

Common Pitfalls and Associated Solutions with the Use of NEC for the Construction Industry Council

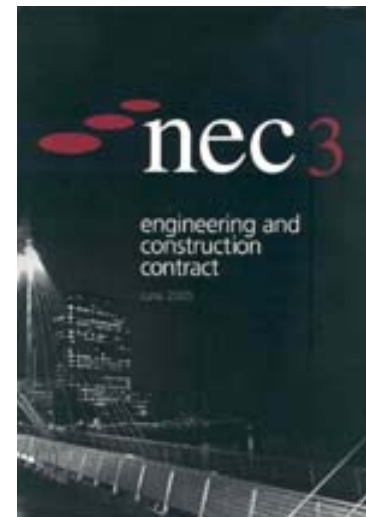
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General Background

Background:

- 1st Edition of The New Engineering Contract (NEC) issued 1993
- Now 3rd Edition of NEC contracts issued 2005
- Variety of projects such as airports, power plants, highways etc.
- Extensive global coverage with success (e.g. UK, India, HK, UAE etc.)



General Background

Background:

- Partnering contract requiring collaboration
- Distinct lack of case law involving the NEC
(Costain v Bechtel [2005] EWHC 1018)
- Successful implementation dependent on people's behaviour
- Philosophy is to reduce conflicts through collaborative partnering
- ***Nevertheless, key practical issues often encountered on projects provide useful lessons learnt and further improvements***

Common Pitfalls of Using NEC

- Contract Documentation
- Risk Register
- Programme
- Assessing the Amount Due
- Time Bar / Sanctions



Contract Documentation

Potential Pitfalls

The terms Preliminaries, Preambles, Provisional Sums or Prime Cost Sums do not appear in the ECC

The ECC uses plain English which can place it at odds with common industry terminology used in other forms of contract



Incorporated into the contract as part of the Works Information or BoQ

Extensive amendments or additional conditions

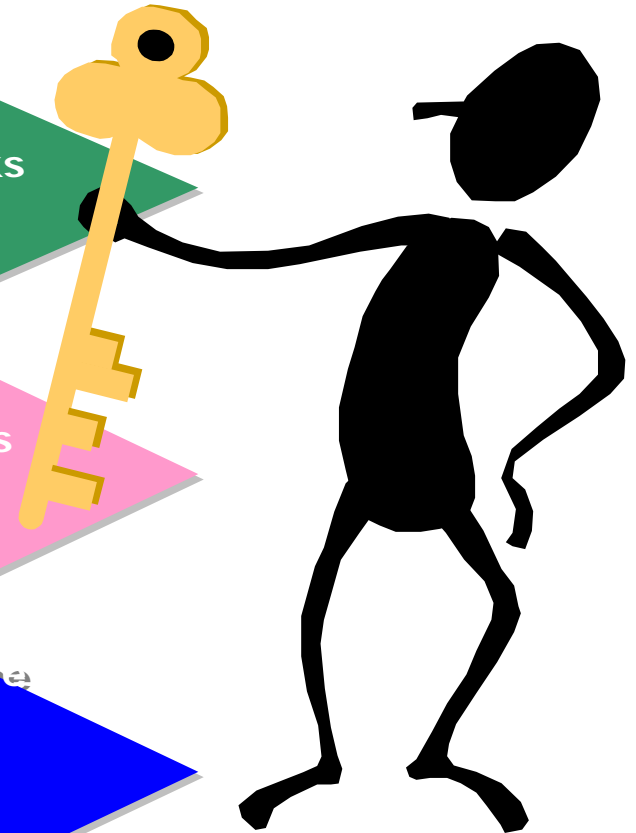
Contract Documentation

Possible Solutions

Provisional Sums etc, may be accommodated by including an assumed scope of works in the Works Information for the *Contractor* to price and include a time allowance

When the scope of the works is defined, a compensation event is issued changing the Works Information leading to a revised cost and time

