have been tracking all the delays throughout the entire duration of the event even though it was previously not accepted as a compensation event.

Using the colour-coded system of identification, the only activity to be carried out within the live programme would be to modify the status of the previously non-accepted compensation event to an accepted or implemented compensation event. This would be achieved by changing its colour from red to amber or green depending on its delivery progress, denoting that the event was now an accepted compensation event (Figure 1(c)).

Keeping accepted programme up to date

Contractors should not allow the accepted programme to become out of date. Most revisions of the programme are submitted monthly; however, this does not prevent the contractor from performing weekly internal updates to the programme ensuring that the live day-to-day programme remains realistic and factual.

Assessing a compensation event can be extremely difficult if the current accepted programme no longer represents a realistic picture of the progress of the works. If the accepted programme is not up to date it is far more likely that the project manager will decide to make their own assessment of a compensation event.

Conclusions

Throughout the lifecycle of major projects, notification of events often increases at an alarming rate. Most compensation-event-related problems could be avoided if more effective communication was in place between the contractor and the project manager. Maintaining

a joint register of notified events and their status, using a colour-coded system, should foster a more positive and collaborative relationship.

NEC contractors should ensure that they engage with the project managers on a regular basis. Having a weekly face-to-face meeting with

the project manager to discuss issues, progress and any upcoming notifications can be hugely beneficial and removes the unwelcome surprise of a compensation event landing on their desk without any warning. All the above suggestions would satisfy clause 10.2 to, 'act in a spirit of mutual trust and co-operation'.

Figure 1. A colour coded system can be used to show the status of compensation events on each revised programme: red is notified but not accepted, amber is notified and accepted but not implemented, and green is notified, accepted and implemented

