

NEC Webinar

Engaging Subcontractors using NEC4 Contracts

Q&A - Unanswered Questions



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Q. During your presentation, you mentioned the importance of cost estimation/estimators in NEC. Could you please elaborate.

A. The Parties' rights under compensation events are changes to the Prices and various dates. The change to the Prices is assessed as the effect of the compensation event upon Defined Cost and the resulting Fee. This is a core clause and so applicable whatever the main Option.

If agreed by the *Contractor* and *Subcontractor*, the prices and rates in the Activity Schedule or Bill of Quantities may be used as a basis of assessment. Otherwise the effect on Defined Cost is used.

To assess 'the effect', it is necessary to assess the Defined Cost of the work 'with the compensation event' and the Defined Cost of the work 'without the compensation event'. This means using the Schedule of Cost Components or Short Schedule of Cost Components as applicable to identify open market rates and other rates and percentages stated in Contract Data.

The exercise involves estimating the works twice to identify the difference (compensation). Unless agreement is reached, the e.g. Bill of Quantities or Activity Schedule is not used.

A practical example under an NEC4 ECS main Option B might be:

The works includes construction of an earthwork embankment, for which there are rates in the Bill of Quantities. The *Contractor* gives an instruction changing the Subcontract Scope to increase the length of the embankment by 25m. The Subcontractor is losing money on these rates and does not agree to use them as a basis for assessment.

The compensation event is assessed by estimating the additional Defined Cost of constructing the additional length of embankment, using the Short Schedule of Cost Components.

This task is as much about estimation as it is about quantity surveying.

Q. I am currently working on an NEC4 ECC in which we are awaiting final design information. I am aware a revised programme needs to be re-issued every 2 weeks to the Project Manager. However, I cannot re-issue a programme until I receive this design information and I am aware of the consequences on programme. Is it ok to go over the 2 week period for reissuing a revised programme when I haven't received information?

A. No, you are still required to submit a programme in accordance with the contract. You should consider giving early warning notifying of the delay in receiving the information and the potential uncertainty this brings. You may also be entitled to a compensation event if the design information is late.

It may be that the design information may be available in parts as they become finalised. This may mitigate the impact of not having any of it and should be considered in the early warning meeting.

If the nature of the design information has big implications on the programme, then presumably there is already quite considerable time risk allowances in place. These together with the anticipated durations should be modelled with a later assumed date of receipt, together with the assessed impacts on the remaining activities and planned Completion.

If a compensation event is notified for the delay in receiving information, it may be useful for the Project Manager to state an assumption as to when the information will be available. This assumption aids in progressing the compensation event, with a further compensation event if needed to correct the assumption.

Q. Is it possible to apply subcontracts in an NEC3 ECC Option F contract?

A. Yes. However, there is no main Option F in the ECS. You can subcontract under an ECC Option F but not subsubcontract on an ECS Option F.

Q. Do you think the valuation process of paying at the end of activities works? As a professional quantity surveyor, the valuation process in terms of paying the Contractor and at the end of activities is unpopular. Subcontractors also don't like this process.

A. Yes, main Option A under an NEC4 ECS is a simple and clear payment mechanism. Problems will only arise if it is established incorrectly or not maintained. To work successfully the Activity Schedule

- must relate directly to activities on the programme,
- be updated whenever the Subcontractor changes its method of working,
- not resemble a Bill of Quantities summary page (as this would significantly hinder cashflow)
- ideally be compiled and priced by the Subcontractor, not the Contractor and
- comprise activities with durations shorter than the payment interval.

In addition, it is important that compensation events are assessed and implemented promptly. The Price for Work Done to Date is calculated using prices on the Activity Schedule, which are not updated for compensation events until they are implemented.

Q. Do Key Dates carry financial penalties?

A. Please see clause 25.3 for the answer. Essentially additional costs incurred or paid to Others in carrying out the work, on the same project, are payable by the *Contractor* (*Subcontractor* in ECS). These form part of other amounts in the calculation of the amount due.

Unlike delay damages in X7, these are limited to the additional cost, not loss. However, they are not stated in the Contract Data, so are 'unliquidated'. Proper care and discovery around the nature of Key Dates and the other contracts forming part of the project should be explored during tendering. Key Dates should be used to manage the interfaces between multiple contracts on the same project and should not be confused with 'project milestones'.

Q. What is your opinion of dates/outputs being dealt with in the Scope rather than using the Key Date mechanism? If a date/output is missed is it a Defect which cannot be corrected? What do you envisage being the recourse?

A. They are different things.

Scope (or Subcontract Scope) may specify various timely deliverables by the Client (Contractor in ECS), as may the programme. If the Client misses a date it may entitle the Contractor to changes to the Prices and dates in accordance with compensation event mechanism.

The Scope may comprise constraints (like flooding or nesting seasons) that prohibit certain activities for periods of time. But remember the Scope is primarily specifying what is to be provided and constraining how it may be done. The Contractor (Subcontractor) may be motivated to progress the works by delay damages X7, the potential costs of missing a Key Date, obtaining a bonus for early Completion X6, incentives under X12 or X20, or by mutual agreement to accelerate under clause 36.

Key Dates are optional for managing the interfaces between more than one contract on the same project. Sectional Completion X5 may also be appropriate if take over of part of the works early is important. Missing this would incur delay damages if X7 also taken or risk unliquidated damages if not.

In summary, pre-contract it is important to have clarity on the outcome you are looking to achieve and considering suitable incentive and motivation. Understand the consequences of missing a date and the broad range of mitigation, planning and contract strategy options available to maximise the chances of the best result. Post-contract, make the most of collaborating on programme, early warning meetings and forecasting activities.