

First Working Session

Q.1  
I am tendering for a NEC Contract, and it is apparent that the NEC is administratively heavy. The quandary that I have is that if I price for all of the resources needed I am unlikely to win the job, whereas if I do not price for all of the administrative resources required, I am likely to be criticised and /or penalised later. What should I do?

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- The NEC is NOT administration heavy
- The NEC is administration "sharey"
- Don't win a contract you cannot manage
- Consider processes and procedures already in place and how they can be adapted
- Consider different processes (not additional processes) to meet the contract needs
- Educate and engage the supply network so that appropriate administration is shared



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- The NEC is heavily process based. Price for everything.
- The NEC is administration is not "sharey" there is no such word do not rely on others doing things
- Allow for management up to the hilt and then add some
- As a Contractor if you do not drive the job you will get caught
- Understand the contract (if possible) and do everything it requires
- Engage your supply chain on the same terms you are on and do not rely on them to do everything they should.



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### First Working Session

Q.2

Should I allow in my tender for my obligation to act in a 'spirit of mutual trust and co-operation'? For example, if the Project Managers assistant on site gives us some verbal instructions to do additional works on site, do we have to follow these or will we be in breach of the clause 10.1 "spirit of mutual trust" if we do (or if we do not)?

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- This is not really a contractual obligation
- This is an approach or ethos
- It is also only half the clause, the first bit is "act as stated in the contract" which is equally (if not more) important
- Taking the example, there has been no communication under 13.1 of the request so no need to comply. Caught by first part of 10.1
- What would you want to allow for and, more importantly, why?



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- Mutual trust and cooperation is definitely an obligation: see Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest) [2013] EWCA Civ 200
- The risk is that the other side will not be mutually trusting and co-operative.
- Assess the risk and price it.



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### First Working Session

Q.3

The quantities in the BoQ and on the Works Information (i.e. the Specification and Drawings) are different. When pricing for the Project which takes precedence?

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- Works information is not the same as specification and drawings, be very careful with terminology
- The use of a BoQ under NEC is optional under main options B and D
- Under the NEC Options B and D are re-measurable, so the Contractor does not take the quantity risk
- The Contractor does have to carry out all the work stated in the Works Information
- Therefore, the WI will take precedence over the BoQ in terms of the amount of work to be done
- The answer could be quite different for an activity schedule contract



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- What a daft idea to have all sorts of contract documents floating about without an interrelationship and without a precedence of documents provision
- If you have an option with Bills of Quantities in the title shouldn't the Bills be the most important document?
- Under NEC Options B and D it is debateable as to whether these amount to re-measurement contracts.
- The negative statement that the Bills of Quantities is not Works Information is unhelpful



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### First Working Session

Q.4

Because of the restrictions on site, the site compound will be outside of the Working Area, do I have to make any allowance for this in preparing my tender (particularly my *direct fee percentage*)?

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- **First things first, get the definition of Working Area right so that it includes the site compound. You can have remote offices as part of the Working Area**
- **Other offices where work is carried out that are not within the Working Area will give rise to problems where payment is made using the SCC**
- **Defined Cost is based on the SCC for options C, D and E**
- **Anything not recovered as part of Defined Cost is recovered through the Fee**
- **For CE's the SCC is always the starting point, so take care not to under-recover on change**



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- **Simple: define the working area on the basis of everywhere that you are likely to carry out work including if necessary your head office**
- **If you cannot do this you need to price everything which is outside the working area separately and the fee is as good a place as any**



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### First Working Session

Q.5

There was a risk register included in the tender documents that listed a number of risks with responsibilities next to each of them. One of the items was "all ground conditions was Contractor risk", and yet we argue that clause 60.1(12) has not been altered so we believe certain conditions will be a compensation event. Who is right here?

