



An Accepted Programme is crucial to a project's success

Programmed for success

by Josh Brown*



A worrying show of hands

I have to admit to being quite concerned when there was a show of hands at a recent NEC (New Engineering Contract) Programme workshop delivered by Glenn Hide of GMH Planning.

When asked if they had worked on projects without an Accepted Programme, the majority of attendees put their hand up. When asked if they had worked without one for six

months or more, a fair few of those hands stayed aloft.

To use their words, NEC is a family of contracts that facilitates the implementation of sound project management principles and practices as well as defining legal relationships.

They have become an increasingly popular form of contract in recent years, and understandably so. They are clear, simple and, crucially, written in plain English. Their structure is straightforward and easy to understand. They encourage collaborative working between those involved, pushing the frameworks and developments they are being used for forward.

The Programme is often referred to as the 'beating heart' of NEC

contracts. In contrast to other forms of contract, NEC is strict with its requirements for the development, acceptance, rejection, and revision of the Programme. This is epitomised in Clause 50.3, which allows the Project Manager to withhold 25% of the Price for Work Done to Date if an Accepted Programme is not in place. That is not an insignificant figure. In fact, it should be motivation enough to ensure there is an Accepted Programme in place – and as soon as possible.

But there are, of course, many other reasons why having an up-to date Accepted Programme may cause issues. Lack of visibility in terms of final outturn costs and Completion Date and the inability to measure future progress and change against the

Accepted Programme, are just two. Without it, there are a multitude of headaches and heartaches awaiting those involved.

That is why I was taken aback at the show of hands at this well attended workshop led by an expert in NEC contracts. I found myself asking, why are there so many projects without an Accepted Programme in place?

Unfortunately, there appears to be a misunderstanding across the industry around the Programme and specific requirements under the contract.

Referencing specifically at the NEC3 Engineering & Construction Contract (ECC), here are some of the key points I took away from the workshop, and from my own experience of just how much better life is working on a project with an Accepted Programme.



Floating around

An area of much confusion under NEC contracts is exactly who owns the 'Float'? The Float is defined by the Society of Construction Law's SCL Delay and Disruption Protocol as 'the time available for an activity in addition to its planned duration'. In the spirit of NEC's insistence of plain English, it is building time into a Programme to accommodate risks such as bad weather events and industrial action – the kind of things that swipe projects from the side with little or no warning.

The Contractor is required to show provisions for Float and time risk allowances on each Programme submitted for acceptance under Clause 31.2.

But when it comes to ownership, is it just the Contractor, the Employer, or is it shared? That all depends on the type of the Float, of which there are

generally three: 'Total Float', 'Time Risk Allowance' (TRA), and the ominously sounding 'Terminal Float'.

The Total (or project) Float demonstrates the time an event or activity can be delayed without delaying planned Completion. It is widely accepted that Total Float is available to either the Employer or Contractor to accommodate the time effects of Compensation Events or lack of progress. In terms of who uses it, it is really a case of who gets there first.

When it comes to the TRA and Terminal Float, that is more straightforward. Both are owned solely by the Contractor.

TRA is the duration allowed by the Contractor in a given activity to allow for the risk of delays if problems arise, that is the bad weather mentioned earlier. The Terminal Float is the difference between planned Completion and the Completion Date set in the contract.



Looking for acceptance

A recurring issue raised at the NEC Programme workshop was the failure of the Project Manager to respond to Programme submissions by the Contractor. The Project Manager can often be reluctant to accept Programmes in the fear that acceptance automatically means accepting liability for any delays shown on it. While many will share the Project Manager's self-protection psychology, failure to respond is simply not an option.

When faced with this, the Contractor's first action is to inform the Project Manager of the contractual mechanisms that aim to prevent this type of behaviour. Under Clause 13.4, the Project Manager has an obligation to reply to a communication submitted or resubmitted for acceptance. If they

do not accept, they have to state the reasons why (the four reasons for rejection are stated in Clause 31.3.).

At this point, it is also worth noting Clause 14.1. This confirms that, while the Project Manager has to accept various Contractor Programme submissions, this acceptance does not transfer liability away from the Contractor to Provide the Works – i.e., they are not taking on liability for any errors in submission if they accept the Programme.

What, despite taking these steps, can be done if the Project Manager is still not responding to the Programme submission? It is time to step things up.

The Contractor should raise a Compensation Event pursuant to Clause 60.1 (6) & 60.1 (9) to escalate the issue and increase the pressure on the Project Manager to respond. It is highly likely the Compensation Event will be rejected in line with Clause 61.4 as not having an impact on Defined Cost and/or the Completion Date. However, if the non-acceptance is not provided on time or is for a non-compliant reason, it can be argued that the Contractor is expending more time chasing or revising the Programme than delivering work and could possibly be a demonstrable impact on Defined Cost.

In light of this possible scenario, NEC4 has introduced a provision for deemed acceptance of the Contractor's programme if the Project Manager fails to respond within the time allowed.



Show and tell

If Clause 50.3 was not enough to demonstrate the importance of the Programme in NEC contracts, then the fact that Clause 31.2 – one of the longest in the whole contract –

certainly will. This clause provides a comprehensive and definitive list of what must be included within each Programme that is submitted for acceptance, including the start date, access dates, Key Dates, Completion Date, and planned Completion (refer to Clause 32.1 for a full list).

Even though the requirements are explicit, it is often the case that Programmes do not actually show the required information. This is, naturally, one of the reasons for non-acceptance under Clause 31.3, so it is strongly advised that Programme requirements are meticulously reviewed before each submission and that there is full compliance with the relevant clauses.

