



Technical

## NEC4 (June 2017) Programme Compliance

Date: 08 Apr 2019

1. Since 1993 the NEC (*New Engineering Contract*) Suite of Contracts have been in use in the Construction Industry. The NEC describes the Contracts as a

*“radical departure from existing building and engineering contracts, being written in **plain language** and designed to stimulate rather than frustrate **good management**”.*

2. The preface to NEC4, the latest iteration of the NEC, sets out the three key objectives of NEC as being to:

*“provide greater stimulus to good management; support new approaches to procurement which improve contract management; and inspire increased use of NEC”.*

3. The preface also describes the NEC as putting the collaboration and

*“sharing of risk and reward at the heart of modern procurement”.*

4. Having first-hand experience of working on NEC Contracts such as: Energy, Environmental, Rail and Signalling, Highways, Utilities and Building Projects we have a detailed understanding of the practical

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problems that are frequently encountered (particularly with managing Time and Compensation Events) when administering the NEC Suite of Contracts.

5. In both the NEC3 and NEC4 the “**Keystone**” of the Contract is the Programme and most problems centre around the Programme and assessing the impact that Compensation Events have on time.

## NEC requires an “Accepted Programme”

6. NEC has a procedure requiring the Contractor to prepare a Programme for Acceptance by the Project Manager. This Programme is used to assess the impact of Compensation Events.
7. The NEC Contracts contain a list detailing what the Contractor should show on the Programme. This list can be found in Clause 31.2 of the NEC3 and NEC4 Contracts. We have summarised the requirements below:
  - Starting Date, Access Dates, Key Dates and Completion Date.
  - Planned Completion.
  - Order and timing of the operations which the Contractor plans to do in order to provide the Works.
  - The order and timing of the Work of the Employer and Others as last agreed.
  - All Interim/Key Contract Completion Dates as prescribed within the Contract.
  - Planned Completion.
  - The order and timing of the Works as agreed with the Employer and others or which have been stated within the Scope.
  - The Contractor should show float.
  - The Contractor should show time risk allowances.
  - Provisions for Health and Safety allowances.
  - Allowance for any procedures required within the Contract.
  - The Contractor should include any acceptance dates required by the Contractor and from the Project Manager.
  - Dates for when plant and other items are required by the Contractor but are provided by the Employer.
  - Dates of any other information required by the Contractor from Others.
8. The Parties can add bespoke programme requirements into the Contract. For example, the Parties can include a requirement for the programmes to be prepared using a specific programming software

package such as PowerProject or Primavera (P6). In NEC4 these bespoke programming requirements should be listed in the Scope (in NEC3 the requirements should be included in the Works Information).

9. If a Programme has not been included within the Contract Data, the Contractor is required to submit a detailed Programme to the Project Manager for acceptance within the period stated in the Contract Data (Clause 31).

## The “Accepted Programme” is Crucial

10. The “Accepted Programme” is absolutely crucial. Below we list some of the problems that are commonly encountered:

- A Compensation Event listed in NEC3 and NEC4 is where the Employer does not provide

“something which it is to provide by the date shown in the “Accepted Programme””.

If the Contractor does not show the things the Employer is to provide on the Programme then strictly, a Compensation Event does not even occur. The Programme needs to be sufficiently detailed for the Employer to see what is required of it.

- The “Accepted Programme” is to show the Contractor’s provisions for float and time risk allowances. This requirement determines the ownership of terminal float and without it the Contractor *could lose out on the benefit of risk allowances if these are not properly identified on the Programme.*
- To review the Programme and to carry out an assessment of the effect of Compensation Events it is fundamental that the Project Manager has the expertise (or has access to that expertise) to understand programming and the Programme. If the “Accepted Programme” is not realistic or properly logic linked/sequenced, the effect of Compensation Events would not be fairly assessed. The Programme should not be accepted by the Project Manager if it is not realistic but assessing this also requires some expertise. The process of acceptance is explained below.

## Acceptance of the Programme by the Project Manager

11. Once the Programme has been submitted for acceptance, the Project Manager has two weeks to accept or not accept it (Clause 31.3 of NEC4). If the Programme is not accepted, then the Project Manager should give reasons for non-acceptance as listed in the Contract and as included below:
  - 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.
  - It does not comply with the Scope.
12. In the interest of working collaboratively and effectively the Project Manager should always fully explain with detailed reasoning their non-acceptance in order to resolve the issues expediently. Quite often we have found that the Project Manager does not expand on their reasoning and therefore does not give sufficient information for the Contractor to amend or update the Programme.

## The Silent Project Manager

13. We frequently see disputes where the Project Manager has received a programme and then remained silent.
14. In NEC3 this silence is not deemed as Acceptance of the Programme. This often leads to disputes about how the effect of Compensation Events should be assessed and which programme should be used.
15. NEC4 introduces a procedure for the Contractor to notify the Project Manager that it has not accepted the Programme within the timescales of the Contract. If the Project Manager still does not respond for a further week (after the Contractor's notification) the Project Manager's silence is treated as Acceptance of the Programme. This gives a solution to situations where there is silence from the Project Manager and encourages the Project Manager to respond. There will inevitably be disputes where the Programme is continually Not-Accepted, either because the Programme is not in accordance with the Contract or because the Project Manager's reasons are not those listed in the Contract for not accepting the Programme. These disputes would need to be resolved by an agreement between the parties or by Adjudication.

