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Programme Issues Workshop Scenario (Q+A)

1. **No programme is identified in the Contract Data, and the Employer then fails to submit a first programme to the Employer for acceptance within the period stated in the Contract Data. Which obligation of the Contract is the Contractor in breach of? What remedy is immediately available to the Employer? What does the Contractor need to do to remedy the problem?**
 - 1.1. Contractor is in breach of Clause 31.1 – obligation to submit a first programme to the Employer for acceptance within the period stated in the Contract Data.
 - 1.2. Under Clause 50.3, if no programme is identified in the Contract Data, one quarter of the Price for Work Done to Date is retained in assessment of the amount due until the Contractor has submitted a first programme.
 - 1.3. The Contractor needs to submit a first programme to the Employer, and it has to *show the information which the contract requires*.
 - 1.4. **Discussion point** – may be worth discussing with your group any common problems that crop up with producing programmes containing the detailed information set out in Clause 31.2.
2. **The Contractor submits a programme to the Employer which does not contain all of the information stipulated in Clause 31.2. What are the Employer's obligations with regard to responding to the programme submitted by the Contractor? How should the Employer respond in the circumstances?**
 - 2.1. Clause 31.3 – Within 2 weeks of the Contractor submitting a programme to him for acceptance, the Employer either accepts the programme, or notifies the Contractor of his reasons for not accepting it.
 - 2.2. Clause 31.3 – reasons for not accepting a Programme are also set out in 31.3. You should discuss the various reasons with your group. Reasons include that the programme "...does not show the information which this contract requires...". The Programme should be rejected on this basis.
 - 2.3. **Discussion point** – consider the obligation of the Employer to act reasonably, bearing in mind the Clause 10.1 "mutual trust and co-operation" obligation (**Q4** touches on issues of reasonableness, too).
3. **In another scenario, the Contractor's programme contains all of the information required in terms of Clause 31.2, but in the view of the Employer it does not take proper account of a 2 month delay that has arisen on the project. What could the Employer do in these circumstances?**
 - 3.1. Clause 31.3 again – the Employer could seek to reject the programme on the grounds that it does not represent the Contractor's plans realistically.
4. **What if the Employer consistently fails to respond to, and/or accept Programmes submitted to them that satisfy the requirements of Clause 31.2?**
 - 4.1. Clause 31.3 – 2 week time period for a response.
 - 4.2. Also under Clause 31.3 – the reasons for rejecting a Programme are set out. One of these reasons should be identified as a reason for not accepting a Programme.

- 4.3. No clear remedy for the Contractor in this situation – and this is one area where there is a gap in the drafting of NEC.
- 4.4. Other options – could give rise to a dispute due to failure by the Employer to implement their obligations in relation to assessing programmes, or on the basis of the grounds offered for rejecting an updated programme.
- 4.5. Consistent failure by the Employer to engage on programme issues – certainly runs contrary to the philosophy of NEC3, and the obligation under Clause 10 to act in a spirit of mutual trust and co-operation? (Although that doesn't necessarily provide the Contractor with a practical remedy).
- 5. What are the potential consequences if either (i) there is no Accepted Programme, or (ii) the Accepted Programme has not been kept up to date?**
- 5.1. These include:
- 5.2. Clause 63.3 – provides that a delay to the Completion Date is assessed as the length of time that, due to the compensation event, planned Completion is later than planned Completion shown on the Accepted Programme.
- 5.2.1. But if there is no Accepted Programme, or the AP is not up to date, this can give rise to obvious difficulties with the assessment process.
- 5.3. Clause 64.2 of the Contract provides that the Employer is obliged to assess a Compensation Event using his own assessment of the programme for the remaining work if either (i) there is no Accepted Programme; or (ii) the Contractor has not submitted a programme or alternations to a programme for acceptance as required by this Contract.
- 5.4. The NEC Guidance Notes observe that: *“Failure by the Contractor to submit revised programmes is of considerable disadvantage to the Contractor in that if a Compensation Event occurs, the Employer may assess it entirely on the basis of his own judgement. Thus it is in the Contractor’s interests to keep the programme up to date and maintain the existence of an Accepted Programme.”*
- 5.5. The position may well be more complicated where that failure may be due, at least in part, to the approach of a PM – e.g. unjustifiably refusing to agree programmes. Clearly, the facts about the basis for such refusal will be important. There could well be counter-arguments available to a Contractor about the ability of a PM to make decisions about CEs, to the Contractor’s prejudice, where these circumstances have only come about due to a failure by the PM to fulfil their obligations under the Contract.
- 5.6. And finally - various Compensation Events are to be assessed by reference to the Accepted Programme (e.g. clause 60.1(2), (3), (5) and (19)). Again, if there is no Accepted Programme, or the AP is not up to date, this can give rise to obvious problems.
- 5.6.1. If the Accepted Programme is not up-to-date, and if this is due to an omission by the Contractor, the risks arising from assessment of CEs by reference to dates in an out-of-date Accepted Programme are likely to rest with them. However, if the absence of an Accepted Programme is due to failures by the Employer, the Contractor could be able to argue that they not be prejudiced by this.

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