

# NEC3 and the Accepted Programme

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The NEC Engineering and Construction Contract has been developed to focus on strong project management principles and provides an environment of collaborative management between the parties.

The contract programme is deemed a key tool for successful project management and is sometimes referred to as the heart of the contract. This is perhaps emphasised by Cl.31.2 –dealing with the preparation of the Contract Programme - which is the longest clause in NEC.

The importance of the programme in the NEC contract is emphasised in Cl.50.3, where it provides the Project Manager with powers to with-hold 25% of the price of work done to date if the Contractor does not provide a programme in accordance with Cl.31.

Assuming no programme is bound into the Contract Data, the Contractor is required to submit the programme at the start of the contract – in a time period specified by the contract.

The Project Manager is then given a prescribed period to accept the programme. The contract provides four reasons by which the programme may not be accepted. Two of these though are not clear quantifiable reasons and are deemed by many to be subjective.

Thus, in a 'collaborative' form of contract, it is possible for the Project Manager to hinder a key part from functioning by non-acceptance without unequivocal reason for doing so - or to create mischief.

## Programme Criteria

Cl.31 refers to preparation and acceptance of the first Contract Programme, and Cl.32 relates to revising the programme.

Within these, more specifically:

Cl.31.1 only requires the preparation of a Contract Programme if there is not one already bound into the contract in the Contract Data.

Cl.31.2 relates to the preparation of the Contract Programme & prescribes a long list of requirements to be taken into account, including the need to have all activities fully logic linked and allocated key resource levels.

Details on provisions made for float and any time risk allowances included in the programme should also be given to the Project Manager.

Finally, it also requires the following:

*'for each operation, a statement of how the Contractor plans to do the work identifying the principal Equipment and other resources which he plans to use'*

Cl.31.3 outlines the duties of the Project Manager, particularly with regards to accepting the programme (or not as the case may be). It details the time limit for providing a response to a programme submission and provides the Project Manager with 4 criteria for acceptance/ non-acceptance:

- *'the Contractor's plans which it shows are not practicable,*
- *it does not show the information which this contract requires,*
- *it does not represent the Contractor's plans realistically or*
- *It does not comply with the Works Information.'*

Where not accepted, the Project Manager should communicate why, based on the four criteria above.

When accepted, this programme is known as the 'Accepted' (or sometimes called the 'First Accepted') Programme and is referred to as such in later parts of the contract management process detailed in the NEC form of contract (such as the change management process).

## Non-Acceptance of the (First) Contract Programme

If a programme is bound into the contract, in the Contract Data as observed in Cl.31.1, this becomes the (First) Contract Programme, and PM acceptance is not required.

It is interesting to note that this 'accepted' programme by default may be the programme prepared by the Contractor at Tender stage and may not now be fully representative of how the project execution team intend to fulfil the contract requirements. Likewise, the quality of the programme and the support information available with it may not fully meet the requirements of Cl.31.2.

Notwithstanding the above, the NEC makes it clear that this programme is contractually binding under Cl.31.

As noted earlier, Cl.31.3 of the contract provides the Project Manager with grounds for non-acceptance including the following:

- *'the Contractor's plans which it shows are not practicable,*
- *It does not represent the Contractor's plans realistically?*

The terms 'not practicable' and 'does not represent...realistically' do not have a definition in the contract and are thus open to interpretation by the Project Manager.

'Not practicable' is defined in dictionaries as (not) 'able to be done or put into practice successfully'<sup>4</sup>.

The word 'realistically' when used in this context is defined as: 'based on what is real or practical'<sup>5</sup> or more comprehensively as:

*'In a way that demonstrates a sensible and practical idea of what can be achieved or expected'*<sup>6</sup>

The above can be considered highly subjective and could be used by the Project Manager to reject programmes without a clear agreement between the parties of the grounds for rejection. There is no definition of the extent or scope these clauses extend to; if just one activity is viewed by the Project Manager as being excessive or ambitious in duration, are these grounds for rejection due to not being practicable?



It is suggested that if the Contractor comprehensively fulfils the obligations of Cl.31.2, including the provision of the statement of how it plans to do the work for each operation and details of the time risk allowances, the Project Manager would have all the information to be able to answer this point.

There is though, a degree of concern with Contractors that this clause enables Project Managers to reject programmes for 'strategic' reasons. If a Contractor experiences this situation, the only redress under the contract is adjudication.

