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NEC Accepted Programmes: a practical guide

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A presentation by
Claire King, Partner, Fenwick Elliott
Mark Pantry, Senior Associate, Fenwick Elliott
Scott Jardine, Senior Managing Director, Ankura

Introduction

- What is the purpose of an Accepted Programme?
- How to set it up correctly:
 - What does the NEC 4 Engineering and Construction Contract provide for?
 - Requirements of the Accepted Programme and amendments
 - Accepted Programmes and Subcontractors
 - Programming tips!
- Keeping it going
- What happens when the system breaks down?
 - Common problems
 - Solutions?

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What is the purpose of an Accepted Programme?



NEC Objectives

- The parties are to act in a spirit of mutual trust and cooperation
- Collaborative working requiring early identification of problems and proactive approach to addressing problems
- Issues resolved as works progress
- Absence of final account process
- Proactive approach is policed by prescriptive procedures
- Use of clear language



How does the AP fit in? (1)

- Good project management
 - ALL parties know what they have to do and when
 - Clear consequences if they do not abide by the Accepted Programme:
 - CI 60.1 (2): Failure to allow access by date shown in the AP
 - CI 60.1 (3): Client does not provide something by date in the AP
 - CI 60.1 (5): The Client or Others do not work within the times shown on the AP
 - CI 60.1 (19): An event which... stops the Contractor completing the whole of the works by the date for planned Completion shown on the AP
 - Assessment of extensions of time (CEs) without the need for complex delay analysis
 - Collaborative working and dispute avoidance

How does the AP fit in? (2)

- Tool for assessing compensation events (CI 63.5)
- Regularly updated to allow for contemporaneous assessment of CE impact
 - Accepted Programme “*current at the dividing date*” (CI 63.1)
 - Date of the instruction / notification / certificate / changing a decision; OR
 - Date the CE was notified
 - “*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 in the Accepted Programme current at the dividing date***”
 - If no delay to completion Contractor’s float within the programme used up
 - If delay does impact the critical path, Contractor retains its terminal float
 - NEC Guidance Note: “*only operations which are not complete and which are affected by the compensation event are changed*”

How does the AP fit in? (3)

- Carrots and sticks to encourage production and updating
 - Cl 50.5: If no programme in the Contract Data, **one quarter of the Price for Work Done to Date is retained** in assessments of amount due until the Contractor has submitted a first programme to the PM for acceptance showing the information which the contract requires
 - Cls 64.1 and 64.2: Contractor loses control of compensation event assessment:
 - PM required to assess all compensation events
 - PM to use their assessment of what the programme should be to do so
- Game playing



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Setting it up correctly



Setting up an Accepted Programme

- Agreeing the first Accepted Programme:
 - Programme identified in the Contract Data; or
 - Programme to be submitted to the *Project Manager* for acceptance
- Accepted Programme and the Activity Schedule (Option A or C)
 - Not the same document but should be “*correlated*”
- What is included in the Accepted Programme? (Clause 31.2)
 - Dates;
 - Methods, operations or procedures;
 - Provisions; and
 - Information
- Frequent amendments to the requirements for the Accepted Programme

Clause 31.2

- The *starting date / access dates / Key Dates* and Completion Date
- Planned Completion
- The order and timing of the operations which the *Contractor* plans to do in order to Provide the Works
- The order and timing of work of the *Client* and Others as last agreed with them by the *Contractor*, or if not so agreed, as stated in the Scope
- The dates when the *Contractor* plans to meet each Condition stated for the Key Dates and to complete other work need to allow the *Client* and Others to do their work
- Provision for float / time risk allowances / health and safety requirements / the procedures set out in the Contract
- The dates when the *Contractor* will need: access to a part of the Site if later than its *access date / acceptances / Plant and Materials* and other things to be provided by the *Client* / information from Others
- For each operation, a statement of how the *Contractor* plans to do the work identifying the principal Equipment and other resources which will be used
- Other information which the Scope requires

