

October 2024

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No. 46: Concurrency & NEC Contracts

Introduction

Training and development support is a key part of CECA's core offer for its membership and working in conjunction with GMH Planning it has delivered a programme of training events around the NEC Form of Contract across several CECA UK regions.

In addition to this training, a series of monthly NEC Contract Bulletins are being produced for both Contractors and Subcontractors to improve practical awareness on key topics within the NEC. The coverage, whilst not exhaustive, is intended as a general overview on some of the contractual principles to increase a wider understanding in support of more sustainable outcomes.

For the purposes of these bulletins a contractual relationship between a "Client" and "Contractor" is assumed. The same rules/principles also apply if the contractual relationship is between a "Contractor" and a "Subcontractor" and so the term "Contractor" will be used to describe both parties.

These bulletins are based on the latest NEC4 family of contracts, but the same principles and rules would apply where parties are engaged under an NEC3 form of contract.

Coming next month:

Bulletin Nr 47 - Requests for Information (RFIs) and Technical Queries (TQs) in relation to NEC Contracts

Please respond to Lucy Hudson should you require any further information on the CECA NEC4 Bulletins via e-mail: lucyhudson@cecasouth.co.uk.

For further advice or guidance on the NEC details please visit www.gmhplanning.co.uk where you will find a wealth of free [NEC Guidance Notes](#), [NEC FAQs](#), and other helpful measures.

NEC Contract focus month 46 - Concurrency & NEC Contracts

It is widely recognised that a key feature of an NEC contract is the approach that it takes regarding the programme. The programme is required to be regularly revised and accepted during the life of a project to promote good project management. "Concurrency" (or "concurrent delay") is a term that is quite widely used within the industry but what does it actually mean, and when would it or could it come into play contractually? This bulletin will consider its meaning, and more importantly whether it has any relevance when being considered in relation to administering NEC contracts.

What is "concurrency" or a "concurrent delay"? An interesting question and not necessarily very easy to answer. This is much easier to define from a dictionary definition sense rather than a contractual one. A simple dictionary definition could be "the fact of two or more events or circumstances happening or existing at the same time" (although there are numerous other conflicting definitions out there).

What would "happening at the same time actually mean" in a contractual sense? Given that programmes are typically issued for acceptance every four weeks or monthly, if two events happen one day apart, one week apart or three weeks apart but in the same reporting period – could that be considered as being "at the same time"? When considering a "concurrent delay", it is normally associated with one event which is the Contractor's liability and another parallel event which is the Client's liability. How is this then assessed?



In the past with other forms of contracts, it was typically viewed that this should mean the Contractor would be entitled to time but not cost, but how does an NEC contract deal with such a situation?

Sometimes "Concurrency" may be made a defined term: Z clauses can sometimes be written to introduce this as a contractual term, but the definition written is typically so subjective that it would only ever lead to dispute (which NEC contracts are written to avoid or at least limit in the first place). Such a definition can often also cause an ambiguity with the existing NEC contract wording (for which clause 63.10 states any impact would go against the party that created the ambiguity).

How would an NEC contract deal with two events happening within the same period? If two events happened in the same period one week apart, under the NEC contract you should assess the effects of the two events in the order they occur. If there is a Contractor delay in say procuring materials, and a Client delay where they deny the Contractor access, then these two delays should simply be assessed in the order they occur. If the Contractor delay in procuring materials happened first, then the effects of that should be assessed first to see the impact that had (if any) upon planned Completion. Then, the subsequent Client delay of lack of access should be applied to see if that had any further effect upon planned Completion (and hence entitlement to move Completion Date), any such effect would be included within the compensation event assessment. This concept has been backed up by the NEC4 ECC Practice Note 1 issued by NEC in October 2017, and by the amendment to clause 63.5 in the January 2019 version of NEC4 ECC contract.

