

# Construction Law Journal

Construction Law Journal  
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INCORPORATING TECHNOLOGY AND CONSTRUCTION LAW REPORTS

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# Construction Law Journal

INCORPORATING TECHNOLOGY AND  
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**Volume 29 Issue 3 2013**

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# The Programme Under NEC3: The Unacceptable Truth

Ewen Maclean\*

<sup>✉</sup> Engineering and Construction Contract; Negotiations

## Introduction

The programme is at the heart of the NEC3 contract and is central to its administration, particularly the commercial function, as well as being a key management tool for the timely delivery of projects. Indeed, some commentators say that the NEC is so much of a management tool that it suffers as a contract by way of comparison.

The programme can be identified in the contract data part two, where there is also an option for the contractor to decide the completion date for the whole of the works. Alternatively, if no programme is identified in part two of the contract data, then part one provides for the contractor to submit a first programme for acceptance within a specified period of the contract date. Other time related particulars are also provided in the contract data part one such as the starting date, access dates and the intervals at which the contractor must submit revised programmes.

The detailed time provisions of the NEC3 are contained within core cl.3 and provide for the contractor to submit and revise its programme under cl.31 and 32 so as to be able to deliver the project in the required time period, as well as concentrate its efforts and resources on critical activities of work. These provisions also provide for the project manager to accept the programme assessing whether the contractor has fully complied with its obligations and whether it can practicably complete the work within the stated period. During the construction phase of a project, the project manager can use the programme to monitor progress and must use it to assess the time effects of compensation events, including any changes to the completion date, or a key date.

NEC3 clearly places a very high value on the programme since at cl.50.3 it allows 25 per cent of the price of work done to date to be retained until the contractor submits its first programme showing all the information required by the contract under cl.31.2. It should be noted that this provision only applies to the first programme and employers may seek to use “Z” clauses to maintain a similar regime for subsequent programmes.

\* Managing Director, FTI Consulting. This article first appeared in ICES Construction Law Review 2012 ([www.ices.org](http://www.ices.org) [Accessed March 20, 2013]) and is republished with kind permission.

## Acceptance of the programme or not!

Under cl.31.3 of the contract, the project manager is required to accept the programme, or notify the contractor of his reasons for not accepting it. This clause provides four specific reasons for not accepting the programme, these being:

- The contractor's plans which it shows are not practicable.
- It does not show the information which the contract requires.
- It does not represent the contractor's plans realistically.
- It does not comply with the works information.

Accordingly, one might think there is an adequate contract mechanism in place to regulate the project manager's decision to accept the programme, or otherwise, and that it is not able to reject the programme for any strategic, or capricious reason. However, the practical reality is that the first and third bullet points are highly subjective and effectively allow the project manager to reject the contractor's programme for a number of reasons under the guise that the contractor's plans are not practicable, or not represented realistically. By way of example the project manager may claim that some of the logic links affecting a non-critical sequence of work, or the durations allowed for in some non-critical activities are not practicable. Bearing in mind that there can be thousands of activities and logical relationships within the programme, this allows the project manager to pick up relatively minor points within the contractor's programme as reasons for not accepting the programme. Unfortunately, this situation is not as rare as it should be.

Although the acceptance of the programme is not a condition precedent to the contractor proceeding with the work, the timely delivery of the project is jeopardised by not having an accepted programme. It is suggested that a truly constructive project manager, acting in accordance with cl.10.1, would either accept the programme, or specify the reasons why it does not accept the programme, setting out details of what needs to be done to make the programme acceptable. This would benefit the project and therefore the employer and the contractor alike.

The project manager's acceptance of the programme is significant because it accepts that the programme is realistic and contains the information required under cl.31.2. However, it is not an admission of liability on behalf of the employer for everything contained in the programme, particularly as cl.14.1 states that the project manager's acceptance of a communication does not change the contractor's responsibility to provide the works, or its liability for design. Moreover, if there are compensation events arising, then these still fall to be considered under the provisions of cl.6. If the project manager is to have any doubts about what it is accepting, it might be prudent to clarify this in any communication with the contractor, stating that the programme is accepted, but not admitting liability for a particular matter.