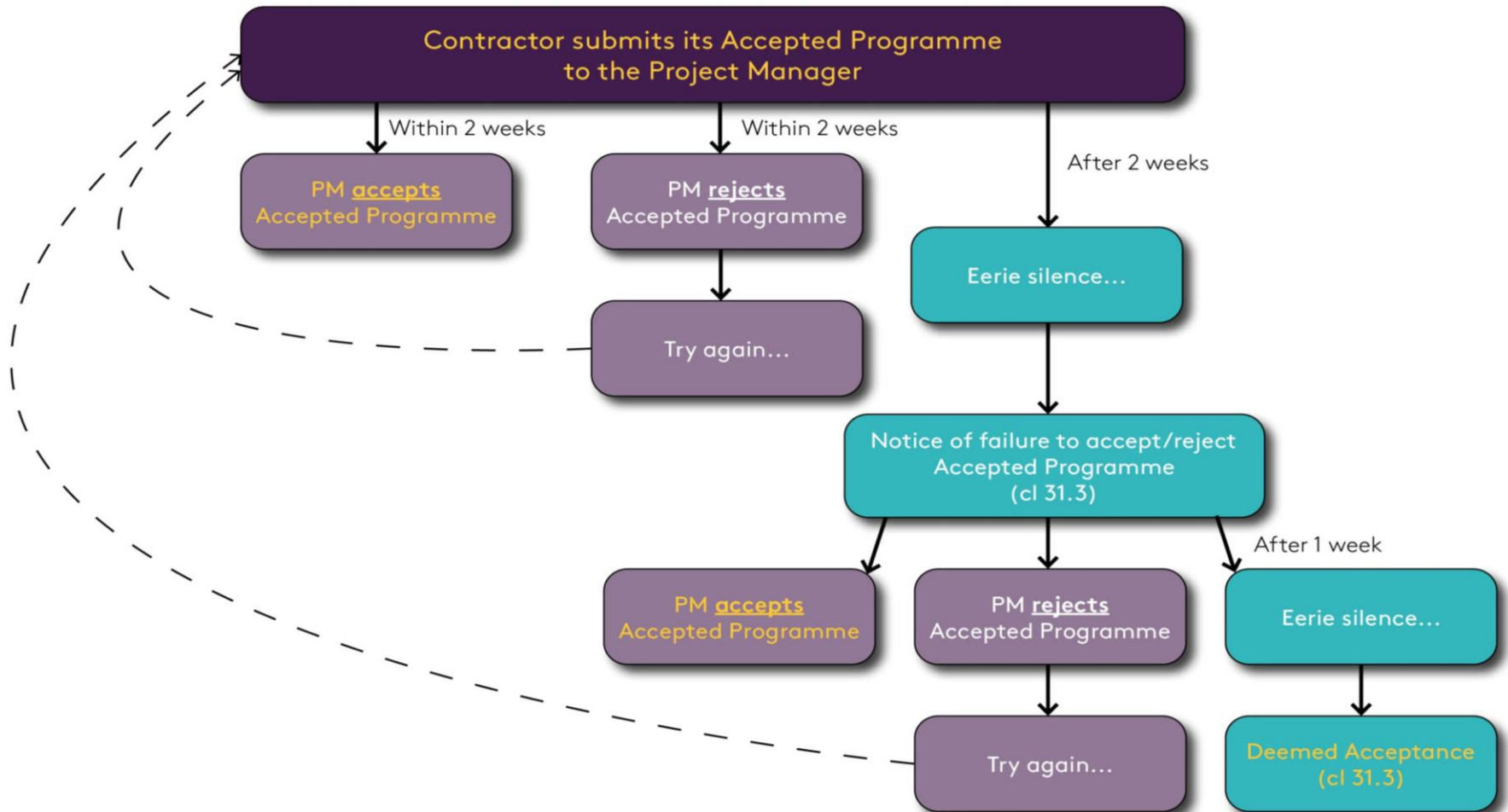
Accepted, rejected or deemed accepted

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- *Project Manager* has two weeks to notify:
 - Acceptance; or
 - Reasons for rejecting the Accepted Programme
- Valid reasons for rejection:
 - *Contractor's* plans are not practicable;
 - It does not show the information required by the contract;
 - It does not represent the *Contractor's* plans realistically; or
 - It does not comply with the Scope

Clause 31.3 Process



Statement of how the Contractor plans to do the work

- The statement required as part of Clause 31.2 becomes what, more practically speaking, may be known as a programme narrative. Includes:
 - *Sequence of planned works*
 - *Resources required (types and numbers)*
 - *Key equipment required*
 - *Critical path*
 - *Time risk allowances*
 - *Assumptions used*
 - *Key dates such as access dates or information from others*
 - *Description of working calendars*
 - *Interfaces*
- Should be issued with every programme submitted for acceptance;
 - *Provides the Project Manager visibility of what the programme is showing*
 - *Explains what has changed and why since the last accepted programme*
 - *Should help the acceptance process*





