



Sorting the wheat from the chaff: Which key records should be produced to help prove entitlement to delay under NEC4?

Change in construction projects is almost inevitable and without adequate record-keeping, difficulties may arise in demonstrating cause, effect, and entitlement to an extension of time.

According to a recent HKA study ([CRUX 2022](#)), the average extension of time claimed equates to 68.6% of the planned project duration. In many cases, the contractor must be successful in an extension of time claim to avoid liability for damages and/or the crystallisation of a dispute. The burden of proof lies with the claimant, and their ability to demonstrate entitlement to an extension of time depends on the quality of the contemporaneous records.


“There is often a lack of good record keeping and a lack of uniformity of approach to record keeping as relevant to management of progress of the works and delay and disruption claims.”¹

The NEC4 Engineering and Construction Contract² (“NEC4”) requires the Project Manager to assess the change to a Key Date or the Completion Date prospectively. Pursuant to Clause 62.2, the Contractor shall prepare a prospective delay analysis to demonstrate the effect of a compensation event on a Key Date or the Completion Date.

If a compensation event occurs at the project outset (e.g., site access issues), then the Contractor can deploy an impacted as-planned delay analysis to demonstrate the effect. Whereas, if a compensation event

¹ SCL Delay and Disruption Protocol 2nd Edition: February 2017, para 1.4.

² NEC4 Engineering and Construction Contract June 2017



occurs whilst the works are progressing, then a time-impact delay analysis may be deployed. However, for one reason or another, the parties might not deal with the compensation event prospectively, and the delay impact is determined retrospectively.

This article considers a non-exhaustive list of records which should be produced contemporaneously to substantiate a prospective or retrospective delay analysis under the NEC4.

The Baseline Programme

Pursuant to Clause 31.1, the first programme (hereinafter referred to as the “baseline programme”) is included in the Contract Data or submitted by the Contractor “to the Project Manager for acceptance within the period expressed in the Contract Data”.³

The baseline programme represents the Contractor’s planned working method which is used in prominent delay analysis methodologies as a benchmark to measure change. Therefore, it is of paramount importance that the Contractor produces and retains a logic-linked baseline programme and all correspondence regarding its acceptance to form the foundations of a prospective, or retrospective claim.

Clause 31.2 sets out the programme's requirements, including details of the planned resource required to carry out each activity. Furthermore, it is also good practice to present and retain planned resource and progress curves which are quick and easy to digest compared to programme software.

If an adequate baseline programme is unavailable, then a prospective delay analysis is unfeasible and in terms of a retrospective analysis, usually, a collapsed as-built analysis will be deployed in these circumstances.

Correspondence

The Parties should document and retain all key correspondence relating to compensation events and important verbal communication should also be produced and shared in a written format. Project correspondence is utilised in claims to demonstrate causation, mitigation, the parties intentions and in some cases, the critical path.

If key correspondence is not captured in written format contemporaneously, witness statements may be required to evidence important exchanges, although witness statements generally carry less weight. A further common pitfall is filing written communications inadequately which can result in significant additional expenditure to identify relevant documents at a later date.

“Written communications should be uniquely numbered, contain a descriptive subject line, be dated and be issued to the agreed distribution list. Any important oral communication ought to be confirmed in writing.”⁴

³ NEC4 Engineering and Construction Contract June 2017, Clause 31.2.

⁴ SCL Delay and Disruption Protocol 2nd Edition: February 2017, para 1.32.



Early Warning Notices

The first step in managing change is the provision of an early warning pursuant to Clause 15.1 which requires the Contractor and the Project Manager to notify “the other as soon as either becomes aware of a matter which could”⁵ cause a delay to a Key Date or the Completion Date. Early visibility of a potential issue provides both parties with the opportunity to collaborate and mitigate the impact of an event by way of an Early Warning Meeting.

Failure to provide such notice could impact the relief sought and limit the Contractor’s entitlement to the part of the delay which would have remained if an early warning was provided. Therefore, evidence of a prompt early warning and active participation in reducing the associated impact should be retained.

Compensation Event Notice

If the delay event is the Client’s responsibility pursuant to Clause 60.1, then the Contractor must also provide prompt notification that a compensation event has occurred. The service of such notice must be within 8 weeks of the Contractor becoming aware that the event has happened, or the Contractor becomes time-barred from claiming an extension of time. Exceptions to this rule apply if the event arises from a Client instruction, certificate or change to an earlier decision. Therefore, the Contractor must retain this contractual record to demonstrate its compliance with Clause 60.1.