### **What happens if Programme Acceptance is not achieved on the project?**

Acceptance of a programme is not a condition precedent for the Contractor to continue with the works, unlike say design acceptance. Under Cl.32 the Contractor is still under an obligation to submit revisions to the programme.

The Contractor may continue to use his non-accepted programme for

the purpose of managing the project, including the management of the project change. The lack of programme acceptance though does affect the assessment of the time effect of change, as this is taken out of the Contractor's hands and given to the Project Manager under Cl.64 of the contract:

*'The Project Manager assesses a compensation event using his own assessment of the programme for the remaining work if*

- *There is no Accepted Programme or*
- *The Contractor has not submitted a programme or alterations to a programme for acceptance as required by this contract.*

There are potential commercial and time management ramifications to this eventuality were the Contractor and Project Manager not to be in agreement on the outcome of this assessment.

### **Revising Subsequent Programmes for Submission**

Any subsequent programme submissions for acceptance falls under Cl.32.2 with regard criteria to be fulfilled prior to acceptance. This includes actual progress achieved on each operation and the reprogramming of future operations, the effects of



<sup>4</sup> Oxford English Dictionary

<sup>5</sup> Dictionary.com

<sup>6</sup> Oxford English Dictionary

implemented Compensation Events and proposals for dealing with delays, Defects and any changes the Contractor wishes to make.

What the NEC Contract fails to require in a subsequent programme are the forecast effects of unimplemented compensation events. These should be included in any programme submitted for acceptance, especially if they affect the planned completion date.

### What happens if a revision to the Accepted Programme is not accepted?

Subsequent programme submissions and the project management review process is thereafter managed under Cl.32. The Clause provides reasons for revising and re-submitting the programme, such as if the Project Manager instructs it or if the Contract Data prescribes intervals for programme revision.

It is, unfortunately, common on projects – especially where extensive project change is occurring – for the Project Manager to fail to accept programme revisions; either within the prescribed time period in the contract or continuously fail to accept.

As noted earlier, the Contractor must continue to progress the Contracted and further Instructed Works. He will though be unable to measure the true effect of further

instructions and other changes since the NEC contract Cl.62.2 requires the time effect of a Compensation Event to be measured against the 'Accepted Programme'.

This has the effect of leaving the Contractor in the position where the last 'Accepted Programme' was quite a time before the Event instigation date and the project logic and durations may have developed in the ensuing time period. Assessing a CE using an 'out-of-date' programme may not measure the true or complete time effect of it.

To accurately measure the effect of the CE (without also measuring the effect of other occurrences happening in the project), the base for the assessment should represent all prior progress and agreed events up to the date of the event.

The scenario discussed above where the last Accepted Programme was many months earlier will not achieve this requirement. It is therefore suggested that in this case for comprehensive assessment of the time impact of change under the NEC contract, a modified version of the last Accepted Programme is required. Based on the original contract ethos of 'collaboration' the Project Manager should support this way forward and hence be able to agree the results of the analysis.

Contractors who diligently attempt to measure the effects of change in

this way often find that Project Managers resist accepting the results due to the use of a 'non-contractual' method of analysis.

### Conclusion

The NEC Construction and Engineering Contract is a collaborative form of contract with a prescriptive project management process imposing duties on both parties that need to be adhered to, to ensure successful management of the project.

This is a resource and time hungry process that requires the correct level of suitably skilled professionals and a project wide understanding of the contract requirements and information flows needed to achieve it.



Thus both parties need to work together in the process of preparation, acceptance and update of the programme.

When this fails, and the programme is not accepted, the management of the project may become more difficult and it is suggested the project as a whole is more likely to fail – in terms of both the project duration and cost.

**ABOUT THE AUTHOR****Steve Ollis**

Steve is a Civil Engineer with over 28 years professional experience in the infrastructure and construction industry and is a Member of the Chartered Institute of Arbitrators.

He is an experienced planner who has worked with Clients, Designers and Contractors on major multi-disciplined infrastructure and construction contracts, with a particular focus on projects using the NEC Engineering and Construction contract.

He has also supported and assisted clients and experts in the analysis of project delay and in the preparation of submissions for use in Mediation, Adjudication and in potential Arbitration/Litigation.

Steve provides planning and programming services including: programme preparation and progress monitoring, time change assessment and management and participation in time dispute resolution processes.

