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Discussion: Producing a programme under the NEC form of contract

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Contribution by Asif Anwar

I would like to question the author of this paper (Hide, 2010) on what appears to be a common incident on programmes submitted within NEC3 Engineering and Construction Contracts and which does not appear to be clearly explained in NEC guidance documents.

A contractor submits a programme during the tender stage and shows the date of planned completion being the same as the contractual completion date. This programme is part of the contract that is awarded. The terminal float in this case is zero.

The contractor then submits the regular revised programme for acceptance and shows the date of planned completion to be 10 weeks early, advising that upon going through the programme in detail, it has re-programmed the works to achieve completion 10 weeks earlier than originally thought. The terminal float in this programme is 10 weeks. The project manager, on behalf of the client, then accepts the programme. Please note that some of the float which was in the initial programme (with zero terminal float) has now been reduced and has now appeared in the terminal float.

During the course of the project, there is a compensation event (for which the client is responsible) which critically delays the works by some 4 weeks.

Subsequently, and as part of its quotation for the compensation event, the contractor shows that both the date of planned completion and the contractual completion date have slipped by 4 weeks.

Is the contractor entitled to a change to the contractual completion date? Is it also entitled to the time-related costs of 4 weeks due to this delay to the contractual completion date?

Author's reply

For the purposes of this response let us assume that at tender the contractor shows a planned completion at week 100, but really believes that it can do it in 90 weeks.

First, the contractor is playing a risky game by showing a later planned completion than it really intends at tender time. Even if it shows a planned completion the same as the completion date – within its price does it allow preliminaries/general items for the full period (100 weeks) or for the projected shorter period (90 weeks)? I cannot imagine too many tenderers taking the risk and including preliminaries/general items up to week 100, as they have probably just lost the job. By taking preliminaries/general items to week 90 they have a potential edge over other tenderers, and this may win them the job.

In this example, it almost does not matter if terminal float was identified on the tender programme or on the first programme submitted after award, as the effects and entitlement would be exactly the same in both cases. It is a fact that any delay under this contract is assessed upon the direct effect to planned completion, not the completion date.

Terminal float is owned by the contractor – this is clarified in clause 63.3 and the associated guidance notes. If there was a compensation event that added 4 weeks to the planned completion, it is likely that it would have the same effect on the critical path if you are looking at a 90 or 100 week programme. The effect therefore on planned completion would be the same – a movement of 4 weeks. The completion date would also move by the same amount, so completion date would be week 104 in both cases, and the value of the compensation event assessment would be the same in both cases.

I think people get upset thinking that the contractor is playing games and getting some sort of benefit. If the contractor had showed the planned completion at week 90 on the tender programme, the completion date would still have been week 100 and the entitlement is very clear that yes, it is entitled to preliminaries/general items if it delays the critical path by 4 weeks and is having to be on site for that additional period. It should be said, however, that we are not talking about a prescribed figure for preliminaries/general items. The additional 4 weeks may only require one supervisor and one site cabin, in comparison with eight supervisors and six cabins during the peak of the works.

Turning this round the other way, would it be fair to keep the contractor on site for an additional 4 weeks (that it has not allowed for within its price in order to give the client its best price at tender stage) and not pay full extra cost for this?

The only scenario under which the contractor could win in this situation is if it does price for 100 weeks knowing it can do the work in 90 weeks, but as I say, this is risky on several counts.

(*a*) The contractor has potentially lost its competitive edge which may otherwise have won it the job.
(*b*) A contractor showing an earlier planned completion even if the same price or slightly more costly could again tip the scales in its favour particularly if time is important to the client.
(*c*) If the client has a compensation event on day 2 of the contract, then the assessment may be less favourable to the contractor as it may use up the total float that is shared by both parties on the 100-week programme, which may not have been there in a 90-week duration programme.

Competitive tendering should obviously prevent this from happening as tenderers have to take a view on how much risk they can apply without losing the job.

I hope this makes things clearer – in my opinion there is no real game to play here.

REFERENCE

Hide G (2010) Producing a programme under the NEC form of contract. *Proceedings of the Institution of Civil Engineers – Management, Procurement and Law* **163(2)**: 59–64.