Example Programme Contents



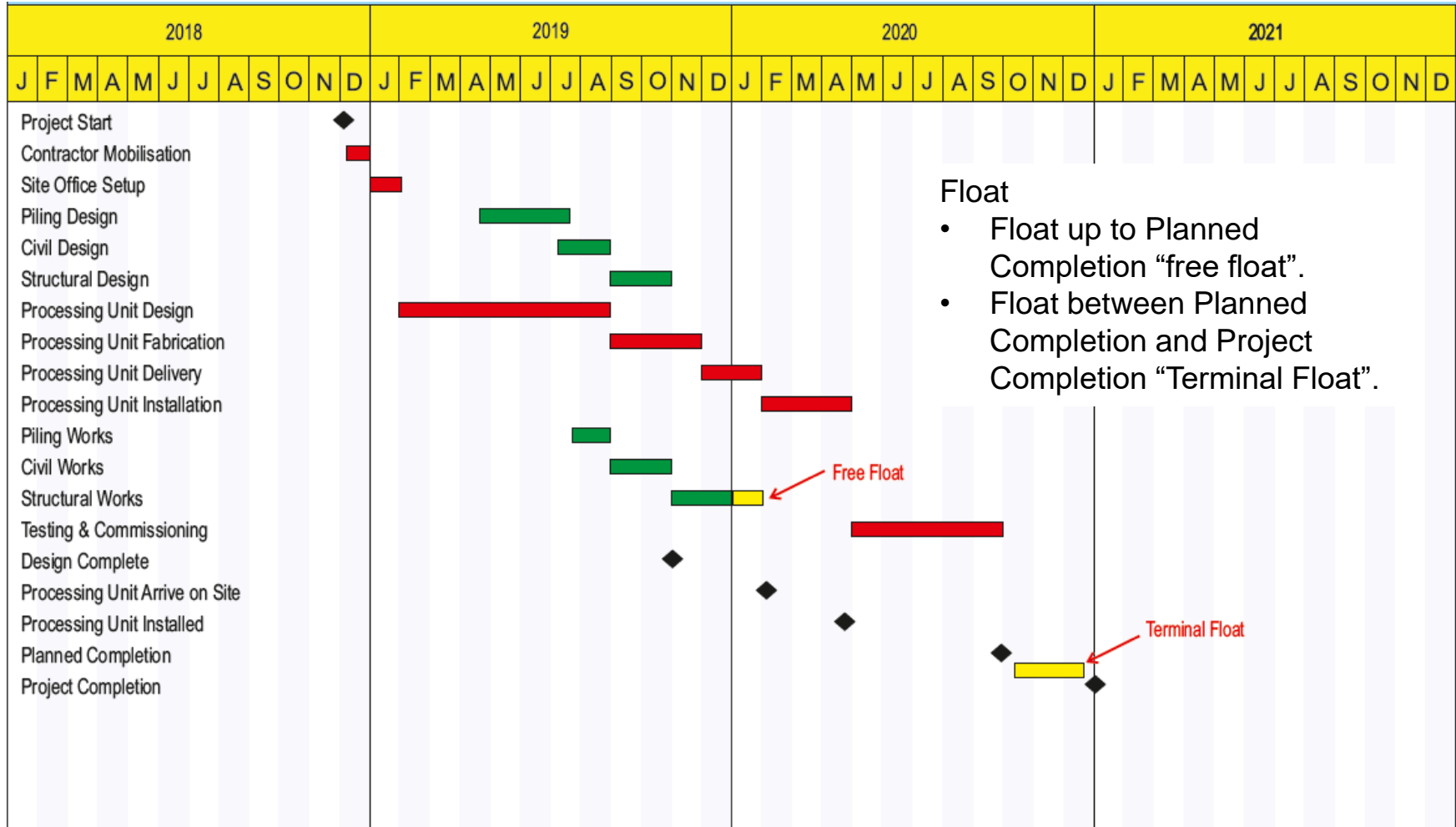
Example Programme Contents

Float and Time Risk Allowance (“**TRA**”) are different concepts

- “**Float**” found within all programmes
 - In its simplest form, it’s the “*gap*” between activities that allows them to be delayed without causing critical delay to the end date of the programme
 - However “*Terminal Float*” is specifically identified in NEC as “*owned*” by the Contractor
- “**TRA**” is specific identified time risk added into the programme.
 - Needs to be identified and explained
 - Can be shown as separate activities in the programme or integrated with planned activity duration – but needs to be identified

