

## Key Dates in the NEC3 and NEC4 Engineering and Construction Contract

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### Introduction

In this article we review the Key Date provisions in the NEC3 and NEC4 Engineering and Construction Contract (ECC) and take an in-depth look at when and how they should be used, and issues around how the clauses may (and have) been interpreted differently by contracting parties. For the purpose of this article we have used clause references and terminology from the NEC4 ECC however the Key Date provisions were not changed from the NEC3 ECC and as such our commentary applies to both contracts.

Key Dates were first introduced in the NEC3 ECC, the basic logic of them is to enable the co-ordination of the work of different contractors working on the same project with the same Client. The provisions dealing with Key Dates are found in a number of clauses, namely clauses 11.2(11), 14.3, 25.3, and 30.3 however other references can be found in the early warning, programme, acceleration and compensation event provisions.

### What's the difference between a sectional Completion and a Key Date?

A Key Date is similar in concept to a sectional Completion under secondary Option X5 however there are three principle differences:

1. The Project Manager does not certify Completion when a Key Date is met by the Contractor. Indeed, the Condition that the work is to meet that is the subject of a Key Date may differ to that required by a sectional Completion.
2. When a Key Date is met by the Contractor, that part of the *works* is not automatically taken over by the Client like it is with sectional Completion, and therefore the Contractor still has a duty to insure those *works* after this point.
3. Sectional Completion can be used in conjunction with secondary Option X7 delay damages to provide the Client with a contractual remedy in the event that the Contractor fails to meet the sectional Completion Date – recovery of a predetermined amount of money for every day the Contractor is late, i.e. a liquidated damage. Key Dates however entitle the Client to recover additional cost which is not predetermined and would exclude any indirect or consequential loss that could be included in a liquidated damage.

NE Consult have been involved in numerous contracts where the Client has used secondary Options X5 and X7, then has also defined each *section* and its *completion date* as a *condition* to be met and a *key date*. This means that contractually if the Contractor does not meet a sectional Completion Date and therefore also a Key Date, they are exposed to the Client recovering both the delay damages and the additional cost. Given that liquidated damages are intended to be an exhaustive remedy for delay it is arguable whether this approach would be found to be enforceable.

## Key Dates in detail

The obligation for the Contractor to work to achieve a Key Date is at clause 30.3, where it requires them to meet the Condition stated for each Key Date by the Key Date. If the Contractor fails to meet a Key Date the remedy is at clause 25.3, where the Project Manager has an obligation to assess additional cost incurred by the Client based on a four-point test:

1. The Client must incur additional cost either themselves or by paying an additional amount to Others (e.g. other contractors).
2. The additional cost must have either been paid or will be incurred.
3. The additional cost must be for the carrying out of work.
4. The additional cost must be incurred on the same project.

Clause 25.3 states that the Client can recover additional cost incurred either in carrying out work or by paying an additional amount to Others in carrying out work on the same project. Does this mean the Client cannot recover both their own additional costs and the additional costs of Others? For example, wouldn't a Client expect that they could recover their own additional project management costs as well as the additional costs of third-party suppliers and contractors? We think so however the clause could be interpreted to mean otherwise.

The Client also cannot recover indirect or consequential loss that could have been included in a delay damage under secondary Option X7, the cost must be additional (presumably to what they would have paid if the Contractor had achieved the Key Date) and be for work (e.g. loss of income or profit are excluded however exactly what constitutes work could also be arguable). It is also possible that the additional cost does not have to have actually been paid at the time the Project Manager assesses it (i.e. within four weeks of the Key Date being met), so presumably forecast additional cost can be included in the assessment.

There is no provision for final assessment of additional cost once the true cost is known therefore, we assume the Project Manager's assessment will stand regardless as to what cost the Client eventually incurs.

This is an interesting point, let's say the other contractor is also working under an ECC, you would expect therefore that our Contractor's delay would be a compensation event in this other contract? If you follow the contractual timescales for compensation events, the Project Manager in our contract may have to assess additional cost before the other contractor has submitted a quotation for their compensation event in the other contract. So, in the absence of factual information from the other contract, on what basis can the Project Manager make this assessment? At best it could be a cautious stab in the dark as it would appear there is no second bite at this particular cherry!

### What is the same project?

Possibly an even more contentious element of this clause is in determining what the 'same project' means. If you're a contractor doing enabling works on a mega-project like HS2 or Crossrail, then does this mean the Client can recover the forecast additional costs associated with every other contractor doing work on the 'project', or would the term 'project' be construed more narrowly and only relate to the 'project' as the Client had defined it in their own governance structure? We doubt the drafters intended the former interpretation however the lack of definition of the term 'project' certainly does not help.