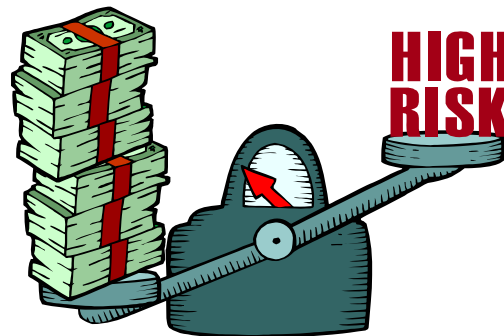
Clear and accurate Works Information reduces the need for amendments, especially when core clauses aim to set out general obligations



Risk Register

Cl. 11.2(14)

- 'The Risk Register is a register of the risks which are listed in the Contract Data and the risks which the *Project Manager* or the *Contractor* has notified as an early warning matter. It includes a description of the risk and description of the actions which are to be taken to avoid or reduce the risk.'



Risk Register

Cl. 16

- The *Contractor* and the *Project Manager* give an early warning by notifying the other as soon as either becomes aware of any matter that could
 - increase the total of the Prices,
 - delay Completion
 - Delay meeting a Key Date or
 - Impair the performance of the works in use.

- The *Contractor* may give an early warning by notifying the *Project Manager* of any matter which could increase his total cost. The *Project Manager* enters early warning matters in the Risk Register.

Risk Register

Potential Pitfalls

- The “contract” Risk Register is in effect for information only
- Misunderstand that this allows the reallocation of risk or the quantification of risk values or probabilities
- Some people use the project risk register* as the “contract” Risk Register



Risk Register

Possible Solutions

Do not use the project risk register as the “contractual” Risk Register

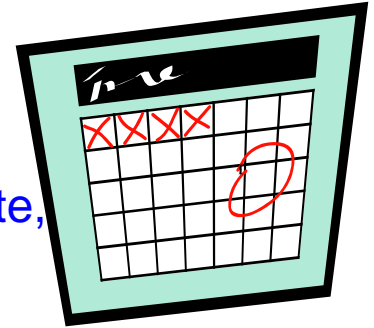
Must not contain owners of risk or values this is covered by the contract



Ensure that the Risk Register only contains the two columns stated in the contract – a description of the risk and the measures to be taken to reduce the risk

Risk transfer done by choice of options and amending the standard contract through Z Clauses