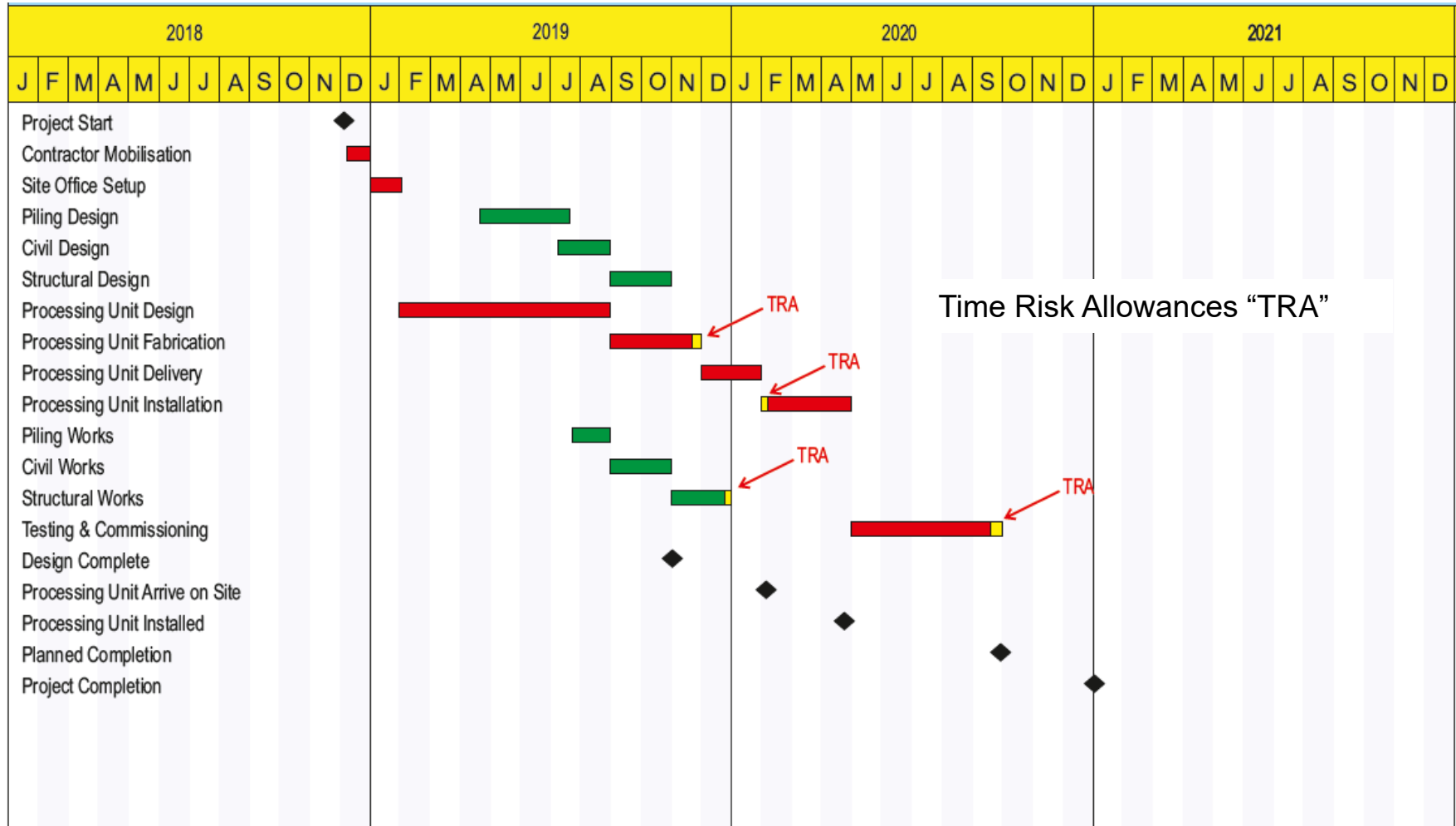
<u>Activity Name</u>	<u>Start</u>	<u>Finish</u>	<u>TRA</u>		
Processing Unit Fabrication			10		← Block Duration
Structural Works			03		← Scattered Duration
Processing Unit Installation			05		← Not Shown - Assigned TRA Calendar in Planning Software
Testing & Commissioning			07		← Shown in TRA Column in Planning Software

Example Programme Contents



- Float
- Float up to Planned Completion “free float”.
 - Float between Planned Completion and Project Completion “Terminal Float”.