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- The inclusion of risk registers in tender documents can be very misleading. What purpose did this one serve - management/liability?? 
- This is not an NEC problem but an inadequate/ineffective amendment problem
- Starting point is that the Contractor takes the risk of everything that is not specifically taken by the Employer (81.1)
- The specific will usually override the general so the risk register probably wins through BUT
- 60.1(12) is wider than just ground conditions (physical conditions)
- The specific wording of the risk register will be important

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- The Risk Register is only an Early Warning wherever it is - clause 11.2(14)
- The Risk Register cannot make a general statement and be a compliant Risk Register item
- How can you identify Risk without stating what is to be done about it?
- Mutual trust and cooperation????? 

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## Second Working Session

Q.1

I submitted a Programme to the Project Manager for acceptance six weeks ago but I have received no communication from the Project Manager about my Programme.

However, I have now had 25% stopped from my Valuations. What can I do about this?

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- Project Manager can only withhold 25% if they have formally rejected a programme for a valid reason under the contract (50.3)
- You should point this out to the PM, who should include interest on any late payment as part of the next assessment if this has been withheld unfairly
- Contractor should not have waited 6 weeks to get a response to the programme
- Could have notified a compensation event if the PM had not responded within two weeks (not that there are likely to be financial implications to be able to attach to this) 60.1(6)
- Project Manager should be much more proactive in communicating if the programme is not good enough to accept
- Both Parties should share a joint meeting to ascertain the status of the programme and what it needs in order for it to be accepted



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- Clause 50.3: "If no programme is identified in the Contract Data , ..."
- Deemed acceptance?
- The lack of an up to date programme frustrates the management of other important NEC processes
- Contractor should issue an EWN & call a risk reduction meeting
- No effective contract mechanism available to resolve this situation for the Contractor
  - Clause 60.1(6)?
  - Adjudication?
    - Contractor would lose!
  - Clause 31.3 "show the information which this contract requires"
  - Clause 31.2
- I would like to see amendments. 1 week. Deemed acceptance.



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## Second Working Session

Q.2

In the Accepted Programme I was told by the Project Manager to allow for a time risk assessment based upon an assumption that the Project Manager had made. Now another Compensation Event is being considered, the Project Manager is saying that the time risk allowance that I included in the Accepted Programme was actually 'float' and he wants to take back that 'float' in his future assessments of Compensation Events. Can he do that?

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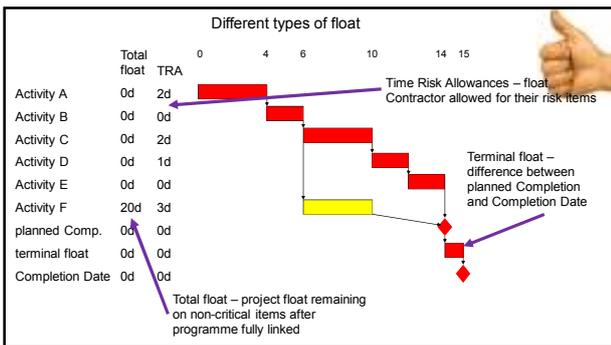
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- The Parties seem to have slightly confused themselves as to what float they are talking about here.
- Time risk allowances should be for items of risk that are the Contractor's risk under the contract. It should not generally be for the PM therefore to state what the Contractor should allow. It is also not for the Project Manager to use up in the assessment of compensation events.
- If this was a period of risk for an Employer risk item then there is nothing to stop the Project Manager from deleting that item of risk. If this item is on the critical path then it will bring forward the planned Completion and create "terminal float" which the Contractor owns. Otherwise if not critical it will create "total float" which is shared under the contract.
- A Contractor would not generally need to price or programme for Employer's risks that might not happen. The premise is that they will be assessed as compensation events if they do occur – otherwise the Contractor would be allowing for prelim type cost that he may not need to spend.