Programme



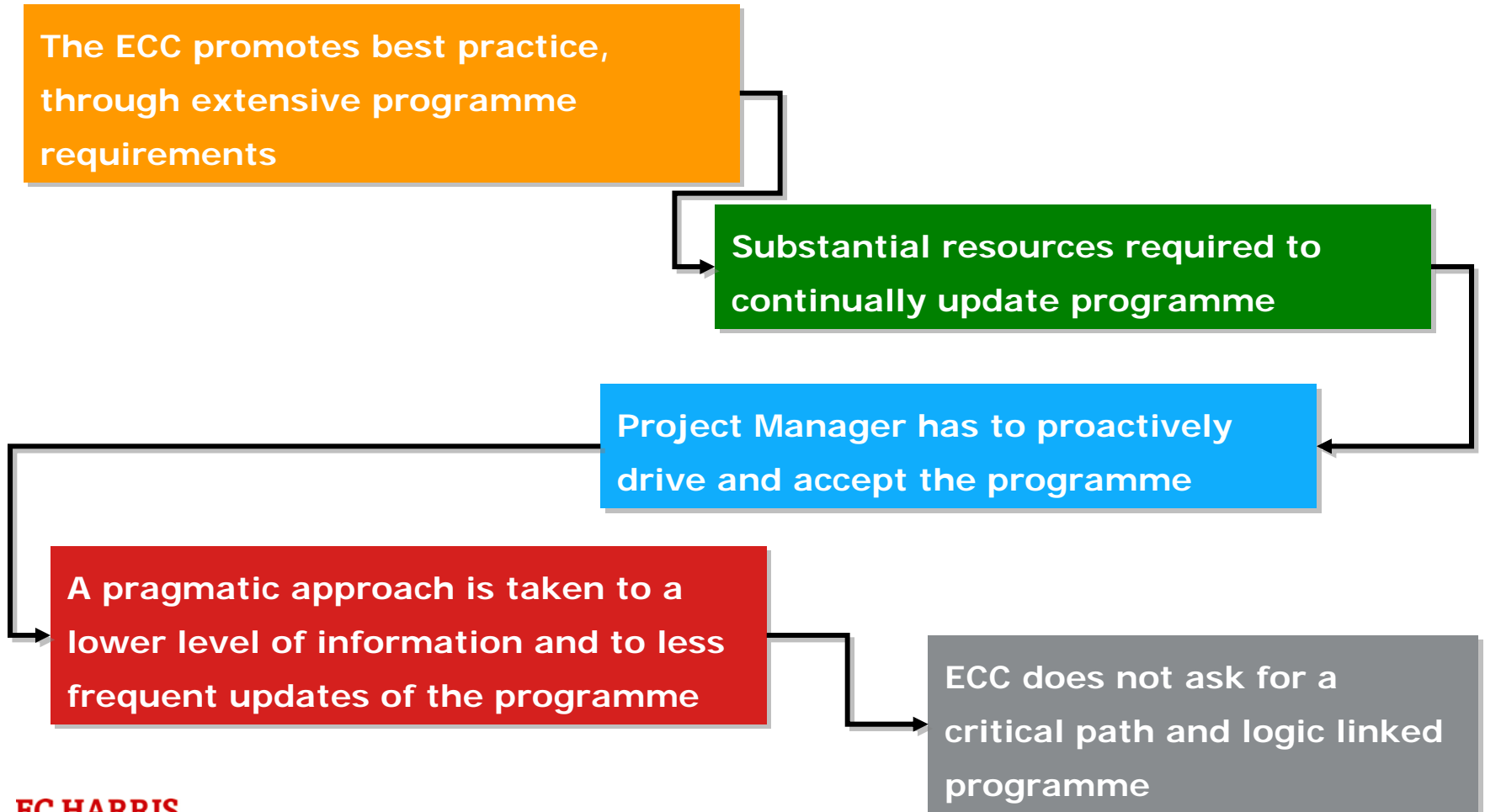
Cl. 31.2 The *Contractor* shows on each programme:

- the *starting date*, *access dates*, *Key Dates* and *Completion Date*,
- planned *Completion*,
- the order and timing of the operations,
- the dates when the *Contractor* plans to meet each *Condition* stated for the *Key Dates* and to complete other work needed to allow the *Employer* and *Others* to do their work,
- provisions for float, time risk allowances, health and safety requirements and the procedures set out in this 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 *Employer* and *Information* from *Others*
- for each operation, a statement of how the *Contractor* plans to do the work
- Other information which the *Works Information* requires.