Example Programme Contents



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Keeping it going



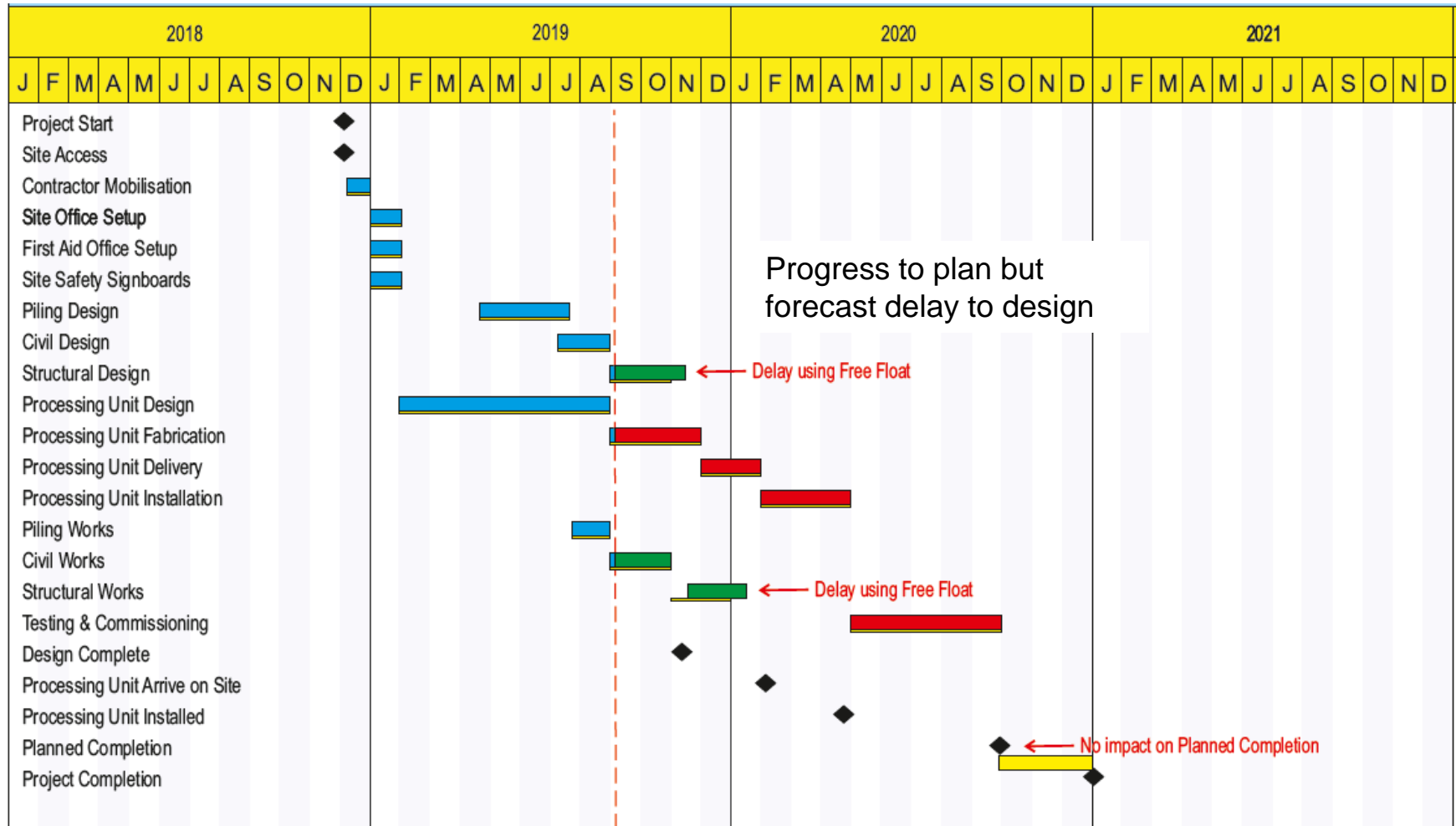
Revisions to the Accepted Programme (1)

- Revising the Accepted Programme – Timings
- Items to be shown on each revised programme:
 - Actual progress achieved on each operation and effect on remaining work;
 - How the *Contractor* plans to deal with any delays and defects; and
 - Any other changes which the *Contractor* proposes
