



Technical

Project Manager's Assessment of Compensation Events

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1. Clauses 64.1 and 64.2 of the NEC3 set out the circumstances in which the Project Manager (PM) may make his own assessment of Compensation Events ("CE's"). Much is demanded of the PM under NEC3¹, including the normal duties of a certifier. He must act impartially, which is one of the few areas where the NEC contract has been tested in the Courts (*Costain v Bechtel* ²)³.
2. The timescales in NEC3 mean that a failure to respond by the PM can lead to deemed acceptance of a Contractor's notification or quotation. The PM should therefore act decisively and in a timely manner. From the Employer's perspective there is a risk that, if the PM "*drops the ball*", the Contractor's interpretation of events/ costs will stand even if it is clearly wrong.
3. Ennis (2010) gives an example where he, as an Adjudicator, has had to decide whether it is reasonable to deem the Employer to have accepted CE quotations in circumstances where the PM did not have proper time to administer them, or indeed whether such matters should be deemed to be a CE in the first place.

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Disallowed Costs and Assessing Records

4. When making an assessment of a CE the PM can remove Disallowed Costs. The interpretation of what the definition of “*Disallowed Costs*” is, and what can or cannot be claimed, can be the source of many arguments.
5. Ennis (2010) identifies a debate he frequently sees in adjudications

“cost which the Project Manager decides is not justified by the Contractor’s accounts and records”:

- He questions whether, during the hurly-burly of the project a full audit of these records for each monthly payment assessment is practicable? His experience is that it is not. What tends to happen is that PM’s will assess them at a later date.
- If a downward revision of interim assessments is made, the Contractor may plead disadvantage or prejudice has occurred through payments being made to Subcontractors in reliance of earlier assessments and raise an estoppel-type defence.
- He goes on to question,

“Is it acceptable for the Employer to plead that his Project Manager was snowed under at the time, and these were only interim assessments?”

- These issues have not been resolved by the Courts.
6. Ennis (2010) also questions; what exactly constitutes “*justified*” in the Contractor’s accounts and records? He asks

“is it enough to show that money has been spent against a particular supplier or Subcontractor?”

7. Ennis (2010) goes on to question that, even if invoices are available to track payments made to satisfy your average auditor, will this suffice for your NEC Quantity Surveyor?
8. The level of detail or actual resources required in the SCC and SSCC can be more than your average auditor would require.
9. Questions need to be asked whether the appropriate value has been obtained from the expenditure without wastage/inefficiency.

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Do PM's make Assessments in a Timely Manner?

10. My research asked

“As a percentage, rate how often PM's assess CE's within the period stated in the contract?”.

The results show that 97% of respondents chose 50% or less of the time. Nobody said 100% of the time.

11. Respondents were also asked

“As a percentage, rate how often the PM will assess a prospective quotation after the works are constructed?”.

The results show that 65% said this happened 50% plus of the time. When asked to rate how often the PM makes his own assessment of both time and money 4 79% of respondents said 50% or less of the time, with 28% saying 0% of the time.

12. The general consensus from the interviews conducted is that PM's rarely carry out their own assessment in time and prospectively. The Contractor's interview summed up what generally happens as follows:

“I'll use [Project A] as an example. They wouldn't give us assessment of a compensation event because they wanted to see us carry out the work a lot of the time and when we did carry out the work they'd say we were beating what we had in the forecast.” (Contractor Interview)

13. This is supported by the Adjudicator's comments:

“Project Managers very often do not deal with CE's in the timescales in the Contract. This is usually because they are either unfamiliar or unaware with the Contract itself, or very often just do not have the time to deal with the process as intended by the Contract.”

“Project Managers, I think, do very often make their own assessment, but it is often made late, which frustrates contractors. Project

Managers tend to want to wait until they know what the actual cost is, particularly with time-related costs, rather than make an assessment before the effects of the CE's are known. In many cases, Project Managers do not have the skills to be able to assess the effect of time, or the confidence to do so.” (Adjudicator Interview)

What happens when a PM makes a Mistake?

14. Judge HH Humphrey Lloyd QC (2006) identifies issues concerning when a PM makes a mistake. Section 5 (Payment) of the core clauses does not explain that a mistake by the PM can be corrected by the Employer and that such a mistake may be anything which is subject to an assessment for payment⁵. This, he states, could cover a mistake in an assessment by the PM of the amount due in respect of a PM (see Clause 64). In addition, he also adds

“NEC appears to provide no mechanism whereby the PM can revise a decision, for example, where there has been an over estimate of additional time and costs required”.

15. It appears that the only course of action in the issues identified above is for either of the parties to take the issue to adjudication; should this really be the only way or should the contract provide a mechanism?

Summary

16. In summary, as can be seen, the PM's assessment of CE's can give rise to a number of contractual and legal arguments and a failure by him to keep to the timescales set by the NEC can raise all sorts of questions and issues.
17. PM's tend not to make assessments within the contractual period and, when Contractors make their best prospective estimate, PM's will then reduce the quotation stripping out any elements that did not occur. This appears to show a lack of understanding of the contract and is perhaps a “JCT Final Account mentality” that does not fulfil the NEC ethos of mutual trust and co-operation⁶.
18. It is also suggested that there may be a lack of estimating and programming skills in the industry. PM's may not want to assess

prospectively as they either do not have or do not trust their ability to “*estimate*” and hence wait until after the Works are carried out on site.

Bibliography

19. Christopher Ennis (2010). “Financial Claims under NEC3 Contracts: An Overview”. A paper presented to the Society of Construction Law Annual Conference in Leeds on 5 March 2010.
 20. HH Humphrey Lloyd QC (2009). “Some thoughts on NEC3”, NEC Users’ Group Newsletter, Special Issue, January 2009; article first published in International Construction Law Review, October 2008.
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Footnotes

1. Brian Eggleston’s book “The NEC3 Engineering Contract – A Commentary” (Third Edition) cites more than 50 duties for the PM to perform, including the assessment and valuation of CE’s.
2. Costain Ltd v Bechtel Ltd [2005] EWHC 1018.
3. Further review of this case and the PM’s duties to act as a certifier can be found in Eggleston (2006), Gould (2008), Lloyd (2006), Thomas (2012).
4. i.e. when the Contractor fails to make any assessment or disagrees with the Contractor’s assessment
5. See core Clauses 50.5, read with Clause 50.2.
6. Clause 10.1

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