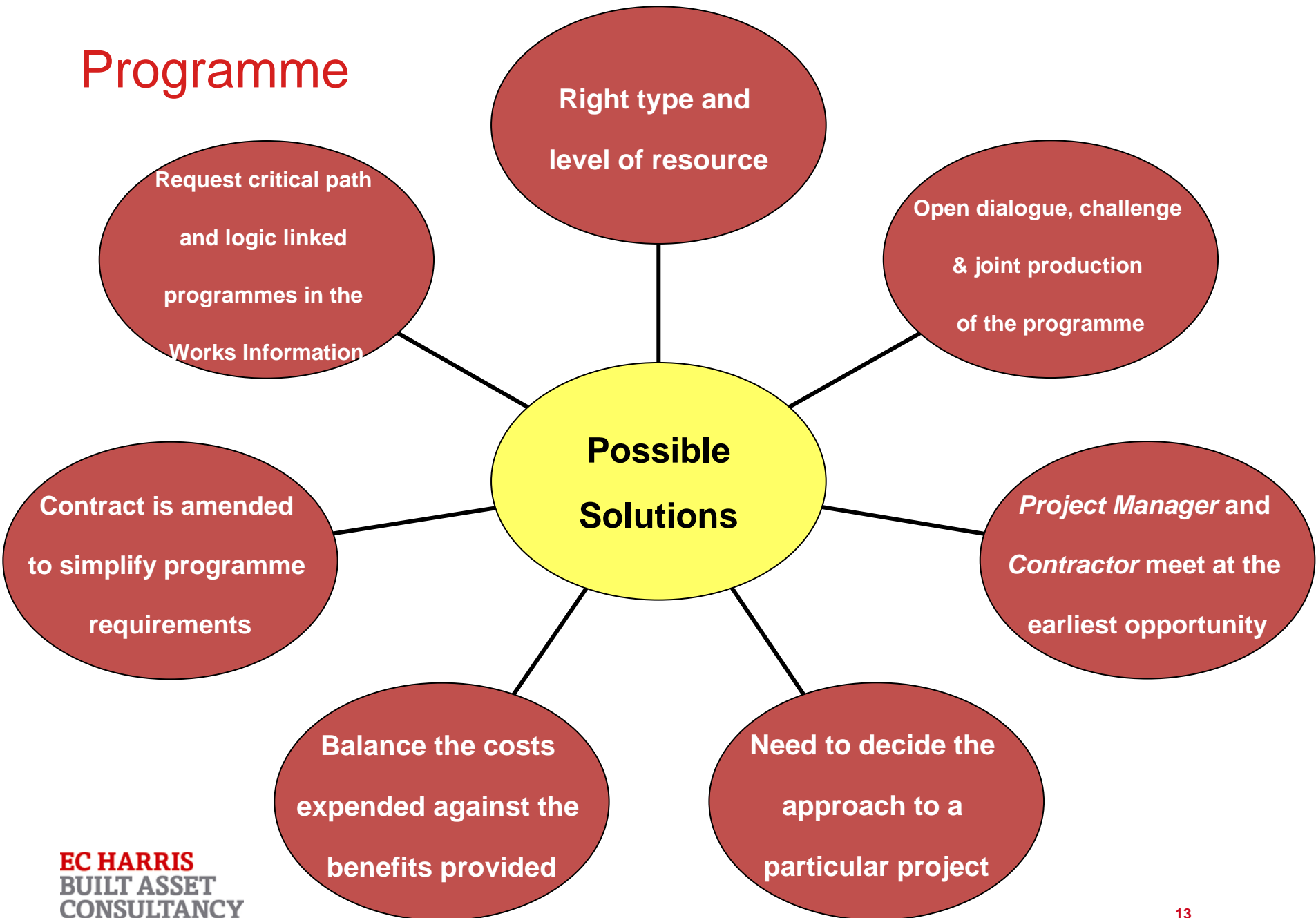


Programme

Potential Pitfalls



Programme



Assessing the Amount Due

Cl. 50

- The *Project Manager* assesses the amount due at each assessment date (Cl. 50.1)
- In assessing the amount due, the *Project Manager* considers any application for payment the *Contractor* has submitted on or before the assessment date (Clause 50.4).