### Instruction to change a Key Date and the Condition?

Looking at other clauses that need managing in relation to Key Dates, clause 14.3 gives the Project Manager the right to instruct changes to the Scope or a Key Date which may then entitle the Contractor to a compensation event under either clauses 60.1(1) or 60.1(4). We say 'may' as if the reason the Scope or Key Date needs changing is the Contractor's own fault then clause 61.2 means this won't be a compensation event.

The drafting of clause 14.3 raises an interesting issue, can the Project Manager instruct changes to both the Key Date and the Condition, or just the Key Date?

Let's say we have Key Date A stated in Contract Data part one as 31<sup>st</sup> March with a *condition* of "construct workshop A", and Key Date B stated as 31<sup>st</sup> July with a *condition* of "construct workshop B and car park". As Project Manager do you have the right to issue an instruction changing the Condition for Key Date A to "construct workshop A and car park" and the Condition for Key Date B to "construct workshop B" which would have the effect of accelerating the car park works?

Clause 11.2(11) defines a Key Date as:

"the date by which work is to meet the Condition stated. The Key Date is the *key date* stated in the Contract Data and the Condition is the *condition* stated in the Contract Data unless later changed in accordance with the contract."

Pay close attention the use of identified and defined terms in this definition and we've underlined the words we think may cause a problem. When read in isolation from the rest of the contract would not you assume this clause means that both the *key date* and *condition* can be changed? If not surely use of the term 'Condition' is redundant and the clause only need state 'the *condition* is stated in the Contract Data'?

Now we go back to what rights the Project Manager has to change Key Dates, clause 14.3 states:

"The Project Manager may give an instruction to the Contractor which changes the Scope or a Key Date."

There's no mention of Condition here so arguably the Project Manager does not have the right to give an instruction changing the *condition* which reinforces the point that defining 'Condition' is redundant unless it was intended that the *condition* can be changed, in which case the Project Manager should be given the right to do this under clause 14.3.

The same can be said for the compensation event at clause 60.1(4) which states:

“The Project Manager gives an instruction to stop or not to start any work or to change a Key Date.”

In our example the Project Manager's instruction changing the Condition of Key Dates A and B would not trigger this compensation event. Is the Project Manager therefore in breach of contract for issuing this instruction? It would appear so, however the drafting used in clause 11.2(11) makes this ambiguous.

The NEC4 User Guide – Managing an Engineering and Construction Contract does explicitly state “the Condition cannot be changed”. Whilst we do agree with the drafters that there is no express term in the contract that gives the Project Manager this right, we don't think that the way clause 11.2(11) has been drafted is helpful – if the *condition* cannot be changed then why does the term 'Condition' need to be defined at all?

In the rules for assessing a compensation event, clause 63.11 provides for the Condition for a Key Date to be corrected by the Project Manager if a change to the Scope makes the description of the Condition incorrect. However, if the Scope has not changed then the Project Manager cannot correct the description. Use of the words 'change' and 'correct' in the context of Key Dates and Conditions is interesting and we suspect this subtle difference is missed by most users.

Going back to our example it would seem that the Project Manager cannot instruct the Contractor to change the Conditions for Key Dates A and B with the effect of accelerating the garage works. Further, it wouldn't seem likely that the Scope would need to be changed either and as such the Project Manager cannot correct the Condition either.

However, if the Project Manager instructs the Scope to be changed then the Conditions for Key Date A and B can be corrected and the effects of this can be taken into account in the compensation event assessment. Presumably the Scope change would impose a constraint on the Contractor that would achieve the desired outcome of accelerating the garage works however this seems an unnecessary complication in the contract. It would be more straightforward if the Project Manager was able to instruct the Conditions to be changed.

## Conclusions

Key Dates are a useful feature of the ECC however as this article demonstrates their use and application should be carefully considered by both Parties before entering into contract.

Whilst they may be beneficial to Clients in helping them to co-ordinate their projects, in the event that the provisions need to be triggered Clients may find that they don't recover all of the additional costs that they thought they would be able to. Further, Key Dates present a significant risk for Contractors to consider in their approach to pricing and managing the contract. When tendering they will have little or no idea of what the potential additional costs might be and as a result may well want to consider negotiating a limitation on this liability.

Project Managers also need to be aware of the limits of their authority in the contract and be careful when considering changes to Key Dates. As we have seen the Key Date provisions are not without issues of interpretation and as such Project Managers could easily find themselves in breach of contract.

Finally, it would be useful for NEC to clarify its advice in the user guide as we suspect most practitioners will miss the subtle difference between not being able to change the Condition for a Key Date but being able to correct it if it was due to a change in the Scope. Better still, surely it would be clearer for all if the Project Manager could directly instruct a change to the Condition rather than having to do this by the back door with a change to the Scope?

We hope this article has provided a useful thought leader and that the issues we've raised are discussed and debated further in industry.

This article has been written by Neil Earnshaw from NE Consult who is a widely recognised expert in NEC contracts. The article is for general guidance only and does not contain definitive advice.

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