- Acceptance or non-acceptance follows the same process as the first programme
- Time limits for acceptance:
 - Two weeks to accept or reject
 - Contractor can issue a notice of failure to respond
 - If no response within one week: deemed accepted
- No mechanism for *Client* to instruct a programme; *Contractor* led
- *Subcontractor* Accepted Programmes

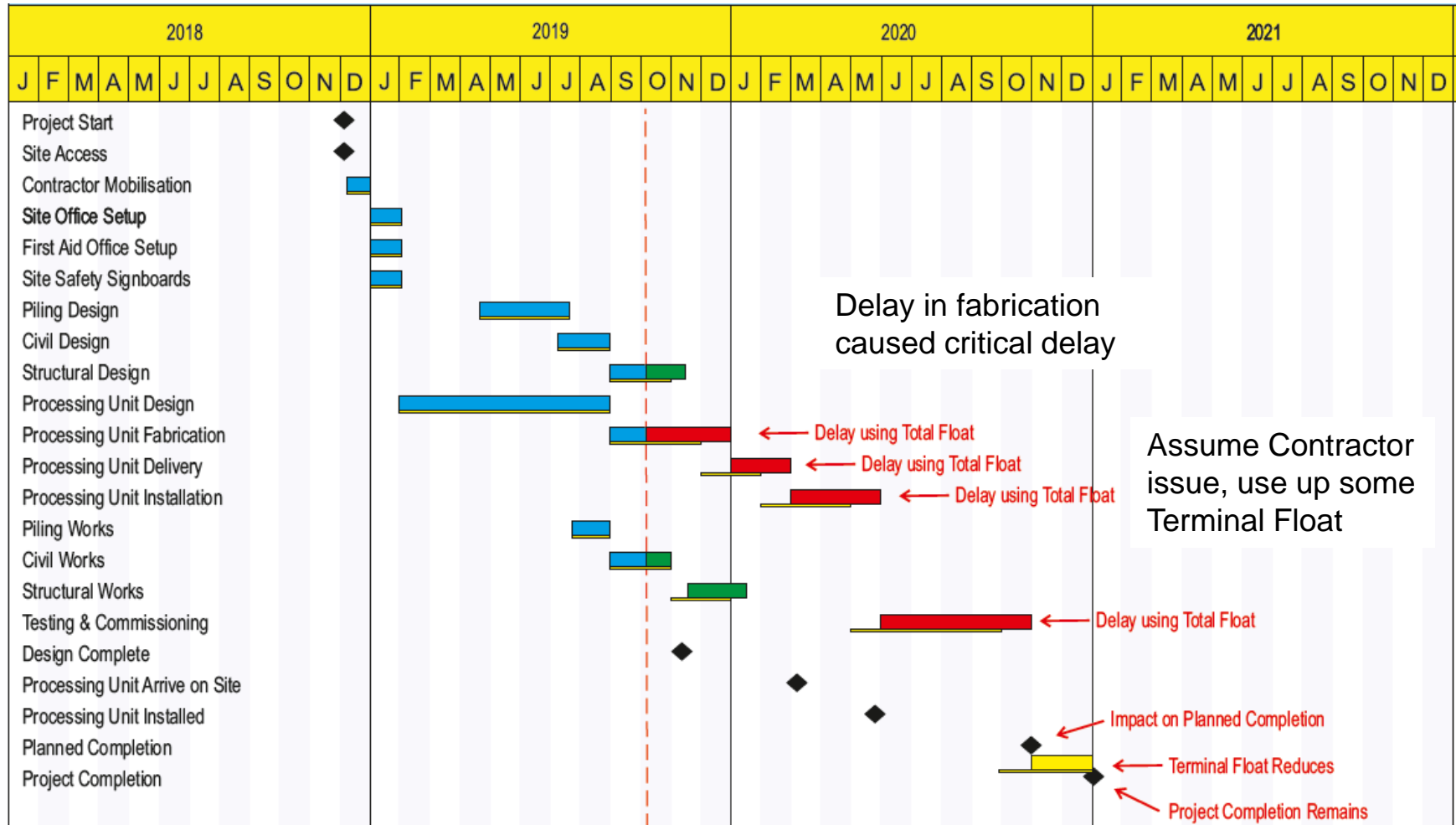
Revision to the Accepted Programme (2)