Assessing the Amount Due

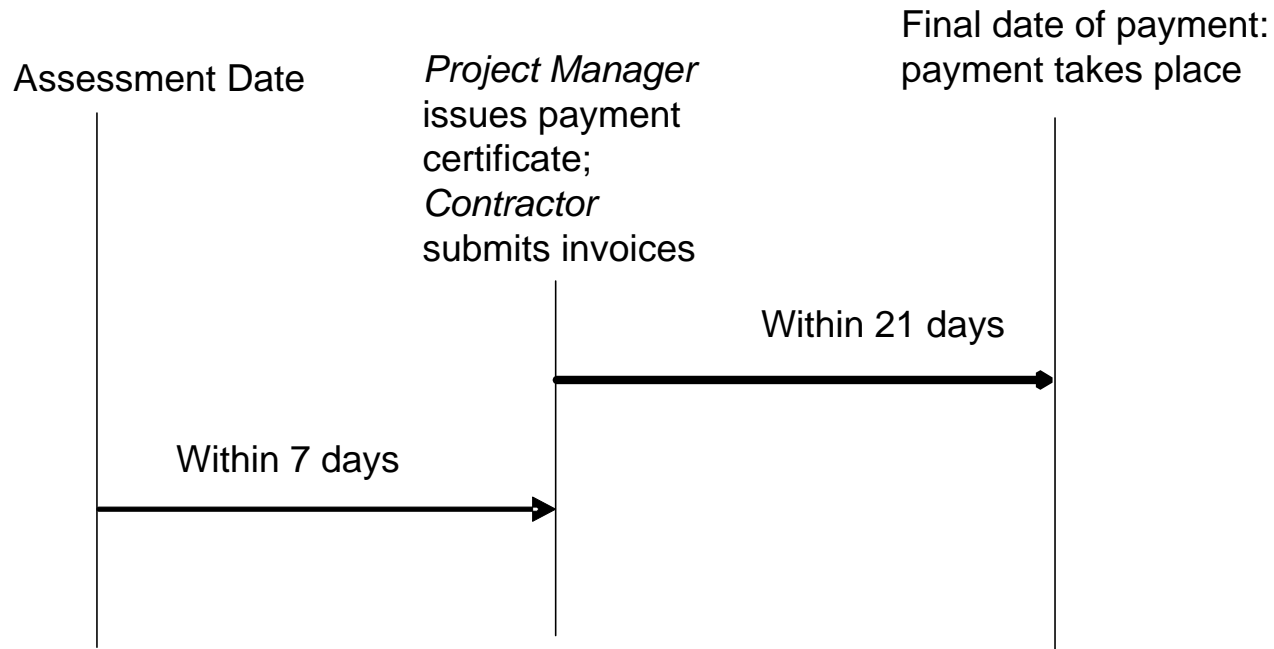
Potential Pitfalls

- No requirement for the *Contractor* to submit an application
- The *Project Manager* has to make assessment even if the *Contractor* does not submit an application
- Failure to certify by the due date will lead to potential claims for interest on late payment and possible enforcement notices