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- What is a time risk 'assessment'?
- Clause 61.6 "... Assessment of the event is based on the [PM's] assumptions. If any of them are later found to be wrong, the PM notifies a correction."
- If the CE has been implemented then any forecast of TRA stands as per clause 65.2, even if it is wrong.
- Clause 60.1 (17) Correction of a PM assumption is another CE
- Correction of the PM assumption might mean there is no longer a need for the TRA but a CE cannot bring forward the Completion Date. PM cannot take back TRA



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## Second Working Session

Q.3

In the Accepted Programme there is an obvious and inadvertent error. How can I rectify that error?

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- Any programme is a line in the sand as to what the Contractor envisaged at the point that he issued the programme for acceptance.
- Programmes have an annoying habit of changing. Things change, errors get noticed, and different constraints become apparent.
- Clause 32.2 confirms that a Contractor can submit a programme at any point for the Project Manager to then accept or not accept.



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- Clause 32.2 allows the Contractor to revise the programme whenever he chooses and Clause 32.1 allows the Contractor to make any “changes which the Contractor proposes” [Emphasis added].
- If the error is “obvious” then hopefully the PM will accept the revised programme.
- Clause 31.3. - two of the reasons that PM can use for not accepting the programme are subjective (e.g. not practicable / realistic)
- Under a JCT contract the Contractor wouldn’t have this problem. He can correct errors in his master programme without getting any permission.



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### Second Working Session

Q.4  
Information has been provided late in respect of the Accepted Programme, and will delay the dates on the Accepted Programme and the Programme Completion Date.  
However, in respect of the progress of works on site, the information is not late. Am I entitled to an Extension of Time / Compensation Event for the delay to the programmed Completion Date?

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- This is a very common issue. In very simple terms unpicking the contract clauses I would say that you should take into account progress and any other changes up until the point that you became aware of the event.
- In this instance if the Contractor is already in delay and the late information would not now affect him then there should be no entitlement for a delay to Completion Date.
- Contractor needs to be careful what he wishes for, as in a future situation where Information is late but soon afterwards has his own delay, then the Employer delay has come first here and he would be entitled to a delay to Completion Date.
- If this logic was not correct, it could be in the interest of a Contractor to never submit a revised programme again if he thinks his original programme will give him a better answer in terms of entitlement – and clearly this cannot be the intent of the contract. What if last Accepted programme was 5 months old?



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- I assume this is information from the Employer, in which case this could be a CE under clause 60.1(3).
- Under cl. 63.3: *“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 as shown on the Accepted Programme”.*
- On this basis the Contractor gets an EOT. ... even though his progress is such that no delay has been caused! The Contractor is effectively getting an EOT to help him out of his own delay.
- Amendment necessary?

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### Second Working Session

Q.5  
The Project Manager has requested a quotation for acceleration to bring forward the Completion Date which we gave him. He did not like the quotation but is insisting upon it anyway and says he will make an assessment of our quotation. Can he do this?

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- In an un-amended contract there is no mechanism for the Project Manager to make his own assessment i.e. this does NOT follow the same rules as a compensation event
- Project Manager accepts the Contractor’s quote and the Completion Date comes forward, or he does not accept the quote and the Completion Date remains where it is
- Check for Z clauses however that may allow the PM to do this. If so, the Contractors only recourse is adjudication if the assessment is not considered fair/contractually correct

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- No provision in the NEC3 that allows the PM:
  - to instruct the Contractor to accelerate; or
  - to assess a quotation for acceleration.
- Clause 14.3 - Allows the PM to change a Key Date, bypassing of the Acceleration provisions at Clause 36?



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### Third Working Session

Q.1

The Project Manager has said that I did not give a Notification of a Compensation Event, and I said that I had given an Early Warning Notice. Surely, an early warning notice must act as a notification of a Compensation Event?