- Update programme using actual progress to date.
- Update for any anticipated changes / delays / subcontractor issues.
- Full update so that the programme is seen as reliable and a genuine tool for the project to use and rely on.
- Ensure update and progress records are comprehensive to help with approval process.
- Don't forget the update to the planning statement,
 - *Explain what has changed and why since the last accepted programme*
 - *Should help with approval*
- Explain “draw down” of / changes to any TRA in the update period.
 - *If not used then release, don't hold for a “rainy day”*
 - *Any new events that need TRA (COVID-19 was a great example)*

Revision to the Programme



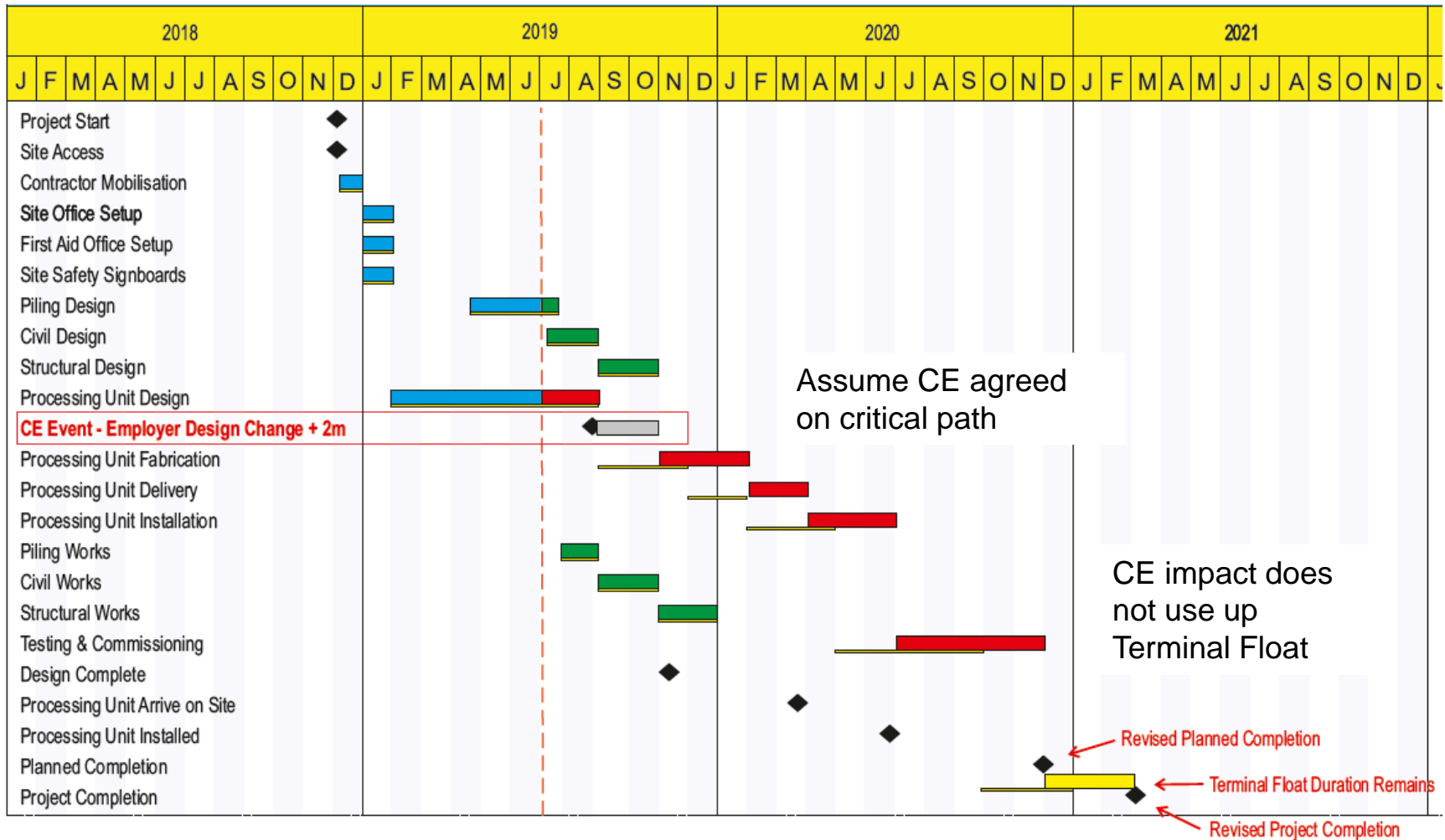
Revision to the Programme



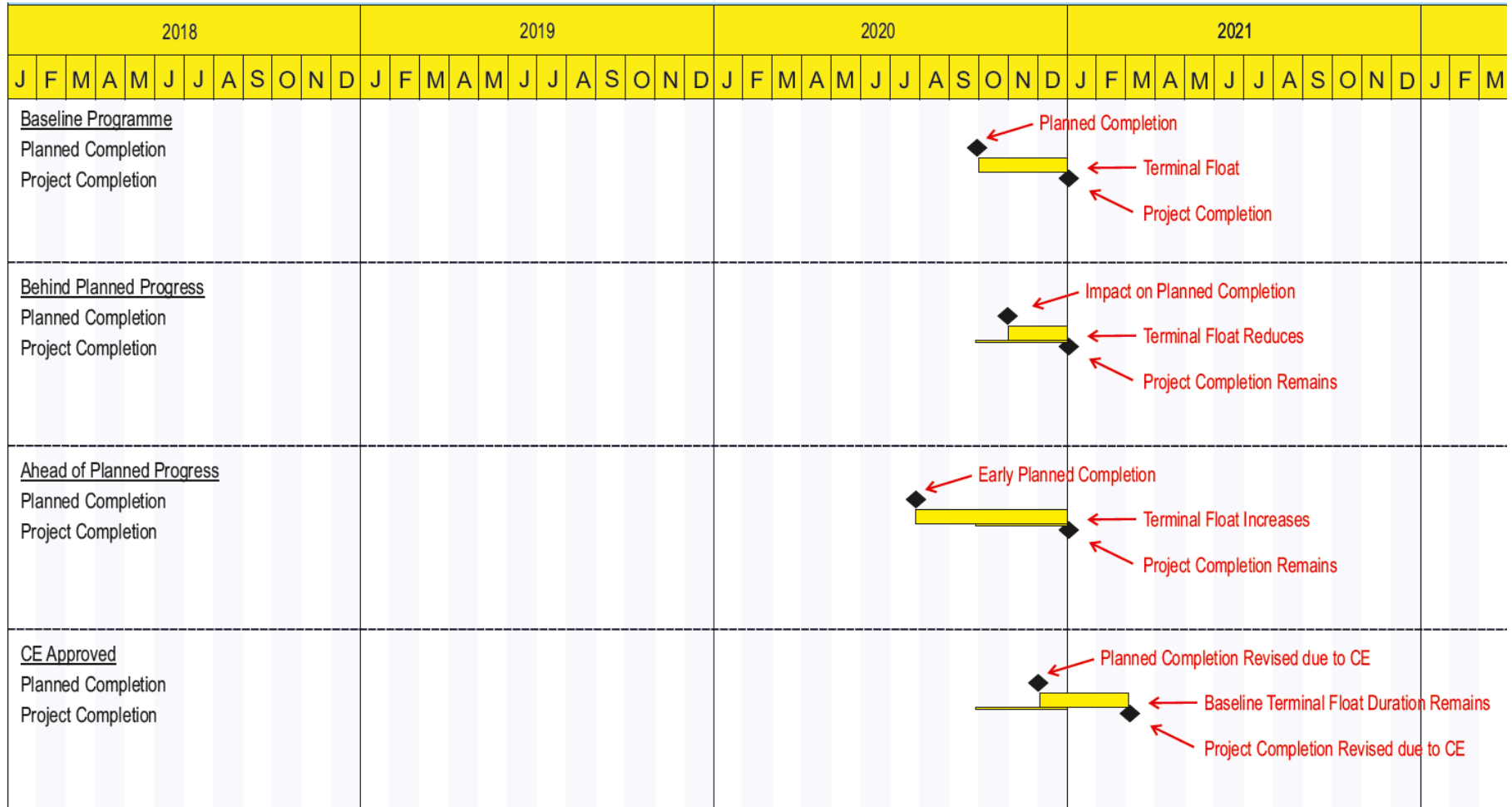
Delays to the project

- Process for dealing with delay events
 - *Early warnings (EW) = future events which are not certain to happen*
 - *Notice of Compensation Event (NCE)*
 - *Project Managers Instruction (PMI) – includes the NCE if originating from PM*
 - *Quotation for Compensation Event*
- Quotation includes assessment of (prospective) delay impact by Contractor
 - *Use “Dividing date” based on date of notification of NCE or PMI*
 - *Based on Accepted Programme “current at the dividing date” (CI 63.5)*
 - *Time impact usually shown on programme by adding in new activities to model the delay event (including new / extra TRA if appropriate)*
- Project Manager assesses a compensation event in certain circumstances including:
 - *If there is no Accepted Programme*
 - *If the Contractor has not submitted a revised programme as required under the contract*

Delays to the project



Revision to the Programme



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What could go wrong?



Common issues

- Delays to submission of initial AP meaning constantly trying to catch up
- SC programmes not realistic:
 - SC failures
 - SC's working from incomplete picture and shooting at an invisible target
 - SC / SCs working on different programming software
- SCs on different contract forms meaning no obligation to provide regular updates
- Constant rejection by PMs:
 - One issue which is never resolved
 - Initial rejection for a sensible reason and snowballs
 - Deliberate rejection so PM can assess CEs
- Failure to show key information (e.g. dates when Client to provide information) on APs meaning no entitlement to CEs
- APs submitted but not showing potential impact of CEs which are disputed just in case...

Think smart! (1)

- Stick to the contractual deadlines:
 - Sufficient programming resource
 - Prioritisation
 - Help subcontractors to help you
- Get round a table and explain what you've done!
- Continue to submit accurate, updated programmes even if they are rejected:
 - Save you time and money if there is a dispute at the end of the Project
 - Good contemporaneous evidence if accurate