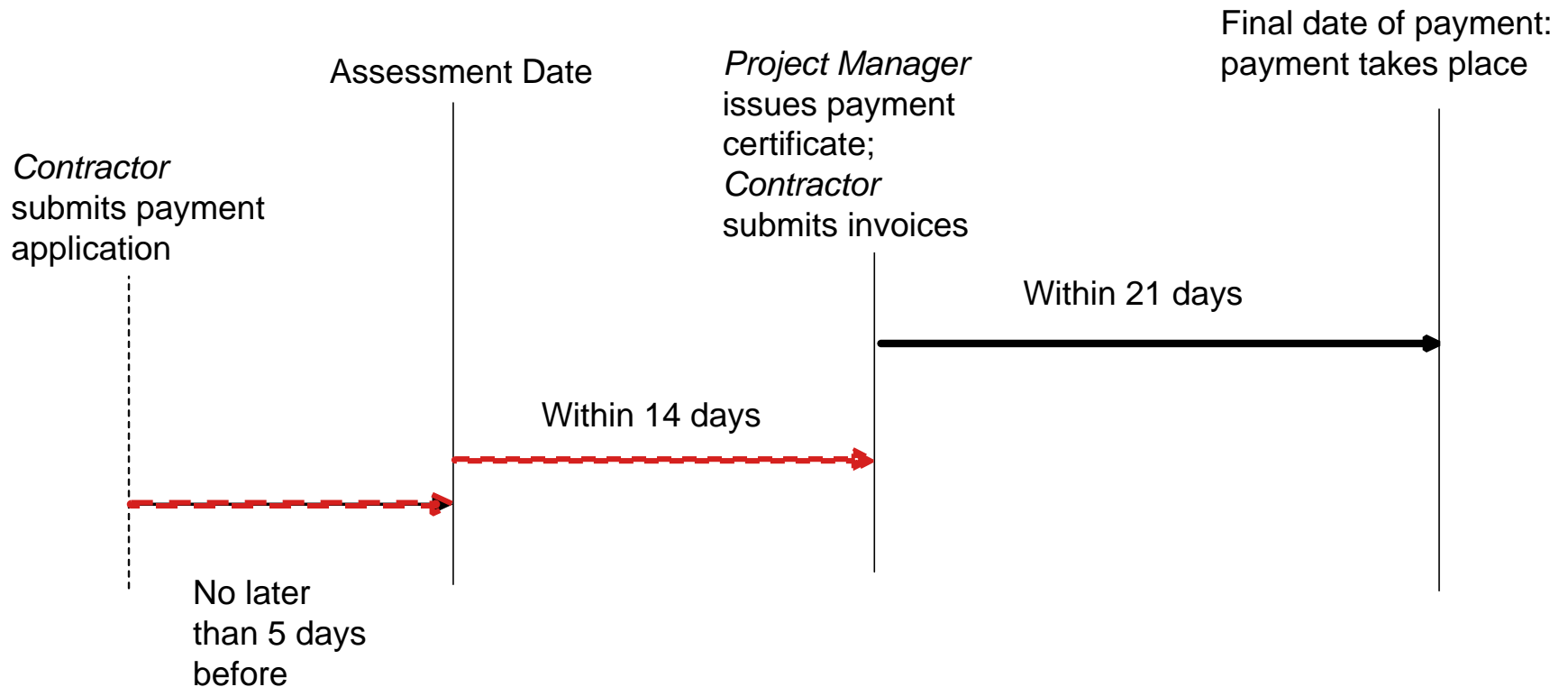
Assessing the Amount Due

Potential Pitfalls – Default NEC Payment Timeline



Assessing the Amount Due

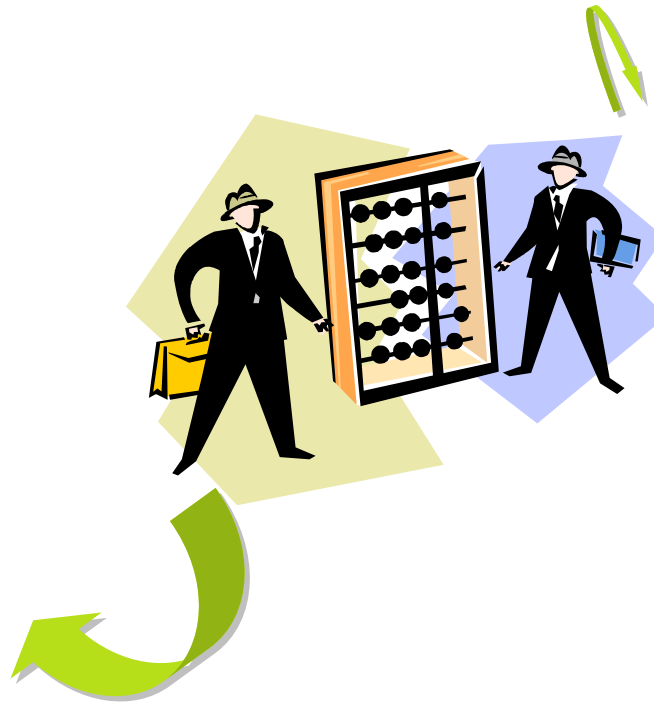
Possible Solutions – Amended NEC Payment Timeline