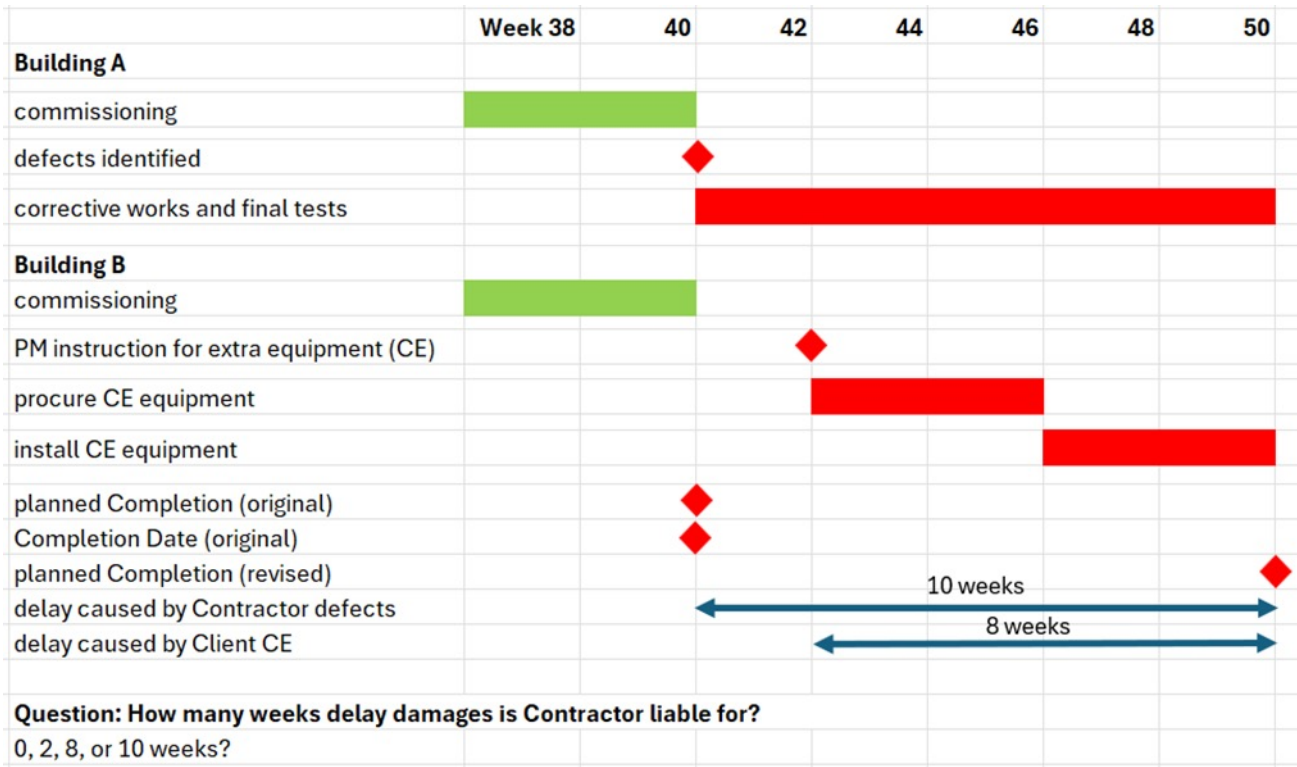
An example of how two events should NOT be considered as concurrent: A Client delays the Contractor by two weeks which will impact the planned Completion by two weeks. One week later after the delayed access was notified and the CE quotation is still being produced, it becomes apparent that there is now a Contractor delay in procuring the materials. There is no contractual right for the Client to say with hindsight that the problem with the material supply should now impact how the delayed access is assessed, and that they do not need to pay for the delay as they view the Contractor delay as "concurrent". The Contractor may have been able to get the materials to site quicker but at a premium, and they decided not to as they knew there was no access anyway. The initial delay caused a two-week delay to the planned Completion of two weeks, and that should be the movement of Completion Date once the compensation event is implemented. The lack of access created "float" that the Contractor just happened to have utilised.

The opposite would also be true to protect the Client, where the material supply issue becomes known which delays the Contractor by two weeks, and later it becomes apparent the Client cannot give access. The Contractor delay would

be considered first, and if the lack of access makes no further delay to planned Completion, the Contractor is still left with the liability of their original delay.

In both of these examples one event created an amount of float on the subsequent activity which the other party happened to benefit from. To apply these logical rules will just result in the fairest outcome and not generally benefit one party more than the other.

Another example:

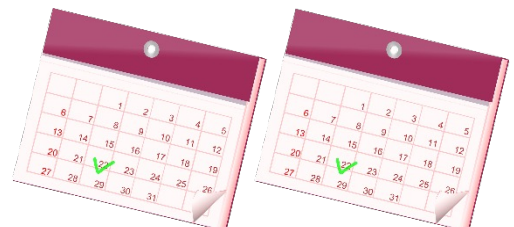


In the above example, the Contractor delay (defective work not complying with Scope) has come first and is going to impact the planned Completion by ten weeks. Shortly after the defect is instructed, additional works are instructed which will take an additional eight weeks. This does not further impact the planned Completion so there is no entitlement to move Completion Date (clause 63.5) and the Contractor would still be liable for ten weeks delay damages.

If the Contractor realises in week 42 that they can achieve the defect corrections in five weeks not ten (and can prove that to be the case) then they can take that into account before assessing the CE. This would then result in the CE moving planned Completion by five weeks and hence Completion Date moving by the same and a delay damage liability to the Contractor of five weeks.

If the reverse of this happened where the Client delay was ten weeks and then a short while later a Contractor delay of eight weeks occurs, the Contractor would be entitled to claim ten weeks of preliminary type costs within the CE quotation and not be liable for any delay damages.

Could true concurrency ever occur? Yes, it is possible that two different events could happen at exactly the same time. If these two events are different Parties' liabilities, there would be little practical choice other than (in the spirit of mutual trust and cooperation) to share the liability. If both delays would have had a two-week impact on planned Completion, one being the Contractor liability and one being the Client liability and neither could be mitigated, it would only seem sensible that the movement in Completion Date would be one week and Contractor liable for one week



delay damages. However, this scenario would be very rare where two events truly happened at exactly the same time and where the Contractor would not be able to mitigate their own delay.

Summary: Concurrency is a potentially dangerous term within the construction industry which can create ambiguity and cause disputes. In NEC contracts the rules on how to assess events is contractually clear so this term of "concurrency" would rarely be relevant. In practice it is not easy to clearly assess delays when there are several events happening at a similar time, but the methodical approach to assess such scenarios in NEC contracts is better than the alternative which could be a potentially long protracted dispute further down the road.