## Programme Updates

16. The process of programme production and acceptance is emphasised in the NEC with clauses setting out procedures and requirements. This includes Clause 32 which is for *“Revising the Programme”*.
17. In NEC the Contractor should submit an updated Programme at regular intervals and the Programme should take account of progress, the duration and logic of the remaining works and Compensation Events. It should also show how the Contractor plans to deal with delays.
18. From practical experience, untangling the issues that arise where the Contract has not been administered in the way intended, good record keeping and a well-prepared programme are critical to successfully resolving disputes or avoiding them in the first place.

## Dealing with Compensation Events

19. Agreeing Compensation Events can be both time consuming and cause delay to agreeing an update to an *“Accepted Programme”*.
20. In NEC3 there was a requirement was to show *“the effects of implemented Compensation Events”* on the Contractor’s revised Programme (Clause 32.1).
21. This wording has been removed in NEC4. The intention is for Contractors to show both implemented and non-implemented Compensation Events on the revised Programmes.
22. This ensures the Programme includes events that may have a significant impact on planned Completion. This should improve the management of these events.
23. Whilst the NEC could be seen as taking the lead in Contract Innovation, the Construction Industry as a whole has recognised that close collaboration across all parties is essential to avoid costly disputes.

## FIDIC 2017 – The Contractor’s Programme

24. The updated FIDIC (*“The International Federation of Consulting Engineers”*) Contracts, which is the Suite of choice on international projects, has adopted similar approaches to those found in NEC. This includes giving early warnings of events and specifying programme requirements.

25.FIDIC's Second Edition (December 2017 – RED and Yellow books) now requires that:

- Planning software is specified.
- Commencement date is identified.
- Key dates should be identified.
- Rest days and holidays to be included.
- All activities to be logic linked.
- Float and critical path are identified.
- Delivery dates for key material/equipment.
- Sequence and timing of inspections and tests.
- The dates in which the Employer is to give right of access in accordance with the Contract Data (Clause 8.3b). If there are no dates in the Contract Data then the Contractor should set the dates for access or possession of parts /whole of the site.
- The Contractor is to provide a supporting Method Statement.

26.Under the FIDIC form Sub Clause 1.1.67 the Contractor submits the Programme for the Engineers approval. Unless the Engineer issues a notice of No-Objection the Programme is seen as Approved.

27.Like the NEC, FIDIC has also been focused on improving clarity, transparency and certainty in order to reduce the number of disputes with the key theme of the Second Edition being *“Dispute Avoidance”*.

## Summary

28.In NEC4 the Programme is key to administering the Contract. NEC4 specifies what the Contractor should show on the Programme, when the Programme should be revised, the grounds for not accepting the programme, what happens if the Project Manager is silent about acceptance and how the Programme should be used to assess Compensation Events. It is crucial the Contractor and Project Manager understand Programming and the Programme because it is used to assess the effect of change on Time and this will impact on the cost of the work.

29.If you require assistance with any of the above issues, please contact Ramskill Martin at any of our offices detailed below.

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ARTICLE BY: JEREMY STEEL (MCIOB), ([jeremy.steel@ramskillmartin.co.uk](mailto:jeremy.steel@ramskillmartin.co.uk))

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<p><b>Sheffield</b></p> <p>The Annexe 260 Ecclesall Road South Ecclesall Sheffield S11 9PS</p> <p>Tel – 0114 230 1329 E-mail – <a href="mailto:frances.sawicki@ramskillmartin.co.uk">frances.sawicki@ramskillmartin.co.uk</a></p>	<p><b>London</b></p> <p>Adam House 7-10 Adam Street London WC2N 6AA</p> <p>Tel – 020 7520 9295 E-mail – <a href="mailto:clive.ramskill@ramskillmartin.co.uk">clive.ramskill@ramskillmartin.co.uk</a></p>
<p><b>Birmingham</b></p> <p>Birmingham Business Park 4200 Waterside Centre Solihull Parkway Birmingham B37 7YN</p> <p>Tel – 0121 481 2381 E-mail – <a href="mailto:clive.ramskill@ramskillmartin.co.uk">clive.ramskill@ramskillmartin.co.uk</a></p>	<p><b>Manchester</b></p> <p>3 Hardman Street Manchester Lancashire M3 3HF</p> <p>Tel – 0161 932 1535 E-mail – <a href="mailto:nick.cheetham@ramskillmartin.co.uk">nick.cheetham@ramskillmartin.co.uk</a></p>
<p>Head Office The Annexe 260 Ecclesall Road South Sheffield, S11 9PS UK</p> <p>Tel – 0114 230 1329</p>	