- Notify the PM if he doesn't respond in the requisite time scales
 - Deemed acceptance under NEC 4 (no such provision in NEC 3)
- Escalation:
 - Senior representatives' meeting
 - Adjudication?

Think smart! (2)

- Keep updating the programme with actual progress and delay
 - *Make sure the programme updates are well supported (update programme statement?)*
 - *Explain any changes to programme logic / structure / TRA etc*
- Keep comprehensive supporting records of progress and delay for the programme updates.
 - *As much as possible!*
 - *Photos, reports, diaries, as-built records etc*
- Transparent reporting of delay issues using EW's and regular reporting
- Don't give up on the programme, it's very important!

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Past the point of no return



Common debates

- Prospective or retrospective analysis?
- Are accurate contemporaneous programmes available?
 - Is the progress data in them reliable?
 - What other records are available to verify the results of any analysis?
- More time consuming and expensive to analyse extension of time entitlement at the end of the job
 - Memories are not as fresh
 - Staff leave
 - Records lost

“Real world” challenges

Issues to consider if in formal dispute:

- Deal with each delay issue separately, or go for a “*all in*” overall dispute
 - *Both have advantages / disadvantages*
- How do you assess unresolved NCE delay impacts?
 - *Can undertake a “compliant” Time Impact Analysis (“TIA”), stepping through each NCE (in dividing date order) based on most appropriate baseline programme.*
 - *But as the impact are likely to be “known” (as dispute is likely to be after the event) then perhaps this is not the best way?*
 - *Middle ground of doing a “sense checked” TIA – are the TIA results close to what actually happened?*
 - *Or undertake a more fact based analysis of delays (Time Slice Windows Analysis for example) – but does this run the risk of not being acceptable?*
 - *“Belt and braces” would be to present both – but time & cost to prepare*
- Regardless of approach adopted, records are key to support programme & delay

Retrospective Assessment of Compensation Events

Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd [2017] NIQB 43

“Evidence from time sheets and other material, of what the consultant actually did in that period, particularly with reference to the change in instructions, is not only relevant evidence but clearly the best evidence to assist the court in calculating the “compensation” to which the consultant is entitled...

*... **why should I shut my eyes and grope in the dark** when the material is available to show what work they actually did and how much it cost them?”*

- Deeny J

Any questions?



Claire King
Partner



Mark Pantry
Senior Associate



Scott Jardine
Ankura

Claire King and Mark Pantry
Fenwick Elliott LLP
T: +44 0207 4211986
E: cking@fenwickelliott.com
mpantry@fenwickelliott.com