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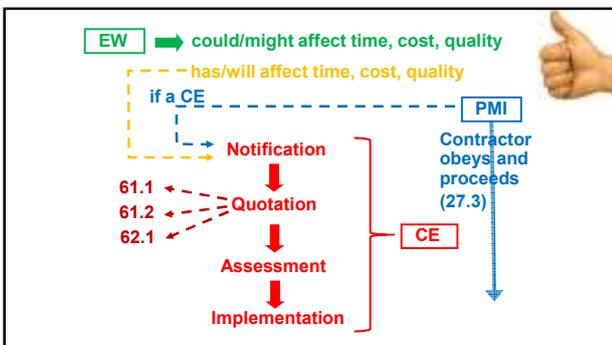
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- An early warning is an early warning
- A notification of a compensation event is a notification of a compensation event
- Not all early warnings lead to compensation events
- Not all compensation events will have been foreseen so no early warning would have been raised or be necessary
- Early warnings when raised are for matters that MIGHT or COULD affect something. If these then become something that WILL or HAS affected the Contractor in terms of time/cost/quality then they should now be communicating this fact – i.e. notifying that now from their perspective that it is a compensation event...



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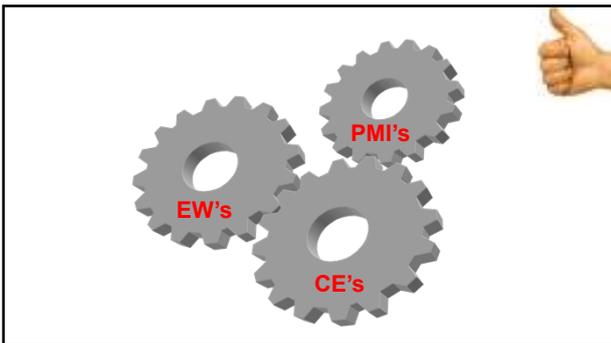
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- Nice diagram!
- In real terms is there any difference at all between the Contractor giving an Early Warning Notice and notifying a Compensation Event?
- How does clause 61.3 work?



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### Third Working Session

Q.2

The Project Manager has said that I did not give a Notification of a Compensation Event, and I said that I did not need to because he had issued a Project Manager's Instruction (PMI). The Project Manager said that he was not aware that his PMI would change the Prices or the Time, and therefore I was required to give a Notification of a Compensation Event even though he had issued a PMI. That cannot be right?

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- A PMI is not in itself a compensation event, unless it states clearly within it that it is a compensation event (and should therefore also request for a quotation)
- Clause 61.1 requires that if an instruction is a change to the Works Information then he should notify that it is a compensation event and request a quotation
- Under clause 61.3 the Contractor can notify a compensation event if they believe it is one and the Project Manager has not.



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- Whoever thought it a good idea to 'steal' from the contractor on the basis of a doubtful technicality?
- ...and in a mutual trust and cooperation contract?
- The Project Manager has an obligation under clause 61.3



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### Third Working Session

Q.3

I gave a Notification of a Compensation Event (a Compensation Event that the Project Manager was fully aware of) within 6 weeks of becoming aware of the Compensation Event, but the Project Manager has said the Compensation Event cannot be accepted because of a Z clause that required me to give Notification of a Compensation of a Compensation Event within 4 weeks of becoming aware of the Compensation Event and therefore my Notification of the Compensation Event was 'out of time'. I objected on the basis that the Z clause was unfair, and also the first clause in the contract says that the parties and the Project Manager are act in a spirit of mutual trust and co-operation. As the Project Manager was aware that this Compensation Event existed (as it resulted from the Project Manager changing the Works Information), this surely must over-ride the strict obligation to time as set out in the Z clause?

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- Time to argue about unfair Z clauses is before you sign the contracts. Fact that they have reduced 8 week period is not necessarily unfair.
- Depends under which reason within 60.1 that the event is believed to be a compensation event, rather than if a PM did or did not now about the event. Contractor is time barred to notify a compensation event within 8(4) weeks of becoming aware UNLESS the PM should have notified and hadn't.
- 12 of the 19 reasons within 60.1 the Contractor is obliged to notify, 7 the Project Manager. Weather, access, unforeseen ground are all things that the PM may be aware of but it is up to the Contractor to notify if it is (to their perspective) a compensation event or not...