Assessing the Amount Due

Possible Solutions

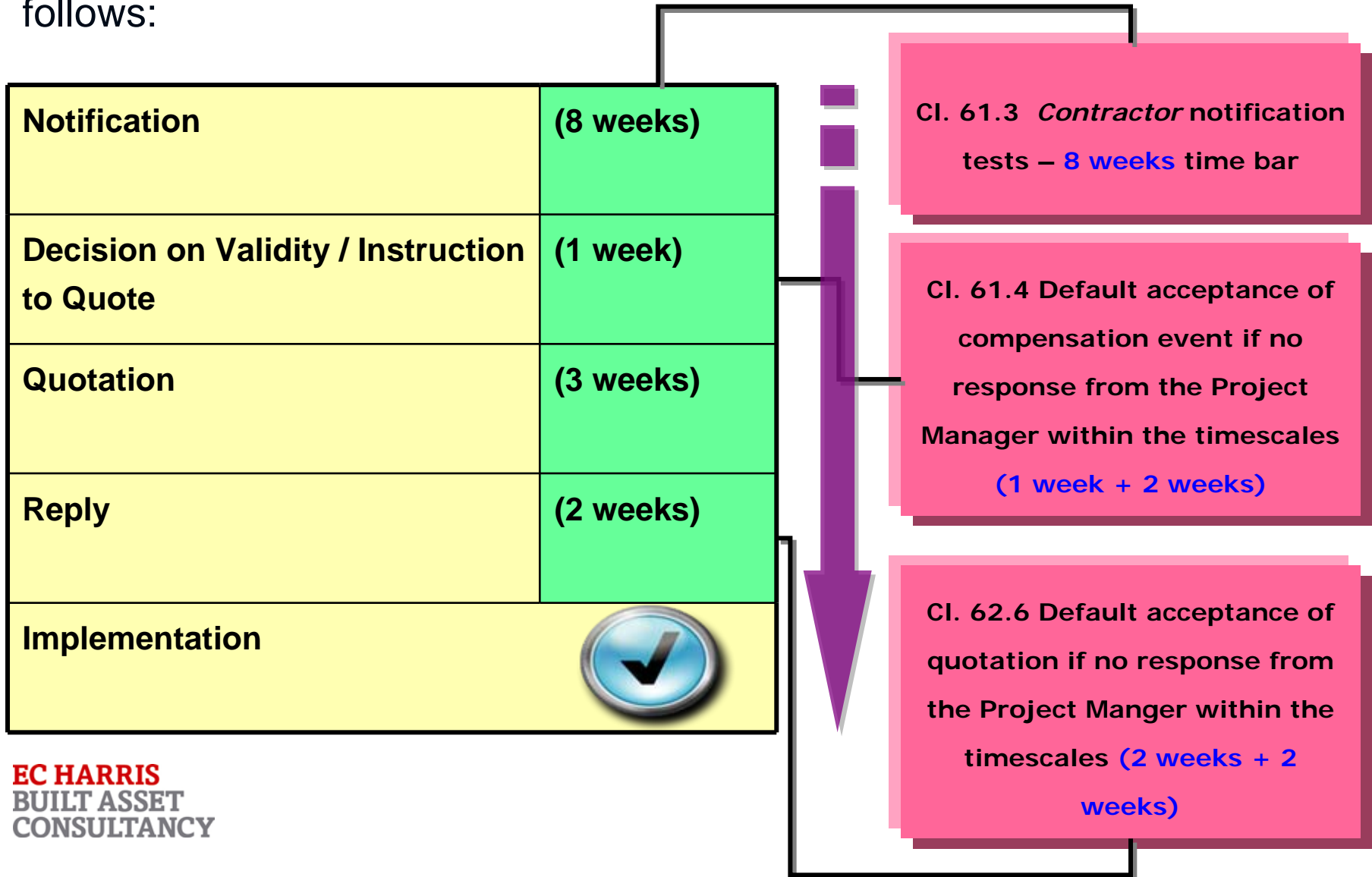
Amend the contract to make the submission of an application a condition precedent for payment



Amend the contract to set the period for certification as 14 days after the Assessment Date

Time bar / Sanctions

The procedure relating to compensation event follows a logical chain as follows:



Time bar / Sanctions

Possible Pitfalls

Internal procedures not aligned with contractual timescales

Sanctions apply to both the *Contractor* and the *Project Manager* – potential for either party to suffer loss if the sanctions are enforced

Mix up of early warning notice and compensation event notice

Understand and comply with the contractual timescales

Commit sufficient resources; otherwise amend the contract to extend timescales

Need a clear, quick and accountable decision making process in client organisations

Keep compensation event notices from other communications

Possible Solutions

Summary

- In order to deliver its benefits users must understand that the NEC is a fundamentally different form of contract requiring intensive management and a different approach by the parties in terms of both documentation and management requirements;
- Users must understand these issues and invest the time and resources required to overcome these potential problems and deliver the benefits the contract offers;
- It is the people who ultimately drives the success of a project – whichever contract form is adopted;
- NEC stands out by providing a framework against which people should collaborate to deliver projects and programmes of work.