There are occasions when the project manager does not respond to the submission of a programme for acceptance, either within the two weeks permitted by cl.31.3, or at all. In this situation, the contractor cannot assume that the programme is deemed accepted, it is simply still not accepted. Indeed, the only deemed acceptances within the NEC3 are in relation to compensation events. Instead the NEC3 contract deals with this situation as a compensation event under cl.60.1(6)

due to the project manager not responding to a communication from the contractor. This can then be dealt with under cl.6 in the normal way.

## Revising the programme

Even when the first programme has been accepted, it has to be revised in accordance with cl.32.1 at intervals no longer than stated in the contract data—although the contractor may issue more frequent revisions if it wishes, and the project manager may also instruct a revised programme to be prepared. Therefore, it is important to keep good communications between the contractor and the project manager regarding the programme to ensure its continued acceptance. Under cl.32.1, the contractor is required to show on each revised programme:

- the actual progress achieved on each operation and its effect upon the timing of the remaining work;
- the effects of implemented compensation events;
- how the contractor plans to deal with any delays and to correct notified defects;
- any other changes which the contractor proposes to make to the accepted programme.

The first bullet point is relatively straightforward, requiring progress to be shown on each operation and its effect upon the timing of the remaining work. Nevertheless, this point takes on greater significance when assessing delay to the completion date under cl.63.3 (see below). The second bullet point potentially causes difficulties because it only refers to showing the effects of implemented compensation events. However, this does not mean that the contractor should show only the effects of implemented compensation events as the other bullet points referring to progress and the remaining work also need to be considered. It is evident from the other bullet points that the contractor needs to show how it plans to complete the works in the knowledge of the progress made and difficulties encountered to date, which may include compensation events, and the task it faces in the future, including the effects of compensation events and matters which may be the subject of early warnings. If this was not the case, the project manager could use this as a reason for not accepting the programme since the programme would be unrealistic without these events. It is also noteworthy that the only effect of the implementation of compensation events is to change the completion date.

One of the reasons for the accepted programme being revised at regular intervals is to record the position of the project in terms of progress and any effect on planned completion and the completion date at particular points in time. It must be acknowledged that adjustments to the completion date will almost invariably lag behind the adjustments to planned completion shown on revisions to the accepted programme. However, an up to date accepted programme allows the parties to consider and deal with compensation events and delays as and when they arise under the contract.

It is clearly a warning sign for the project if there is no accepted programme, or if the accepted programme has not been revised at the intervals required by the contract. As noted above, the accepted programme is fundamental to the smooth operation of the NEC contract and without it other provisions in the contract

become difficult, or even impossible to operate. For example, it is extremely difficult to assess the effects of compensation events on a prospective basis against an accepted programme that does not exist.

In relation to cl.32.1, it is extremely important that when the contractor updates and reschedules the programme to ascertain the effect on planned completion that it saves this information before showing how it plans to deal with any delays arising. This allows the contractor to establish what the effect of progress and compensation events would have been but for his plans to overcome them, which may otherwise be lost if it is not recorded.

## **Assessing compensation events against the accepted programme**

Not only is the accepted programme used to manage the effect of progress and change on the project, but it is also a central plank in the assessment of compensation events in accordance with cl.63.3. This clause provides that the delay to the completion date is assessed as the length of time that, due to the compensation event, planned completion is later than planned completion as shown on the accepted programme.

The guidance notes make clear that this assessment under cl.63.3 is after any appropriate adjustments to time risk allowances (cl.63.6) have been made. Moreover, the notes also advise that any float in the programme before planned completion is available to mitigate, or avoid any consequential delay to planned completion. In contrast, any terminal float in the programme between planned completion and the completion date and the planned achievement of the condition required by a key date and that key date is not available for this purpose.

The fact that the accepted programme is expressly referred to in cl.63.3 as the benchmark by which to measure delay leads to some differences in terms of its interpretation. Some people believe that it is literally only the last accepted programme that should be used when assessing delay without the consideration of progress between the date when it was last accepted and the current date. However, this would prevent a proper assessment of whether a delay has truly impacted planned completion, or the completion date. One reason for this is that, as time progresses in a construction contract, the critical path changes as some activities are progressed ahead of schedule and others fall behind. Clearly, if an out of date programme is used as a means to measure an effect on planned completion, or the completion date then in the absence of progress any results can be rendered meaningless. Furthermore, there can be occasions when there is no accepted programme although this scenario is provided for under cl.64.2 where the project manager assesses a compensation event using its own assessment of the programme for the remaining work if either:

- there is no accepted programme;
- the contractor has not submitted a programme, or alterations to a programme for acceptance as required by the contract.