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- One of the key ones the PM is obliged to notify is a 60.1(1), an instruction to change the Works Information
- Notification only needs to include a statement of what the matter is, and why it is a compensation event. It does not need to include any cost or time details at this stage. It is just trying to establish the principle that both Parties agree that it is a compensation event for which the Contractor can go on to give a quotation for.



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- Who would insert an unfair Z clause into a contract with mutual trust and cooperation?
- The PM always should have notified under 61.1 and he cannot hide from that.




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**Third Working Session**

Q.4  
I said that even if I am disallowed the Compensation Event on this technicality, I will be entitled to recover Common Law Damages instead, and the Project Manager said that that was not the case. That cannot be correct surely?

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- The Parties should be following the contract that they have signed up to
- An Adjudicator if asked to get involved with a dispute would adjudicate to the contract clauses that the Parties have signed up to
- If the Project Manager should have notified for one of the reasons that they are responsible, then an Adjudicator will find in favour of the Contractor
- I suggest that there is no specific common law to fall back on here – and would be very difficult/subjective to assess. If a Contractor experiences weather in excess of a ten year event they are obliged to notify this within 8(4) weeks or they lose the right to time and money.




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- The first remedy will always be to get the matter corrected by the dispute resolution procedure in the contract which in the UK will always include Adjudication
- There is nothing in this contract that bars the right to or modifies common law damages for breach



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### Third Working Session

Q.5

We have notified the Project Manager of an event that we consider to be a Compensation Event, but the Project Manager has said that it is not a Compensation Event. As far as we are concerned this is definitely a Compensation Event. What can we do about this?

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- May be you need to do a better job at convincing the Project Manager as to why it MUST be a compensation event
- State reason under clause 60.1 why it is a compensation event
- Attach evidence, e.g. extract from Works Information that shows that something is additional to the original requirements
- If you still cannot convince the Project Manager that it is one then you can take this matter to adjudication – and now rather than at the end of the job to get a decision, which may help in this instance and in future decisions on that project.



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- Don't mess about adjudicate the matter!



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### Fourth Working Session

Q.1

It has taken me ages to get the information required to prepare a quotation for a Compensation Event – can I recover the cost of my time in preparing this quotation?

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- Recovery depends on Option being used
- Under Option A and B the cost of producing a quotation are specifically excluded from the definition of Defined Cost (11.2(22))
- BUT if the delay and cost was a result of the PM failing to reply or changing a decision then a new CE (60.1(6) or (8)) may arise
- Under Options C, D and E the cost is recoverable as part of PWDD
- In addition, under Options C, D and E the cost should be part of the CE and therefore also amend the Total of the Prices



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**Options A & B**

- No recovery of costs of preparing quote
- How does Contractor decide what to include in his tender – significant commercial risk!

**Options C, D and E**

- Were the quotations prepared by People working in the Working Area (or People whose normal working place is in the Working Area)?
- “the effect of the compensation event” upon Defined Cost.
  - Does this include *preparing* quotations? – Probably.
  - Has Contractor incurred extra cost? E.g. if QS is already on site there is no increase in Defined Cost - unless being paid overtime to do quotation.
- What constitutes ‘preparing’? Procuring and setting up subcontracts?




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**Fourth Working Session**

Q.2

I submitted a quotation for a Compensation Event. The Subcontractor’s Fee to me is 20% and my Subcontractor’s Fee percentage to the Employer is 15%. In my assessment I included both the Subcontractor’s Fee percentage to me and my own Subcontractor’s Fee percentage to the Employer. However the Project Manager is only paying my own Subcontractor’s fee percentage (at 15%) and does not accept the Subcontractor’s Fee Percentage. This means that I am paying out 20% to the Subcontractor but I am only recovering 15% myself. Surely, that cannot be correct?