One of the many big talking points during the NEC Programme workshop was whether to show early warnings on the revised Programme. While Clause 32.1 requires Contractors to 'show the effects of implemented compensation events', it does not specify whether to show either early warnings or Compensation Events. The general consensus was, however, pragmatic. Show both.

As an example, a Contractor may include the date of a risk reduction meeting and then link the Early Warning to the element(s) of the Programme that will be impacted should the risk become reality. While the Early Warning cannot drive things forward, the resultant Float will give a crystal-clear indication of the urgency of the issue. It is a case of better to be safe than sorry.



It's a (Key) Date

Another hot topic of conversation was

around Key Dates and unliquidated damages.

First introduced in NEC3, Key Dates are applicable when the Employer requires that specific milestones and conditions are to be met by a certain date. NEC defines a Key Date as: 'the date by which work is to meet the Condition stated. The Key Date is the key date stated in the Contract Data and the Condition is the condition stated in the Contract Data, unless later changed in accordance with this contract'.

For example, a Key Date could be the requirement to provide power to a building by a certain date, allowing another contractor to start their part of the project. The Condition and Key Date would be stated in Contract Data Part 1. Ideally it should be identified at the tender stage, unless agreed otherwise, but most certainly before starting work on site. It is vitally important to get this right. The Contractor is contractually obligated to achieve a Key Date – and meet the Conditions of each one – under Clause 30.3.

Should a Contractor fail to meet the stated Condition by the relevant Key Date, they could find themselves liable to pay unliquidated damage to the Employer. These would be for the additional costs incurred to complete the outstanding or delayed works on their behalf (as described in Clause 25.3), and/or additional costs to prevent delays. This could, for example, be to provide temporary power for a building project while issues are resolved to establish permanent power, in order to prevent other delays in the Employer scope.

Such costs must not include any time-related costs, such as professional team staff, loss of rent, and so on. These are recoverable under secondary option clause X7 (delay damages), if selected.

This type of risk can be difficult to quantify. It just goes to show the critical importance of effective management of the Programme.

Building on this, the Contractor should use the Early Warning and Compensation Event processes to

notify of any potential delays. The Early Warning process should be used when the Contractor may be at risk of not achieving a Key Date. A Compensation Event kicks in when a Key Date has been missed for which the Contractor is not liable.

Another point of note from the workshop was to consider Key Dates when preparing the Contract Data for tender packages as a means of introducing real and tangible pain/gain against a Programme.



A tender consideration

True of many other things in life, maybe more so in the case of construction projects, is getting things right from the very start. The Programme is extremely important at the tender stage of any project.

Clause 31.1 stipulates that a Programme can either be bound into the contract, or a first Programme submitted for acceptance after contract award, within the period stated in Contract Data Part 1.

However, Contractors are strongly advised to produce a detailed Programme at the tender stage. Not only will this help to drive the right approach from the outside and ensure that an appropriate Clause 31 submission is in place prior to the start date. It also should verify that the Completion Date is achievable and, as a result, the submitted tender price is much more likely to be correct.

The quality of the Programme, and resources, should also be a significant factor in the tender assessment. The Employer should reflect this significance in the tender scoring process, with a suitably high weighting of, say, 15-20%.

As well as ensuring the planner's competency to produce a Programme

using the associated software, it will also demonstrate an understanding of the project and compliance with contractual requirements from the outset. It is also prudent of the Contractor to specify the form of the Programme submission (i.e., Primavera P6, MS Project, Adobe, etc.) in the Works Information and any other specific requirements, to help ensure both parties are clear on what is required.

So, too, is including a proposal in any tender to hold a project start-up workshop. It is an ideal opportunity to review the key clauses and process and also agree the intended approach for administering the contract – the latter could be referenced should any issues or differences of opinions arise during the project. Embracing the NEC ethos of collaboration, this early workshop could be key to the project's successful delivery.

Wrapping up

There's a strong message delivered by Glenn Hide at the start of his paper 'Producing a Programme under the NEC form of contract: 'The NEC suite of contracts puts far greater contractual requirements upon the Contractor to produce and manage a detailed programme than other forms of contract currently in existence within the construction industry.'

While Glenn says this puts considerable pressure on the Contractor in terms of the level of detail they need to include, he rightly argues it is ultimately in their interests anyway. At the end of the day, it is for their own efficient project management as much as anything else.

Getting the Programme detail right is, of course, essential. Getting it

agreed is crucial. Contractors need to keep pushing, utilising every tool at their disposal to arrive at this place, and ensure the focus is firmly fixed on getting the project delivered on time and on budget.

Glenn argues that it is not just about having a practical management tool in place. The Programme becomes a key commercial tool in assessing any entitlement, particularly when Compensation Events are notified.

Projects that do not set this up often become problematic and arrive at the very situation that the drafting of the contract was trying to avoid in the first place, he concludes.

It is why that show of hands of the NEC Programme workshop was so worrying.

And it is why getting this right from the off is key.

* ABOUT THE AUTHOR



Josh Brown, MSc, BSc (Hons), AACostE, is Project Quantity Surveyor at Solomons Europe. Specialising in the

process and engineering sectors, he has more than five years' experience working on a wide variety of projects across the north of England. He is currently providing commercial support to Bolton-based Booth Industries on several major contracts with clients including AWE and Network Rail, and has spent more than two years supporting main contractor Laing O'Rourke on the development of Liverpool Street Station and Tottenham Court Road as part of the Crossrail project, London. Josh has gained valuable hands-on experience in the control and management of project costs and has a keen interest in NEC contracts and commercial management. Having achieved a distinction on completing an MSc in Quantity Surveying in 2019, he is currently working towards Chartership on the RICS's Assessment of Professional Competence (APC) programme.

Resources and further reading

- NEC: www.neccontract.com
- GMH Planning: www.gmhplanning.co.uk

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