Therefore, even where the project manager makes its own assessment of a compensation event, it has to consider the remaining work and therefore progress to the works has to be considered to establish what the remaining work is.

It is suggested that NEC3 would benefit from clarity being brought to cl.63.3 either by amendment, or within the guidance notes to note that the assessment of delay should be against the accepted programme accounting for progress up to when the compensation event occurred. It would also be necessary to amend, or provide further guidance in respect of cl.62.2 for quotations for compensation events. Under this clause, the contractor submits details of its assessment with the quotation and if the programme for remaining work is altered by a compensation event, the contractor includes the alterations to the accepted programme. It is noteworthy that this clause also refers to remaining work and as the remaining work cannot be assessed without the consideration of progress, this reinforces that progress should be shown.

Finally, when programmes are submitted with quotations under cl.62.2 and there is no response by the project manager, then the relevant compensation events can be implemented by default after the contractor has reminded the project manager it still has to respond. However, this does not mean that the programmes submitted with the quotations become accepted programmes under cl.31.3.

## Getting the programme accepted

It is evident how important it is to have an accepted programme; without it there is a higher likelihood that a project will end up in delay and dispute. As in any walk of life, and not just construction contracts, if parties are communicating there is a better chance of agreeing things, or at least resolving differences. Communication is also key in getting the programme accepted.

There are, of course, many provisions within the NEC3 form of contract for communications. These include risk reduction meetings, where many issues, including contentious ones, can be addressed. If issues are being addressed properly through the provisions of the contract, then the programme can be developed accordingly, such that its acceptance should be beyond doubt. It may even be prudent for the contractor to draft its programmes with the project manager's assistance in order to increase the certainty of the programme being accepted.

Practical considerations in getting the programme accepted also include providing the programme in an appropriate amount of detail. Too little detail, where there are only a limited number of activities that are several months long, is not likely to provide the project manager with enough information to test the programme and could cause him to reject it. Conversely, programmes with too much detail, where there are tens of thousands of activities showing daily tasks, may be over engineered for a typical one year long construction project and be rejected for not being manageable and practicable. Indeed, one would have to ask the contractor if it is making a rod for its own back in having to revise such a programme just on a typical four weekly basis.

In order to improve the probability of having the programme accepted, the following suggestions are made which may provide assistance in the achievement of this objective.

1. Do what the contract states and adhere to all the requirements of cl.31.2 and 32.1, including any additional requirements which might be found in the works information.

2. Submit a programme with an appropriate amount of detail.
3. Issue a narrative with the programme to assist the project manager in understanding it. Clause 32.1 requires a statement of how the contractor plans to do the work for each operation, but consider providing additional information if it helps explain the programme.
4. Do not provide a statement, or narrative with the programme which is, in effect, a claims submission, as this may prevent the programme from being accepted. Claims or entitlements which arise under the contract are advanced through the compensation event provisions of core cl.6 and not core cl.3.
5. Discuss the programme with the project manager before it is submitted.
6. Consider the project manager's input into the programme.
7. If the project manager does not respond to the submission of the programme within two weeks, then the contractor may consider serving a notification under cl.60.1(6). If the project manager withholds acceptance of the programme for a reason not stated in the contract, then the contractor may consider serving a notification under cl.60.1(9).
8. Ensure that the project manager fully understands that accepting the programme does not mean it is relieving the contractor of its responsibility to provide the works, or his liability for design.
9. Communicate with the project manager and encourage it to provide specific reasons why a programme is not accepted and what needs to be done for it to be accepted.
10. Agree with the project manager having regard to cl.12.3 that it can accept the programme "subject to comments", if the comments relate to minor items which do not affect the overall programme. Agree that these comments can be corrected within the next programme submission rather than prevent acceptance of the current programme.

The NEC3 contract has the laudable aim of addressing the programme requirements in more detail than any other standard form, making the programme a fundamental element of the project management process and a key tool in the timely delivery of a project. Whilst the parties should make every effort to agree and accept the programme, the practical reality is that there are occasions when the programme is not accepted and this is, perhaps, an unacceptable truth?