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- Relevant to payment under Options C, D and E and change under all
- It can be correct that you lose out if your Subcontracted fee percentage is less than you are being charged
- BUT not necessarily
- All turns on how you interpret Defined Cost
- You apply subcontracted fee to Defined Cost of Subcontracted work.
- The Defined Cost of subcontracted work is, essentially, payments due to Subcontractors. Is the Subbies fee part of a payment due?
- Safest to assume you don’t get fee on fee




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- **Options A & B**
  - Defined cost is based on *"the components in the Shorter Schedule of Cost Components whether work is subcontracted or not"*
  - The Shorter Schedule of Cost Components does not include for any components to cover overheads or profit etc.
  - The fee percentages are to cover for all costs for which there are no cost components in the Schedule
  - In effect, the subcontract fee percentage has to include for the O/Hs & P for both the Subcontractor and the Contractor
- **Options C, D, E and F**
  - Defined cost is based on the amount of payments due to Subcontractors
  - Plus the subcontract fee percentage (so the subcontract fee percentage covers the Contractor's O/Hs & P).

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### Fourth Working Session

Q.3

I prepared a quotation for a Compensation Event and as I did not have all of the required information, I had to make certain assumptions, which I set out in the quotation which was accepted by the Project Manager. Those assumptions turned out to be wrong. I have asked the Project Manager to pay me extra for the corrections of my assumptions, and he has refused to do that. That cannot be correct surely?

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- **The obligation of the Contractor is to produce a fully inclusive quote for the CE instructed, risk can be included**
- **There is provision for the PM to add assumptions (cl 61.6) if the effects of the CE are too uncertain.**
- **There is no right for the Contractor to make assumptions**
- **If the Contractor thinks assumptions are necessary there should be dialogue if that fails he should price what is in the CE**
- **Can a "proposed" assumption be adopted by the PM through the quote and acceptance procedure?**

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- Under the NEC3 there is no such thing as a Contractor assumption, only PM's
- When the PM accepts a quotation it doesn't mean he has accepted that the Contractor's assumptions are the Employer's risk
- Sometimes the conditions for carrying out a CE can turn out to be better than the Contractor assumed and hence he carries out the work quicker/cheaper. The Contractor will still be paid in accordance with his accepted quotation

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### Fourth Working Session

Q.4  
I do not agree with the Project Manager's assessment of a Compensation Event. What can I do about that?

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- **ADJUDICATE!**
- Pay lawyers/consultants lots of money
- Suspend until the PM certifies the payment you believe is due (Y(UK)2.4)
- Terminate for failure to pay (cl 91.4) or allege repudiation
- Issue an Early Warning (could affect time and/or cost)

**OR**

- Go and have a meeting and understand why, then review the above options

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- Rob Horne's previous slide pretty much sums up this up!
- Although I do not think that the Contractor can use clause 91.4 (R16) to terminate if he does not agree with a PM's assessment.
- The PM might be right – the Contractor first needs to understand WHY the PM has reached a different assessment. This must include talking to the PM.



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### Fourth Working Session

Q.5

The Project Manager has said that we did not raise an early warning about an event that has now become a Compensation Event. What difference does that make at this stage, after all it is now a Compensation Event?

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- Did you give an Early Warning? Content more important than form but must be communicated separately (cl 13.7)
- Did the PM notify the failure when asking for the quotation cl 61.5 (notification being communicated separately – cl 13.7)
- If a proper EWN wasn't given and a proper notice of that failure was given then the CE will be assessed as if the EWN had been given (cl 63.5)
- What practical difference does that make?
- Maybe some, maybe none, it depends on the nature of the event and when an EWN could have been given in relation to mitigating the impact of that event



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- Clause 63.5: *“If the PM has notified the Contractor...the event is assessed as if the Contractor had given the early warning”* – mitigation?
- Clause 61.5 does not include any express wording to say the PM must state what he would have done to mitigate the effects of the event.
- In theory, when preparing his quotation the Contractor must somehow predict how the Employer / PM would have reacted to an EWN.
- The PM has the advantage of hindsight. Had he received the required EWN would he actually have instructed any mitigation measure!



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