If the Project Manager agrees on the principle that a compensation event has occurred, the Project Manager may instruct the Contractor to provide a quotation to reflect its impact. However, if the Project Manager disagrees that a compensation event has occurred or considers that the event has no effect on the works, then the Project Manager notifies the Contractor. At this point in the process, a potential dispute could crystallise over the principle of whether a compensation event has occurred.

“Consistency is key with record keeping and if gaps exist in the records, the Contractor will experience difficulties in demonstrating the effect of a compensation event during that period.”


Revised Programmes

Once the Project Manager agrees on the principle that a compensation event has occurred, the Project Manager instructs the Contractor to provide a quotation within three weeks of the instruction. At this point, the Contractor must adequately quantify and demonstrate the effect of the compensation event on a Key Date or the Completion Date.

The NEC4 encourages a prospective approach towards analysing and agreeing on the effect of a compensation event and if actual progress has been made, then a time-impact delay analysis method may be deployed. In addition to a reliable logic-linked baseline programme, the time impact analysis requires equally reliable updates to the baseline programme to consider the actual progress achieved.

Programme revisions are not only a valuable tool in managing change and demonstrating delay but an obligation under Clause 32.2. Whilst the Contractor is entitled to submit a revised programme for acceptance whenever it likes, it should avoid using revised programmes to manage expectations which do not reflect the

⁵ NEC4 Engineering and Construction Contract June 2017, Clause 15.1.



actual happenings on site. If the programmes are found to be unreliable, the Contractor compromises its ability to demonstrate delay prospectively and retrospectively.

“... Updated Programmes are a repository of data regarding progress achieved prior to their data date. ... Hence, Updated Programmes are also a helpful progress record.”⁶

Resource, Progress, and Productivity Records

A common stumbling block in a claim is the demonstration of a causal link between the compensation event and its impact. A consequence of a compensation event is commonly a decline in resource and/or productivity which in turn impacts progress. Therefore, implementing and maintaining an effective system for recording resource and progress information is essential not only to supporting a case in a dispute but avoiding one altogether.

Actual resource and progress data should be recorded against each activity. The frequency at which data should be recorded depends on the scale of the project, although, capturing this data daily is highly advantageous. Adequate resource and progress records are pre-requisite to a productivity analysis which is required to support a disruption analysis. If the resource and progress information is recorded at a higher level, it may not provide the granularity required to demonstrate entitlement.

Site diaries which record daily resource expenditure, progress, stoppages, and reasons for the stoppages against each activity performed are indispensable tools in demonstrating cause and effect, particularly when submitted to and approved by the Client. The Contractor should also retain this data on a single excel sheet in a histogram format to avoid the costly process of extracting the data from individual sheets retrospectively.

“... data should be recorded in a manner that allows it to be matched to the activities in the Accepted Programme/Updated Programme.”⁷

Visual Evidence

“A picture paints a thousand words”⁸, and photographic evidence of progress and/or causes of delay is a powerful tool which is often overlooked although the imagery date and location must be demonstrable.

Summary

The ethos of the NEC4 is to analyse and agree on the change as it becomes apparent. However, for one reason or another, the parties may adopt a wait-and-see approach, and a retrospective analysis of the impact may be required. In this case, the records detailed above are of equal relevance, although the retrospective delay analysis method would be better suited.

⁶ SCL Delay and Disruption Protocol 2nd Edition: February 2017, para 1.19.

⁷ SCL Delay and Disruption Protocol 2nd Edition: February 2017, para 1.7.

⁸ Frederick R. Barnard (1921)

Consistency is key with record keeping and if gaps exist in the records, the Contractor will experience difficulties in demonstrating the effect of a compensation event during that period. In any case, effective record-keeping often requires additional resources although it should be viewed as an investment in reducing risk and exposure to costly damages rather than a burden. However, this additional expenditure could be a drop in the ocean compared to the potential loss the parties are exposed to in the absence of adequate records.

“Records should be kept and stored for at least as long as the contract requires or for any relevant statutory limitation period.”⁹

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⁹ SCL Delay and Disruption Protocol 2nd Edition: February 2017, para 1.13.